



# HOW CHILDREN BECOME 'FAILED ASYLUM-SEEKERS'

Research report on the experiences of young unaccompanied asylum-seekers in Kent from 2006 to 2013, and how 'corrective remedies' have failed them

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# SUMMARY

**Dover, Kent is one of the main UK entry points for child asylum-seekers, many of whom are from Afghanistan. Some are granted asylum, but the majority are refused and granted discretionary leave to remain (DL, now UASC leave)<sup>1</sup> until they reach 17½ years old, under Home Office<sup>2</sup> policy. Many remain in the UK despite having lost all appeals against subsequent applications to stay. Some are still ‘looked after’ by local authorities under the ‘leaving care’ provisions.<sup>3</sup> Many survive by working illegally, sleeping in friends’ accommodation, in fear of being picked up, detained and removed to Afghanistan by charter flight.**

In 2012 the Court of Appeal decided the case of *KA (Afghanistan)*,<sup>4</sup> which acknowledged that the Home Office had systematically failed to endeavour to trace the family members of young unaccompanied asylum seekers, and decided that ‘a remedy’ should be provided for at least some of these young people. With new resources to carry out immigration and asylum work funded jointly by the University and a consortium of charitable funders<sup>5</sup>, in December 2012 Kent Law Clinic began to work with local organisations to identify young people who could potentially benefit from that judgment, and, in working on their cases, investigate and identify the factors surrounding how these children became failed asylum-seekers.

This report sets out our detailed analysis of the cases of 20 refused Afghan asylum seekers assisted by Kent Law Clinic. The evidence from these cases supports a wider concern amongst both practitioners and academics that specific common factors contribute towards children eventually becoming ‘failed asylum seekers’. For many young people the refugee determination procedure appears like an administrative justice processing machine, in which bureaucratic imperatives of cost and time, of contractual compliance, and of a culture of disbelief, produce failed asylum-seekers as the most likely outcome. In relation to young people from Afghanistan, practitioners sometimes see little difference in the young people’s own stories between those who are granted refugee status and those who are not.

Despite detailed guidance, quality oversight and critical inspection reports, the Home Office’s default position is still to refuse. Social Services often assess young people as older than their claimed age, sometimes by only a few months, and the age assessments are not always made available. Tribunal determinations rely on ‘implausibilities’ to dismiss appeals despite reference to the correct guidelines on children’s evidence. Even though legal aid still pays whatever can be justified for representing child asylum-seekers, many applicants face the Home Office and the Tribunal with brief accounts flawed by unexplained discrepancies. And most seriously, even where a claim identifies clear errors of law or illegal Home Office procedures, and binding caselaw on ‘corrective remedies’ clearly applies, young people’s claims are dismissed, often by what seem to us to be tortuous logic.

Our work focused first on whether any of our clients could make fresh claims based on *KA*, and then reflected on the whole asylum process from arrival to exhaustion of all appeal rights, as revealed in these cases. We then critically review the courts’ development of the ‘corrective remedy’ principle since *KA* in relation to young people’s asylum claims. We ask whether in the light of these developments the courts are ever likely to provide a ‘sanction’ against errors of the Secretary of State, and consider what alternative strategies might assist young asylum-seekers.

We resolve to continue working with local practitioners and other organisations to draw wider attention to these issues, to try to ensure that other young people’s claims are dealt with in accordance with best practice.



# MAIN RESEARCH FINDINGS

- **Most young people had not appealed against the initial refusal of asylum.** Then, in all those cases, their application for further leave was refused largely based on the applicant's alleged implicit acceptance of the allegations in the first refusal.
- **Most Home Office refusals and Tribunal dismissals were on grounds of incredibility and implausibility.**
- **Most young people refused on credibility grounds had also been age-disputed by Social Services**
- **Some refusals relied on initial 'illegal entry' interviews** conducted on arrival without appropriate safeguards such as legal representation or the presence of an appropriate adult.
- **Some young people endured long-drawn-out appeal processes, and had become 18 by the time their case went before a tribunal.**
- **The best interests of the child were rarely considered** other than by inserting standard text.
- **Family tracing was not carried out in any of the cases,** and in some cases the Home Office stated that family tracing in Afghanistan was impossible. Nevertheless, in some cases the issue of family tracing was relied on by Home Office or Tribunal judge to discredit the applicant's claim. This is echoed in the later 'corrective remedy' judgments discussed in section C below.

**We hope these findings, echoing those in other reports, will spark a wide discussion about how young people's asylum claims are considered and determined.**

# INTRODUCTION

## Section A

In Section A we provide a statistical background to the presence of so many young Afghan 'failed asylum-seekers' in Kent. Then we provide a historical survey of legal cases concerning the 'corrective remedy' principle, leading to the Court of Appeal judgment in *KA (Afghanistan)* which provided the impetus for this work. We set out our research methodology, and summarise our conclusions.

## Section B

In Section B we set out our evidence, looking at each stage of the asylum process in turn and referring to other recent research reports. We note instances where procedures and decisions appear to flout official guidance, formal UNHCR recommendations or indeed higher court judgments dealing with specific procedural issues.

