Case No: C5/2011/1207

Neutral Citation Number: [2012] EWCA Civ 315

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

Before Mr Justice Blake and Senior Immigration Judge Ward

AA104912009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2012

Before :

LORD JUSTICE PILL
LORD JUSTICE RIMER
and
LORD JUSTICE ELIAS

- -

Between :

HK (AFGHANISTAN) & ORS BY THEIR SOLICITOR AND LITIGATION FRIEND, KAMALJIT SANDHU	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Becket Bedford (instructed by **Messrs Sultan Lloyd**) for the **Appellant**
Mr David Blundell (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 9 February 2012

- -

Judgment

Lord Justice Elias :

1. The appellants are three Afghan children. They arrived, separately, as unaccompanied children in the UK and applied for asylum. They were refused both asylum and humanitarian protection on 6 May 2009, 8 May 2009 and 21 August 2009 respectively. However, each was given discretionary leave to remain, granted in accordance with the respondent's policy on unaccompanied child asylum seekers, for another two years at least. Each appealed to the Asylum and Immigration Tribunal ("AIT") and in each case the appeal was dismissed. Each appellant sought a reconsideration order which was granted by a senior immigration judge. Following the demise of the AIT, these three appeals went to the Upper Tribunal.

The hearing before the Upper Tribunal.

2. The Upper Tribunal (Mr Justice Blake P and Senior Immigration Judge Ward) summarised the findings of the first tier judges relating to each of these appellants, namely HK, NS and MM respectively, as follows:

> "[HKs] appeal was heard by Immigration Judge Obhi on 3 July 2009. The Immigration Judge found that that appellant was not at risk of being taken by the Taliban and further found that he had a surrogate family in the form of his uncle and aunt, and that if returned to Afghanistan it was unlikely that his uncle would refuse to care for him. The Immigration Judge also looked at the situation with regard to humanitarian protection but found that there was no evidence of any individual threat to this appellant which was any greater than that which the vast majority of citizens in Afghanistan faced.
>
> With regard to [NS], his appeal was heard by Immigration Judge Buchanan on 12 October 2009. The immigration judge found that the appellant was not at specific risk of being abducted or exploited by the Taliban and found that there was no reason why he could not continue to live with his mother and paternal uncle if he were to be returned. The Immigration Judge also found that this appellant had not demonstrated any specific individual threat to him that would not be encountered by other young Afghans of his age.
>
> The appeal of [MM] was heard by Immigration Judge Deavin on 14 July 2009. In a very brief determination the judge found that the appellant lived in a village in north-east Afghanistan and that there was no sound evidence of any problems encountered with the Taliban or of any forced conscription. The Immigration Judge did not consider the question of humanitarian protection."

3. Although this particular summary of the third appellant's case does not say so, the finding was that he had been living with his maternal uncle in Afghanistan. In the case of each of these appellants, their families had made arrangements for them to leave in the belief that they would not be safe in Afghanistan.

4. The Upper Tribunal had to determine whether the lower tribunals had erred in law. It concluded that each tribunal had erred in dealing with the question of humanitarian protection. The Tribunal in *HK* had approached the question of humanitarian protection improperly. The law as understood at the time of that decision required, in order to establish the right to such protection, that any threat to a civilian's life or person had to be individualised. By the time of the Upper Tribunal hearing, it had been established that this was a misunderstanding of Article 15(c) of the Qualification Directive: see *Elgafaji* v *Staatssecretaris van Justitie* [2009] 1 WLR 2100. The threat did not have to be specifically targeted at the applicant. In the other two cases the question of humanitarian protection was not addressed at all. The Upper Tribunal held that in view of these errors the decisions had to be set aside and the Upper Tribunal proceeded to remake them.

5. The Upper Tribunal considered and analysed a mass of evidence demonstrating the difficulties faced by children in Afghanistan, not only from the armed conflict itself, but also from such problems as forced recruitment by the Taliban and the risk of homelessness, forced labour and sexual exploitation. Reliance was placed by the children in particular on the decision of the Asylum and Immigration Tribunal in *LQ (age; immutable characteristic) Afghanistan* [2008] UKAIT 0005. The finding in that case was that there would be no adequate reception facilities for an orphan child applicant if he were to be returned to Afghanistan, and that in those circumstances he would be at risk of exploitation and ill-treatment.

