



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/01597/2010

THE IMMIGRATION ACTS

**Heard at Field House
On 10 June 2012**

**Date sent
On 28 June 2013**

**Before
UPPER TRIBUNAL JUDGE JORDAN**

Between

AKF

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P. Lewis, Counsel instructed by Kesar & Co., Solicitors
For the Respondent: Ms H. Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and procedural history

1. The appellant is a citizen of Afghanistan, a Pashtun, who was born on 3 August 1993. He is now 19 years old. The appellant arrived in the United Kingdom on 22 July 2009, avoiding immigration controls at about the time he reached his 16th birthday. He was apprehended by police. According to him, he had left Afghanistan approximately 15 months before his arrival, that is sometime in the spring of 2008, when he would have been aged about 14½. He said he had travelled from Afghanistan overland. His journey was authenticated to the extent that he had visited Greece and France *en route* where he had been fingerprinted.

2. The appellant claimed asylum on being detained but his application was refused on 20 November 2009. He was, however, granted discretionary leave to remain as a minor until 3 February 2011 at which point he was 17½ years old. This appears to signify the respondent accepted the date of birth provided by him of 3 August 1993.
3. He appealed the refusal of asylum but the respondent's decision was upheld by First-tier Tribunal Judge Malone on 15 February 2010.
4. During the period of extant leave, the appellant submitted a further application on 19 January 2011 which was refused on 28 April 2011. His appeal came before Judge Blair-Gould who dismissed the appeal. However, on 15 November 2011, Judge Holmes decided the Secretary of State's decision was not in accordance with the law because inadequate steps had been taken to consider the appellant's application as made by a minor, thereby requiring the Secretary of State to make a fresh and lawful decision which duly occurred on 1 February 2012.
5. The fresh decision, made on 1 February 2012, was a refusal to grant the appellant further leave and to issue directions for his removal under s. 10 of the Immigration and Asylum Act 1999. The appellant's appeal against this decision came before First-tier Tribunal Judge Oxlade whose determination was promulgated in April 2012 following a hearing which took place on 14 March 2012.

The error of law

6. When the further appeal came before me in the Upper Tribunal on 4 January 2013, I determined that the determination of Judge Oxlade disclosed errors of law which required me to remake it. I gave my reasons which form Appendix 1 to this determination.

The nature of the claim and the respondent's approach to it

7. The appellant advanced his claim in a statement he made on 4 August 2009. In it he claimed that he was born in the village of Shar-e-Now in Paktia Province. His father was a shoe-maker and ran a shop in the market whilst his mother worked in the offices of an aid agency. Indeed, the agency occupied premises owned by the appellant's parents. Shortly after the agency took occupation, his parents received a 'night letter' in which the Taliban threatened the family if his mother continued to work for what they considered to be the Americans. Shortly afterwards, the appellant's own home was razed to the ground by a deliberate arson attack and his mother was killed in the blaze. Neighbours assisted him to travel to Pakistan. Originally, the appellant had claimed that both his parents had died and that he was assisted in Pakistan by a neighbour's uncle.

8. In the course of the second statement made by the appellant on 9 February 2012, he spoke of his relatives. He identified a maternal uncle as well as to paternal uncles living in Pakistan with whom the family did not maintain good relations. He claimed he had no contact with them. As a result, however, of assistance provided by the International Red cross, the appellant contacted his maternal uncle living in Afghanistan. The appellant claimed that his uncle wanted no more to do with him. There was, however, an occasion when an attempt was made to speak to him by telephone organised by the appellant's solicitor at which the appellant himself was present but the uncle did not speak to him. The event was the subject of a witness statement by the interpreter who was present on 27 May 2011. It was he who dialled the number provided by the Red Cross and the person who answered confirmed he was N K and that the appellant was his nephew. He said he had told the appellant that he should not call him in Afghanistan anymore and that he had his own problems with the Taliban who had threatened him as a result of his involvement in the construction industry. The uncle confirmed that he lived in Paktia. He showed reluctance to assist the appellant.

9. The incident is confirmed by a message from the Red Cross to which the appellant's uncle replied:

"I received your message to the Red Cross and became too happy for you. We did have your address to write your messages and we thank the Red Cross for transmitting your RCM (Red Cross Message) to us. We will call you on the phone, as we received your number. Here is my cell phone address.... thank you and the Red Cross for your address and phone number. Do not worry, your mother is passed away and we do not know about your father that where has he gone, he is missing.

10. The appellant's representatives have also been involved in the gathering of information about the aid agency for whom the appellant's mother worked. Contact was made with Mr Ahmadzai, a Czech citizen who is employed by an organisation known as People in Need (PIN). He had worked for the organisation since 2004 and confirmed that the appellant's mother worked for him in Paktia province as a Female Social Organiser for the National Solidarity Programme. He provided details from the organisation's archives which showed she worked for PIN from 2005 to 2007 and lived in Sharre Nau (which the appellant's solicitor had transliterated as Shar-e-Now). Mr Ahmadzai did not know exactly what happened to the appellant's mother but confirmed that, at the time, the organisation received night letters and that the appellant's house was burned down. The provincial manager told him that part of the family had fled to neighbouring Pakistan and some were burnt in the house.

11. The appellant's representatives provided a report dated 6 November 2011 from Dr Antonio Giustozzi, a well-known expert witness who spoke of the presence of the Taliban and other Islamist groups particularly in

the Zazi (elsewhere transliterated as Zazai), the tribal area where the appellant stated he came from. He spoke of a deteriorating security situation in 2010 with an increasing number of insurgent attacks in Paktia compared with the same period in 2009. There was a considerable intensification in the first quarter of 2011. He spoke of the well-established record of the Taliban in pursuing local officials and NGO workers; in general, *"everybody who maintains relations with government or foreign forces"*. This material was clearly consistent with the appellant's account of his parents being threatened and their home attacked.

12. The report then went on to deal with the risk in Kabul province and the southern districts of Kabul itself both from the Taliban and Hizb-e Islami. The infiltration of the Taliban into Kabul has resulted in violent attacks in some areas of the city. There was an escalating cycle of violence between 2008 and 2010 when large-scale attacks were suspended in exchange for political concessions in Kabul but the ceasefire broke down in February 2011 and targeted attacks took place against officials. He described a significant infiltration by insurgents in a number of southern and western districts of the capital, populated by Pashtuns.