## Section C

In Section C we set out the higher courts' further development of the 'corrective remedy' principle following *KA*, and critically examine how that has been used in relation to family tracing in young people's asylum claims. We conclude that in relation to family tracing, the 'corrective remedy' principle is unlikely to provide any safeguard for young people, although other historical illegalities may still be challengeable.

## Section D

Finally, in Section D, we review proposals by some commentators that to provide a fair and safe asylum determination procedure for children and young people requires an entirely fresh look.

# SECTION A: BACKGROUND TO THE RESEARCH



## 1 Statistics and background

From 2006 – 2012 some 18,674<sup>6</sup> young unaccompanied asylum-seekers arrived in the UK, many through Dover, Kent. Between April 2008 and April 2013, 1465 young asylum-seekers have been supported by Kent Social Services (KSS).<sup>7</sup> Most would have been referred to local legal aid solicitors, and most dealt with by the Home Office Kent Local Immigration Team (LIT).

National statistics for 2012<sup>8</sup> show that of 681 initial decisions on those who arrived as unaccompanied minors, 28% were granted refugee status or humanitarian protection, 51% were refused asylum but were granted discretionary leave (DL) under Home Office policy until the age of 17½, on the formal basis that there are inadequate reception facilities for them in their home country,<sup>9</sup> while 21% were refused. In March 2013 this grant of discretionary leave was formally incorporated into the immigration rules.<sup>10</sup> Young people who are refused asylum can now be granted 30 months UASC leave under the immigration rules, which can be renewed until the age of 17½.

Many young unaccompanied asylum-seekers are from Afghanistan. They comprised 30% of new applications in 2011, but over 50% of those arriving in 2009. Their claims concern: fear of forcible recruitment to armed groups; a fear of reprisals against family members involved with the Afghan Government or international forces; fear of being killed in family conflicts, or in the continuing Taliban insurgency. Of 184 newly-decided Afghan cases in 2012 only 32 were granted asylum<sup>11</sup>, with just 1 being granted Humanitarian Protection (HP) (18% in total).<sup>12</sup> Some 121 (66%) were granted DL until 17½ and 30 (16%) were refused outright<sup>13</sup>. This means that either their account was not believed or, if believed, it was nevertheless decided that they would not be at risk of persecution or serious harm in Afghanistan. Yet the UNHCR and other international organisations have documented the serious risks that children face in Afghanistan, noted that child labour is widespread, child abuse is endemic and that unaccompanied children are among the most exposed and vulnerable section of that society.<sup>14</sup>

The majority of those granted DL/UASC leave apply for further leave to remain, and most are refused and expected to return home.<sup>15</sup> However, few choose voluntary return,<sup>16</sup> and remain in the UK, now categorised as 'failed asylum seekers' rather than 'children'. In the first 4 months of 2013 360 failed asylum-seekers were removed to Afghanistan.<sup>17</sup>

Local support organisations remain concerned that the Home Office 'culture of disbelief',<sup>18</sup> the political complexion and budget pressures of the local authority, and pressures on legal representatives working to legal aid contract terms<sup>19</sup> have not well served these young people.

In July 2012, in the case of *KA (Afghanistan)*,<sup>20</sup> the Court of Appeal decided that in failing to trace the families of asylum-seeking children from Afghanistan, the Home Office had unlawfully failed to follow the requirements of the EU Reception Directive on the treatment of child asylum-seekers.<sup>21</sup> Following the cases of *Rashid*<sup>22</sup> and *R (S)*,<sup>23</sup> 'a remedy' should be provided to those young people even if now over 18 and no longer refugees: they should potentially be granted leave to remain.

From December 2012 Kent Law Clinic accepted referrals of young people who could potentially benefit from *KA*, and, in working on their cases, sought to identify how these children became 'failed asylum-seekers'.

## 2 Legal background to the 'corrective remedy' principle and its application in children's cases

The cases of *Rashid*<sup>24</sup> and *R (S)*<sup>25</sup>, decided in 2005 and 2007, considered what impact a finding of an historic illegality should have on a claim, when there is no current basis for it to succeed. Those cases concerned individuals excluded from Home Office policies because of 'conspicuous unfairness' and delay.

*Rashid*, an Iraqi asylum-seeker, arrived in 2001, when Home Office policy provided for refugee status and indefinite leave to remain (ILR) for Iraqis. He was refused, and further representations refused in 2004 under the post- Iraq war policy. The SSHD relied on *Ravichandran*,<sup>26</sup> which required a current well-founded fear of persecution, and argued that there is no public law principle requiring compensation for past failures. The court decided that the erroneous first refusal arose from a 'catalogue of serious administrative errors' and had denied *Rashid* his refugee rights: such 'conspicuous unfairness' that it amounted to 'an abuse of power requiring intervention by the court',<sup>27</sup> requiring a corrective remedy, under the 'residual or general power' under the Immigration Act 1971 ss 3 & 4.

## SECTION A: BACKGROUND TO THE RESEARCH (CONT)

In *R (S)* the claimant (and many others) had been excluded from a Home Office exceptional leave to remain (ELR) policy because the Home Office had prioritised new claims in order to meet new Public Service Agreement target times, not reaching S's claim until the ELR policy had been withdrawn. The court expressed reservations about the consequences of *Rashid*. Carnwath LJ stated (para 39):

*'...it seeks to transform 'abuse of power' into a magic ingredient, able to achieve remedial results which other forms of illegality cannot match'*

Nevertheless the court decided (para 54) that if there had been illegality and the Department has the power to correct it, it should do so, and while an asylum decision must still be made based on present circumstances, it must be recognised that *'those circumstances include the present need to remedy injustice caused by a past illegality'* (*R (S)* para 47).