6. The AIT had to determine whether the risk of serious harm was for a Convention reason. The only potentially relevant Convention reason was that the harm would result by reason of "membership of a particular social group". The AIT held that age was an immutable characteristic and that since the applicant was at risk by reason of his age, this was for a Convention reason and accordingly he was entitled to asylum. Had he not been able to establish a Convention reason, then the applicant would only have been entitled to humanitarian protection (although in this case this would not have had materially different consequences to being granted asylum status).

7. The Secretary of State has in a number of cases reserved her position on the correctness of *LQ*, and some judges have cast doubt upon the decision: see e.g the observation of Thomas LJ in *ZK (Afghanistan) v Secretary of State for the Home Department* [2010] EWCA Civ 749 para 35. However, it has not been overruled and Mr Blundell, counsel for the Secretary of State, was prepared to accept that it is good law for the purposes of this appeal.

8. However, the Upper Tribunal in *HK* did not accept that *LQ* was authority for the broad proposition that all children in Afghanistan form a particular social group irrespective of their particular family circumstances. It held that if the unaccompanied child has family to whom he or she can return, then *LQ* will be inapplicable.

9. It seems to me that this construction is plainly right, and it was followed on this point without demur by the Court of Appeal in *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305.

10. The central issue which the Upper Tribunal had to determine, therefore, was whether on the evidence it could properly conclude that these children had family in

Afghanistan who were willing and able to receive and protect them. The Upper Tribunal held that they did, setting out its reasons as follows (paras 48-51):

> "48. We have taken this evidence into consideration, and we agree that it presents a bleak picture for children who are returned to Afghanistan and who do not have a family that will care for them. We note that in the case of the first appellant, the finding of the Tribunal was that this young man from Kundoz province had no parents, although he was looked after by a maternal uncle following the death of his family in the earthquake. His maternal uncle and wife did not have children of their own and clearly became de facto parents of the young man. The immigration judge found that he had a surrogate family in Afghanistan and, if he were to be returned, it was unlikely that his uncle would refuse to care for him. Indeed, Mr Bedford did not dispute that the relatives of all three appellants would be willing to care for their respective appellant. With regard to the second appellant, he was looked after by an uncle when his father disappeared. The third appellant, together with his mother was simply taken to live at an uncle's home after the disappearance of his father.
>
> 49. None of these boys is an orphan and none is without family in Afghanistan. It was pointed out on behalf of the Secretary of State that in each of these cases the appellant was advised that he could seek to make contact with his relatives through the auspices of the Red Cross organisation. Information was provided that the Red Cross International tracing service is a way for families who have been separated to try to restore contact. It was noted that it is a free service and that in the United Kingdom contact should be made with the local Red Cross Branch; if the organisation feels that it is able to help the inquirer will be asked to fill in a relevant form which will be sent to the headquarters in London, from whence it is forwarded to the appropriate Red Cross or Red Crescent Society in the appropriate country or to the International Committee of the Red Cross. They can offer assistance in putting the parties in contact through letter or phone.
>
> 50. In each case this information was provided in the refusal letter to the appellant, but there was no evidence before the Tribunal in any of the cases that any efforts had been made to contact relatives in Afghanistan. None of these respective families lived in areas of Afghanistan where it might be thought that they could have been displaced by the conflict. None of the families lived in the provinces which are under the control of the Taliban or where there is regular ongoing fighting which generally displaces local people from their areas. There is no reason to believe that the relatives of these three young men are

> living anywhere else other than where they were previously living when each the appellants had contact with them.
>
> 51. There is no evidence of any endeavour being made on behalf of the any of the appellants to make contact with their relatives still living in Afghanistan. As Mr Bedford accepted, it was not in dispute that the respective families would be willing to collect and take care of these young men upon their return."