13. In addition, the appellant submitted a report from Mr Ian Shearer, the Sackler scholar, Middle East Department, British Museum. Mr Sackler appears principally to be an archaeologist whose particular specialty is the preservation and protection of Afghanistan's cultural heritage. In pursuit of these activities, he has been involved in work in the National Museum in Kabul. However, whilst working as an archaeologist in remote areas of Afghanistan, he has been involved with health care provision for local Afghans for whom he has been trained to dispense medical aid. This has led directly to his involvement with Afghan children.

14. In paragraphs 13 and 14 of his report, he spoke of the violence meted out by the Taliban to those perceived to be traitors. This has involved instances against their family members. As a result of the lack of central control by the Taliban leadership, the fate of an individual or his family members would be at the whim of the local Taliban commander. He considered that the risk of death or injury was very real. In particular, Paktia province was an especially active base for Taliban operations and the place of reprisals against Afghans perceived to be working against their interests. Those in large urban areas are not necessarily safe.

Therefore the risk of harm to a family member of a perceived traitor from the Taliban is difficult to accurately quantify: there is certainly a tangible risk to [the appellant] from the Taliban, as many other individuals - particularly young males - related to perceived traitors have been killed.

He described this as part of the broader strategic campaign by the Taliban to undermine confidence in the Khazai regime but it was impossible to quantify the precise level of risk other than to define it as *'real, genuine and worrying'*.

15. In her letter of 20 November 2009, setting out her reasons for refusing the appellant's application for asylum, the Secretary of State recited the appellant's claim that his mother had worked for an international aid agency. At that time, the appellant had named the agency as *'TEN'* rather than PIN. Because the appellant had been unable to give adequate details about the nature of the work, where it was based and the nationality of the organisation, the Secretary of State rejected the appellant's claim that his mother was so involved. Inevitably, this resulted in the wholesale rejection of this part of the claim. Accordingly, the respondent rejected the appellant's claim that the family was targeted, that the family home was destroyed and his parents killed. The Secretary of State, therefore, approached her task on the basis that the appellant had parents in Afghanistan who were able to care for him. The reasons are set out in paragraphs 17 to 21 of the refusal letter. As a result of the material before me which I have set out above, Ms Hursley on behalf of the respondent, no longer sought to rely upon these findings.
16. Importantly, however, the respondent made alternative findings on the assumption that the appellant's case were true. The Secretary of State considered there was a viable internal relocation alternative in Kabul where he could be protected by his maternal uncle who had already taken responsibility for his care. Having considered country guidance on dealing with the risk of those seeking a safe-haven in Kabul, she concluded the appellant could safely return there. This examination of the appellant's case did not, of course, reflect the fact that the appellant was a minor. Whilst the appellant's claim to be an orphan was expressly rejected, his age was not apparently challenged.
17. This error resulted in a further refusal decision in which the respondent's reasoning is found in the letter of 1 February 2012. By that time, the appellant was no longer a minor and was just over 18 years of age. The Secretary of State repeated her position that the appellant's mother did not work for an aid agency, the family was not targeted and the appellant was of no particular interest to the Taliban or at risk on return to his home. The respondent repeated the assertion that the appellant had parents in Afghanistan able to care for him. Once again, however, a viable alternative relocation option was raised.

The error in the respondent's approach to the claim

18. It follows from this summary that the appellant's claim has never been considered by the Secretary of State on the basis that the appellant is a witness of truth in relation to the core element of his claim. Whilst in

purely rational terms, the prospect of relocation to Kabul should be the same whether or not the appellant's claim to be at risk of persecution in his home area is accepted or rejected, there is a possibility of a decision-maker being influenced by a prior adverse credibility finding; it is one thing for a decision-maker to consider relocation as a hypothetical option on the basis of a finding that the applicant has consistently lied about his history; quite another, if the applicant has truthfully spoken of his family being targeted by the Taliban as a result of his mother's involvement with an international aid agency which ultimately led to her death.

Judge Oxlade's fresh approach and findings

19. Judge Oxlade approached the appeal on the basis that he could rely on none of the findings relied upon in the previous appeals. He considered that the documentary available to him in respect of the appellant's mother's work, the burning of the house and her death went to the core of his claim and influenced views on the appellant general credibility which resulted, at least in part, in the appeal being dismissed. On the material which I have recited above, he found the appellant's home had indeed been targeted as a result of her or his mother's work. I agree with that approach.
20. He did not, however, accept that the appellant's father had died or that the appellant did not know where he was living. In paragraph 43 of his determination, he reached the sustainable finding that the appellant's failure to attempt to trace his father on receipt of the information from the International Red Cross about from his uncle, established that he knew his whereabouts. This also explained a period of time that was lost in his account between the death of his mother in 2007 and his setting out for the United Kingdom in 2008. He found as a fact that the appellant and his father had spent a period of time together in Pakistan. Thus, he concluded that the appellant was aware that his father was alive and that he was in Pakistan and that the appellant left him in order to travel to the United Kingdom. Once again, this is a sustainable finding of fact.
21. The findings of Judge Oxlade impacted upon the effect of the Secretary of State's duty to trace the parents of a minor. Given the finding that the appellant knew of his father's whereabouts, but the appellant had not been frank about that information, the Judge concluded that the Secretary of State could not reasonably have done more. The maternal uncle had expressly indicated that he no longer wished to be involved in which case tracing would have had no positive effect. The Judge found the failure of the respondent in her duty to trace was not, therefore, material omission in the sense that it would have had no effect.

22. In relation to relocation in Kabul, Judge Oxlade found that the Taliban would not proactively seek out the appellant, in effect, reaching the sustainable finding of fact that there were other, richer pickings for the insurgents in Kabul (*'a target rich environment'*) with the result that he would not be at risk of Article 3 ill-treatment. The decision of Judge Oxlade, however; did not deal with the reasonableness of relocation, in other words, whether it would be unduly harsh to do so.
23. This, therefore, is the issue which remains outstanding before me. This requires an examination of conditions in Kabul.

