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Case Nos: C5/2011/1943, 1699, 2439, 2119, 2417, 1215

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAPTER); FIRST TIER
Ref: AA/13345/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2013

Before:

LORD JUSTICE MAURICE KAY
(VICE PRESIDENT OF THE CIVIL DIVISION OF THE COURT OF APPEAL)
LORD JUSTICE JACKSON
SIR STANLEY BURNTON

- -

Between:

EU (Afghanistan)
FU (Afghanistan)
SU (Afghanistan)
AR(Afghanistan)
QA (Afghanistan)
AK (Afghanistan) **Appellants**

- and -
Secretary of State for the Home Department **Respondent**

- -
- -

Becket Bedford (instructed by **Messrs Sultan Lloyd**) for **AK, EU, AR, QA** and **FU**
Raza Husain QC and **Sonali Naik** (instructed by **Sutovic & Hartigan**) for **SU**
Jonathan Hall and **Nicholas Chapman** (instructed **by the Treasury Solicitor**) for **the Secretary of State**

Hearing date: 17 December 2012
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Judgment

Sir Stanley Burnton :

Introduction

1. In its judgment in *KA (Afghanistan) and others v Secretary of State for the Home Department* [2012] EWCA Civ 1014, this Court, differently constituted, considered and decided the generic legal issues arising in the present cases, which are lead cases heard together so as to enable the Court to give guidance on the principles applicable in similar cases. The basic generic facts were summarised by Maurice Kay LJ, with whose judgment the other members of the Court agreed, as follows:

> The appellants are young men from Afghanistan who arrived in this country as unaccompanied minors, aged 15 or 16, and claimed asylum. In each case the Secretary of State refused the asylum application but, pursuant to her policy on unaccompanied minors, granted discretionary leave to remain (DLR) until the age of 17½. Shortly before reaching that age, each appellant made an application for asylum or humanitarian protection which was refused. Each appealed unsuccessfully to the First-Tier Tribunal (FTT), which, except in the cases of SA and QA, determined the appeal before the appellant had attained the age of 18. Subsequent appeals to the Upper Tribunal (UT) were heard and dismissed after the appellants had attained their majority. In each case, the UT approached the assessment of risk on return on the basis of the facts as at the time of the hearing before it, including the fact of the appellant's recently attained majority.

I shall refer to the judgment of Maurice Kay LJ as "the Judgment".

2. It follows from the dismissal of their appeals to the Upper Tribunal that none of the Appellants established that at the date of the Upper Tribunal's determination of his claim he was in need of international protection, and therefore entitled to asylum, or that any of his Convention rights would be infringed if he returned to Afghanistan. Nonetheless, the Appellants claim to be entitled to indefinite leave to remain by reason of the Secretary of State's breach of her duty to endeavour to trace their respective families, imposed by Article 19.3 of the Reception Directive, transposed into our domestic law by regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005. Maurice Kay LJ referred to this duty as "the duty to endeavour to trace", and so shall I. The Appellants contend that the Secretary of State's breaches give rise to their right to benefit from what has been referred to as the corrective principle, or as the protective principle, established by the judgments of this Court in *Rashid* [2005] EWCA Civ 744, [2005] INLR 550. The Secretary of State disputes all of their claims.

3. The appeal of KA has been allowed by consent, it being agreed that his Article 8 claim should be remitted to be heard by the Upper Tribunal. This is my judgment on the application of the principles established in *KA* to the facts of the remaining individual cases.

The applicable principles

4. In *KA*, the Court held:

   (1) The analysis of *Rashid* by Carnwath LJ (as he then was) in *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 [2007] INLR 450, is correct: paragraph 13 of the Judgment.

   (2) The Secretary of State had indeed failed to comply with her duty to endeavour to trace.

   (3) In particular, she did not discharge her duty by merely informing a child of the facilities of the Red Cross: paragraph 24(1) of the judgment.

