Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04272/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination Promulgated**
12 November 2013	**12 December 2013**

Before

The Hon Lord Matthews
Upper Tribunal Judge Kekic
Upper Tribunal Judge Reeds

Between

MASTER B K A

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms B Smith of Counsel
For the Respondent: Mr Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan whose assessed date of birth is 1 August 1996. He left Afghanistan approximately one year before his screening interview, which took place on 28 September 2012, travelling from Kabul to Pakistan, Iran, Turkey, Greece and Italy. He eventually arrived in the United Kingdom from Calais, apparently in the rear of an HGV. He was served with the form IS 151A on 12 September 2012 and was then released to the care of Kent Social Services. He claimed

asylum on the same day. As is set out in a determination of Judge Vaudin d'Imecourt dated 5 September 2013 which is now under appeal, the appellant's claim in short was that he was a vulnerable minor who had lost contact with his family in Afghanistan and that it would breach his rights under the Refugee Convention to return him there at the present time. He was at risk of ill-treatment as a member of a particular social group, namely a child. It was also his claim that he had a well-founded fear of persecution based on his perceived political opinion as a person at risk from the Taliban because his father had been a serving police officer and the Taliban wished to recruit him. Shortly after his father's death the Taliban came looking for him and his mother decided that he had to leave. They went together to Kabul and she made arrangements with an agent, whereafter he was taken to Pakistan before journeying to this country. He said his mother lived in Baghlan in Afghanistan and he had a young brother and sister who lived with their mother. In his Statement of Evidence Form, combined interview and NINO application he said that he had no uncles or aunts or grandparents in Afghanistan. In his evidence at the hearing in the First-tier Tribunal however he said that his grandfather was still alive and lived in Kabul although he also said that the person was his father's cousin, his mother's uncle. It appears that he also said that both his mother's father and his father's father lived in Kabul when he left. We will turn to deal with this matter in more detail at a later stage.

2. The respondent did not accept his claim that he was at risk from the Taliban and refused to grant him asylum but in accordance with her stated policy she granted the appellant limited leave to remain in the United Kingdom outside the Rules as an unaccompanied asylum-seeking child until 1 February 2014. He appealed against the refusal of asylum as already indicated. For reasons which are set out in the determination of the First-tier Tribunal and into which we need not go in detail, the Tribunal dismissed his appeal on asylum grounds, on humanitarian protection grounds and on human rights grounds but purported to allow it on the basis that the respondent had not acted in accordance with the law to trace the appellant's family. The respondent had not made any efforts to trace the family, citing lack of resources.

3. We pause to note that it is accepted on all hands that the appellant provided the correct address for his mother and siblings.

The Findings of the First-tier Tribunal

4. It is unnecessary to repeat all of the conclusions reached by the Tribunal since in the result the appeal before us was argued on fairly narrow grounds. In summary, the FtT proceeded on the basis that the appellant's date of birth was 1 August 1996 in accordance with a **Merton** compliant age assessment.

5. The Tribunal was also satisfied that the appellant suffered from a congenital hearing defect which had made him very vulnerable and had more than likely caused him to have educational problems. It was entirely possible that he had some learning difficulties although he had not had a cognitive assessment and no medical report had been produced. He was a young man with complex speech, language and communication difficulties and, although he was able to interact appropriately with

peers and teachers, he was to a great extent dependent on others for his well-being and general welfare. He would not be able to lead a totally independent life at the moment and was incapable of caring for himself by way of cooking and making decisions with regards to his well-being. His self-help skills were very limited. When he had no-one to cook for him he was not eating a healthy diet. The judge assessed the evidence in the round bearing in mind that he was dealing with a minor with a degree of disability. It was found that the appellant had been able to survive for over one year outside his home area and family unit and had been able to make his way to the United Kingdom which demonstrated to an extent a degree of self-reliance. He had indicated that his father had returned from the United Kingdom having been here for some four years before being sent back to Afghanistan and that was not disputed. The appellant's position was that his father joined the police shortly after his arrival and was in the police for a further short time before he was kidnapped by the Taliban and killed. It was pointed out that no supporting evidence was produced despite the length of time available in this case and despite the judge's raising this matter as one of considerable concern. No effort was made to contact the authorities in Kabul, in accordance with the appellant's apparent instructions. The judge was conscious that there was no requirement to produce corroboration but given the ease with which he said such evidence might have been obtained he did not consider himself bound to accept the appellant's bare claim. Reference was made to a number of inconsistencies set out in the reasons for refusal letter. The judge himself was concerned about lack of efforts made to trace any information about the death of the appellant's father. He was satisfied to a very high degree of probability that given the roles played by the British and American forces in Afghanistan and from the available objective material referred to in the refusal letter, there would have been a record kept of deaths of police officers including police officers serving in the Baghlan area from where the appellant came, particularly if it had occurred in the circumstances alleged by the appellant. He was satisfied that the objective background material supported the claim that if a police officer was killed it was likely to have been recorded and it showed that there had been no recorded incidents of a police officer having been killed in the circumstances claimed by the appellant in the Baghlan area between 2009 and 2012. Paragraphs 64 to 67 of the First-tier Tribunal's determination are in the following terms:

> "64. Having heard evidence from the appellant and having read all the statements in this case, including the various reports from the Kent Social Services, I was entirely satisfied that the appellant has family living in the Baghlan area, which includes his mother, his brother and sister and more than likely his father and if not, his step father. I was also satisfied from the same evidence that the appellant has at least one grandparent presently living in Kabul. He would not have been aware of this if he had not visited his grandfather in Kabul. Indeed at one stage of his evidence before me he admitted that he and his family had visited his grandfather in Kabul on at least one occasion in the past before he retracted that evidence.
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> 65. I find that it is entirely possible that the appellant has had no communication with his family since his arrival in the United Kingdom, although I note that he has a friend who appears to have gone to Afghanistan who he had asked to bring photographs back to him. That same friend must have been told where and how

to contact his family. But, as Mr Smyth has pointed out on his behalf, the appellant has been closely observed by the social services and has been in their care to such an extent that if he had communicated with family abroad, that would have been noticed. Nevertheless, I do not find that this means that the appellant has no family or relative abroad to whom he could turn to for support. No effort has been made in this case to trace his family in Kabul or in the Baghlan area by his solicitors on his behalf and they are perfectly able to do so but it would appear from what I have been told that they are instructed or have been instructed not to do so.

66. I am entirely satisfied that the appellant is a minor and a vulnerable individual who would not be able to survive in Afghanistan on his own and that he would be able to relocate on his own in Afghanistan. Nevertheless, on the evidence that I have heard in this case I was also entirely satisfied that the appellant has family support both in both Kabul and in his home area.

67. I was also satisfied and find that the appellant was never in fear of the Taliban in his home area. Despite his claim that his father was killed by them there is absolutely no supporting evidence for this and clearly there would have been such evidence if it was true. There is also no supporting evidence that his father has ever been a member of the police force in Afghanistan and that evidence would also clearly be readily available if true. Normally one would not require corroboration evidence in this type of case, nevertheless given the time that has gone since he has been in the United Kingdom and given my serious concern raised on 5 June, I would have expected the solicitors in this case to have traced the father or at least to have been able to confirm the appellant's account through the authorities in Afghanistan. I bear in mind as a matter damaging to the credibility of the core of the appellant's claim that none of this has been done. Without further evidence supporting the appellant's bare assertion that his father was in the police force and that he was kidnapped in the circumstances in which he claims, bearing in mind the objective background material which shows that such incidents would have been recorded, I was not satisfied that the appellant is telling the truth about this matter, despite every possible allowance for his age."

6. Paragraph 69 runs as follows:

"69. Therefore, looking at the whole of the evidence in this case in the round, I do accept that the appellant is an Afghani national and that he is a vulnerable minor who could not relocate on his own in Afghanistan. Nevertheless, I do find that the appellant has family support in Kabul and in his home area. I find that these people can be contacted on his behalf by his solicitors and by the respondent at his request, if he gives them the necessary information. I find that the appellant can be safely returned either to Kabul or to his home area where he would have family support to look after him and provide for his needs. I find that the appellant's account that his father was in the police and was killed by the Taliban not to be a true account. I find that the appellant is not in need of international protection on the basis of any claimed political opinion."