The reasonableness of relocation - Dr Antonio Giustozzi's evidence

24. The evidence submitted by the appellant includes that found in the report of Dr Giustozzi. In paragraph 9, he described how both the Taliban and Hizb-e Islami are trying to penetrate Kabul province and since 2006 have infiltrated the southern districts of Kabul province itself. During 2008 the Taliban intensified military attacks in the Kabul area. The influence of the Taliban underwent an intensification at Kabul University and other colleges. The escalation of attacks upon Kabul continued until the spring of 2010 at which point a ceasefire was brokered but which broke down in February 2011. There are, of course, incidents of assassinations, including the police intelligence director for western Kabul, Mohammed Gul (July 2010) and a policeman in the centre of Kabul (January 2011). This is part of a more generalised targeted campaign against officials and members of the security forces. The level of violence is increasing. In 2010, civilian deaths were recorded at 2,777.
25. Dr Giustozzi spoke of prospective landlords and employers seeking information about an individual's origins and family background thereby effectively depriving him of anonymity, eventually feeding back to those interested to know a person's whereabouts:

Whether or not the connection to his mother and her NGO employment would be obvious is difficult to say; certainly the villages in Paktia will know the family but in Kabul the Taliban not proactively seek [the appellant] because he is a low priority target in the target rich environment of the capital. The main risk to [the appellant] would be of a chance encounter with the Taliban who might then enquire about his background. He would in all likelihood settle in one of the Pashtun-populated neighbourhoods of southern and eastern Kabul, which are also the ones infiltrated by the Taliban.

26. Dr Giustozzi continued by dealing with the situation in Kabul:

21. Finding accommodation will be difficult and expensive. Due to the massive return of refugees from Pakistan, which led to the population of Kabul doubling in 12 months, and to the destruction of 65,000 - 70,000 houses caused by the war, rents shot up in 2002-2004. Four- to six-fold increases are reported to have taken place over the last 18 months. It takes

a manual labourer's wage to pay for the rent of a room, but it can often take more. Even in remote parts of Kabul, two-room apartment cost in May 2013 US\$120, up from US\$20, 18 months earlier, that is 2 ½ times the salary of a civil servant. By May 2007 rents had moved even higher, as the building industry failed to meet demand and the average monthly rent of two room apartment reached around US\$200. After that prices continued to grow. At the same time the price of rents continued to grow: a room in a modest neighbourhood of Kabul cost in April US\$55 a month. A four-bedroom house in a more affluent neighbourhood can cost US\$10,000 a month to rent. As of early 2011, even in the most remote and inaccessible parts of Kabul (up the mountain sides), the average family house was rented for US\$220-330 a month, with no running water or electricity provided. According to the Afghan Ministry of Housing, the number of houses urgently needed is 180% more than those currently existing. On average, Kabul's houses and flats accommodate more than three times as many people as they were built to, according to the Ministry of Housing. The typical low income household would cope by sharing one or two rooms around 7-12, an option clearly not available to [the appellant].

22. Earning a livelihood on its own would be a major challenge, particularly if [the appellant] will not be able to rely in family relations. Unskilled work as a daily labourer in the building industry is the most widely available option, but due to massive unemployment (35-50% depending on the estimates) most workers only get a few days of work each week. Daily labour rates in Kabul are about US\$4 a day, but of course work is not always available. EUPOL estimates that a man with a family needs US\$600 to live in Kabul, a single man would need a fraction of that, probably US\$200 to least... [the appellant] could earn a good livelihood working as an interpreter, however this would represent a new source of risk as interpreters are a category targeted by the Taliban.

Mr Ian Shearer's evidence

27. Mr Shearer's report spoke of the upsurge in attacks upon targets by the Taliban in Kabul and elsewhere and the difficulties of obtaining protection from the police. In paragraph 32 in his report, he takes up the point made by Dr Giustozzi that familial and clan-based support is paramount to an Afghan's survival outside his home region.

The social safety net for young adults without familial support in Kabul and other urban centres is limited at best. By Afghan standards [the appellant] is well into adulthood and would be expected to support both himself and any extended family members still alive. Yet [the appellant's] experiences of the last few years have left him without the webs of support and protection most Afghans require to make a living, and in my personal and professional experience, [the appellant] is highly vulnerable to economic exploitation at best, and at risk from arbitrary arrest by the Afghan authorities, homelessness, unemployment and blackmail utilising corrupt Afghan authorities as their mechanism to do so.

28. Mr Shearer continues by saying that the Taliban pose a risk to those who are otherwise without means to support themselves of being recruited to their.

29.He described the risk by reference to the nature of Kabul :

Despite the substantial size of Kabul's ever increasing population, the Afghan capital is in many ways actually a conglomeration of rural villages masquerading as a neighbourhood and like many small, rural communities, the truth about an Afghan identity can be very hard to keep. The many difficulties that [the appellant] would face on his return from Afghanistan would be exacerbated in my personal and professional experience of Afghanistan by the absolute disconnect between his age and experience in the UK and the expectations that would be placed upon him in his home country: he is a teenager in the United Kingdom and considered a man in Afghanistan with enormous attendant pressures and responsibilities on him to feed, clothe and house himself, as well as take full economic responsibility for any surviving family members.

My analysis of this material and approach to the re-making of the decision

30.The difficulty I find in accepting this pessimistic outlook on the appellant's chances is that the appellant has shown himself a resourceful and effective young man for a number of years in the United Kingdom and will not be returning as an *ingénue*. There is simply no question of his being burdened with the responsibility of taking on the support of his family members either in Afghanistan or in Pakistan. Dr Guistozzi appears to accept that he is capable of acting as a translator. Whether or not he chooses to pursue that course is a matter for the appellant but it demonstrates a level of ability that is far beyond the level of a baker or a construction worker, two of the categories identified as comparators in the reports.

31.I have a further difficulty in accepting the evidence from the uncle at face value in that it is more likely than not that the uncle would prefer his nephew to remain in the United Kingdom where conditions are likely to be more favourable to him than in Kabul in terms of further education, job prospects, health-care and the safety-net of benefits available for maintenance and accommodation in the event that circumstances become tough. If the appellant were living with his father in Pakistan for a year or so, it is probable that he was in no immediate danger there and that the decision to travel to the United Kingdom was not prompted by an immediate fear of serious harm. In these circumstances, it is not likely that the appellant's uncle would readily wish that the appellant's plans be thwarted by a return to Afghanistan. Furthermore, there is a marked difference in the uncle's attitude as displayed in the telephone call compared with the response to the Red Cross set out in paragraph 9 above.