In the aftermath of these cases, the Home Office issued caseowner guidance<sup>28</sup> which enabled a large number of refused asylum seekers to benefit from a reconsideration of their claim with a view to granting leave.

These cases arguably established a 'corrective remedy' principle allowing refused asylum seekers to benefit in cases of conspicuous unfairness,<sup>29</sup> and subsequent court judgments relied on this to achieve 'a remedy' for the mishandling of children's claims.

The first of these was *AA (Afghanistan)*,<sup>30</sup> heard in 2007. AA was assessed as over 18 and was refused asylum outright. On appeal he was accepted as aged 17, but his appeal was dismissed, without regard to the Home Office failure to grant DL to him according to their policy. The Court of Appeal accepted that there had been an error of law but now had to consider whether this was merely academic, given that at the date of the Court of Appeal hearing the appellant was an adult of 19. The Court accepted that that failure had deprived AA of the right to work, obtain support, and apply for further leave. Keene LJ directed the SSHD to remake their decision and consider granting the appellant a period of leave.

This case also addressed the issue of the prejudice caused to a minor who had been incorrectly assessed as an adult, undergoing an asylum interview without appropriate safeguards for a minor and having his claim decided without regard to the appropriate guidance for assessing the claims of children. Following *AA*, the Home Office issued guidance to caseowners<sup>31</sup> requiring them to ask: *'Should the applicant be granted leave due to perceived disbenefits arising from UKBA errors?'* Caseowners were advised to consider reassessing the weight attached to negative credibility points arising from interview records which had been improperly conducted.

Three years later, the Court of Appeal considered the issue again. *SL (Vietnam)*<sup>32</sup> was 14 when he arrived. Following a series of errors, his appeal against refusal of asylum was dismissed with no grant of DL. He was arrested and a deportation decision made. The Court of Appeal decided that the SSHD's decision to deport failed to take into account her failure to grant DL, or the impact her failure had had on the appellant's situation. His appeal was granted.

At that point the courts had identified at least 3 scenarios in which past illegalities in the handling of a young person's asylum claim had given rise to a corrective remedy:

- A past failure to grant Discretionary Leave (for example following a non-Merton-compliant<sup>33</sup> age assessment which is later overturned (*AA*, *SL*))
- Reliance on an interview carried out without appropriate safeguards for children (*AA*, *AN & FA*<sup>34</sup>)
- Failure to carry out family tracing (*DS*<sup>35</sup>, *KA*)

What these cases have in common is an attempt to find a just solution for 'failed asylum seekers' now over 18, who have no fresh claim but who maintain that their fear of return to Afghanistan was never properly considered. The case of *KA* can be seen as a further attempt to address this issue.

### 3 *KA (Afghanistan)*, the 'corrective principle' and family tracing

When an unaccompanied child claims asylum in the UK the Home Office has a duty to endeavour to trace family members. The Reception Directive<sup>36</sup> para 19(3), implemented in regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005,<sup>37</sup> states:

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

In the earlier case of *DS (Afghanistan)*<sup>38</sup> the Court of Appeal heard evidence that between 2006 and 2010 the Home Office had systematically failed to implement this requirement, and therefore had failed to have regard to the best interests of a child.<sup>39</sup> The SSHD argued that referral of a minor to the Red Cross was sufficient to comply with this duty. However, the judgment stated at para 47:

*'...In the present case, however, the Secretary of State did nothing at all to assist with tracing family members or to enquire about reception arrangements on return and the court has been invited to uphold that inactivity. It is neither necessary nor appropriate to specify precisely what should have been done; this can be worked out once the principle is established. What should be done will vary from case to case. Inactivity, combined with the failure to bring to the attention of the Tribunal the instruments cited in this judgment, was not, in my view, a permissible option.*

*The Secretary of State seeks to defeat the claim by reason of the appellant's alleged failure to cooperate with the Red Cross. Tracing work by the ICRC would almost certainly have been assisted by a contribution from the Secretary of State, based on information available to her. **The lack of cooperation does not relieve the Secretary of State of her duties**'. (writers' emphasis)*

DS had further held that the Home Office failure to attempt to trace the appellant's family members was relevant to his asylum claim, deciding that the Home Office failure to attempt to trace his family had deprived him of the evidence that he was not able to contact them.

These findings are particularly important for young people from Afghanistan. In **LQ (Age: immutable characteristic) Afghanistan**,<sup>40</sup> heard in 2008, the Upper Tribunal had determined that since age is an immutable characteristic, an orphan under the age of 18 may belong to a 'particular social group' for the purposes of the refugee convention. LQ was not designated a country guidance case,<sup>41</sup> but the 2011 country guidance case of **AA (unattended children) Afghanistan**<sup>42</sup> recognises that unattached children returning to Afghanistan may be at risk of suffering serious harm.