Grounds of Appeal

7. The appellant raised five grounds of appeal but in the result Ms Smith only argued three before us. Most of the arguments centred on ground one which related to the

appellant's potential status as an unattended child and the details of which we shall turn to shortly. Ground two was to the effect that there were inadequate reasons for rejecting the core asylum claim (viz fear of the Taliban) and ground three attacked the weight attached to certain oral evidence given by the appellant in circumstances to which we shall turn.

8. It might be convenient were we to deal with grounds two and three before turning to the first ground.

Ground Two

9. It was submitted that in relying on the failure by the appellant's representatives to attempt to corroborate the death of his father by approaching the Afghan authorities the judge gave no regard to the potential risk to his safety if attempts were made to do so. The Home Office Country of Origin Report stated "that the Afghan National Police … "is widely viewed with suspicion and essentially serves to complicate the local security situation yet further". The same source supported that "in Laghman, there was clear evidence of relations between the police and the Taliban" and further background material highlighted instances of the police betraying colleagues to the Taliban. It could not therefore be assumed that to contact the authorities and provide details of the appellant and his family in such a way would not place him in danger. Even a subjective fear on the appellant's part would be sufficient.

10. The judge placed particular weight, it was said, on the failure to contact the authorities because of the objective background material which showed that such incidents would have been recorded but he did not identify which background material he was referring to. Insofar that it might be inferred that he was referring to a large number of reports contained at B273-B470 of the appellant's bundle he committed a material error of fact because those reports show that a large number of policemen had been killed by insurgents but did not provide the names of the policemen or give any indication that records of such names would be kept.

11. It was submitted that the undue weight that the judge afforded the failure to contact the authorities to seek corroborative evidence tainted the rest of his findings on the material before him.

12. Mr Deller said that the judge was aware that corroboration was not required and directed himself appropriately. The Secretary of State's refusal letter set up an expectation that there would be some reference to the claimed manner of the appellant's father's death if it happened. The judge had made it clear that the matter had troubled him. He had no reason to dispute that the point had been made that there might be links between the police and the Taliban but that did not diminish the weight the judge was entitled to attach to the lack of evidence. He thought the death certificate could have been asked for. The risk was not sufficiently demonstrable to provide a reason why a request was not made. As far as the other matter was concerned the refusal letter identified a number of links to reports of deaths of police officers in Baghlan but the death of the appellant's father was not recorded. In the

context of the case as a whole the judge had done his best with what he had to work with.

13. In our opinion nothing turns on this ground. It was a matter for the judge to assess what weight to attach to the failure to provide supporting evidence. Even if there were good reasons for the appellant's solicitors not attempting to obtain a death certificate the fact remains that there was no report of an officer being killed in Baghlan Province in the circumstances claimed by the appellant. The issue is not whether officers were named but whether the circumstances were reported. It is the case, as far as we can see, that there is no report of the death of an officer, even an unnamed one, in the circumstances claimed by the appellant in Baghlan at the material time. This was an omission to which the judge was entitled to have regard.

Ground Three

14. This ground was tabled under reference to the appellant's vulnerability, which was not disputed. It is to the effect that at the hearing on 5 June 2013 the appellant gave lengthy oral evidence which continued after the lunch break. An adjournment was granted following a further 15-minute break in the afternoon session and the judge indicated the following:

> "32. It was apparent to me that the appellant had had no problems understanding questions before lunch and making himself understood by the interpreter. After the lunch adjournment the appellant had been mumbling and had given the impression that he could not understand questions asked of him. As a result this application was made by Mr Smyth. Ms Sreeraman for the Home Office had no observation. Very reluctantly I agreed to adjourn the case to another date in order to ensure that the appellant had been given every opportunity to present his case fairly."

15. The judge found that A had at least one grandparent presently living in Kabul and, as we have indicated, said that "… at one stage of his evidence before me he admitted that he and his family had visited his grandfather in Kabul on at least one occasion in the past before he retracted that evidence."

16. It was said that the judge erred in placing weight upon that aspect of the appellant's oral evidence as it was heard during the afternoon session of the hearing on 5 June 2013 when the appellant no longer seemed to understand the questions asked of him. It was said that the error was exacerbated by the three-month delay between the judge hearing this evidence and the writing of his determination, albeit that delay was caused by the hearing being adjourned as opposed to tardiness on behalf of the judge. It was also said that there was no evidence that the judge had had regard to the report from the Paediatrics, Speech and Language Therapy Services which stated:

> "he does not have a secure understanding of single words in Pashtu or English. He also struggles to understand basic concepts such as "who", "where", "what" and is unable to follow simple commands such as "point to" and "show me".