32.I do not, however, go so far as to say that the appellant could safely return to the uncle's home in Paktia given the evidence about circumstances there. Nor am I prepared to accept that the uncle

should be expected to re-locate to Kabul to form a household in Kabul with the appellant. But nor do I think it is necessary for him to do so.

33. I reject, however, the uncle's claim that he would entirely wash his hands of the appellant if he were to be put in a position of serious need. The ties of blood and family are strong and probably as much so in Afghanistan where a person in need cannot look to the state for financial assistance. This appellant as a young man seeking to make his way in Kabul is likely to be in the same position as many thousands of others who have moved to the cities, both for security and financial reasons just as the United Kingdom itself has seen urbanisation in past centuries as the relative draw of urban life has won over from rural, village life. It is true that this puts pressures on housing and jobs in urban areas as we have seen in Afghanistan, and in Kabul in particular, but I would not regard this as evidence that this migration is unreasonable or that life in the towns is unduly harsh.

34. Whilst it is tempting to say that such migration would not occur if the relative advantages of relocating to Kabul did not outweigh the disadvantages, a report from Amnesty International (to which I shall return later) voices a proper degree of caution about treating such people as economic migrants and no more:

“economic migrants” ignores the reality that those who are displaced have not moved out of choice. Most have fled after their homes or villages were razed, after they or family members were killed or injured in fighting, after their children were unable to attend school safely or were singled out for recruitment into armed groups, after they received threats or were compelled to hand over money or property to armed groups, or for other reasons related to, or aggravated by, the conflict.

35. The circumstances of the appellant's father in Pakistan are even less well developed in the evidence than those of the uncle and this is largely the responsibility of the appellant who has revealed little about them. I hesitate to speculate about those conditions but the fact that the appellant's father remains there both says something about the relative advantage in living *there* rather than in Afghanistan as well as the fact that, had the father's circumstances in Pakistan been abject, I am certain they would have been developed in the evidence as a plank in the appellant's claim to be in need of surrogate protection. Hence, avoiding speculation, I would not regard the appellant as being unable to look to his father to some support if the need arose but I am cautious about placing an over-reliance on the extent of such help.

36. Given the fact that there is no evidence that relations between the appellant and his family members have broken down, it would be usual to expect other family members to do what they can in case of need. It has, of course, been traditionally the family, rather than the state, that has offered individuals a support mechanism.

37. For these reasons, I approach the reasonableness of the appellant's relocation to Kabul on the basis that he is not an orphan, that he has family members who cannot reasonably be expected to join him in Kabul to offer the support of their presence but who will do all that is in their power to prevent the appellant from descending into destitution or penury. The fact that the extent of the assistance his father is able to offer has not been established as a result of the appellant's failure to adduce evidence about it in circumstances when he could, if he chose, have done so. He returns as a young man in good health who had acquired independence in his living arrangements and who has developed skills in the United Kingdom.

The COIS report

38. The COIS report reissued on 8 May 2013 provides the following information:

1.08 Eurasianet, updated 1 February 2011 and accessed 6 February 2012, provided the following information about the housing shortage in Kabul:

The lack of affordable housing - driven by a rapidly rising population spurred by rural to urban migration, the wartime destruction of neighborhoods, and an influx of well-heeled foreign contractors occupying choice locations - has become one of the biggest social problems in Kabul. Critics say not enough is being done by city authorities to address the issue...Kabul Mayor Muhammad Younus Nawandish highlights the population issue. 'Kabul had a population of some 1.5 million in 2001, and now the number of its inhabitants exceeds 5 million,' he says, adding that the vast majority are unable to find housing in the capital. The subsequent demand for rental homes and flats has caused rental prices to skyrocket, as have property prices. New homes have cropped up in pockets where land prices are within reach, but they tend to lack formal urban planning, and critics say new housing projects tend to cater to the more wealthy... a three-room apartment in an average area of Kabul that rented for about \$200 per month five years ago, now costs a minimum of [US] \$500.

'Middle-class Afghans' incomes, however, have not kept pace. With few exceptions, public-sector workers' wages range between \$50 and \$250 a month.'

1.09 However, the Economist Intelligence Unit in their Afghanistan report, dated January 2012 and accessed 6 February 2012, stated:

'In a further sign of economic weakness, house prices in Kabul have started to fall after years of inflated house prices and rents. Real estate agents in the capital have complained that the announcement of the first phase of the transition of ISAF forces marked the tipping point, with house prices dropping by 20-40% over the summer of 2011. Property dealers have also expressed concerns that Kabul is becoming increasingly segregated along ethnic lines; in particular, Pashtuns are said to be congregating in areas of the city with easier access to the Pashtun-dominated east and south of the country.'

1.10 The International Organisation of Migration Country Sheet on Afghanistan, updated 13 November 2009 and accessed 6 February 2012, further added,

'Buses, donated to Afghanistan by India, Japan, Iran (around 600), all operate in Kabul at the moment. A typical bus fare for transportation within the city is around AFA 5. Private transportation companies also exist. Fares are higher than on public buses.'

8.82 The US Department of Defense 'Report on Progress Toward Security and Stability in Afghanistan', dated April 2012, stated:

During this reporting period [October 2011 to March 2012], security incidents in Regional Command - Capital were statistically insignificant (less than one percent) compared to all security incidents throughout Afghanistan, and thus represented no significant change compared to the same time period one year ago. RC-C [regional command Capital] is by far the smallest RC... Kabul City had a relatively calm fall [2011] and winter [2011-2012].

8.83 However, the International Institute for Strategic Studies' Armed Conflict Database stated the following in a piece describing the situation in March to April 2012:

The Taliban mounted coordinated attacks across Kabul and neighbouring provinces in April, which they said marked the launch of their spring offensive against NATO troops. Around 21 insurgents, including suicide bombers, launched simultaneous attacks on Nangarhar, Paktika and Logar provinces as well as Kabul's diplomatic quarter. The siege lasted over 18 hours before Afghan troops, charged with the security of Kabul, ended it with a final gunfight at the Afghan Parliament. Afghan President Hamid Karzai called the attack a massive 'failure' on the part of the intelligence services, especially NATO. He said Afghan forces proved themselves capable of defending the country. Western military officials admitted they were surprised by the scale and sophistication of the synchronised attacks.'