In the earlier country guidance case of **HK (Afghanistan)**,<sup>43</sup> heard after LQ, the Upper Tribunal had clearly wished to limit refugee status to only those young people for whom it was accepted that they had lost contact with their family. On appeal to the Court of Appeal in **HK (Afghanistan)**<sup>44</sup> it was confirmed that, where a family had assisted a child to travel to the UK, any assertion that family members are unable to meet them on return must be supported by credible evidence of efforts to contact those family members.

However, shortly after **HK**, a differently-constituted Court of Appeal in **KA (Afghanistan)** considered how the systematic failure to trace family members affected appellants who were now over 18 and could not benefit from decisions such as LQ. The court accepted that the failure to trace may be relevant to judicial consideration of the asylum claim, and to the best interests of the child, since those could not be satisfactorily determined without knowing whether family members could be traced. It was accepted that in certain cases there should now be a 'corrective remedy' for such young people.

This judgment gave hope to those supporting young Afghan 'failed asylum-seekers' that something could now be done for them.

#### 4 Research methodology and outcomes for our clients

Kent Law Clinic understood that as at December 2012 Kent Social Services was supporting around 100 'appeal rights exhausted' young people over 18. The Clinic determined to contact as many as possible to examine their case papers in the light of **KA** and see if, following that case or for any other reason (such as Article 8 rights to family life), further submissions or a fresh claim for asylum could be made. Every client so contacted was asked to consent to the use of their case papers as a basis for identifying what common legal and practical problems face young asylum-seekers in Kent. At that time it was envisaged that we would eventually make contact with most of the relevant young people, either formally via Social Services, through local organisations or by word of mouth. However, we believe that some of our potential clients may have since been removed, and others have been afraid to come forward.

Clients were recruited through a combination of gatekeepers and 'snowball sampling'.<sup>45</sup> This could not provide a statistically representative sample of the wider population of young refused asylum seekers, but the cases are typical of those who remain in contact with local support organisations.

We examined the formal papers<sup>46</sup> of over 25 young people, 20 of whom were from Afghanistan. We considered whether Home Office and other relevant guidance had been followed, what legal arguments had been deployed, what findings of fact had been made, and considered the crucial legal issues arising at each stage of each case.

## SECTION A: BACKGROUND TO THE RESEARCH (CONT)

Where further legal work appeared possible, the Clinic formally prepared the claim with a student caseworker as with any other Clinic case. Otherwise, where the client was still contactable, the client was offered a full written advice and a face to face discussion explaining their situation, which endeavoured to explain to each client the precise weaknesses in their own claim, any issues arising from previous advisers' case preparation, and any legal errors made by the Tribunal. We believe, and generally those clients agreed with us, that this kind of detailed explanation was valuable to them even though it did not change their current legal position.

In November 2013 a preliminary report was circulated to a focus group of specialist solicitors and researchers from 2 projects working on young peoples' asylum claims (Migrant and Refugee Children's Unit, Islington Law Centre, and Law Centres Network Principles to Practice (P2P)), and to the three current Kent legal aid suppliers. We held a round table discussion of the conclusions emerging from the report, and gathered participants' own experiences of the different stages of the asylum process. Participants also considered the relevance of the 'corrective remedy' judgments to such clients' cases. Student volunteers assisted in taking detailed notes of the round table discussion. The comments of practitioners have been incorporated into the final report.

Most participants agreed that this was a most valuable meeting from both research and practice points of view. The group plans to hold regular 3-monthly meetings to continue discussions on developments in law, policy and practice, with the aim of improving outcomes for unaccompanied child asylum-seekers in Kent, and a second meeting has already been held.

Importantly, for 10 out of the 20 clients we felt that further legal action could be taken. For 3 clients we prepared out-of-time appeals, one of which was accepted, but the Home Office then withdrew their decision. For 8 clients we prepared fresh claims, 4 based on *KA (Afghanistan)*, of which two were recorded as fresh claims (one now has a right of appeal, the other is awaiting a decision), and 4 on other grounds. Three of those clients were then referred to legal aid solicitors. Unfortunately, some clients whom we advised had an arguable fresh claim have been too scared to approach the Home Office in person to lodge it.

### 5 Summary of research conclusions

Our study considered every stage in the asylum process, and looked at the acts of the major relevant institutions involved at each stage: Home Office, Kent Social Services, legal representatives and tribunal judges. We considered what factors had contributed to the failure of our clients' asylum claims. Our study highlighted a number of concerns which reinforce the findings of other studies (see below). We would expect that a larger study would reveal similar conclusions.<sup>47</sup> Our concerns are, in order of importance:

- **Most had not appealed against the initial refusal of asylum.**  
Then, in all those cases, their application for further leave was refused largely based on the applicant's alleged implicit acceptance of the allegations in the first refusal.
- **Most refusals and Tribunal dismissals were on grounds of incredibility and implausibility.**
- **Most claims refused on credibility grounds had also been age-disputed by Social Services.**
- **Some refusals relied on initial 'illegal entry' interviews** conducted on arrival without appropriate safeguards such as legal representation or the presence of an appropriate adult.
- **Some young people endured long-drawn-out appeal processes, and had become 18 by the time their case went before a tribunal.**
- **The best interests of the child were rarely considered** other than by inserting standard text.
- **Family tracing was not carried out in any of the cases.** In some cases the issue of family tracing was relied on by Home Office or Tribunal judge to discredit the applicant's claim. This is echoed in the later 'corrective remedy' judgments discussed in section C below.