   (4) This was a systemic breach. The Secretary of State "failed to discharge the duty in relation to unaccompanied minors from Afghanistan because she adopted the policy of granting them leave to remain until they reached the age of seventeen and a half, whereafter any further application would be considered on its merits. By that time, of course, the duty to endeavour to trace would be close to expiration because of the imminence of majority": paragraph 16 of the judgment.

   (5) A failure to discharge the duty may be relevant to judicial consideration of an asylum or humanitarian protection claim: paragraph 24(2).

   (6) Such a failure may also be relevant to a consideration of the section 55 duty: paragraph 24(3).

   (7) Furthermore, the assessment of risk of return is not subject to a bright line rule, under which risk may be considered to be necessarily reduced or to have ceased on a claimant's actual or assessed eighteenth birthday: paragraph 18 of the judgment.

5. At paragraph 25 of the judgment, Maurice Kay LJ stated:

> There is a hypothetical spectrum. At one end is an applicant who gives a credible and cooperative account of having no surviving family in Afghanistan or of having lost touch with surviving family members and having failed, notwithstanding his best endeavours, to re-establish contact. It seems to me that, even if he has reached the age of 18 by the time his appeal is considered by the tribunal, he may, depending on the totality of the established facts, have the basis of a successful appeal by availing himself of the *Rashid*/*S* principle and/or section 55 by reference to the failure of the Secretary of State to discharge the duty to endeavour to trace. In such a case *Ravichandran* would not be an insurmountable obstacle. At the other end of the spectrum is an applicant whose claim to have no surviving family in Afghanistan is disbelieved and in respect of whom it is found that he has been uncooperative so as to frustrate any attempt to trace his family. In such a case, again depending on

> the totality of established facts, he may have put himself beyond the bite of the protective and corrective principle. This would not be because the law seeks to punish him for his mendacity but because he has failed to prove the risk on return and because there would be no causative link between the Secretary of State's breach of duty and his claim to protection. Whereas, in the first case, the applicant may have lost the opportunity of corroborating his evidence about the absence of support in Afghanistan by reference to a negative result from the properly discharged duty to endeavour to trace, in the second case he can establish no such disadvantage.

6. I have to say that, like the Court of Appeal in *S,* I have great difficulties with the judgments in *Rashid.* In cases that are concerned with claims for asylum, the purpose of the grant of leave to remain is to grant protection to someone who would be at risk, or whose Convention rights would be infringed, if he or she was returned to the country of nationality. Of course, breaches of the duty of the Secretary of State in addressing a claim may lead to an independent justification for leave to remain, of which the paradigm is the Article 8 claim of an asylum seeker whose claim has not been expeditiously determined, with the result that he has been in this country so long as to have established private and family life here. But to grant leave to remain to someone who has no risk on return, whose Convention rights will not be infringed by his return, and who has no other independent claim to remain here (such as a claim to be a skilled migrant), is to use the power to grant leave to remain for a purpose other than that for which it is conferred. In effect, it is to accede to a claim to remain here as an economic migrant. The principle in *Rashid* has been referred to as "the protective principle", but this is a misnomer: the person seeking to rely on this principle needs to do so only because he has been found not to be in need of protection. I do not think that the Court should require or encourage the Secretary of State to grant leave in such circumstances either in order to mark the Court's displeasure at her conduct, or as a sanction for her misconduct. I agree with the short judgment of Lightman J in *S*. He said:

> … I have the gravest difficulty seeing how the fact that the challenged administrative act or decision falls within one category of unlawfulness as distinguished from another, and in particular the fact that it constitutes an abuse of power giving rise to conspicuous unfairness, can extend to the remedies available to the courts.