11. The Tribunal considered whether the children would be able to travel safely from Kabul to the place where their families were based and concluded that they would. Accordingly, both asylum and humanitarian protection were refused. The Upper Tribunal's conclusion was summarised as follows:

> "The families were all able to make arrangements for the boys to travel out of Afghanistan and to the west. They travelled with the assistance of agents and each of the families was clearly able to provide the finance for such journeys, which is no small amount of money. We have no reason to believe that their families could not travel to Kabul to meet them on return. Therefore, while we take into consideration the evidence which has been produced regarding the dangers for children in Afghanistan, particularly those who have no family to turn to, we do not believe that these appellants would face a real risk of such eventualities."

12. Permission to appeal to the Court of Appeal was dismissed on 13 April 2011 by Blake P. At that stage, the grounds of appeal were focused on Article 19(3) of Directive 2003/9/EC (the "Reception Directive") and Article 15(c) of Directive 2004/83/EC (the "Qualification Directive"), which relates to humanitarian protection. However, following the refusal by Mr Justice Blake P, the appellants amended their grounds of appeal to include a new ground relating to an alleged failure to have regard to section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act").

13. Section 55 sets out the need for the Secretary of State, when exercising, *inter alia*, her functions in relation to immigration and asylum, "to have regard to the need to safeguard and promote the welfare of children". As the Supreme Court emphasised in *ZH (Tanzania) v SSHD* [2011] UKSC 4, the welfare of the child is a primary consideration to be weighed with all other relevant factors: see the judgment of Baroness Hale at para. 26. Section 55 was not in force when the original decisions were made but it was by the time the case was before the Upper Tribunal. This argument based on section 55 was linked to the duty of the Secretary of State under Article 19(3) of the Reception Directive, which I set out below.

14. On 20 June 2011 Sullivan LJ granted permission to appeal on the papers but solely on this new ground. He said:

> "The matters raised in paragraphs 2-19 of the Appellants' Skeleton Argument are arguable, not least because Counsel for the Secretary of State in DS (Afghanistan) submitted that it was on all fours with these appeals (para. 32). It is arguable that the

> Tribunal's decision in these appeals was flawed for the same reasons as those given in paragraph 88 of DS by Rimer LJ, agreeing with Lloyd LJ."

15. Permission was refused on the other grounds following an oral hearing before Pill LJ on 25 October 2011.

16. The basis on which permission to appeal was granted was that the appeal raised issues which were arguably identical to *DS (Afghanistan)*. That case was in a number of respects similar to this appeal. The applicant was a 15 year old unaccompanied asylum seeker who was refused asylum on the grounds that he could safely return to Afghanistan because he had a mother and a maternal uncle there, the latter having arranged for his removal. His evidence was that he had no contact with his relatives but the Asylum and Immigration Tribunal found that he had failed to attempt to contact these family members. The Tribunal held that he had given misleading information to the Red Cross who regularly make contact with family members in these circumstances, and had led the Red Cross "on a wild goose-chase." The Court of Appeal (Pill, Lloyd and Rimer LJJ) was not prepared to interfere with that finding, although Pill LJ found it harsh in the particular circumstances of that case. In the light of this evidence, the AIT held that there would be family in Afghanistan who would meet the applicant on return. The Court of Appeal held that this was a sustainable conclusion, notwithstanding that there had been no attempt to trace the family members made by the Secretary of State. However, the court found that on the facts of the case there had been no consideration of the section 55 duty and the matter was accordingly remitted to the Upper Tribunal. *DS* figures significantly in this appeal and I consider the judgments in that case more fully below.

The relevant legal provisions.

17. As I have indicated, in addition to section 55 of the 2009 Act, Article 19(3) of the Reception Directive is also relied upon by the appellants. This Directive was implemented in domestic law by the Asylum Seekers (Reception Conditions) Regulations 2005 (the "2005 Regulations"). It is primarily concerned to deal with the way in which asylum seekers are treated in the UK. However, regulation 6 imposes specific obligations owed to unaccompanied child asylum seekers.

18. Article 19(3) is as follows:

> "Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety."

19. Regulation 6 provides:

> "1) So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the members of the minor's family as soon as possible after the minor makes his claim for asylum.
>
> (2) In cases where there may be a threat to the life or integrity of the minor or the minor's close family, the Secretary of State shall take care to ensure that the collection, processing and circulation of information concerning the minor or his close family is undertaken on a confidential basis so as not to jeopardise his or their safety."