The next section sets out in detail the evidence from our clients' cases.



SECTION B:  
EVIDENCE FROM  
THE ASYLUM  
PROCESS AS  
EXPERIENCED BY  
OUR CLIENTS

## 1 Arrival, initial interview and screening interview

Upon claiming asylum children are generally first subjected to a screening interview to record basic personal details, a summary of their journey to the UK and information about the basis of the claim. However, some are interviewed even before that, and both initial interviews and screening interviews have been used against young people.

The issue of **initial interviews** had been considered in 2012 by the Court of Appeal in *AN (a child) & FA (a child)*.<sup>48</sup> This case established that a child should not be interviewed about the substance of their asylum claims without the presence of an appropriate adult. It was also recognised that it was inappropriate for a vulnerable child to be interviewed upon arrival following a long and tiring journey. Any initial detention and interview should only be for the purposes of protecting their welfare.

Lord Justice Black stated:

*I am not attracted to the idea that the mischief can be corrected by giving the child an opportunity to explain himself on an occasion when he does have the assistance of an independent adult (para 117).*

*It seems to me the appellants are right to say that procedural and substantive safeguards are the most effective means of obtaining the child's full and reliable account of the reasons why he is here and that those safeguards should include the presence of a responsible adult when asylum is being discussed (para 122).*

*Where there has been a clear breach of the principles set out in the various provisions governing questioning about asylum... it ought at the very least to be exceedingly difficult to persuade the court to admit material that has been thereby obtained; some breaches will inevitably rule out reliance on the material... (para 126)*

A number of our clients had experienced on-entry interviews carried out without a lawyer or responsible adult, and sometimes before being allowed to wash, eat or drink. In some cases that initial interview had a specific negative impact on the case.

**Case 11** was interviewed on arrival, before any food or sleep, via a telephone interpreter. His stated date of birth was 14 though he was later assessed as 16. He was asked questions about why he had entered the UK illegally, including information about his substantive asylum claim. He was required to talk about the death of his brother, about treatment he had received from his uncle, and about his journey. His answers were recorded in barely-legible notes which were not provided until his appeal against refusal of further leave, several years after the event. The fact that he had not mentioned the death of his mother in that first interview was relied on both in the initial refusal letter and by the tribunal to find him not credible. He was refused leave to appeal to the Upper Tribunal. Following the case of *AN (a child) & FA (a child)* it is strongly arguable that the decisions of both Tribunals to admit that interview were wrong.

**Case 5** was recorded as having in his jacket pocket a notebook containing telephone numbers. The notebook was not kept as evidence. No official attempted to telephone any of the numbers, nor was the applicant given an opportunity to explain where it had come from. This was later referred to in his refusal letter as evidence that he was being untruthful about contact with his family. He explained to Kent Law Clinic that he had been put in the back of a refrigerated lorry, and the agent provided him with several jackets which were not his, to keep him warm.

**Case 9** was refused because (among other reasons) the account he gave in a later interview partly contradicted what he had said in his initial interview conducted immediately upon arrival. His explanation that he was 'confused when he left the lorry' was not accepted.

Such examples were supported by the findings of a 2012 Children's Commissioner's report.<sup>49</sup> This revealed that the Home Office had been subjecting newly-arrived unaccompanied children to inappropriate 'illegal entry interviews', where children were being made to sign screening interview records to confirm the accuracy of the contents in the absence of appropriate safeguards. That report concluded that children arriving to claim asylum are often ill, tired, hungry and frightened, and generally not fit for interview. The report noted the lack of proper audit trail for evidence such as untranslated documents, phone numbers and email addresses purportedly found on arrival, with young people having no opportunity to rebut any suspicions.<sup>50</sup>

## SECTION B: EVIDENCE FROM THE ASYLUM PROCESS AS EXPERIENCED BY OUR CLIENTS (CONT)

The report recommended that any interviewing beyond the gathering of basic identity data should be postponed until the child has had time to recover from the journey. It was also recommended that telephone interpreting should not be used for interviews that will lead to any immigration decision.

The Home Office view of the **screening interview** is a *'relaxed non-contentious interview which is not used for his asylum decision'*, suggesting that representatives need not be present.<sup>51</sup> Yet several refusals in our sample had relied on initial interviews and screening interviews to found negative credibility decisions. Since the 2012 Children's Commissioner Report, it is understood that Kent LIT do not conduct formal screening interviews upon arrival. Instead young people are referred to social services, where they are either sent to the Millbank Reception Centre or placed in foster care, and then invited back to Kent Reporting Centre for the interview accompanied by a responsible adult and a legal representative. The use of telephone interpreters for screening interviews however, has continued. Participants at the round table discussion observed that this is only an acceptable policy if representatives are able to bring their own interpreters (which is funded by the LAA) since the telephone connection is not always clear, and misunderstandings do occur which have required intervention to ensure that the interview record is accurate. It was noted that using Farsi interpreters for Dari-speaking applicants or using interpreters speaking the wrong dialect of Arabic can lead to important misunderstandings. More than one telephone interpreter has translated 'boyfriend' as merely 'friend' in an asylum claim where the applicant feared persecution on account of his sexuality.

