Neutral Citation Number: [2011] EWCA Civ 305

Case No: C5/2010/0277

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
Designated Immigration Judge O'Malley

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2011

Before :

LORD JUSTICE PILL
LORD JUSTICE LLOYD
and
LORD JUSTICE RIMER

- -

Between :

DS (Afghanistan)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Mr Manjit Gill QC and **Mr Abid Mahmood** (instructed by **Blakemores**) for the Appellant
Mr John Paul Waite (instructed by **the Treasury Solicitor**) for the Respondent

Hearing date : 8 February 2011

- -

Judgment

Lord Justice Pill :

1. This is an appeal against the decision of the Asylum and Immigration Tribunal ("the Tribunal") (Designated Immigration Judge O'Malley) on 20 November 2009 whereby the appeal of DS ("the appellant") against the rejection of his claim for asylum was dismissed. It was also held that the appellant is not a person in need of humanitarian protection. Reconsideration of an earlier decision of the Tribunal on 24 April 2009 to allow the asylum appeal had been ordered on 27 May 2009. By the decision of 20 November 2009, it was held that the original Tribunal had made an error of law. The Tribunal conducted a full reconsideration and stated that the only issue was "whether the appellant would be at real risk of persecution on return to Afghanistan".

2. The appellant is a citizen of Afghanistan born on 15 September 1993. He arrived in the United Kingdom on 23 September 2008, aged just 15, and claimed asylum. In view of his age, he was granted leave to remain until 15 March 2011. He is still a minor.

3. The appellant's claim that he was in fear of the Taliban had been rejected at the earlier hearing and his appeal was based on the principle established in *LQ (age: immutable characteristics) Afghanistan* [2008] UK AIT 00005 the application of which has not been challenged by the Secretary of State ("the respondent") in this appeal. The finding in that case, at paragraph 4, was that the applicant, aged 15 at the date of the hearing on 6 October 2006, was an orphan and that "there would be no adequate reception facilities in Afghanistan and that, as an orphan, the appellant would be subject to the risks of exploitation and ill-treatment adumbrated in that evidence" [the expert evidence before the Tribunal].

4. The Tribunal held, at paragraph 5:

> "The sole remaining question is, therefore, whether the appellant's ill-treatment would amount to persecution for one of the reasons mentioned in article 1A(2) of the Refugee Convention. The only one proposed is 'membership of a particular social group'."

At paragraph 6, the Tribunal stated:

> "We think that for these purposes age is immutable. It is changing all the time but one cannot do anything to change one's own age at any particular time. [Membership of a particular social group depended on his being a child]. At the date when the appellant's status has to be assessed he is a child and although, assuming he survives, he will in due course cease to be a child, he is immutably a child at the time of assessment."

5. At paragraph 7, the Tribunal held:

> "But his [the Adjudicator's] findings do establish that the appellant is an orphan and would be at risk. In the light of the expert evidence, we conclude that the risk of severe harm to the

> appellant, as found by the Adjudicator, would be as a result of his membership of a group sharing an immutable characteristic and constituting, for the purposes of the Refugee Convention, a particular social group. We therefore substitute a determination allowing his appeal under s83."

6. For the respondent, Mr Waite, does not challenge the correctness of the decision in *LQ*, as applied to orphans. Further, he conceded, for present purposes, that even though the appellant is not an orphan, and having regard to the risks for minors in Afghanistan, he should be treated in the same way and as if he were an orphan. It must follow from the acceptance of the finding in *LQ,* quoted at paragraph 3 above, that as an orphan, in the absence of adequate reception facilities available in Afghanistan, the appellant would be subject to the risk of exploitation and ill-treatment. That narrows the issue considerably. The first issue is as to the role of the Secretary of State when an unaccompanied minor claims asylum. The second issue is whether the Tribunal was entitled to infer, adopting the language of the Tribunal in *LQ*, that adequate reception facilities were available.

7. Mr Manjit Gill QC, for the appellant, submitted that when an unaccompanied minor arrives from Afghanistan, the respondent is under a duty to enquire whether adequate reception facilities are available if he is returned and to take the results of the enquiry into account when considering the asylum claim. Mr Waite submitted, that there is no such duty and that, even if there is such a duty, it does not bear upon consideration of an asylum application but only on the policy on discretionary leave, to be mentioned later. On the evidence, the Tribunal was entitled to conclude, he submitted, that the risks in Afghanistan, found in *LQ* to exist in the absence of adequate reception facilities, did not, on the evidence, arise. The Tribunal was entitled to infer the availability of the appellant's mother and uncle.

8. The appellant gave evidence that his father was dead and that his mother lived in Taghab, in Afghanistan. He is an only child. His maternal uncle, who arranged for his departure, also lives in Taghab. The appellant claimed to have had no contact with either his mother or his uncle since he left Afghanistan. He had approached the Red Cross to find his mother and uncle. He had no family in Kabul and could not live there because there is no one to protect him. An issue of fact arose as to the appellant's dealings with the Red Cross and I will consider that later. The Tribunal resolved it against the appellant.

9. The Tribunal held:

> "25. I consequently find there is no evidence upon which I can find that the Appellant's mother and Younus [the uncle] have disappeared. The case is to be distinguished from *LQ* where the Tribunal was concerned with an orphan who, it was submitted, would be subject to risks of exploitation and ill treatment.
>
> 26. I consequently find that the Appellant is not a member of a particular social group as claimed. In Afghanistan he has a mother and his uncle to return to and live with without fear of either exploitation or ill treatment. There is no other issue

> because it has already been found the Appellant is not at risk from any other claimed source."