7. Nonetheless, the Secretary of State's breach of duty may be relevant to her or the Tribunal's decisions. Her failure may be relevant to the assessment of risk on return. The lack of evidence from the Secretary of State as to the availability or otherwise of familial support should be taken into account. In addition, there are cases in which the consequences of her breach of duty are relevant. *SL (Vietnam)* [2010] EWCA Civ 225 [2010] INLR 651 was such a case. The appellant should have been granted leave to remain under the then minors policy. If he had been, he would have been able to work lawfully. Because of his precarious immigration status, he could not work lawfully, and he resorted to the large-scale cultivation of cannabis. The circumstances in which he had done so were relevant to the assessment of the gravity of his drug offending,

and should have been taken into account when deciding whether his deportation should have been upheld. Similarly, the failure to endeavour to trace may result in a failed asylum seeker, who may in consequence lose contact with his family, putting down roots here and establishing a valid Article 8 claim. The necessity for such a causative link was stated in paragraph 25 of the Judgment where Maurice Kay LJ gave as the reason for a claimant failing to avail himself of "the protective and corrective principle" that there was "no causative link between the Secretary of State's breach of duty and [the appellant's] claim to protection".

8. I would also add a comment to what was said by this Court in *KA* about the line between minority and adulthood. One should, in addition, take into account what I conceive to be the reason for the Secretary of State's policy to grant limited leave to remain to children, irrespective of his or her asylum claim. It would simply be inhumane to return an unaccompanied young child, specifically in cases such as the present to Afghanistan, at least where there will be no family to take care of him or her on arrival in Kabul. But that rationale applies with less and less force with increasing age.

9. In this connection, it is necessary to bear in mind that the birthday that has been ascribed to a claimant is often arbitrary. For example, a claimant contending to have been aged 16 in June 2012, but who is unable to give his date of birth, may as a formality have been given the date of birth of 1 January 1996. If his age is disputed, and he is assessed as aged 18, he may be recorded as having been born on 1 January 1994. Thus, the Secretary of State's decision letter dated 28 January 2010 in relation to EU records his date of birth as "01 January 1995 (disputed) 01 January 1993 (assessed)". I do not think that anyone believed that he was born on 1 January of either year. That date was given as a formality to reflect his age as asserted and assessed. In such a case, the origin of the precise date of birth is a further reason why the achievement of adulthood cannot of itself necessarily change the assessment of risk on return.

10. Lastly, I should mention a point made by the Secretary of State which I consider to have substance. Unaccompanied children who arrive in this country from Afghanistan have done so as a result of someone, presumably their families, paying for their fare and/or for a so-called agent to arrange their journey to this country. The costs incurred by the family will have been considerable, relative to the wealth of the average Afghan family. The motivation for their incurring that cost may be that their child faces risk if he or she remains with them in Afghanistan, or it may simply be that they believe that their child will have a better life in this country. Either way, they are unlikely to be happy to cooperate with an agent of the Secretary of State for the return of their child to Afghanistan, which would mean the waste of their investment in his or her journey here.

11. I turn to consider the facts of the individual cases before the Court.

AK

12. AK's date of birth was taken to be 1 January 1993. He entered the UK in September 2008 and claimed asylum. The Secretary of State rejected his claim, but in accordance with her policy granted him leave to remain, in his case until 10 July 2010. He then made a further application for leave to remain, which too was rejected.

He appealed to the First-tier Tribunal, which heard his appeal on 5 November 2010. He claimed that his father and his brother had been active in the Taleban, and that his brother had been accused of planting a mine that killed a high-ranking member of the Afghan government named Mokbil. His mother had told him that the government authorities were looking for him. He feared that if returned to Afghanistan he would be at risk from the government authorities or from the family of Mokbil. Immigration Judge Chohan rejected his claims. By reason of the discrepancies and inconsistencies in the account he had given, he rejected AK's credibility, concluding that "the account the appellant has put forward is not genuine and has simply been put forward in order to remain in the United Kingdom". Although he was still a minor, he had a family, a mother, brother, sister, cousin, maternal uncle and his son, to whom he could return. He was not at real risk of persecution or ill-treatment. His Article 8 claim was also considered and rejected.