It is not disputed that these appellants were unaccompanied minors.

20. This tracing obligation is also found in similar terms in paragraph 68 of the Guidelines on International Protection issued by the United Nations Refugee Agency (UNHCR), dated 22 December 2009. In an aide memoire issued by the UNHCR in August 2010, which deals specifically with special measures applying to the return of unaccompanied and separated children to Afghanistan, it is specifically stated that:

> "The Government of (the sending country), with the cooperation of the Government of Afghanistan, will ensure that genuine efforts are made to trace family members. If family members are successfully traced, the Government of (sending country) in cooperation with the Government of Afghanistan will ensure through an individual assessment that the family is willing and able to receive the child. The outcome of this assessment (where applicable) will inform the decision on return."

It also asserts that in any decision affecting the child, the child's best interests must be a primary consideration.

The Secretary of State's offer of remission.

21. Following the grant of permission by Sullivan LJ, the Secretary of State considered the merits of the appeal. In *DS* she had accepted, through her counsel, that *HK* was on all fours with *DS*. It is, therefore, hardly surprising that since the court in *DS* quashed the decision to refuse asylum for failing to take into account section 55, the Secretary of State recognised that a similar outcome was to be expected in this case, notwithstanding that the points now relied upon were not raised below. Accordingly, she wrote to the appellants' representatives, at first on 21 November 2011 and again on 25 January 2012 offering to remit the matter to the Upper Tribunal for a rehearing. This was precisely the relief granted in *DS*.

22. The proposed order included provision for the Secretary of State to draft a further decision-letter dealing with section 55 within 56 days of the sealing of the order. The matter would at that stage have proceeded to a full rehearing in the Upper Tribunal

where section 55 could have been taken into account. The Secretary of State further accepted that she should begin efforts to trace the families of HK and MM.

23. The third appellant, NS, has now become 18 and as Mr Bedford, counsel for the appellants, accepted, different considerations apply in his case. However, the Secretary of State accepted that in the light of the decision of this court in *ZK Afghanistan*, para.18 per Jackson LJ, he too was entitled to have the original determination quashed notwithstanding that he has now reached majority, and to have a new hearing at which he could advance any fresh arguments or evidence upon which he wished to rely.

24. By a letter dated 2 February 2012, the appellants' representatives rejected the Secretary of State's offer. Essentially their reason for doing so is that they consider that in the circumstances the only appropriate order for these appellants is to grant them refugee status. The question we have to decide is whether that submission is correct.

The grounds of challenge.

25. So far as this appeal is concerned, the material principle which *HK* decides is described in the headnote of the case as follows:

> "Where a child has close relatives in Afghanistan who have assisted him in leaving the country, any assertion that such family members are uncontactable or are unable to meet the child in Kabul and care for him on return, should be supported by credible evidence of efforts to contact those family members and their inability to meet and care for the child in the event of return."

26. In *DS* Lloyd LJ noted (para 58) that this was "not an unfair comment" as to the relevant principle in *HK*, even though the judges did not articulate it in precisely those terms. I respectfully agree and indeed would assert that it is a fair encapsulation of the principle relied upon.

27. Mr Bedford contended that this principle was wrong and that quite independently of the failure to have regard to the section 55 duty, the Upper Tribunal's approach was flawed. But in the light of the concession by the Secretary of State that the case should be remitted to the Upper Tribunal, he had to go further and to persuade the court that remission was inappropriate and that the only proper decision was to require the Secretary of State to grant asylum, at least to the appellants, HK and MM, who were still children.

28. There were various strands to Mr Bedford's submissions on this point. I think that they can fairly be reduced to the following propositions:

i) The Upper Tribunal was not entitled to conclude that the failure by the children to make attempts to contact family members (or their surrogates) justified an inference that the family members would be able to receive and protect the child. It was not reasonable to expect a young child to make attempts to trace family members thereby placing the onus on the child to

satisfy the Tribunal that there was no-one in Afghanistan who could receive and protect him.