Submissions and Authorities

10. Mr Gill's submission was that, in the circumstances, and even if the appellant had made insufficient attempt to contact his family, the Secretary of State should have made enquiries of her own about facilities on return. No such enquiries were made and the need for them was not brought to the attention of the Tribunal.

11. Mr Gill relied on Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. It makes provision, at article 19, for unaccompanied minors at 19.1 and 19.2. 19.1 imposes on Member States a requirement as soon as possible to take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, in other ways. 19.2 provides that unaccompanied minors who make an application for asylum shall be placed with a foster-family or in other ways. That obligation was met; the appellant was placed with Mr and Mrs Cooper under section 20 of the Children Act 1989.

12. Article 19.3 provides:

> "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."

13. Effect is given to the Directive in The Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005/7). 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.
>
> (3) For the purposes of this regulation -
>
> (a) an unaccompanied minor means a person below the age of eighteen who arrives in the United Kingdom unaccompanied by

> an adult responsible for him whether by law or custom and makes a claim for asylum;
>
> (b) a person shall be an unaccompanied minor until he is taken into the care of such an adult or until he reaches the age of 18 whichever is the earlier;
>
> (c) an unaccompanied minor also includes a minor who is left unaccompanied after he arrives in or enters the United Kingdom but before he makes his claim for asylum."

14. Mr Gill also sought to rely on international documents which post-date the Tribunal's decision but which, he submitted, demonstrate the duties imposed on a Government when a child claims asylum. Guidelines on International Protection issued by the UN Refugee Agency (UNHCR) dated 22 December 2009 provide, at paragraph 65:

> "Due to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims. The general measures outlined below set out minimum standards for the treatment of children during the asylum procedure. They do not preclude the application of the detailed guidance provided, for example, in the Action for the Rights of Children Resources Pack, the Inter-Agency Guiding Principles on Unaccompanied and Separated Children and in national guidelines."

Paragraph 68 provides:

> "For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate tracing and family reunification with parents or other family members. There will be exceptions, however, to these priorities where information becomes available suggesting that tracing or reunification could put the parents or other family members in danger, that the child has been subjected to abuse or neglect, and/or where parents or family members may be implicated or have been involved in their persecution."

Paragraph 73 provides:

> "Although the burden of proof usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied. If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt. Similarly, the child should be given

> the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim."

15. In August 2010, UNHCR issued an aide-memoire listing "special measures applying to the return of unaccompanied and separated children to Afghanistan". Paragraph 8A provides, in so far as is material:

> "i) The Government of (*sending country*) will ensure that unaccompanied and separated children are not returned to Afghanistan, unless return is decided upon in a formal procedure which contains all necessary safeguards, assesses all solutions available to a child, and ensures that the child's best interest is a primary consideration. The child shall be fully informed and consulted at all stages of this process and provided with appropriate counselling and support.
>
> ii) The Government of (*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."

These are stated to be "minimum safeguards" and it is added that implementing them "would require the commitment of the sending country to secure the cooperation of the Government of Afghanistan".

16. Mr Gill referred to the Secretary of State's policy document entitled 'Processing an Asylum Application from a Child' current at the time of the Tribunal's decision. Chapter 15 bears the heading 'Family Tracing & Reunification'. Regulation 6 of the 2005 Regulations is cited. At paragraph 15.1 it is stated:

> "There is therefore a general principle that family tracing should take place as soon as possible, and not necessarily be suspended until the asylum claim is finally determined. However this must be qualified by the need to protect the child's safety and the safety of his/her family that have remained in the country of origin. It will not therefore be appropriate to commence tracing until the case owner understands the nature of the asylum claim and is able to gauge the risk to the child or his/her family."

17. It is also provided, in Chapter 15, that any tracing that is undertaken must consider the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") "to have regard to the need to safeguard or promote the welfare of children in the UK and whether it is in the children's best interests to return them to their family or extended family, if reunification is possible". (The section is cited

more fully by Lloyd LJ at paragraph 70). The main purpose of such contact with the family is stated in the policy document to be:

> "to obtain information as to the family's current location and circumstances, and
>
> to obtain information relevant to an assessment of whether there is a prospect of reuniting the child safely with their family in the event of return."

18. The policy document specifies in Chapter 16 general principles arising from that duty. These include:

> ". . .
>
> when assessing claims from children, case owners may need to be proactive in their pursuit and consideration of objective factors and information relating to the child's claim
>
> full consideration of the child's asylum claim should take place before case owners consider their eligibility for any other forms of leave (e.g. Humanitarian Protection or Discretionary Leave)
>
> a specific best interests consideration which satisfies the requirements of Article 3 of the UN Convention on the Rights of the Child and the section 55 duty must also be abided in every case."

19. It is also provided, in Chapter 16:

> "In all cases case owners must act carefully and communicate their intentions to the child. In some cases, British Embassies/High Commissions may be able to help with family tracing in the relevant country. The post must be given as much information as possible to help them with their enquiries such as details of any visas that the child may have been issued in the past, or information about any school the child attended, etc. The case owner may request a copy of the VAF [visa application form] from the overseas post. Contact details for British Embassies abroad can be obtained from the Foreign & Commonwealth Office's website.
>
> 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."