8.84 The Institute for War and Peace Reporting issued this report on 17 April 2012 regarding insurgent attacks on 15 and 16 April 2012:

'A number of key locations in the capital were targeted, with dozens of militants firing on the Afghan parliament, the national army academy and the Sherpur district, home to senior government officials and diplomats. Foreign embassies also came under fire in the onslaught, which began at noon on April 15 and was only brought to a halt the following morning... There were also attacks in Logar, Nangarhar and Paktia provinces. According to the interior ministry, 47 people died, 36 of them the insurgents who carried out the attack. Three civilians and eight policemen were killed. Of the 65 people injured, 25 were civilians.'

8.85 The US Congressional Research Service report, 'Afghanistan: Post-Taliban Governance, Security and US Policy', dated 3 May 2012, stated that:

'...observers note an apparent increase in major attacks in Kabul [city], which is generally considered secure: on June 28, 2011, insurgents stormed the historic Intercontinental Hotel in Kabul, prompting a several hour gun battle with Afghan authorities backed by NATO-led forces. On August 19, 2011, insurgents attacked the compound of the British Council in Kabul, on the anniversary of Afghanistan's formal independence from Britain in 1919. The September 13, 2011, rocket and gunfire attack on the U.S. Embassy in Kabul and ISAF headquarters prompted even more significant questions about U.S. and Afghan successes, although some U.S. officials used the attack as an indication that insurgent groups are altering their tactics in response to being largely defeated in their strongholds in eastern and southern Afghanistan... On April 15, 2012, about 35 insurgents attacked several locations in downtown Kabul, as well as conducted attacks in a few other provinces.'

8.86 The Danish Immigration Service report on their fact-finding mission to Kabul in February/March 2012, entitled 'Country of Origin Information for use in the asylum determination process,' and dated May 2012, stated:

'Regarding the security situation in Kabul, IOM said that there have been a number of suicide attacks which influences the lives of ordinary people. However, apart from suicide attacks, Kabul is safer than other places in Afghanistan, and the area is more under control. This is, according to IOM, due to the fact that Afghan National Army (ANA) and ANP in general are more trained in security operations in Kabul and other big cities like Herat and Mazar-i-Sharif and the situation is more under control in these cities compared to other parts of the country. In Jalalabad, however, the authorities are not yet that efficient, and the Taliban has a strong influence.'

Amnesty International '*Fleeing War, Finding Misery: The Plight of the Internally Displaced in Afghanistan*'

39. The appellant's bundle includes a report from Amnesty International '*Fleeing War, Finding Misery: The Plight of the Internally Displaced in Afghanistan*' (February 2012). The report was concerned with the fate of internally displaced persons (IDPs) rather than returning failed asylum seekers. It was based on research gathered during five fact-finding missions between November 2008 and June 2011, each three to five weeks in length, as well as additional information obtained by Amnesty International researchers in follow-up communications from London between July 2011 and January 2012. During its field research, Amnesty International conducted private interviews with more than 100 internally displaced persons and returning refugees in 12 slum communities in and around Herat, Kabul, and Mazar-e-Sharif.

40. In Kabul, the researchers visited communities in Bagh-e-Dawood, in the Paghman District in the west of the city, housing 140 to 150 families and located on parcels of land variously owned by private individuals and the Ministry of Defence; Chaman-e-Babrak, in the north of the city,

with 1,300 families and located on private land; Charahi Qamber, in the west of the city, with 750 families, located on land owned by the Ministry of Defence; Ferqa Shanza, in the Paghman District, with approximately 25 families and located on land owned by the Ministry of Defence; and Kart-e-Parwan, where several hundred families live on privately owned land. These are relatively small numbers, as we shall later see.

41. There is no doubt that life for these persons is at a very low level. However, the circumstances of those interviewed should not be treated as the inevitable consequences of all those returning. For the population of Afghanistan as a whole, the average household size is between seven and eight individuals, and one-fifth of all households in the country have 10 or more people.² The households Amnesty International visited for its report were usually larger than the national average, often with 10 to 15 extended family members and sometimes as many as 30. Hence, the 'profile' of those in camps is different from that of the appellant.

42. The report continues:

Four hundred people a day are displaced in Afghanistan, on average, bringing the total displaced population to 500,000 by January 2012.

Such internal displacement is on the rise. Conflict-induced internal displacement increased rapidly in the first half of 2011—the UN Refugee Agency (UNHCR) estimates that nearly 100,000 people were internally displaced between January and June of that year. The number of displaced persons has increased every year since at least 2008.

Tens of thousands of these displaced individuals have sought shelter in and around Kabul and other Afghan cities. Precise numbers are difficult to determine, but as many as 35,000 displaced persons are now living in slum areas in Kabul alone. They make do as best they can, finding abandoned lots and constructing makeshift dwellings from mud, poles, plywood, plastic sheeting, and cardboard that offer them little protection from the elements. Nearly two dozen displaced children under the age of five froze to death in January 2012.

43. The report identified difficulties faced in access to water as a serious concern, and access to work without which many families do not get enough to eat and cannot afford health care. The families live under constant threat of forced eviction. Lack of basic hygiene means that illness spreads easily, particularly amongst young children.

44. This, however, should be seen in the context of the much broader picture of the effects of the conflict and the process by which the country is seeing the return of many who fled. Over three decades of fighting created a refugee population, which peaked at 6 million in the 1980s:

Refugees started to return to Afghanistan in 1989—over one million from Pakistan in a six-month period in 1992—and by 1997, some 3.9 million had returned. Another rise in displacement, both internal and international, began in 2001 and peaked in 2002. Refugees again began to return to Afghanistan in large numbers from 2002 to 2004 and have continued on a much smaller scale in subsequent years. Nevertheless, the number of returning refugees dropped substantially in 2011, with 60,000 UNHCR-assisted refugee returns in the first 10 months of 2011 as compared with over 100,000 during the same period in 2010. The most frequently cited reasons for not returning are lack of livelihood opportunities, lack of shelter, and insecurity, UNHCR reported in October 2011. Speaking at a distribution centre for returning refugees in December 2011, Peter Nicolaus, UNHCR’s representative in Afghanistan, said that the failure to address the issue of livelihoods and consequent problems of reintegration “was the biggest mistake that UNHCR ever made” and that the agency was now concentrating on sustainable integration. “It’s the income that counts, the livelihood. In very simple terms we need to find jobs for the people coming back,” he remarked.