13. AK appealed on the ground that the First-tier Tribunal had failed to consider the Secretary of State's breach of the duty to endeavour to trace. There was no challenge to the credibility finding. His appeal to the Upper Tribunal was heard by Designated Immigration Judge O'Malley. It was heard on 2 March 2011, by when he had reached 18. Judge O'Malley nonetheless considered the duty to endeavour to trace. He noted that AK had been asked, in his Statement of Evidence Form, for the address of his father. The reply recorded was "whereabouts unknown". He was also asked for the same information for his mother, to which the reply was simply "Afghanistan". He was asked for the same details for his brother Alam Khan, and responded "whereabouts unknown". He said that his brother Mirza's address was "Afghanistan". The Judge concluded, as he was entitled to, that AK had been unable or unwilling to provide the information sought, and he commented: "One wonders what more the Secretary of State was required to do." He added that AK had been provided with details of organisations in the United Kingdom to whom he could have turned to seek assistance in locating his parents, but was apparently not interested in taking up that line of enquiry for himself, but did nothing. Given that AK was no longer a child, and had family in Afghanistan, not surprisingly his appeal was dismissed.

14. On behalf of AK, Mr Bedford made the point that his client had not been informed why the information as to the whereabouts of his family had been sought. That may be, but it does not explain why he gave the answers he did.

15. On the basis of the findings of fact made by the First-tier Tribunal and the Upper Tribunal, I see no basis on which it could be concluded, as Mr Bedford invites us to do, that although he was 18 when his appeal was determined by the Upper Tribunal it should have benefited from the protective principle. In any event, on the Tribunals' findings of fact, AK has a family to return to in Afghanistan, and it is indeed difficult to see what could have been done by the Secretary of State if she had endeavoured to trace his family on the basis of the information he had given. His failure to give any sensible information as to the addresses of his family is entirely explicable by his unwillingness to return to Afghanistan. He would not be at risk on return and was therefore not entitled to asylum. I see no basis on which it could be said that if the Secretary of State did fail to perform her duty to endeavour to trace, her decision, or those of the First-tier Tribunal or the Upper Tribunal, were materially in legal error.

16. I would dismiss AK's appeal.

AR

17. AR was said to have been born on 1 January 1992. He applied for asylum in February 2007. The Secretary of State rejected his claim, but in accordance with her policy relating to unaccompanied minor asylum seekers she granted him leave to remain until 1 June 2009. On the expiration of his leave, he claimed an extension. It was refused. By the time his appeals came before the Tribunals, he was no longer a child. Before the First-tier Tribunal, he contended that he would be at risk from the Hazara people. That contention was found to be incredible, and was not pursued. In addition, he claimed that his Article 8 rights would be infringed by his removal. The Upper Tribunal reconsidered his Article 8 claim and rejected it. The essence of the Tribunals' determinations was that AR faced no risk on return and his return would not infringe any Convention right.

18. Before his appeal to this Court came on for hearing, AR returned to Afghanistan. In consequence, by virtue of section 104(4) of the Nationality, Immigration and Asylum Act 2002, his appeal must be treated as having been abandoned, and I say no more about it.

EU

19. EU claims to have arrived in this country in August or September 2008. He made a claim for asylum in February 2009. He claimed to have been born in 1995, which would have made him 13 or 14. However, his age was disputed, and was assessed as 16, and his date of birth recorded as 1 January 1993. His claim for asylum was refused, but on the basis that he was a child, he was granted discretionary leave to remain until 1 June 2010. He applied for further leave to remain. It was refused on 5 October 2010. He appealed to the First-tier Tribunal. In its determination dated 18 November 2010, Immigration Judge Astle found that the account given by EU, on which he based his claim for asylum, was "a fabrication designed to gain him access to the United Kingdom". In relation to his contact with his family, the Immigration Judge stated, in paragraph 25 of his determination:

> … given his attempt to mislead the authorities here by making a fabricated claim, initially denying having been fingerprinted and saying that he had never travelled by boat even though he was detained on an island in Greece, I find that I can place no reliance on his claim that he is not in touch with his family. I have been shown correspondence with the Red Cross who say that they are unable to trace the Appellant's brother. This is not perhaps surprising given that the only information provided by the Appellant is his brother's name and the name of the village where he used to live. I note that he has not apparently provided them with the names of his mother and sister and I do not accept that the letters from the Red Cross demonstrate that he is unable to contact his family. In addition I note that he has an aunt who lives in Kabul. It is a matter for him and his family whether he remains in Kabul or returns to his village but I do

> not consider that it would be unreasonable for him to relocate to Kabul ….