**Case 7** was alleged to have given inconsistent information concerning his relatives in Afghanistan:

*When you left Afghanistan you had your parents, a 9 year old brother and 5 year old sister and you have no other relatives. (Screening Interview Q1.16). Alternatively you have 2 maternal uncles and an aunt in xxx district (Asylum interview).*

What is actually asked at Screening Interview Q1.16 is *"Who lived at home?"* and although beneath the question it requires the interviewing officer to ask for details of *"all extended family that may have resided in a large rural area or nearby"*, in representatives' experience this question is not always asked in full, leading to the possibility that some family members are not recorded through no fault of the young person.

During 2013 Kent LIT started carrying out screening interviews of young people at Dover Eastern Docks, within a 5-day window of arrival. Local practitioners complained about the short notice sometimes given<sup>52</sup> since it is often too soon to arrange legal representation to meet the client prior to interview. In practitioners' experience, there was a concern that Social Services may not fully understand the legal gravity of the situation, appearing to prioritise turnaround times rather than ensuring that the child meets their legal representative before the interview.

We conclude that if the Home Office continue to adopt a forensic approach to assessing the credibility of children's claims, safeguards must be assured, including time to meet their legal adviser before any interview, adequate interpreting, a proper evidence trail and accurate recording of the interview, particularly in cases such as those from Afghanistan where the credibility of information provided about family members is crucial to the claim.

### 2 Age assessments and credibility

Of our 20 clients social services departments assessed 16 of them to be older than their claimed age. All except one were accepted to be children although not the age they claimed to be. The most common assessment of age in our study was to be 2 years older than claimed, with individuals who claimed to be 14 or 15, assessed as 16 or 17. The second most common assessment was to be assessed as 3 years older than claimed. The round table discussion noted from their experiences that it is particularly Afghan applicants who are regularly assessed as older than they claim, sometimes by only a few months, whereas other nationalities such as Eritrean applicants are generally accepted to be the age they claim.

Our sample showed that Kent LIT often accept the Social Services 1-page summary age assessment giving the child an older age than claimed, without asking for or seeing the full Merton-compliant age assessment. Clients are not routinely provided with a full copy of their age assessment, making it more difficult for them to obtain advice on and potentially challenge the conclusions. The participants at the round table meeting noted that negative age assessments were not promptly written up and given to the young people. Instead requests have to go through the legal department and often took several weeks to receive. In some cases young people had been age assessed as adults and sent to NASS accommodation in the North of England, or even detained, without legal advisers being informed, making it very difficult to advise a client on their right to challenge the assessment. Few of the Kent age assessments in our sample were formally challenged.



It is of course possible that some children and young people are being advised by agents or others before their arrival to claim a younger age, damaging what may otherwise be a strong and truthful claim. However, if Social Services are incorrectly assessing children to be older than they are, the consequences of such an error goes beyond the type of support that is provided. As we did not have access to all the age assessments in our sample we cannot comment on the legality or otherwise of them. However, it is evident that a negative age assessment is one of the factors that can significantly damage an asylum claim and lead to a negative assessment of credibility. It potentially affects whether an asylum claim is accepted or not.

The Home Office published policy on age assessments<sup>53</sup> states:

*The [UK Border] Agency does not request local authority age assessments to assess the credibility of an applicant's asylum claim. However, case owners must consider all evidence provided when making a decision on the asylum claim, including information contained within an age assessment. It is important to note that an age assessment report is based on notes, rather than a verbatim record.*

*...Minor discrepancies between the age assessment and information submitted to the Agency should, generally, not be investigated further, nor relied upon.*

*If it is considered appropriate to raise a credibility issue identified within an age assessment, **before a finding is made, it must be put to the applicant (if in person, in the presence of a responsible adult) and they must be given the opportunity to explain or clarify the discrepancy in question.** (writers' emphasis)*

In **Case 13**, information from the age assessment was used to allege a number of discrepancies and to suggest that the young person was misleading the authorities. These points were not put to the young person before the decision was made.

In **Cases 10 and 11** the tribunal judges used the findings of the age assessment to find that the young people had 'lied about their age' and therefore their asylum claims were not credible.

From the significant satellite litigation on age disputes, it is clear that the science does not support age assessments more accurate than plus or minus two years of the assessed age. Despite this, some tribunal judges made precise age assessments of only a few months difference from the claimed age.

### Case study

**Case 14** arrived in the UK as a 15 year old claiming a fear of being forcibly recruited to the Taliban. He was age assessed as over 18 in a one page assessment which was not Merton compliant. He was sent to adult NASS accommodation. He did not receive any legal advice and subsequently absconded from his accommodation. He was then detained for 10 months during which time arrangements were made for him to be removed to Greece. Legal representatives challenged his age and his removal to Greece by judicial review and he was subsequently released from detention. He did not receive an asylum interview until over 3 years after he had arrived by which time he was 18 by his own account. No attempt was made to trace his family, no consideration was given to his best interests and his screening interviews were carried out without appropriate safeguards. His account was disbelieved by the Home Office and it was argued that in any event as an adult he could internally relocate to Kabul. On appeal it was accepted that he had been a minor on arrival but his appeal was nevertheless dismissed. Had he been correctly recognised as a minor from the start, he could not have been detained, could not have been considered for removal to Greece, and should have received a prompt interview and decision. It is highly likely he would have been granted discretionary leave, if not refugee status as an unaccompanied child.