ii) Any evidence about the adequacy of reception facilities, in this case at least, should have been supplied by the Secretary of State. She is required by regulation 6 to endeavour to obtain that evidence. Here she had failed in her duty to carry out any tracing inquiries at all and therefore the Upper Tribunal was not in a position to be satisfied that the family members could receive the children. If children deliberately mislead the Secretary of State or the Red Cross as to the possible whereabouts of their relatives in Afghanistan, thereby frustrating attempts to trace those relatives, that might well justify a Tribunal drawing adverse inferences against them. That was indeed the position in *DS* and explains the conclusion reached in that case. But there was no such conduct here.

iii) In the absence of any proper evidence to show that the child would be received in Afghanistan, asylum had to be granted. That is the logic of the decision in *LQ*.

iv) The decision to grant asylum was the only proper conclusion, quite irrespective of whether the section 55 duty had been formally taken into account. It was necessarily in the best interests of these children to be allowed to remain in the UK in circumstances where, as unattached children, they would be subject to a real risk of serious harm in Afghanistan, as *LQ* indicated.

v) The court ought not to allow the Secretary of State to delay the determination of the asylum claim pending the fulfilment of her statutory duties. The court ought to require her to grant asylum status now; it is in the interests of these children that their status should be speedily determined so that they are not left in a state of uncertainty.

vi) This approach would not be inconsistent with the child's best interests. The Secretary of State would still be required to fulfil her statutory duty under regulation 6 to trace family members. If she was successful and it became clear that they would be willing and able to receive and protect these children, this might justify her revoking the asylum status on the grounds that the situation had changed and that the continuing need for asylum was no longer present.

29. The Secretary of State submits that this analysis betrays a number of errors of law. First, the onus is on an asylum seeker to establish that he cannot safely return to his home country, here Afghanistan. That is so even if the asylum seeker is a child. The Upper Tribunal was therefore fully entitled to conclude that a failure by these children even to try to make contact with family members through the Red Cross, in circumstances where that possibility had been specifically drawn to their attention, should count against them. There was every reason to suppose that the family members were willing to receive them - indeed that was not disputed - and no obvious reason to suppose that they would be unable to do so. The lack of any evidence to suggest otherwise, and the failure by the children effectively to put that issue to the test by seeking contact with family members, justified the inference that they would be safely received in Afghanistan.

30. Second, Mr Bedford was wrong to say that the regulation 6 duty was part of the asylum determination. Paragraph 68 of the judgment of Lloyd LJ in *DS* plainly established otherwise. The regulation 6 duty is quite independent of the asylum determination. A tribunal simply has to make a decision on the best material available to it. In the absence of any input from the Secretary of State, there was no further material which the Tribunal could consider. Of course, it would have to have regard to any relevant material which compliance with regulation 6 duties might unearth, as might be the position on remission, but it could not take account of material it did not have.

31. Third, the submission that *LQ* establishes that an unattached child will necessarily be at risk of severe harm if returned is incorrect. *LQ* was not a country guidance case; the IAT in that case was satisfied on the material before it that the particular child would face such a risk, but it was not stating a general proposition applicable in all cases. Each case depends on its own facts which the tribunal has to analyse and assess, having regard to any relevant country guidance case.

32. Fourth, this case is on all fours with the decision of this court in *DS (Afghanistan).* The court there considered that a remission was appropriate and there is no justification for treating this case differently.

33. Finally, it would not be in the best interests of these children for the court to require asylum to be granted now when the position may well be that there is family in Afghanistan who can receive them, as the Upper Tribunal believed to be the case. Objectively viewed, returning these children to their families is highly likely to be in the children's best interests rather than remaining in this country with no family to look after them. Mr Bedford's approach is putting the desire to succeed in these asylum claims ahead of these children's best interests. That same error was also reflected in the correspondence between the parties following the concession made by the Secretary of State that the case should be remitted; one of the reasons why the appellants objected to that course was that it might result in further evidence being unearthed which was incompatible with the asylum claims.

Discussion.

34. The crucial premise for the submission that the Upper Tribunal should have upheld the claim to asylum is that it was not entitled to draw any adverse inferences against these children from their failure to seek to contact family members in Afghanistan. I do not accept that premise; the onus is on the asylum seeker to make good the asylum claim, and that applies to children as it does to adults. It is true that the particular vulnerability of unaccompanied minors has led to special rules relating to the handling of their cases, such as in the way interviews are conducted, and there is a greater tendency to give them the benefit of the doubt where evidence is disputed (see the Guidelines on International Protection issued by the UN Refugee Agency, 22 December 2009, para 73 reproduced by Pill LJ in the *DS* case, para 14). But this does not involve any formal shift in the onus of proof.