45. Nevertheless, in the last decade, UNHCR has assisted the return of over 4.6 million refugees to Afghanistan. Including those who returned without UNHCR assistance, between 5.5 million and 6 million refugees are estimated to have returned to Afghanistan between 2002 and 2011. As a recent Security Council report notes, “The Afghanistan return operation remains the single largest such operation for UNHCR.” Some 1.7 million refugees remain in Pakistan, and 1 million remain in Iran.

The Afghanistan Operational Guidance Note

46. I was referred to the Afghanistan OGN v10, issued in June 2012 so far as it relates to Returns:

5.1 There is no policy which precludes the enforced return to Afghanistan of failed asylum seekers who have no legal basis of stay in the United Kingdom.

5.3 The preferred option for repatriating those Afghan asylum applicants who having exhausted the independent appeal process, are found not to need international protection is assisted voluntary return. This policy is in line with the Tripartite Memorandum of Understanding on Voluntary Return, between the UK, the UNHCR and the Afghan Transitional Administration. However, as agreed with the Afghan authorities, from April 2003 those not choosing voluntary return and found to be without protection or humanitarian needs have been liable to be considered for enforcement action although those individuals or groups identified as vulnerable are excluded from the programme of enforced returns. We recognise that the Government of Afghanistan is still in the process of rebuilding the country and we do not wish to destabilise that process with a rapid influx of large numbers of people. All Afghans returning from the UK are offered access to a training and employment package and care is taken to return people gradually to those areas with adequate security and infrastructure where we are satisfied they will have sufficient support.

H and B v the United Kingdom

47. I was also referred to the decision on the ECtHR in *H and B v the United Kingdom* - 70073/10 44539/11 - Chamber Judgment [2013] ECHR 298 (09 April 2013) which itself makes reference to a considerable amount of British jurisprudence such as *GS (Article 15 (c) : Indiscriminate violence) Afghanistan CG* [2009] UKAIT 00044, *HK and others (minors - indiscriminate violence - forced recruitment by Taliban - contact with family members) Afghanistan CG* [2010] UKUT 378 (IAC), *AA (unattended children) Afghanistan CG* [2012] UKUT 00016 (IAC), *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163 (IAC) *PM and others (Kabul - Hizb-i-Islami) Afghanistan CG* [2007] UKAIT 00089 and *RQ (Afghan National Army - Hizb-i-Islami - risk) Afghanistan CG* [2008] UKAIT 00013. The first applicant in *H and B v the United Kingdom* argued amongst other things, that it would be unduly harsh for him to internally relocate to Kabul or elsewhere in Afghanistan because of his poor mental health. He relied on a letter dated 28 March 2011 from his GP which stated that he was being treated for depression and had reported symptoms of sleep disturbance, loss of appetite, an inability to experience pleasure and low mood. His GP noted that the first applicant reported no suicidal planning, but he was concerned that there was a possibility of self-harm and he had therefore referred the first applicant for a mental health assessment. The first applicant also submitted a report dated 2 December 2011 by Dr Giustozzi, the author of a Landinfo report also before the Court which stated, *inter alia*, that the first applicant could be relatively easily tracked down in Afghanistan because everybody would be aware of his father's past and he would be easily recognised.
48. In considering whether the applicants have established that they would be at real risk of ill-treatment in Afghanistan, the Court observed that they had not claimed that the levels of violence in Afghanistan are such that any removal there would necessarily breach Article 3 of the Convention. The issue of the levels of violence in Afghanistan has been thoroughly examined by the Asylum and Immigration Tribunal and the Upper Tribunal in the series of country guidance cases I have mentioned above. The conclusion that the levels of violence was not such as to create a general risk of ill-treatment to all persons returned to Afghanistan was reached on a proper examination of the evidence and a readiness to reflect changing conditions in a rapidly evolving situation.
49. The ECtHR found no evidence to suggest that it should reach a different conclusion, concluding that there is not currently in Afghanistan a general situation of violence such that there would be a real risk of ill-treatment simply by virtue of an individual being returned there.
50. Both applicants had concentrated on the risk of ill-treatment which they alleged they would suffer at the hands of the Taliban owing to their

support of the international community. In relation to the second applicant's claim that he would be unable to relocate to Kabul because he would be destitute there, the Court recalled that humanitarian conditions in a country of return could give rise to a breach of Article 3 of the Convention only in a very exceptional case where the humanitarian grounds against removal were "compelling" (*N. v. the United Kingdom* [GC], no. 26565/05, § 42, 27 May 2008). UNHCR in its December 2010 Guidelines generally considered internal relocation reasonable where protection was available from the individual's own extended family, community or tribe in the area of intended relocation. Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control. Referring to decisions made by the United Kingdom courts that, in general, relocation to Kabul for young single males would not be unsafe or unreasonable the ECtHR found that the second applicant, a healthy single male of 24 years of age who spoke excellent English and left Afghanistan in April 2011 when already an adult (not during his formative years as argued by him), had failed to submit any evidence to the Court to suggest that his removal to Kabul, an urban area under Government control, where he still had family members including two sisters, would engage Article 3 of the Convention.

Overall conclusion on relocation in Kabul: *H and B v the United Kingdom* followed

51. Dr Giustozzi described how both the Taliban and Hizb-e Islami are trying to penetrate Kabul province and since 2006 have infiltrated the southern districts of Kabul province itself and, during 2008, had intensified military attacks in the Kabul area. Yet, as recent events show, the incidents of assassinations appear to be principally targeted against official organisations although civilian casualties are bound to occur in the cross-fire. Elsewhere there was evidence of an apparent increase in major attacks in Kabul. Dr Giustozzi described the main risk to the appellant as the result of a chance encounter with the Taliban in one of the Pashtun-populated neighbourhoods who might then enquire about his background. He describes that finding accommodation is difficult and expensive largely due to the massive return of refugees from Pakistan. I would not, however, accept that the appellant should be equated with a daily labourer performing unskilled work in the building industry.
52. Ian Shearer's evidence describes the appellant as highly vulnerable to economic exploitation at best, and at risk from arbitrary arrest by the Afghan authorities, homelessness, unemployment and blackmail. But I would not regard the appellant as a person who falls into this category for the reason I have given. Nor would I classify him as '*a man in Afghanistan with enormous attendant pressures and responsibilities on him to feed, clothe and house himself, as well as take full economic*

responsibility for any surviving family members'. Whilst I accept that he has family members who cannot reasonably be expected to join him in Kabul to offer the support of their presence, I also consider that those family members will do all in their power to prevent the appellant from descending into destitution or penury. There is also evidence that house prices in Kabul have started to fall after the years of inflated house prices and rents.