17. Ms Smith submitted that no weight should be placed on the evidence that the appellant had a grandfather. It was material to the claim and affected the whole of the case. Reference was made to the report which picked up the difficulties with his language and it was said that his carers had also picked this point up. The appellant could give completely unrelated answers to very specific questions.

18. Mr Deller submitted that the judge had narrated the very careful steps he took to deal with the appellant's vulnerability. In any event there was a finding that there were other family members so evidence about his grandfather was of no materiality. The fact that there was a three-month gap did not amount to a problem.

19. The judge in his very careful report has narrated the steps which he took to make sure that the appellant understood what was going on and refers to breaks which were taken. He was obviously alive to the appellant's vulnerability. He narrates that after the luncheon interval the appellant's cross-examination continued at 2pm and it was during the course of that he gave evidence, to which we have already referred, as follows:

> "He said his grandfather was still alive and lived in Afghanistan, in Kabul. He then said that the person was his father's cousin, his mother's uncle. He repeated that the person was his father's cousin and he thinks that he was his mother's uncle."
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> He said that when he left Afghanistan his mother's father was in Kabul. When asked where his father's father was when he left Afghanistan he replied that when he was leaving Afghanistan his father's father was in Kabul, but that since then he did not know where he was. He said it was correct that his mother's father and his father's father lived in Kabul when he left."

20. Towards the end of close examination it is noted that his evidence was as follows:

> "He said that he did go to Kabul with his mother and family before he went to Kabul to leave Afghanistan. He said that when they went to Kabul he and his family stayed with the agent. He said that he had not been to stay with his grandfather in Kabul."

21. It is narrated that he was re-examined and paragraph 30 of the determination goes on as follows:

> "30. In answers to questions then asked by the Tribunal the appellant stated, inter alia, as follows:
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> > I reminded the appellant that in his evidence he had told the Tribunal that his father's father and his mother's father both lived in Kabul at the time that he left Afghanistan, and he was asked whether that was correct, he answered that it was not like that, both lived in Kabul. I then asked him what his father's name was and he said it was Bahran. I asked him for his mother's name and he said it was Zainab. I then asked him what was the name of Bahran's father and he replied that Bahran did not have a father. I asked him what was the name of Zainab's father and he said Zainab's father was called Haman."

22. It was thereafter that the Tribunal took a 15-minute break. On return Mr Smyth for the appellant said that the latter had reached his limit. He said that he had a number of questions which he would like to ask but the appellant needed an adjournment and could not continue. It was in that context that the judge noted the difficulties which the appellant had had after the lunch adjournment. The judge agreed to adjourn the case to another date and it called again on 4 September 2013. At that point incidentally the judge raised the issue as to why the Afghani authorities had not been contacted to establish information about the death of the appellant's father.

23. In any event Mr Smyth indicated that he had now had no further questions to ask. In the meantime a number of letters had reached the Tribunal on 3 September 2013, including one, as we understand it, from Kent County Council dated 9 August 2013 which stated inter alia that the appellant had been "greatly traumatised by the Tribunal" and that "the cross-examination in court would appear to have impacted upon his emotional well-being potentially exacerbating his vulnerability".

24. This no doubt prompted the comments at paragraphs 42 and 43 of the determination which are in the following terms:

> "42. I wish to record that my recollection of the cross-examination on 5 June 2013 was one of a gentle process of questioning by Ms Sreeraman, who never pressured the appellant. I had endeavoured to give a number of short adjournments at convenient times so as to ensure that the appellant was under no pressure. If I had thought the cross-examination likely to "traumatise" the appellant I would have stopped it. It was never raised as an issue on 5 June 2013 and no concern regarding the appellant's ability to answer questions were raised at that time.
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> 43. The statement in the letter of 9 August 2013 comes as a surprise to me today …"

25. Having considered the submissions in support of this ground of appeal and the relevant paragraphs in the determination we are satisfied that the judge was perfectly conscious of the appellant's vulnerability, that he took appropriate steps to deal with it and that having seen and heard the appellant's evidence for himself was in a perfect position to know what weight to attach to it. It is, we think, of significance that nothing was made of this point at the time by the representative who then acted for the appellant and it seems to us with respect that this ground is something of an afterthought.