## 3 Asylum interviews

The initial research report did not cover the asylum interview stage as we did not have access to every interview record. However the round table discussed practitioners' experiences, including the writers' own, of Home Office interviews.

First, in the round table practitioners' experience, the quality of interviewers and interpreters in Kent LIT is very variable. Some officers are able to put the child/young person at ease and ask the questions in a clear, straightforward way. Some clearly structure the interview and appear to be asking questions that are appropriate and relevant to determining the asylum claim. In contrast other interviewing officers adopt a very formal approach which does not put the young person at ease. Practitioners reported having had to call a halt to interviews on more than one occasion where repeated unsympathetic questioning about a traumatic incident had reduced the child to tears.

## SECTION B: EVIDENCE FROM THE ASYLUM PROCESS AS EXPERIENCED BY OUR CLIENTS (CONT)

The round table noted that some young people endured very long interviews, appearing to be far too long for a child's concentration. Representatives' interpreters mention this after the interview is over, having become aware that the child is no longer paying attention, but feel they cannot comment. One round table participant noted a general issue about cognition levels of children, ie that children have different levels of understanding and knowledge, which is often not appreciated by either practitioners or Home Office staff, with Social Services often unwilling to provide educational assessments to support this.

**It was felt that the asylum interview stage cannot be analysed separately from the refusal letter.** Practitioners noted some interviewers' tendency to 'interview to refuse', where questions were not focused on the actual issues at the core of the claim but appear to be an opportunity to ask a series of questions in order to find discrepancies compared to the witness statement, or even to create discrepancies within the asylum interview itself. It is recognised as good practice to put discrepancies to the applicant to give them an opportunity to respond and some interviewers were capable of doing this in a sensitive way without appearing to accuse the applicant. This can allow for a simple misunderstanding to be corrected. However, at times interviewers put very minor discrepancies to an applicant in a non-sensitive way which can only serve to increase the anxiety of the young person and make them feel defensive. It was noted that occasionally discrepancies were put to the young person in a way that slightly misquoted or incorrectly paraphrased what the young person had said in previous statements, making it hard for them to respond meaningfully to the question.

Interpreters, whilst generally accurate, are heard to make mistakes which if not corrected could lead to the interviewing officer continuing the interview questions based on a misapprehension of what had actually been said. Whilst some interviewing officers are happy for the legal representative to intervene if they became aware that there is a significant misunderstanding, others can become defensive and ask that the legal representative strictly reserve any comments for the end of the interview.

One young person, who had crossed Europe hidden in a lorry and not known at any point which country he was in, was asked: 'Were you unaware of the lorry's destination?' but answered 'No'. After the representative had insisted that the interviewer check straight away with the interpreter exactly what he had asked, it turned out that question had been translated more naturally as 'did you know where the lorry was going?' to which the answer was indeed No. The interviewer agreed to note the problem. This reinforces the need for the presence of representatives and an independent interpreter at the interview.

### 4 The asylum decision: Home Office Reasons for Refusal Letters

#### a Credibility

The UNHCR Quality Initiative Project Sixth Report, April 2009<sup>54</sup> had investigated the way in which asylum claims by unaccompanied children are assessed in the UK. They noted that in almost half the decisions there was no explicit consideration of age in the credibility assessment. They noticed a tendency for children to be required to 'prove' aspects of their claim, and disbelieved if they could not provide enough evidence; and a failure of the Home Office to properly understand and apply the benefit of the doubt.

Almost all the cases we considered were refused on grounds of incredibility or implausibility.

**Case 1**, aged 15, was refused in a 5 page refusal letter, which disputed credibility because of 'a lack of detail in his initial application'. He had stated that he was being abused by family members but had not said in his statement how often he was abused, what he was abused with or why the abuse was happening. No discrepancies or other credibility points were raised. Subsequent Home Office policy guidance on assessing claims of young people states<sup>55</sup>:

#### 13.1 General principles

*...be aware that children do not often provide as much detail as adults in recalling abusive experiences*

**Case 8** was criticised as he did not know the names and ethnic origin of the 3 Taliban who came to his home at night when his father was killed. This was held to be inconsistent with the fact that he was able to recognise them as Taliban.

**Case 15's** father died when the applicant was 1 or 2 years old. His refusal criticises him for being unable to provide any information about his father's time with the Taliban and being unable to state precisely how old he was when his father died.

A number of refusals tried to insinuate inconsistencies between answers that the young person had given at different times during the interview and between the interview and his earlier statement, regularly using the term 'Alternatively' to create the impression that the young person had given significantly differing accounts. This was done without the young person's responses being placed in the context of the specific questions which they were answering. Although some of the discrepancies are real, on closer inspection many of these alleged discrepancies may be easily explained. This use of the term 'alternatively' appears to be a rhetorical technique which is

being used for the effect which it creates on the reader of the refusal letter. The round table participants confirmed the widespread use of both this specific technique and a more general use of misleading allegations, which was felt to be especially inappropriate in cases concerning children.

*'You were educated in a local mosque (Screening Interview). Alternatively you never attended school as the Taliban would not allow it' (Witness statement).*

This may easily be explained if we appreciate that the young person did not use the term 'school' for the mosque that he attended.