35. I do not suggest that it would in all cases be appropriate to draw an adverse inference that the child would be safely received merely from the failure of the child to try to make contact with his or her family. It will depend on a range of factors which would include the circumstances in which the child came to the UK, the age of the child, and

whether he or she has been encouraged to make contact. But in my judgment it is in principle an inference which it is legitimate for a court to draw where the evidence justifies it, and it was not an improper inference for the Upper Tribunal to make on the evidence before it.

36. I would add that even had the Upper Tribunal found that there were no family members who could receive these children in Afghanistan, it would not necessarily follow that they could not safely be returned. *LQ* is not a country guidance decision and the fact that the evidence in that case satisfied the AIT that the applicant, an orphan, faced a real risk of serious harm if returned to Kabul does not mean that all tribunals thereafter will have to reach identical findings of fact. Indeed, it would be an error of law for a tribunal to treat *LQ* as having made a binding conclusion of fact, as this court recognised in *ZK (Afghanistan)* to which I have made reference. It will depend on the evidence adduced.

37. Indeed, in the most recent country guidance case, *AA (unattended children), Afghanistan* [2012] UKUT 00016, the Upper Tribunal (Mr Justice Owen and Senior Immigration Judge Jarvis) concluded, after evaluating extensive evidence about the circumstances facing children in Afghanistan, that whether unattached children would be subject to severe harm would depend upon their individual circumstances and the precise location to which they would be returned.

38. So I do not accept that it would necessarily follow that the absence of someone to receive the child would compel the conclusion that asylum should be granted. Accordingly, even if Mr Bedford were right in his submission that the Upper Tribunal should have found that the appellants would not be subject to adequate reception facilities on return to Afghanistan, that would not be sufficient to establish the right to asylum status. The case would still have had to be remitted to the Upper Tribunal on that issue.

39. I do not, however, accept the submission of Mr Blundell that the regulation 6 duty is quite distinct from the asylum application. The logic of that submission is that on remission, if for some reason the Secretary of State still failed in her duty to try to trace family members of these appellants, then on the current evidence at least, the Upper Tribunal would be obliged to refuse asylum provided it considered that sending the children back to their families was in their best interests. That would be so even though, if the Secretary of State had carried out her regulation 6 duty, she might have established that in fact there was no-one able to receive the child on return to Afghanistan. I find that an unattractive submission.

40. In my judgment, it is a necessary part of the section 55 duty to give primary consideration to the interests of the children that the Secretary of State should obtain as much information as is reasonably possible to assist her in determining where those best interests lie. If she fails unjustifiably to do that, I do not see how it can properly be said that she has complied with the section 55 duty. Moreover, the regulation 6 duty is in terms said to arise as soon as an asylum application is lodged and it is plainly intimately connected with the determination of that application. This suggests that it should be treated as a necessary element in the determination of an asylum application.

41. I do not accept, as Mr Blundell submitted, that analysing the duty in that way is inconsistent with the Court of Appeal decision in *DS*. On the contrary, in my view, the judgments of Pill and Rimer LJJ are wholly consistent with this analysis. Pill LJ said this (paras 44-45):

> "I do not accept the submission of Mr Waite that the Secretary of State was entitled to do nothing by way of tracing enquiries. Regulation 6(1) of the 2005 Regulations, following the Directive, imposes a plain duty on the Secretary of State to endeavour to trace the members of the minor's family as soon as possible after the minor makes his claim for asylum. I reject the submission that, because the Regulations deal with the reception of asylum seekers, the duty does not arise and I fail to see how the Secretary of State can ignore her regulation 6 duty when considering the asylum application. The possibility and desirability of a safe return are factors which should be considered from the start, as stated in the policy document.
>
> In *ZH*, Lady Hale, at paragraph 23, cited article 3(1) of the UNCRC, section 11 of the Children Act 2004 and section 55 of the 2009 Act. The need to "safeguard and promote the welfare of children who are in the United Kingdom", specified in section 55, requires a proactive attitude to the possibility of return to a family. That appears to be conceded, and asserted, in chapter 15 of the Secretary of State's policy document entitled "Processing an Asylum Application from a Child", though the care to be exercised in making enquiries is emphasised. Although not issued until after the Tribunal's decision, the guidelines issued by UNHCR on 22 December 2009 and the aide-memoire of August 2010 confirm the need. "