26. We are satisfied that the findings in fact made by the First-tier Tribunal cannot be assailed and that they should stand. Against that background we turn to consider the first point made by Ms Smith in her submissions.

Ground 1

27. It was submitted that at the date of the hearing the judge had found that the appellant had provided his correct address, that he had not been and was not in touch with his family and that he was dependent on others for his well-being. Further, owing to his particular characteristics, namely his age and vulnerability, he would be at risk if returned to Afghanistan alone. At the hypothetical return date of

the date of the hearing he would be returned alone. It was not open to the judge having made the above findings to conclude that the appellant could be safely returned to Afghanistan at some unspecified point in the future. The appeal had to be determined on the basis of risk at the date of the hearing. On the basis of the findings of fact made by the judge, the appellant was a refugee and was entitled to international protection.

28. The key findings by the judge were as follows:

    1. The appellant was a child;
    2. The appellant was very vulnerable on account of his congenital hearing defect, communication difficulties, likely educational and learning difficulties, very limited self-help skills and dependency on others for his well-being. Reference was made to what was said in paragraphs 57 and 66 of the determination.
    3. The appellant was not in contact with his family in Afghanistan (paragraph 65 referred).
    4. The appellant could not relocate on his own in Afghanistan and would not be able to survive in Afghanistan on his own (paragraphs 69 and 66 referred).
    5. The appellant had provided the correct address for his family in Afghanistan.

29. The judge had concluded that the appellant had family in Kabul and his home area and that in light of that the appellant's solicitor or the respondent could make contact with the family after the hearing.

30. What it came to was that the judge found that at the date of the hearing the appellant was a member of a particular social group as an unattended child and overall was a particularly vulnerable one. It would not do to assess the risk to him at some future date in the event of contact being made by his representatives or the respondent.

31. The judge had made a material error of law.

32. It was clear following Ravichandran that risk must be assessed at the date of the hearing and this was endorsed in ST (Child asylum seekers) Sri Lanka [2013] UKUT 292 (IAC) at paragraphs 15 and 27.

33. The Secretary of State had breached her duty to endeavour to trace his family and it was not open to the judge to find that this breach could be rectified in the future yet go on to dismiss the appeal. Nor was it open to the judge to find that the appellant's representatives should take positive steps to alleviate the risk on return. It was not their role to arrange for the safe return of their client. The implication that the appellant could do more to facilitate his safe return contradicted the finding that he had already supplied the correct address for his family.

34. There was no finding that the appellant would be able to track down his family whether in Baghlan or Kabul of his own motion and this could not be inferred given the findings about his difficulties.

35. Since he was not in contact with his family and would be at risk as a vulnerable minor on his own in Afghanistan the only conclusion open to the judge was that at the date of the hearing the appellant had made out his entitlement to international protection. Reference was made to LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005 (15 March 2007) and AA (unattended children) Afghanistan CG [2012] UKUT 16.

36. The findings about the appellant's vulnerability and lack of contact had not been appealed by the respondent.

37. There was no evidence that the appellant was in touch with his family or any information about their current location or whether they could be contacted. It followed that the findings of the judge were self-contradictory. There was no evidence to support the judge's hope that the appellant's family would be contacted, were still living in the same location or were still alive or indeed that he would be welcomed back if contact was made. The belief that they could be contacted and would be a protective force was purely speculative. All that was known was that at the material time, the date of the hearing, the appellant was not in touch with his family and that he would be at risk if returned unaccompanied. He should, therefore, be recognised as a refugee.

38. If the risk changed at some point in the future it would be open to the SSHD to bring the matter back before the Tribunal.

39. Ms Smith accepted that there was case law such as SHL v Secretary of State for the Home Department (Tracing obligation/Trafficking) Afghanistan [2013] UKUT 312 (IAC) and KA (Afghanistan) and Ors v Secretary of State for the Home Department [2012] EWCA Civ 1014 which showed that there must be more than a mere breach of the duty to endeavour to trace before asylum was granted but a failure to discharge the duty might be relevant to the determination of the asylum claim.