20. Reference has also been made to paragraph 17.7 of the policy document which provides:

> "Discretionary Leave under UASC Policy [unaccompanied asylum seeking child]
>
> The UK Border Agency has a policy commitment that no unaccompanied child will be removed from the United Kingdom unless the Secretary of State is satisfied that safe and adequate reception arrangements are in place in the country to which the child is to be removed.
>
> Where:-
>
> > the child does not qualify for asylum or HP or otherwise under the general DL general policy, and;
> >
> > we are not satisfied that the child will be able to access adequate reception arrangements in the country to which they will be removed;
>
> the child should normally be granted DL **for three years or, with effect from 1 April 2007, until they are 17.5 years of age**, whichever is the shorter period. This applies in all cases except where stated otherwise in country specific operational guidance notes (OGN)." [emphasis in original]

21. The commentary on the UN Convention on the Rights of the Child of 1989, (UNCRC"), by the UN Committee on the Rights of the Child in September 2005, provides, at paragraph 80:

> "Tracing is an essential component of any search for a durable solution and should be prioritized except where the act of tracing, or the way in which tracing is conducted, would be contrary to the best interests of the child or jeopardize fundamental rights of those being traced. In any case, in conducting tracing activities, no reference should be made to the status of the child as an asylum-seeker or refugee. Subject to all of these conditions, such tracing efforts should also be continued during the asylum procedure."

22. *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC4 was decided since the decision of the Tribunal. Lady Hale, with whom the other members of the Supreme Court agreed, asked "in what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a

citizen of the United Kingdom will also have to leave?" That is a different question from the present one but Lady Hale considered the current legislative context in which asylum decisions such as the present must be made. The 2009 Act was in force at the time of the Tribunal's decision:

> "23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC:
>
> > 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'
>
> This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'.
>
> 24. Miss Carss-Frisk [for the Secretary of State] acknowledges that this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2). Both the Secretary of State and the tribunal will therefore have to address this in their decisions.
>
> 25. Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as 'a primary consideration'. . ."

In reaching her conclusion, Lady Hale also relied on guidelines issued by the UNHCR. I cannot read her statements of principle as being confined to article 8(2) considerations.

23. In reliance on the general approach required by the legislation, on regulation 6 of the 2005 Regulations and the Secretary of State's own policy statement at chapters 15 and 16, Mr Gill submitted that the Secretary of State was under a duty to make enquiries about the availability of adequate reception facilities for the appellant in Afghanistan. No steps whatever were taken by the Secretary of State.

24. Investigation as to precisely how such work might be done, whether through an Embassy, the Red Cross, or otherwise, does not arise, it was submitted by Mr Gill, because the Secretary of State made no attempt to trace. Further, the relevant instruments should have been brought to the attention of the Tribunal. The decision was erroneous in law for a failure to take account of this aspect of the case, it was submitted.

25. Mr Waite submitted that it was the duty of an asylum seeker to "substantiate" his claim (Immigration Rule 339L), the burden of proof being on the applicant. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for qualification and status as refugees provides, at article 4.1:

> "Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection."

Article 6 of the 2005 Regulations did not specify that the Secretary of State's obligation was relevant to the merits of an asylum claim. It was included in Regulations dealing with the reception of asylum seekers, but did not require the duty in regulation 6(1) to be performed before the decision on asylum was taken.

26. The UNHCR Guidelines on international protection do not impose a duty to engage in attempts to find parents, it was submitted. There is, in any event, no obligation to make the enquiries before reaching a decision on the application for asylum.

27. Mr Waite submitted that there was no inconsistency between the Secretary of State's grant of discretionary leave ("DL") under 17.7 and the refusal of asylum in this case. For practical reasons, DL may be granted promptly. Under 17.7, the Secretary of State was not satisfied that safe and adequate reception arrangements were in place, the burden being upon her. A finding that the applicant had not established a claim to asylum, the burden of proof being upon him, was not inconsistent.

28. Counsel submitted that, having made the findings of fact he did and which will need to be considered further, the Tribunal was entitled to draw the inference that the appellant's position would not be akin to that of the appellant in LQ. The Tribunal was entitled to rely on the lack of cooperation with the Red Cross by the asylum seeker.

29. Mr Waite further relied on the decision of the Tribunal in *HK & Ors v Secretary of State for the Home Department* [2010] UKUT 378 (IAC). The case concerned three Afghan children who were unaccompanied child asylum seekers. Asylum and humanitarian protection was refused to each of them in 2009 but each was granted discretionary leave to remain for at least 2 years in accordance with the respondent's policy on child applicants. One of the issues was the risk they would face on return.

Having considered the evidence, the Tribunal (Blake J presiding) stated, at paragraph 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."

The Tribunal found that the relatives of all three appellants would be willing to care for their respective appellant. It was stated, at paragraph 49:

> "None of these boys is an orphan and none is without family in Afghanistan."

30. The Tribunal found that in each of the cases, the appellant was advised that he could seek to make contact with his relatives through the auspices of the Red Cross:

> "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 the 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 [for the appellants] 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."