53. Nevertheless, there are large numbers of displaced persons now living in slum areas in and around Kabul although I would not regard the appellant as a person who obviously falls into the profile of those there. It has to be recalled that UNHCR has assisted the return of over 4.6 million refugees to Afghanistan. Including those who returned without UNHCR assistance, between 5.5 million and 6 million refugees are estimated to have returned to Afghanistan between 2002 and 2011. The OGN speaks of assisted voluntary return as a policy in line with the Tripartite Memorandum of Understanding on Voluntary Return, between the UK, the UNHCR and the Afghan Transitional Administration.

54. *H and B v the United Kingdom* supports the Tribunal's earlier decisions that in general, relocation to Kabul for young single males would not be unsafe or unreasonable. In particular, the ECtHR found that the second applicant before it, a healthy single male of 24 years of age who spoke excellent English and left Afghanistan in April 2011 when already an adult failed to establish that his removal to Kabul was unlawful.

55. Looking at this material in the round when assessing whether it would be unduly harsh for the appellant to relocate to Kabul, I am satisfied that it would not. I readily concede that there are difficulties in finding accommodation or work but the appellant is better equipped than many to perform that task. He is not to be treated as an orphan. His position cannot be equated with the IDPs identified in the Amnesty International report. The level of violence and the level of infiltration by the Taliban should not be under-estimated but nor does the evidence suggest that it places an individual in a position where it renders his relocation unduly harsh or unreasonable. Of course, these considerations are set against the background of the sustainable finding of fact that the appellant is not at risk of persecution or serious harm but I fully accept that 'serious harm' and 'undue harshness/unreasonableness' are different concepts and should remain distinct.

The tracing duty

56. Mr Lewis repeated his submission that the respondent had a duty to trace the appellant's family in accordance with the dicta of the Court of Appeal in KA (Afghanistan) & Ors v SSHD [2012] EWCA Civ 1014 (25 July 2012). I had set out the principles in my decision that Judge Oxlade had made an error of law. For the sake of continuity, I repeat them

here. The duty to endeavour to trace arises from Council Directive 2003/9/EC of 27 January 2003 (the Reception Directive), Article 19.3 of which 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."

57. The principle was articulated in the Asylum Seekers (Reception Conditions) Regulations 2005, regulation 6 of which provides:

"(1) So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the members of a minor's family as soon as possible after the minor makes his claim for asylum.

58. This prompted Maurice Kay LJ to explore, in the case of a person who had since reached his legal majority, whether the historic illegality continued to be relevant:

The *Rashid/S* line of authority

14. The first question in the present case is whether the Secretary of State failed to discharge the duty to endeavour to trace. Her case is that she did not and that it was discharged by, for example, informing the minor of the tracing facilities of the Red Cross. It will eventually be necessary to examine each of the cases in detail but I have no hesitation in saying that, if that was all that was done, it would not discharge the duty to endeavour to trace. This conclusion is supported by *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305, in which Pill LJ said (at paragraphs 46-47):

"I readily acknowledge the difficulties which may arise on the making of enquiries ... 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 ... 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.

The Secretary of State seeks to defeat the claim by reason of the appellant's 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 ... the duty cannot be ignored."

17. Having accepted that there was a systemic breach of the duty to endeavour to trace, I now have to consider whether that may trigger the *Rashid/S* principle. It is a complicated question and not simply a matter of the systemic breach entitling these appellants, without more

ado, to the allowing of their appeals with remittal to the Secretary of State to consider grants of leave to remain, which is the primary relief sought. Nor does it admit of the simplistic analysis that the appellants were over 18 when their cases came before the FTT or the UT and, as a consequence and in accordance with the *Ravichandran* principle, the breach had become irrelevant to the requisite consideration of their cases by reference to the circumstances prevailing at the time of the hearings. When the *Rashid/S* principle applies, it modifies the strict application of *Ravichandran*.

22. In *HK* it was submitted on behalf of the Secretary of State that the duty to endeavour to trace is quite distinct from the processing of an asylum application. Elias LJ (with whom Pill and Rimer LJ agreed) said (at paragraph 40)

"... the regulation 6 duty is in terms said to arise as soon as an asylum application is lodged and it is plainly intimately connected with the determination of that application. This suggests that it should be treated as a necessary element in the determination of an asylum application."

However, he went on to conclude that failure to discharge the duty to endeavour to trace does not lead axiomatically to a successful outcome for the child's application on appeal. It is necessary for there to be a careful consideration of the facts of each individual case.

25...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.

26...Even in the context of a clear breach of the duty to endeavour to trace, a tribunal will retain a certain robustness in assessing the evidence of a young person who has demonstrated a deep-rooted resistance to being returned to his country of origin.

The application of the principles

59.As I have pointed out above in paragraphs 20 and 21, Judge Oxlade did not accept that the appellant's father had died or that the appellant did not know where he was living. The appellant's failure to attempt to trace his father on receipt of the information from the International Red Cross about from his uncle, established that he knew his whereabouts. This also explained a period of time that was lost in his account between the death of his mother in 2007 and his setting out for the United Kingdom in 2008. The appellant and his father had spent a period of time together in Pakistan. The appellant was aware that his father was alive and that he was in Pakistan and that the appellant left him in order to travel to the United Kingdom. These findings impact directly upon the effect of the Secretary of State's duty to trace the parents of a minor. Given the finding that the appellant knew of his father's whereabouts, but the appellant had not been frank about that information, the Judge concluded that the Secretary of State could not

reasonably have done more. The maternal uncle had expressly indicated that he no longer wished to be involved in which case tracing would have had no positive effect. The failure of the respondent in her duty to trace was not, therefore, material omission in the sense that it would have had no effect.