40. In Ms Smith's submissions the spectrum referred to in KA was a slight distraction. Risk had already been established. The appellant was found to be vulnerable. While it was found that he had family the point was whether he was unattended at the date of the hearing. Finding that he could be in contact with them at some point looked to the future.

41. In response, Mr Deller did not challenge the fact that the respondent had failed to undertake her tracing obligations. He did not dispute that the question of whether the appellant was a refugee had to be decided at the point of the hearing. The case, however, was whether or not the appellant could properly be said to be unattended. A correct family address had been provided and the judge had found that the family were there. The issue boiled down to what one made of the lack of contact. One would presume that the family would help. The finding that there was a family in Kabul and Baghlan defeated any suggestion that he had any well-founded fear of being an unattended child. Was he merely unattended because he had not in fact maintained contact? The respondent's position was that that was not the case.

42. In further submissions, Ms Smith pointed us to the reception directive which defined what an unaccompanied child was. Where there was a finding that there had been no contact for a year, it was difficult to know why the appellant could not be said to be unattended. The evidence had been that the appellant's mother had no telephone. Lack of contact meant that the appellant must succeed.

Discussion and Decision

43. We have little difficulty in acceding to the suggestion that if the appellant was part of the social group of unattended minors in Afghanistan then he would fall to be granted protection. There is no dispute that the risk has to be determined as at the date of the hearing rather than at some future date.

44. So far so good. Can it be said, however, that the appellant is in fact an unattended child or rather would be an unattended child if returned to Afghanistan as at the date of the hearing?

45. We proceed on the basis of the facts as found by the First-tier Tribunal.

46. The starting point is the finding that the appellant has family in Baghlan, which is where the appellant said they were. For present purposes, it matters not whether there is also a grandfather or grandfathers in Kabul.

47. Ms Smith submitted that there was no evidence to support the suggestion that the family were still living in the same location or were still alive or would welcome the appellant back. On the other hand there was no material before the judge which suggested that there would be any reason for them to move, he having rejected the appellant's core asylum claim. No reason was given why the family would not accept him back. In our opinion the judge was entitled to take the view that the family having been in Baghlan a year ago were likely still to be there and reject any suggestion that they would not welcome back the appellant since there was no evidence to support that theory.

48. It is noted that at paragraph 12 of the determination the judge noted that the appellant claimed that he had lost contact with his family. There is, however, no finding to the effect that he had in fact lost contact. The findings simply make it clear that there has been no contact. Do these amount to the same thing?

49. If there has been a loss of contact that is a matter which should be proved by the appellant. In this regard we refer to the case of HK and Ors (minors, indiscriminate violence, forced recruitment by Taliban, contact with family members) Afghanistan CG [2010] UKUT 378 where it is said that where a child has close relatives in Afghanistan who have assisted him in leaving the country, any assertion that such family members are not contactable 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.

50. In the particular case we are dealing with, apart from the reference to the mother having no telephone, there is really no evidence that the family are uncontactable. Of particular relevance to our considerations are paragraphs 49 to 54 of HK which are in the following terms:

> "49. None of these boys is an orphan and none is without family in Afghanistan. It was pointed out on behalf of the Secretary of State that in each of these cases the appellant was advised that he could seek to make contact with his relatives through the auspices of the Red Cross organisation. Information was provided that the Red Cross International tracing service is a way for families who have been separated to try to restore contact. It was noted that it is a free service and that in the United Kingdom contact should be made with the local Red Cross Branch; if the organisation feels that it is able to help the inquirer will be asked to fill in a relevant form which will be sent to the headquarters in London, from whence it is forwarded to the appropriate Red Cross or Red Crescent Society in the appropriate country or to the International Committee of the Red Cross. They can offer assistance in putting the parties in contact through letter or phone.
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> 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 [sic] 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.
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> 51. There is no evidence of any endeavour being made on behalf of the [sic] any of the appellants to make contact with their relatives still living in Afghanistan. As Mr Bedford accepted, it was not in dispute that the respective families would be willing to collect and take care of these young men upon their return".

51. This was of course decided before KA and EU and cases in that line but nonetheless we are of the view that there has been no evidence presented that the family are uncontactable.