31. Having found that the method of return was a necessary ingredient in any appraisal of risk, the Tribunal stated:

> "53. The Tribunal finds itself with a similar dearth of evidence in these cases. However, it is known that the appellants would be returned to Kabul. The respondent pointed out the availability of assistance through the Red Cross, to which we have referred above. The respondent also made reference to the International Organisation for Migration which assists Afghan nationals through voluntary returns and reintegration into society. It was pointed out in the respective refusal letters that once an application for return assistance has been approved, the IOM sending mission makes travel arrangements and IOM Afghanistan provides reception assistance through the coordination cell at Kabul airport. Their personnel guide beneficiaries through immigration and customs processes. Temporary accommodation is provided upon request and returnees are offered onward transportation and assistance to their final destination. It is therefore our conclusion that assistance would be available to these appellants, both in seeking out their relatives in Afghanistan, and in facilitating their reunion and the reception of the appellants upon return to Kabul. As noted above, we have no reason to believe that contact with their families would be impeded by the situation in Afghanistan, and we have no reason to believe that the families have moved from where they were previously living.
>
> 54. 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 their 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. There is no real risk that they would be homeless as they have families to whom they could return, and they have uncles who would be able to protect them from any abuse or violence on the journey home. There is no reason to believe that they would have to stay in Kabul other than while in transit, and it has not been shown that the level of violence in Afghanistan is such that they could not travel safely from Kabul to their home areas."

The Tribunal concluded that the evidence did not show that any of the appellants faced a real risk on return to Afghanistan.

32. Mr Waite submitted that the present case was on all fours with *HK* and the same result was correctly reached by the Tribunal. Mr Gill submitted that, as in the present case, the Tribunal failed in *HK* to have regard to the duties imposed on the Secretary of State when considering the return of children. He further submitted that there are

factual differences in that it was accepted that all three appellants had relatives who would be willing to care for them, that the respective families would be willing to collect and take care of these young men upon their return and that there was no reason to believe that their families could not travel to Kabul to meet them on their return. The evidence does not establish any of those facts in the present case, submitted Mr Gill.

Factual issue

33. Before I express conclusions, I refer to an issue of fact on which the Tribunal found against the appellant. The Tribunal found that the appellant, and his foster parent Mr Cooper, did contact the Red Cross but that the appellant did not mention his mother, as distinct from his uncle, to the Red Cross and, by failing to reply to a Red Cross letter of 9 June 2009 in which information about the whereabouts of the uncle was requested, the Red Cross "had been sent on a wild goose chase to the wrong province and district". The Tribunal was not prepared to find that the appellant's mother and uncle had disappeared.

34. Mr Gill relied on the age of the appellant at time of arrival, 15 years, and the Secretary of State's finding at paragraph 16 of the refusal letter of 13 March 2009:

> "You were asked during your asylum interview a number of questions about Afghanistan, Afghan life, and your life in Afghanistan. You were able to answer these questions and gave credible answers."

35. At interview, the appellant said, as summarised by the Secretary of State, that he was born and lived in Sohel Khil, Tagab district, Kapisa district. He said that his mother lived in Taghab. His maternal uncle's house in Taghab was about a 10 minute walk from where he lived. The Tribunal repeated that both mother and uncle lived in Taghab. He said he had no family in Kabul. The appellant claimed that he asked the Red Cross to find his mother as well as his uncle. They lived only 15 minutes away from each other. He claimed that he had told the Red Cross that his mother's address was Sohil Khail village in Tagab and his uncle lived in Habat Khail village in the same district which is Kapisa. (The spelling of the locations varies in the documents cited).

36. The appellant produced letters from the Red Cross. It is clear that a tracing request was made. The British Red Cross letter of 9 June 2009 referred to a reference to the International Committee of the Red Cross, in Kabul ("ICRC"):

> "We have now heard from the ICRC that the details given are not sufficient or precise enough to conduct a tracing enquiry. The ICRC has informed us that there is a village in Paktya province by the name of Haibat Khail, but this is not a village in the Takhar province.
>
> The ICRC contacted the Afghanistan Red Crescent Society (ARCS) field officers in Takhar and Paktya province to get more information on the last known address that you gave us. According to the Takhar field officer, there is no village or area

> by the name of Habat Khail/Haibat Khail. According to the ARCS field officer in Paktya province, there is a village by the name of Habat Khail/Haibat Khali but this is in Zurmat district of the province but the village Soya Khail is not in the close by areas as mentioned in the information you gave us.
>
> Therefore the ICRC would like to request you to confirm if the last known address is located in Zurmat district of Paktya province. Additionally they have asked if you could provide us with the name and address of another relative who could supply information of the current location of your uncle Younus.
>
> We would be grateful if you could provide the information requested by the ICRC to help them continue to locate your uncle as soon as possible."

37. The appellant did not reply to that letter, as Mr Cooper confirmed. The Tribunal found that the appellant had not mentioned his mother to the Red Cross. It was concluded:

> "24. The address given to the Red Cross for his uncle Younus is not the address he gave to the Home Office or the address mentioned in his first statement at paragraph 2, Taghab. In that statement at paragraph 18 the Appellant said Younus also lived in Taghab. That is not the address given to the Red Cross. It is therefore unsurprising that the Red Cross was unable to find Younus if they had been sent on a wild goose chase to the wrong province and district."

38. The Tribunal's findings are confidently stated in that paragraph but I have difficulty in relating them to the information supplied. It is unfortunate that the document containing the request for tracing is not available and the court does not know whether the information in it was consistent with information supplied to the Secretary of State, and found to be credible, and to the Tribunal. What is clear is that the Secretary of State played no part in the procedure.