20. The Immigration Judge also rejected EU's claim to be the father of the unborn child of the Slovakian lady with whom he was living, and he rejected EU's Article 8 claim.

21. EU appealed to the Upper Tribunal. In his determination dated 6 May 2011, Designated Immigration Judge Bowen considered that the Secretary of State's breach of the duty to endeavour to trace was irrelevant, since EU had reached 18. He found that there was no error of law in the Immigration Judge's determination and he dismissed the appeal.

22. The only basis for an appeal is that the Upper Tribunal treated the Secretary of State' breach of duty as irrelevant. In my judgment, it was right to do so. The findings of fact made by the Immigration Judge included her rejection of EU's assertion that he was not in touch with his family. It follows that there was no link between the Secretary of State's breach of duty and EU's claim to remain in this country. His case is at the extreme and wholly unmeritorious end of the spectrum to which Maurice Kay LJ referred. I would dismiss his appeal.

SU

23. SU arrived in the UK aged 15 and claimed asylum on the basis that he was at risk because of a lethal family feud that began when he was aged 8, when he accidentally killed a neighbour. The Secretary of State eventually rejected his claim, but in line with her policy in relation to children granted limited leave to remain until he reached 17½. On the expiration of his leave, he sought further leave to remain. The Secretary of State refused his application. On his appeal, the First-tier Tribunal accepted much of his case, including that he had indeed probably killed a neighbour. However, he had remained in the same house for 3 years and nearby for another 3 years, and there was no real likelihood of retaliation by the time he left Afghanistan in August 2007. Immigration Judge Baldwin said:

> I have set out [the facts] at some length in order to make it clear why I accept that the core of his original account is probably true but why there is very good reason to doubt much of the new evidence now presented. Furthermore, I find it inherently implausible that what he did when he was just 8 years old would, so many years later, have set off a blood feud. If it remained relatively safe for him to remain in the same locality for years I find it simply not credible that he could not now return to that area. Even were it not safe to return to exactly the same location I find it highly unlikely that if the appellant were to return he would face a real risk of being tracked down and identified elsewhere in Kabul, a city with a 7-figure population. … I find that he is likely neither to be persecuted nor seriously ill-treated for the reasons he has given.

24. SU maintained that he had no family to whom he could return. However, the First-tier Tribunal found that it was incredible that he had lost contact with his family. The

Tribunal also found that he did not suffer from significant learning difficulties which should preclude his return, but that he had "set out to deceive in this regard".

25. Before the Upper Tribunal, SU did not rely on the Secretary of State's breach of her duty to endeavour to trace. Immigration Judge Monson accepted that he should have been given leave to remain for a period of a few months, until he reached 18, but since he had reached 18 by the time his appeal came before the Upper Tribunal he regarded the error of law as immaterial.

26. Before us, it was submitted that SU was entitled to the application of the corrective principle on the basis that if the Secretary of State had endeavoured to trace his family, there might have been evidence to support his claim to have lost contact with his family. However, this submission fails to take into account the finding that his claim to have lost contact was incredible. I see no basis for the application of the corrective principle, and I would dismiss his appeal.