52. Ms Smith referred to AA and in particular to paragraph 133 thereof. That is in the following terms:

> "133. We are further satisfied that the appellant would be at real risk of persecution as an unattached child from his particular home area who has lost all contact with his family, so that family protection will not be available to him. We note in that regard that the respondent has not made any tracing enquiries as required by the Asylum Seekers (Reception Conditions) Regulations 2005. But as the Court of Appeal observed in DS (see paragraph 34 above) the appellant's claim has to be determined on its merits, whether or not any steps had been taken by the respondent in discharge of that obligation. We would simply add that we are entirely satisfied on the evidence that the appellant immediately responded when his social worker told him about the Red Cross tracing service; but that that has not yet produced any response (see paragraph 109 above). But the centrality of

the question of whether a child would have the protection of his or her family on return, serves to demonstrate the importance of the discharge by the respondent of her duty to make tracing enquiries."

53. The Secretary of State's failure to endeavour to make tracing enquiries is something which has to be taken into account in assessing the merits of the asylum claim but a decision nonetheless has to be made. It is noteworthy that AA proceeded on the basis that the child had lost contact with his family. As appears from paragraph 109 attempts had been made to contact his father on a telephone number but they had not worked. Attempts had also been made to contact the family through the Red Cross Tracing Service but to date there had been no response. While we accept that it is not for the respondent to shuffle off her responsibilities to endeavour to trace a family by referring a child to the Red Cross, nonetheless it is for the appellant to make out his case. He has not made out a case that his family are not contactable. On the contrary, he obviously felt able to instruct a friend to make contact with them.

54. That, however, only deals with part of the problem. It might be said of the decision we have just reached that we too are looking to the future. We are predicating the lack of risk on the basis of contact which will be made in the future, which is precisely what is complained of in relation to the determination of the First-tier Tribunal. However we are not satisfied that the fact that administrative arrangements have to be made mean that the *tempus inspiciendum* of the decision of the First-tier Tribunal falls to be regarded as in the future. We refer to paragraphs 52 and 53 of HK as follows:

"52. The Court of Appeal in the case of HH (Somalia) and others [2010] EWCA Civ 426 accepted that the route of return for an appellant should be looked at. It was said that it is impossible to decide whether return home is feasible or relocation is reasonable without knowing how the individual is going to get there. They considered that in any case in which it can be shown, either directly or by implication, the route or method of return is envisaged, the Tribunal is required by law to consider and determine any challenge to the safety of the route or method. In that case it was considered that the tribunal had erred in refusing to determine that appeal on the basis of what was known about the route of return. It was known that return would be to Mogadishu airport, and it was implicit that the journey onward would be by road. The Court found that the method of return was a necessary ingredient in any appraisal of risk. Even if they had no real information about this, they were still obliged to do as best as they could to deal with the issue.

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."

Paragraph 54 runs as follows:

> 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."

55. In relation to Sri Lanka, the case of ST referred to by Ms Smith made it plain at paragraph 29 that the judge was wrong to respond to the submission that the appellant was entitled to refugee status because of present risk by concluding that any risk of harm to the child would be diminished at the unspecified time in the future when the child (or former child) might actually return. What was required was an assessment of risk on the hypothesis that the child was being returned at the time of the decision on appeal. Nonetheless at paragraph 73(d) of the determination the Upper Tribunal made the following comments:

> "(d) If the Home Office were, hypothetically, to return to Colombo Airport at the present time, it would be doing so under a legal regime of UK law that imposed a duty to safeguard him and protect him whilst he was under their jurisdiction. At the least this would require the provision of a suitable escort for the appellant on his journey to Colombo. It would require suitable liaison with the High Commission, any willing family members, international organisations or local social services on his arrival. He would not just be dumped at the airport or the nearest beach."

56. HK was a country guidance case which, as far we are aware, has not been undermined in relation to the question of travel arrangements. In ST, as we have just indicated, it was explicitly pointed out that the risk had to be assessed as at the date of the hearing. Nonetheless in each case it was also recognised that administrative arrangements would have to be put in place in the future to facilitate the return of the individual concerned. That did not mean that the decision on the merits was flawed.

57. With that in mind we are satisfied that the submission that the First-tier Tribunal had regard to a hypothetical future date in assessing risk is fallacious.

Conclusions

58. For the reasons already given the appeal against the First-tier Tribunal's determination is dismissed.

LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)