39. In reaching its conclusion, the Tribunal plainly relied on the failure to respond to the letter of 9 June 2009 in finding that the Red Cross had been "sent on a wild goose chase". Given the age of the appellant and the Secretary of State's finding of credibility, that was a tough finding against the appellant. It may also be that the inconsistencies in spelling have contributed to the confusion. I am not, however, prepared to hold that the "wild goose chase" finding was one the Tribunal was not entitled, on the evidence before it, to make or that the Tribunal erred in law in that respect.

Conclusions

40. Discretionary leave was granted pursuant to chapter 17 of the Secretary of State's policy document but that did not obviate the need to make a finding on entitlement to asylum which, we were told, would entitle an applicant to a longer period of leave to remain. I am not prepared to hold that the grant of discretionary leave is necessarily

inconsistent with a prior refusal of asylum. As submitted by Mr Waite, the test to be applied may be a different one.

41. It is established first, that the appellant entered the United Kingdom as an unaccompanied minor aged 15, to be treated in the same way as if he were an orphan, and at risk on return to Afghanistan in the absence of "adequate reception facilities". That is the expression used by the Tribunal in *LQ* at paragraph 5. In her policy statement on DL the Secretary of State uses the expression "safe and adequate reception arrangements", which is to the same effect. The appellant has family in Afghanistan and, on the Tribunal's findings, he has made no or no sufficient attempts to trace them so that they can receive him on return.

42. I refer to the concessions made on behalf of the Secretary of State mentioned at paragraph 6 of this judgment. On that basis, the appellant is a member of the social group identified by the Tribunal in *LQ* and is at risk in the absence of adequate reception facilities on a return to Afghanistan. Even if he is not a member of the social group, so that he is not eligible for asylum, the need for humanitarian protection for an unaccompanied minor on return to Afghanistan would need to be considered.

43. The issue is as to what, if any, duties are imposed on the Secretary of State before returning an unaccompanied minor to Afghanistan. Mr Waite did not dispute that the appellant was entitled to a ruling on the asylum issue; discretionary leave would arise only on a finding that there was no entitlement to asylum.

44. 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.

45. 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.

46. I readily acknowledge the difficulties which may arise on the making of enquiries and these too are considered in the policy document. In the present case, however, the Secretary of State did nothing at all to assist with tracing family members or to enquire about reception arrangements on return and the court has been invited to uphold that inactivity. It is neither necessary nor appropriate to specify precisely what should have been done; this can be worked out once the principle is established. What should be done will vary from case to case. Inactivity, combined with the

failure to bring to the attention of the Tribunal the instruments cited in this judgment, was not, in my view, a permissible option.

47. The Secretary of State seeks to defeat the claim by reason of the appellant's alleged failure to cooperate with the Red Cross. Tracing work by the ICRC would almost certainly have been assisted by a contribution from the Secretary of State, based on information available to her. 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.

48. I would allow the appeal and remit the case to the Tribunal for further consideration, including the hearing of evidence. It would not in my view be appropriate to allow the appeal outright. Written submissions on the basis for remittal are invited. This may be a pyrrhic victory for an appellant who is likely to have reached the age of eighteen before a decision is made but Mr Gill understandably seeks to establish that more is required of the Secretary of State in the circumstances.

Lord Justice Lloyd :

49. Lord Justice Pill has set out the history of, and the circumstances material to, this appeal, so I can be brief as to the facts. The citations in his judgment, from the AIT's determination and from other materials, also relieve me of the need to set out quotations of more than a few of the relevant texts.

50. The appellant arrived in the UK on 23 September 2008. He was then just 15 years old. He was not accompanied by any family member. His father was dead, but his mother was (and so far as is known still is) alive, and he had had protection also from his uncle, who lived not far away from him and his mother. His uncle had helped in the arrangements under which he travelled to the UK. He was not an orphan when he left Afghanistan, nor is this one of those cases where protection is sought against the family of the asylum-seeker, or where the family has become separated involuntarily.

51. His application for asylum was refused on 13 March 2009, though discretionary leave to remain was granted until 15 March 2011, when he would be six months short of his 18th birthday. This was on the basis that he was "an unaccompanied asylum seeking child and the Secretary of State is not sufficiently happy that adequate reception arrangements exist for you in Afghanistan": see paragraph 45 of the Reasons for Refusal letter dated 13 March 2009.

52. The basis of his claim to asylum is that he is a refugee in that, "owing to well-founded fear of being persecuted for reasons of … membership of a particular social group … [he] is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". What is said to make him a member of a particular social group for this purpose is not just that he is a child but that he is, in effect, an orphan child.

53. In *LQ (Age: immutable characteristic) Afghanistan* [2008] UKAIT 00005, the AIT (Deputy President Ockleton and Immigration Judge Sommerville) held that a citizen of Afghanistan aged 15 who was in every sense an orphan was at risk for that reason. On the first consideration of his appeal it had been held that there would be no

adequate reception facilities in Afghanistan and that "as an orphan, the appellant would be subject to the risks of exploitation and ill-treatment" which had been dealt with in expert evidence. His claim to asylum had been rejected because he was not a member of a particular social group. The Tribunal held that he was. They did say, at paragraph 6:

> "That is not, of course, to say that he would be entitled indefinitely to refugee status acquired while, and because of, his minority. He would be a refugee only whilst the risk to him as a child remained."