FU

27. FU was given the date of birth of 1 January 1993. He claimed asylum here in October 2008. The Secretary of State rejected his claim, but in accordance with the minors policy granted him leave to remain until he reached 17½. His appeal to the Tribunal was dismissed. On the expiration of his leave, he made a further claim to remain, which the Secretary of State again rejected. On his appeal to the First-tier Tribunal, which was heard in November 2010, when he was still a child. He contended that he would be at risk on return because he would be a child without the support of his family. He had lived in Kabul with an uncle, who had helped him come to this country, but he did not know whether his uncle still lived in Kabul. The Secretary of State had failed to endeavour to trace any of his family, as had the social workers who had been responsible for his care here.

28. In his determination dismissing FU's appeal, Immigration Judge Phull said that there was no evidence that his uncle was no longer in Kabul or would be unwilling to care for him. FU did not suggest that anything had happened to his uncle or that any attempt to contact his uncle had been unsuccessful. The appellant had lived with his uncle for several months and later with his mother and sister in Pakistan for 4 months. It was reasonable to expect that the appellant would have memorised their address and/or his uncle's telephone number in Kabul so that he could make contact once he had reached safety. If returned to Kabul, FU could seek assistance from the International Organisation for Migration, who would provide reception assistance (as to which see the determination of the Upper Tribunal in *HK, NS and MM* [2010] UKUT 378) and assist him to locate his uncle. It followed that he would not be at risk.

29. FU's appeal to the Upper Tribunal was heard by Immigration Judge Parkes, sitting as a Deputy Judge of that Tribunal, in two parts. The claim for asylum was heard on 12 April 2011 and the Article 8 claim heard on 23 June 2011, so that by both dates FU was treated as over 18, and this was not disputed. In his first determination, Immigration Judge Parkes held that since FU had reached 18, the duty to endeavour to trace no longer applied, and that "there is no room for an artificial exercise considering the situation had the Immigration Judge looked at it in full". The issue in relation to the duty to endeavour to trace was raised again on the Article 8 appeal. Immigration Judge Parkes held:

> 12. With regard to the tracing obligation, that was not an essential part of the asylum process but in any event the Appellant's evidence was that he had tried and failed to contact his uncle in Afghanistan using the phone number provided. The Appellant has not shown that if the Home Office had tried to trace his family they would have had any more success as they would have had the same information that the Appellant had, although I note it was found that it had been shown he is an orphan. I am not satisfied that the Appellant has shown that he has suffered a loss or disadvantage by the Secretary of State's failure to apply the tracing obligation.
>
> 13. If the Appellant's position is to be considered now then neither section 55 or the tracing obligation would apply. In the absence of evidence of a loss or disadvantage to the Appellant I find that the decision is not in accordance with the law. If the decision were to be reconsidered by the Secretary of State very different considerations would apply and there is nothing to show that an advantage would be gained at this stage, other than delay.
>
> 14. As the decision is in accordance with the law, the question arises whether the decision to remove the Appellant is proportionate in the circumstances. The Appellant is now 18 and has been in the UK since 2008 and has received support from his foster family and has been receiving education in the UK. The findings of the Immigration Judge suggest that he has an uncle in Kabul to whom he could turn to support. The Appellant has not provided evidence of friendships or relationships of unusual strength or durability. On return he would have the advantages of the UK education and has shown that he is an adaptable individual. The evidence does not show that his removal would be disproportionate.

Accordingly, FU's appeal was dismissed.

30. It is accepted by the Secretary of State that Immigration Judge Parkes' determinations contain two legal errors. In his first determination, he wrongly stated that the 2005 Regulations had not been in force when FU's appeal had first been heard in 2009. The Judge may well have confused the commencement date of the 2005 Regulations with that of section 55 of the Borders, Citizenship and Immigration Act 2009. In his second determination, the Judge wrongly stated that FU had tried and failed to contact his uncle in Kabul, whereas the evidence was that it was his uncle in this country whom he had tried to contact. However, in my judgment neither of these errors is material, and in any event neither error was made by Immigration Judge Phull. I see no basis for a challenge to her findings of fact. In essence, there was no evidence of any risk to FU on return, and no error in the assessment of his Article 8 claim. I would dismiss his appeal.