60. This was the provisional view that I expressed in ordering that the decision required to be re-made and nothing that Mr Lewis submitted to me addresses the issue. Although in his submissions to me, he repeated the fact that the appellant has never been offered the opportunity of tracing, notwithstanding the fact that the respondent had a duty to do so, and it has affected the outcome, I do not agree. The findings of fact made by the Judge are clear and sustainable.
61. The attempts at tracing either the uncle or the father have drawn a blank, albeit for different reasons. The uncle has been contacted and has indicated a reluctance to assist when approached by the appellant's representative. He does not therefore need to be traced and it is fanciful to suggest that the outcome would be any different if he were now approached by a United Kingdom government official, even if it were safe for that to happen. The appellant has not been frank about the father's whereabouts but there has been a consistent account that he is, or was, in Pakistan. Hence, this has little bearing on a return to Afghanistan. Failure in the respondent's duty to trace is not a point-scoring exercise by which an appellant wins leave to remain on the basis that the Secretary of State has breached a duty owed to him and the 'historical wrong' should not be viewed in this way. Rather, it is a piece of evidence that enters into the overall assessment and from which a decision-maker derives such assistance as he is able. The duty is a collaborative exercise between government and asylum-seeker in which both parties have a part to play: the asylum-seeker because he can provide information that only he knows; the government because, depending on the circumstances, it may have resources, influence or men on the ground that the asylum-seeker cannot hope to match. If the collaboration works it might achieve the safe return of a minor (or indeed an adult) and its failure may therefore be a material factor in assessing whether a person should be removed. Where however the evidence is that the government's failure to trace has had no material impact on the outcome, that the appellant has not been prejudiced, that the public interest in removal has not been significantly affected, there is nothing in the tracing point. If no consequences of this type flow from it, it is essentially immaterial.
62. For these reasons, although I have found that the First-tier Tribunal Judge made an error of law, I conclude that the appellant has failed to establish that it would be unduly harsh or unreasonable for the appellant to relocate in Kabul and that the failure of the Secretary of State in her duty to endeavour to trace the appellant's family during his minority do not establish he is entitled to a grant of leave to remain.

DECISION

The Judge made an error on a point of law and I substitute a determination dismissing the appeal on all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
26 June 2013

Appendix 1

FINDING ON ERROR ON POINT OF LAW

1. In paragraph 47 of the determination of First-tier Tribunal Judge Oxlade, the Judge states:

The Respondent argues that the appellant could relocate to Kabul. Dr Giustozzi speaks of the Taliban's attempts to infiltrate Kabul, and in particular the Pashto areas, where the appellant would naturally attempt to locate... Her opinion is that... in Kabul the Taliban would not actively pursue him, because he would be a low priority being in such a "target-rich environment". His only risk in Kabul would be by chance encounter with the Taliban. Dr Shearer echoes this... In light of their reports, I find that the Taliban will not proactively seek out the appellant, who would be a low priority in Kabul, living in a target rich environment. I find that the appellant is unlikely to be found by the Taliban, save by chance encounter. I find that this falls below the standard needed, that is being at real risk of persecution, serious harm, or a breach of his Article 2 and 3 rights."

2. The Judge reached a sustainable conclusion that the appellant was at risk in his home area because he faced persecution there, see paragraph 46. It was also necessary for her to consider whether the appellant was at risk of persecution in another part of the country by reason of circumstances that might operate there. That is the function of paragraph 47 (above). The Judge's finding that the appellant would not be at real risk of persecution in Kabul is a sustainable finding.
3. However, the Judge overlooked the fact that the issue of relocation to Kabul also involved a consideration of whether it was unduly harsh or unreasonable for him to do so. This was a separate and discreet enquiry and, by its very nature, distinct from whether he was at real risk of persecution there. Although the Judge prefaced her comments in paragraph 47 by referring to the respondent's submission that the appellant could relocate to Kabul, the Judge treated this as an assessment of the risk the appellant faced, omitting to deal with the issue of whether it would be unreasonable for him to do so. I have concluded that this amounts to a legal error.
4. At the time the Judge heard the appeal on 14 March 2012, the appellant was already an adult although only some 18 ½ years old. She accepted that the family home had been destroyed by fire in which the appellant's mother had died; however, he found the appellant had made no attempt to trace his father and that the reason for this failure was because he knew his father was in Pakistan and that the appellant and his father had spent a period of time and which accounted for the delay between 2007 and 2008. The Judge also found that the appellant's evidence was designed to conceal (the

Judge used the word "*diminish*" in paragraph 44) the family members available to assist him on his return.

5. In such circumstances an adult male, in good health, particularly one who has shown sufficient initiative to travel to the United Kingdom on his own and make a way for himself here is likely to encounter significant difficulties in his attempt to establish that it would be unduly harsh for him to settle in another part of the country of his nationality. Mr Lewis, on behalf of the appellant, however, submitted that there were such difficulties facing an appellant in finding work in the capital where the cost of living has significantly risen over the last few years, along with the cost of accommodation and that the appellant would face destitution.
6. This issue had been raised by Dr Guistozi in paragraph 22 of his report which was before the Judge. This is an issue that I could not properly resolve in the time available to me.
7. Furthermore, Mr Lewis maintained his submission that the respondent had a duty to trace the appellant's family in accordance with the dicta of the Court of Appeal in KA (Afghanistan) & Ors v SSHD [2012] EWCA Civ 1014 (25 July 2012). The duty to endeavour to trace arises from Council Directive 2003/9/EC of 27 January 2003 (the Reception Directive), Article 19.3 of which provides:

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14. The first question in the present case is whether the Secretary of State failed to discharge the duty to endeavour to trace. Her case is that she did not and that it was discharged by, for example, informing the minor of the tracing facilities of the Red Cross. It will eventually be necessary to examine each of the cases in detail but I have no hesitation in saying that, if that was all that was done, it would not discharge the duty to endeavour to trace. This conclusion is supported

by *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305, in which Pill LJ said (at paragraphs 46-47):

"I readily acknowledge the difficulties which may arise on the making of enquiries ... 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 ... 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.

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26...Even in the context of a clear breach of the duty to endeavour to trace, a tribunal will retain a certain robustness in assessing the evidence of a young person who has demonstrated a deep-rooted resistance to being returned to his country of origin.

8. I do not attempt to predict the outcome of the argument in relation to the duty of the Secretary of State to have endeavoured to trace the appellant's family or, indeed, whether such a duty arose in the circumstances of this appeal. However, there is no reason why the appellant should not be permitted to raise it in the context of an Article 8 claim as well as the relevance of an 'historic illegality' (if such it be).