42. At paragraph 47 he made it plain that the lack of co-operation by the applicant did not relieve the Secretary of State of her regulation 6 duty:

> "The lack of cooperation does not relieve the Secretary of State of her duties. It would be relevant to a decision as to what the Secretary of State was required to do in a particular case and also to the eventual decision as to whether the right to asylum had been established in that case. But the duty cannot be ignored."

43. Rimer LJ, in his judgment, also stated quite unambiguously that the regulation 6 duty was part of the "best interests" consideration (para 88):

> "I would [allow the appeal] for the reasons explained by Lloyd LJ. In arriving at its determination, the AIT gave no consideration to the obligation upon the Secretary of State, under section 55 of the Borders, Citizenship and Immigration Act 2009, to ensure that her functions in relation to the appellant's asylum application were discharged 'having regard to the need to safeguard and promote the welfare' of the

> appellant whilst in the United Kingdom. It was conceded on behalf of the Secretary of State in *ZH (Tanzania)* that the section 55 duty extends to the disposition of an asylum application by a child such as the appellant (paragraph 24 of Lady Hale's judgment). In this case, however, there is a real question as to whether that duty has been discharged. For example, no steps have been taken by the Secretary of State towards enquiring as to the availability of adequate reception facilities for the appellant in Afghanistan; nor has a 'best interests consideration' of the nature referred to in Chapter 16 of the Secretary of State's policy document 'Processing an Asylum Application from a Child' been carried out. The result was that the AIT disposed of the appeal without the material necessary to enable it to decide it in accordance with the law."

44. In my view, neither of these judgments supports the Secretary of State's submissions on this point. The strongest support comes from the judgment of Lloyd LJ and in particular the following observations at para 68:

> "The obligation to endeavour to trace under regulation 6 applies when a child has made an asylum application, but the application is to be determined on its merits, whether or not any steps have been taken pursuant to the obligation. To that extent, I would accept the submission of Mr Waite for the respondent that the obligation to endeavour to trace is distinct from the issues that arise on an application for asylum. If steps have been taken pursuant to the obligation under regulation 6, the results, if any, may be relevant to the determination of the asylum application, depending on what the issues are on that application. In fact, no attempt to trace was made by UKBA in the present case. All that was done was to draw to the attention of the appellant or his foster-carer the facilities of the Red Cross, with a view to his attempting to trace his relatives through that agency. There is a question as to whether the use made of these facilities by or on behalf of the appellant was appropriate, but nothing was done pursuant to regulation 6. It seems to me that that failure is not, by itself, relevant to the determination of the appellant's asylum application. However, the Secretary of State is still subject to the obligation, and steps ought now to be taken to comply with that obligation."

45. But Lloyd LJ accepted that the question whether family protection was available in Afghanistan was the critical issue underlying the asylum determination, and he noted that compliance with the regulation 6 obligation might cast light on that issue. For this reason he took the view that the case should be remitted on the basis that the renewed hearing should have regard to any further evidence relating to the issue of family protection, and that the tracing duty under regulation 6 should be carried out before the matter was reconsidered by the Upper Tribunal.

46. I do not read Lloyd LJ's judgment as endorsing a principle that the regulation 6 duty is always irrelevant to any asylum application. In my judgment he was merely saying

that breach is not, *of itself*, relevant. In my view he was thereby recognising that there may be cases where the Secretary of State or a tribunal could make a determination on an asylum application in circumstances where regulation 6 had not been complied with, but that would not necessarily compel the conclusion that asylum should be granted. I would not dissent from that proposition, as I indicate below. The significance of an unjustified failure to trace is not that regulation 6 has not been complied with but rather that the decision maker is not in a position to assess the best interests of the child. In any event, if Lloyd LJ did mean to lay down the principle relied on by the Secretary of State, that was not endorsed by the other two judges and is not in my view binding.