54. That leaves a degree of uncertainty as to the definition of the particular social group. Does membership cease on the day of the person's eighteenth birthday? It is not easy to see that risks of the relevant kind to a person who is a child would continue until the eve of that birthday, and cease at once the next day. However, for present purposes it is sufficient that a particular social group is recognised consisting of Afghan citizens who are under 18 years old and who are orphans, whether strictly speaking or in practical terms. It is open to the present appellant to seek to show that he is in this category, for which purpose he has to prove, to the necessary standard, that he is, in practical terms, an orphan.

55. As I have said, he was not in that position before he left Afghanistan, because his mother was alive and he had protection from his uncle as well. The burden is on him to show that he is now to be regarded as in that category.

56. In *HK and others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG* [2010] UKUT 378 (IAC) the Upper Tribunal (Immigration and Asylum Chamber) (Mr Justice Blake and Senior Immigration Judge Ward) made a number of relevant findings. At paragraph 48 they summarised the position in the terms set out by Pill LJ at paragraph 29 above.

57. One of the appellants in that case was an orphan in the strict sense, both of his parents being dead, but none was without family in Afghanistan. Reference was made to arrangements that can be made through the Red Cross to contact family members where families have become separated. There was no evidence of any effort having been made by the appellants to make contact with their relatives by this or any other means. At paragraph 51 it was said to be "not in dispute that the respective families would be willing to collect and take care of these young men upon their return". Pill LJ has set out paragraphs 53 and 54 of the determination at paragraph 31 above.

58. Given the fact that it is in the appellant's interests, desiring asylum as he does, to downplay the possibility of contact with his mother and his uncle, and what they could and would do for him if he were to return, it is not surprising that, on the respondent's behalf, strong reliance was placed on this decision. The headnote of the case includes, as a summary of the relevant point decided, the following text:

> "3. 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."

59. I cannot find that the point was formulated in quite that way in the text of the decision, but it is not an unfair comment on the relevant part of the Tribunal's determination.

60. There is, however, another strand to the situation. As I have mentioned, the Secretary of State granted discretionary leave to remain to the appellant, for a specific time, because of not being satisfied as to the reception arrangements in place if he were returned. Under the Secretary of State's policy, it is for her to be satisfied as to that, and therefore the onus is on her, not on the appellant. For the appellant, however, it is argued that this is exactly the same question as arises, in the present case at least, on the asylum application, so that it is wrong to regard the burden as lying entirely (or even at all, it is said) on the appellant.

61. In order to assess this point it is necessary to consider European Union legislation and UK legislation and policy statements, as well as some wider international guidance.

62. European Community Directive 2003/9/EC lays down minimum standards for the reception of asylum-seekers. Article 18, in Chapter IV dealing with provision for persons with special needs, covers minors, and article 19 is about unaccompanied minors. Article 18.1 provides that, when implementing the provisions of the Directive that involve minors, "the best interests of the child shall be a primary consideration" for Member States. Article 19.1 deals with representation of unaccompanied minors and article 19.2 with their placement with adult relatives, a foster family or the like. The latter provision explicitly relates to the period up to the moment they are obliged to leave the host Member State in which the application for asylum was made or is being considered, so it is clear that this obligation exists and applies regardless of the outcome of the asylum application. Performance of the obligation, and the manner of performance, is neutral as regards the asylum application itself.

63. Pill LJ has set out article 19.3 at paragraph 12 above, which is relied on by the appellant for the obligation to endeavour to trace the members of the asylum-seeker's family as soon as possible, an obligation which, it is said, the UK Border Agency did nothing to discharge in the present case. It is applied in domestic legislation by regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005, which Pill LJ has set out at paragraph 13 above. That obligation came into force in February 2005. Undoubtedly it applied in relation to the appellant.

64. The obligation is imposed generally. It has to be considered in relation to a potentially wide variety of cases in which a child applies for asylum or other protection. The child may be an orphan in every sense, with no parents and no-one else in a position to provide the protection of a parent. He or she may have become separated from his or her parents altogether involuntarily, through events in the country of origin or elsewhere. On the other hand the child may have been abandoned by his or her family, or rejected or ill-treated by the family, so that protection is sought against the family. The child may have come here as a result of trafficking. The present case is not in any of these categories, unless the appellant is right to contend that he is, in practice, an orphan. He came here by arrangements made by his

uncle, and there is no basis for saying that, if he had stayed, he would not have had continued support and protection from his mother and his uncle. In principle it appears to be a case in which reunification of the family would, or at least could, be in the child's interests, if it is possible to return him safely to his family in Afghanistan. The level of risk and the availability of protection against that risk are therefore at the heart of this case.

65. Pill LJ has quoted at paragraph 21 from a publication issued in 2005 by the UN Committee on the Rights of the Child, General Comment (No 6) entitled "Treatment of Unaccompanied and Separated Children outside their Country of Origin". Paragraph 80 from which he has quoted is part of section VII dealing with Family Reunification. I find all of paragraphs 79 to 83 pertinent in the present context. I set it out despite the repetition of paragraph 80.