QA

31. QA's date of birth was given as 1 January 1993. He claimed to have arrived in this country on 7 September 2007, when he claimed asylum. The Secretary of State rejected his claim, but granted leave to remain until his 18th birthday. In June 2010 he made a further claim for asylum, which was again refused. The basis of his claim was that if returned he would face mistreatment as a result of his imputed political opinion for the Hezb-e-Islami, and as a street child, and in any event because of the indiscriminate violence in a situation of armed conflict. He succeeded before the First-tier Tribunal. In her determination dated 10 January 2011, Immigration Judge Lingam accepted his account of events in Afghanistan and held that he would be at risk if returned, and was therefore entitled to asylum. She did not consider the possibility of QA relocating to Kabul. In addition, in an extraordinarily short passage of her determination, she held that his return would infringe his rights under Article 8. In her determination, Judge Lingam stated that QA had informed her that he feared asking the Red Cross or any other organisations to locate his mother for fear that if foreigners were to ask after his mother, it might place his family in danger and alert those who were interested in him.

32. The Secretary of State appealed. Her appeal was heard by Deputy Upper Tribunal Judge Froom in May 2011. He held that the First-tier Tribunal's determination was the subject of three material legal errors: the Immigration Judge had assessed QA's claim as if he were still a child, whereas at the date of the hearing before her and of her determination he was 18; secondly she had not explained why QA would be at risk from Hezb-e-Islami in Kabul, to which he would be returned; and thirdly her determination of the Article 8 claim was insufficiently reasoned, being contained in a single short sentence. Judge Froom held that QA could, as an adult, safely be returned to Kabul, and he rejected the Article 8 claim.

33. It is contended on behalf of QA that the Upper Tribunal was wrong to have interfered with the decision of the First-tier Tribunal. I disagree. Judge Lingam failed to address the possibility of internal relocation to Kabul, and made findings of risk that were unsupported by the evidence, as Judge Froom pointed out. She did treat QA as if her were a child, without any explanation. Her consideration of the Article 8 claim was worse than perfunctory. Judge Froom carefully examined the evidence and made findings that were open to him.

34. In my judgment, the only criticism that can be made of the determination of the Upper Tribunal is that it treated QA's eighteenth birthday as a bright line, which is particularly inappropriate where, as in his case, there is doubt as to his precise date of birth. However, no attempt was made before the First-tier Tribunal or the Upper Tribunal to suggest that by reason of his appearance or his conduct he should be regarded as vulnerable in Kabul. There was no evidence that even children were at risk of forced recruitment in Kabul. The evidence relied upon by QA suggested that those vulnerable to exploitation were younger than him: see paragraph 27 of the determination of the Upper Tribunal. Judge Froom found that QA could live a relatively normal life in Kabul, and he rejected the contention that he would be vulnerable by reason of his age. Given QA's refusal to provide information to the Red Cross or other organisation to enable his mother to be traced, it is impossible to see that the Secretary of State's breach of the duty to endeavour to trace is relevant to his case. He is now well over the age of 18. It is also contended for QA that the Secretary of State's delay in determining his claims resulted in prejudice that should be

remedied by the grant of leave to remain, since if his claims had been timeously determined, he would have been granted asylum. This contention is inconsistent with the fundamental principle of asylum law and practice, upheld by this Court in the judgment, that claims are decided on the basis of facts at the date of decision. It is inherent in this context that decisions made at different times may have different outcomes. Delays on the part of the Secretary of State in determining claims, at least if not deliberate, do not justify their determination on artificial basis of obsolete facts.

35. For these reasons, I would dismiss QA's appeal.

Lord Justice Jackson

36. I agree.

Lord Justice Maurice Kay

37. I also agree.

38. In his judgment, Sir Stanley Burnton is more overtly critical of the previous jurisprudence than I was in the Judgment. However, I do not disagree with what he says.

39. I am satisfied that we have now faithfully applied the approach set out in the Judgment.