47. It follows, in my judgment, that even if the Upper Tribunal had had regard to the section 55 duty, it would have been entitled to conclude that it was not in a position properly to give effect to that duty without the information (or lack of it) resulting from the Secretary of State's tracing inquiries.

48. I do, however, recognise that where the position of children is concerned, tardy inquiries by the Secretary of State, or delayed responses, can sometimes effectively defeat the claim because the child might have gained maturity before the case is finally determined. There is a tension in these situations between the obligation to determine the application speedily and the duty to obtain information about the child so as to secure its best interests. Moreover, it is not necessarily desirable to resolve that conflict by granting asylum where there is unreasonable or unexplained delay by the Secretary of State, or because the process is proving to be difficult or slow. That might not be in the best interests of the child.

49. I do, however, recognise that there may be cases where the resolution of this tension, having regard to the child's best interests, would justify a tribunal granting asylum even absent any evidence from the Secretary of State. An obvious, and one hopes unlikely, example would be where the Secretary of State had deliberately failed to carry out the regulation 6 duty so as to ensure that the applicant achieved maturity before the decision was taken. But there may be other cases falling short of deliberate delay where the Secretary of State is finding difficulties in obtaining information and the Tribunal feels it must in fairness to the applicant simply get on and determine the claim and fix his or her status. The Secretary of State's own internal documents raise this as a possibility. Chapter 16 of the Secretary of State's own policy document entitled "Processing an asylum application from a child" contains the following passage:

> "Family tracing can be a lengthy process, and contact with the family is only one aspect of the overall consideration.
>
> Any information obtained from the child at interview about the relationship ties with their family and their contact details and as well as information gathered from the family should be considered in the round with the other evidence available. Case owners should not defer making an initial decision pending the outcome of a tracing request, particularly if the decision is to afford international protection to the child. All tracing efforts should be minuted on CID and on the HO file and updated as necessary. Results of the tracing process can be forwarded as

> additional information within the appeal bundle in the event of a refusal and can be used at appeal even though it was not included in the decision letter."

50. This is focusing on the initial asylum decision but in principle a tribunal hearing an appeal may properly adopt a similar approach, particularly where the decision, absent further evidence, would be to grant international protection. This would be on the basis that asylum could be revoked at a later date if and when further evidence of the child's circumstances emerged.

51. However, I do not accept that it would be appropriate here for this court to require the Secretary of State to grant asylum. Potentially relevant factors have never been considered by the Upper Tribunal and it is necessary that they should be. This was the approach in *DS*, and I believe the same relief should be granted here. I do not accept Mr Bedford's submission that there is a material difference between this case, where the appellants were found to have been unwilling to try to trace their families, and *DS*, where they gave false or misleading information to the Red Cross. In each case there was a lack of co-operation and in each an adverse inference was in principle open to the Tribunal.

Disposal.

52. Accordingly, the appeal succeeds on the grounds conceded by the Secretary of State, and the matter must be remitted to the Upper Tribunal to consider these applications afresh in the light of any evidence put before the Tribunal. This will include relevant information, if any, which the Secretary of State is obliged to try to obtain pursuant to her regulation 6 obligations.

Lord Justice Rimer:

53. I too would allow the appeal. I agree with both judgments.

Lord Justice Pill:

54. I also agree that the appeal should be allowed on the basis stated by Elias LJ and for the reasons he gives. I express agreement specifically with his analysis of *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305. The regulation 6 duty is not distinct from the asylum application, as Mr Blundell submitted. It is, as Elias LJ states at paragraph 40, intimately connected with the determination of that application.

55. Both section 55 and regulation 6 are manifestations of the duty under article 19(3) of the Reception Directive:

> "Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible."

As the Upper Tribunal stated at paragraph 133 of *AA*, a post-*DS* case cited by Elias LJ at paragraph 37:

“But the centrality [to an asylum application] of the question of whether a child would have the protection of his or her family on return, serves to demonstrate the importance of the discharge by the respondent of her duty to make tracing enquiries.”