> "(a) General
>
> 79. The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child's view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated. Efforts to find durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated. Following a rights-based approach, the search for a durable solution commences with analysing the possibility of family reunification.
>
> 80. Tracing is an essential component of any search for a durable solution and should be prioritized except where the act of tracing, or the way in which tracing is conducted, would be contrary to the best interests of the child or jeopardize fundamental rights of those being traced. In any case, in conducting tracing activities, no reference should be made to the status of the child as an asylum-seeker or refugee. Subject to all of these conditions, such tracing efforts should also be continued during the asylum procedure. For all children who remain in the territory of the host State, whether on the basis of asylum, complementary forms of protection or due to other legal or factual obstacles to removal, a durable solution must be sought.
>
> (b) Family reunification
>
> 81. In order to pay full respect to the obligation of States under article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking

> full account of the right of the child to express his or her views (art. 12) (see also section IV (e), "Right of the child to express his or her views freely"). While the considerations explicitly listed in article 9, paragraph 1, sentence 2, namely, cases involving abuse or neglect of the child by the parents, may prohibit reunification at any location, other best-interests considerations can provide an obstacle to reunification at specific locations only.
>
> 82. Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of non-refoulement obligations (including those deriving from article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6 and 7 of the International Covenant on Civil and Political Rights). Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the circumstances in the country of origin contain lower level risks and there is concern, for example, of the child being affected by the indiscriminate effects of generalized violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights.
>
> 83. Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best-interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein. In this context, States parties are particularly reminded that "applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner" and "shall entail no adverse consequences for the applicants and for the members of their family" (art. 10 (1)). Countries of origin must respect "the right of the child and his or her parents to leave any country, including their own, and to enter their own country" (art. 10 (2))."

66. Departmental guidance dealing with this issue was revised to take account of the change in the law in November 2009 to which I am about to come. Pill LJ has quoted

the most relevant passages from parts 15, 16 and 17 at paragraphs 16 to 20 above. Part 15 is headed "Tracing and family reunification", part 16 "Assessing an asylum application from a child" and part 17 "Possible outcomes of an application".

67. The point is made elsewhere in part 15 that the child may have been separated from the family through no fault of its own and may wish to return, but that this may not always be the case. The present is not a case of separation against the will of the family or the child: it was the family that sent the child to the UK, presumably hoping that he would be able to obtain asylum. It seems to me clear from the text of this document that the obligation to endeavour to trace the family is independent of the process of the asylum claim: expressly, it is not to wait for the outcome of the asylum claim and it is therefore a quite separate process.

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.

69. I would also observe that, although the grant of discretionary leave to remain to the appellant was on the basis that the respondent was not satisfied as to the reception arrangements in place if he were returned, this does not show that the respondent was satisfied that no suitable reception arrangements were or could be put in place. I accept that the discretionary leave policy is applied in a precautionary way. The fact that, at a given moment, the Secretary of State is not satisfied as to the suitability of reception arrangements does not show that no suitable arrangements do or can exist. That will depend on what enquiries have been made, and with what result. Unless the respondent has enquired thoroughly, and has come to the conclusion that no such reception arrangements can be made, a failure to be satisfied at a given time does not give rise to any wider inference as to the position. The appellant's submissions wrongly equated the proposition that the Secretary of State was not satisfied in the relevant respect, with the different proposition that she had found that she could not be so satisfied.

70. After the rejection of the appellant's asylum application, but before the reconsideration of his appeal by the AIT, domestic law changed by the introduction on 2 November 2009 of section 55 of the Borders, Citizenship and Immigration Act 2009, which is, relevantly, as follows:

> "(1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> (c) any general customs function of the Secretary of State;
>
> (d) any customs function conferred on a designated customs official.
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)."

71. This provision did not apply directly to the appellant's case, at the time it came into force, because no function referred to in subsection (2) remained to be performed by the Secretary of State or an immigration officer as regards the appeal. What remained to be done was the hearing and determination of the reconsideration of the appeal by the AIT. Nevertheless, it seems to me that the AIT ought to have borne this obligation in mind when deciding the appeal, because of the Tribunal's role as decision-maker: see *R (Razgar) v SSHD* [2004] UKHL 27, [2004] 1 AC 368 at paragraph 15. The position might have been different if the role of the Tribunal were not that of being a part of the decision-making process. If its function were equivalent to that of deciding a conventional appeal or a conventional judicial review application, then the process might be limited by reference to material which had been before the decision-maker and to the law as it stood at the time of that decision. But it has long been clear that the role of the AIT, now the First-Tier Tribunal or the Upper Tribunal, as the case may be, is not constrained in this way: see Macdonald's Immigration Law and Practice, 8th ed., paragraph 19.22. It seems to me to follow that in the present case the AIT, hearing and determining this appeal in November 2009, with section 55 in force, ought to have had regard to the contents of the section. That Designated Immigration Judge O'Malley did not do so is no criticism of him, because it seems that neither side drew his attention to the section. (The appellant was then represented by other solicitors and Counsel than appeared on his behalf before us; the respondent was represented by a presenting officer.)

72. As regards the best interests assessment, the point is made in paragraph 17.8.2 of the departmental guidance to which I have referred, and from which Pill LJ has quoted, that:

> "When sufficient information is available to make an overall assessment of the child's best interests, the assessment should be balanced against the need to provide effective immigration control."

73. In *ZH (Tanzania) v SSHD* [2011] UKSC 4 the Supreme Court had to consider issues concerning the interests of children in a different situation, namely a decision as to the position of the non-British mother of two very young British children. But for the existence of the children it was highly likely, to say the least, that the appellant mother would not have been allowed to stay in the UK. The case establishes the importance of considering the impact on children of an immigration decision in relation to a parent, particularly the mother. It does not deal with the present case, where the child's position is directly at issue. Among the factors to which attention was drawn in *ZH* was (put broadly) the difficulty that the child might have in coping with life in the country to which the parent might be returned. That is not an issue in the present case, where the problem of the country of origin for the appellant is not any general difficulty in coping with life there, but rather what is said to be the risk of ill-treatment that he would face if he is truly to be regarded as, in effect, an orphan.

74. Lady Hale drew attention at paragraph 25 to the distinction between cases where the best interests of the child are paramount - the determining factor - such as adoption and separation of a child from its parents against their will, and others (including that which was before the Supreme Court, and the present appeal) where it is a primary but not the sole consideration.

75. At paragraph 24 (as quoted by Pill LJ in paragraph 22), Lady Hale records the acceptance on behalf of the respondent that the duty under section 55 applies not only to how children are looked after while decisions about immigration asylum deportation or removal are made, but also to those decisions themselves, and that a decision taken without having regard to the need to safeguard and promote the welfare of the child will not be in accordance with the law, for the purposes of article 8(2) of the ECHR.

76. In relation to the present issue, the welfare of the child is not paramount, but it is a primary consideration. It must therefore be weighed together with all other relevant factors, but no other factor is to be treated as inherently more significant than the welfare of the child: see Lady Hale at paragraphs 26 and 33.

77. Lady Hale went on to apply the relevant principles, asking what was encompassed in the "best interests of the child". At paragraph 29 she said this:

> "Specifically, as Lord Bingham indicated in *EB (Kosovo)*, it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the

> other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away."

78. Lord Brown and Lord Mance agreed with Lady Hale. Lord Hope and Lord Kerr also did so, while giving judgments of their own. Lord Hope commented at paragraph 44 on the "obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration". Taking the child's best interests as a starting point, the necessary assessment was as to whether they were outweighed by the strength of any other considerations.

79. Thus, even if the child's best interests, on their own, are seen as best served by his remaining in this country (which should not be taken for granted), that is not the end of the assessment and will not necessarily prevail over other factors, including the maintenance of proper immigration control.

80. No best interests consideration was undertaken in the present case, in relation to section 55, as provided for by one of the passages in part 16 which Pill LJ has quoted in paragraph 18. That is not surprising because section 55 was not in force at the time of the refusal of the asylum claim. However, the relevance of this provision was not drawn to the attention of the AIT. In turn the Tribunal, therefore, did not have regard to the matters required by section 55.

81. As Pill LJ says, we were also shown a number of documents, some dating from before and some from after the date of the determination of the appeal by the AIT, emanating from the United Nations. I need not add to his citations and references to this material beyond that which I have already set out. It seems to me that, for the most part, the domestic law material is sufficient on which to dispose of this appeal. I find nothing in the international material which is inconsistent with the conclusions that I draw from the UK legislation and cases.

82. In my judgment the AIT's determination was wrong in law for the short and simple reason that it did not include any consideration of that to which regard must be had under section 55, namely the need to safeguard and promote the welfare of the appellant as a child in the UK. By the time of the hearing, although not at the time of the Secretary of State's refusal, a determination such as that which the Tribunal undertook could not lawfully be conducted without regard to this factor.

83. I would therefore allow the appeal and remit the case to the Upper Tribunal for a further reconsideration hearing, in relation to which regard must be had to the factors relevant under section 55. The case is far from being one in which an outcome in favour of asylum for the appellant is a foregone conclusion, so that remitting the case would be a waste of time. To the contrary, the determination of the case will depend on a best interests assessment which has not yet been considered, on which co-operation from both parties will be needed for the Upper Tribunal to be able to discharge the obligation imposed by section 55.

84. The appellant claimed in the alternative that he was entitled to humanitarian protection. The AIT held that he was not. So far as I can see the two issues are governed by the same facts and considerations. In the light of this court's decision in

FA (Iraq) v SSHD [2010] EWCA Civ 696, I would remit the case on the basis that the reconsideration by the Upper Tribunal should address his claims both under the Refugee Convention and to humanitarian protection.

85. As Pill LJ has explained at paragraphs 33 to 39, the AIT resolved against the appellant an issue of fact as to his co-operation with, or use of, the Red Cross in its attempts to trace his relatives. It looks as if there is more to be said on this subject, quite apart from any light that might be cast on the critical underlying issue of the availability to him of family protection in Afghanistan if UKBA were to take steps to discharge the obligation under regulation 6 discussed above. Because this issue is so important to the asylum application, it seems to me that the case should be remitted on the basis that this issue remains open on the reconsideration. Further evidence, whether or not as to attempts since the hearing before the AIT to trace his relatives, may enable the issue to be decided in a more satisfactory manner.

86. Although there is more to be done before a hearing by way of reconsideration, both as regards tracing attempts and in order to enable the Upper Tribunal to consider what would be in the best interests of the appellant as a minor, every effort should be made so that the reconsideration can be undertaken and its result promulgated before the appellant attains the age of 18 on 15 September 2011.

Lord Justice Rimer :

87. I have had the advantage of reading in draft the judgments of Pill and Lloyd L.JJ. I agree that the appeal should be allowed and that the case should be remitted to the Upper Tribunal for further consideration.

88. I would do so 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.

89. I also agree with Lloyd LJ that, on the remitted hearing, the Upper Tribunal should address the appellant's claims both for asylum and humanitarian protection; and that, for the reasons he gives in his penultimate paragraph, the issue of fact there referred to should remain open.