*'You claimed your father worked at a military base and was employed as [job 1]. (Asylum interview record). Alternatively, you claim your father was previously employed as [job 2] but left this job because he was threatened by the Taliban. (Asylum interview record)' (Case 7).*

There is no discrepancy here, as it is clear from the rest of the interview that the applicant is referring to two different jobs that his father did at different times.

As with adult claims, the fact that a child was able to avoid the persecution was sometimes evidence that he was not at risk. **Case 5** was told:

*'...your claim that the Taliban were intent on harming you specifically is inconsistent with their not having done so before you had the opportunity to flee your home area...'*

Some refusals use credibility problems in the applicant's account of his journey to the UK to dispute the core of the claim. In a case where no specific credibility issues were raised, the Asylum and Immigration (Treatment of Claimants) Act (AI(TC)A) 2004 s8 was applied where an applicant had passed through Greece without claiming asylum. This was taken to have damaged his credibility, despite his young age at the time and to the particular difficulties that asylum seekers face in Greece.<sup>56</sup>

More recent refusal letters in the sample did note that they were assessing the credibility of a child, and stated that they had applied a more liberal benefit of the doubt and relied more on objective background evidence, in accordance with UNHCR guidance. For example, the refusal in Case 6 stated *'greater dispensation has been given to you throughout the asylum claim as a result of the understanding that you are a minor and that the problem of proof is compounded in the case of children'*.

In **Case 10** this principle seems to have been understood:

*'Whilst it is considered that you have presented no objective evidence to support this claim, objective evidence shows there was ongoing fighting in [P] in 2004. Due to your age the benefit of the doubt has been given to you on this matter and as such it is accepted that your father died in 2004'*

However, other refusal letters simply incorporated the formal wording into the letter without applying it.

Case 7, whose father disappeared when he was 10, was found lacking in credibility because he could not give the name of his father's workplace. His father had disappeared, and colleagues had suggested that the Taliban had taken him. The refusal letter states:

*'You have adduced no evidence to support the view that your father had been taken by the Taliban, and it is pure speculation on the part of the other employees at [X] that he had been taken by the Taliban'. (writers' emphasis)*

*'In reaching this conclusion due regard has been given to your age and claimed level of education'*

Refusal letters frequently note the failure of a child to 'adduce evidence' of matters where it is difficult to think what evidence could be provided other than the child's testimony.

**Case 14's** father died when he was 10 years old. His refusal letter stated:

*'It has not been possible to obtain evidence that your father was the leader of the Taliban where you lived. It is therefore not accepted that you have demonstrated sufficient evidence to support your claim that your father was involved with the Taliban as claimed'*.

*'...The claim that your father was involved with Taliban and died is based on information provided to you by your mother and is therefore considered to be subjective. You have adduced no evidence to support your claim to have an objectively well-founded fear...'*

## b 'implausibilities'

While in some cases there were clear inconsistencies which may lead a reasonable person to question the young person's account, in others negative credibility findings have been reached based on the caseowner's own speculations about how a particular individual in another culture would or should have acted:

## SECTION B: EVIDENCE FROM THE ASYLUM PROCESS AS EXPERIENCED BY OUR CLIENTS (CONT)

The Home Office provides clear guidance on addressing credibility<sup>67</sup> noting in particular:

*Decision makers should never use speculation to reject a material fact. In Y v Secretary of State [2006] EWCA Civ 1223, the court advises decision makers to avoid conclusions based on how they believe the applicant or a third party ought to have behaved. After all this is simply a matter of personal opinion.*

*Any decision not to apply the benefit of the doubt to a material claimed fact that is otherwise internally credible must be based on reasonably drawn, objectively justifiable, inferences. Decision makers must never make adverse credibility findings by constructing their own theory of how a particular event may have unfolded, or how they think the applicant, or a third party, ought to have behaved.*

Yet it is evident that this guidance is not followed in some cases:

*'...It is considered that if [your relative] did not trust the agents with your sister then he also would not take the risk of sending you, a young boy who he cares about, with these men...'* (Case 3)

*'It is considered that if your mother knew that her husband was a commander of the Taliban and that his usual base was the madrassa that if your mother did not want you to be associated with the Taliban that she would have arranged your education at another location and therefore it is not accepted that your mother allowed you to attend the madrassa and consequently it is not accepted that you were educated in the madrassa...'* (Case 10)

### c Failure properly to consider the Refugee Convention or humanitarian protection

The UNHCR Report noted the Home Office failure to apply the Refugee Convention in an appropriate and child-specific way and failing to consider the difficulties a child would face in attempting to access adequate protection.

The length and detail of the refusal letters in our study varied. A number of refusal letters from 2009 and earlier were brief, around 5-6 pages, and dealt with the claim primarily by finding the young person not credible without adequately considering the claim as that of a child. There was no consideration of the risks faced by a child returning alone, or relocating as a child, or any consideration of subsidiary protection under the Qualification Directive. In contrast some more recent refusal letters, particularly those from Kent LIT, were more than 30 pages long and addressed all aspects of the claim in considerable detail. Those refusals did in general note that they were considering the claim of a minor and quoted UNHCR and Home Office guidance on how claims from minors should be considered.

However, large tracts of those letters consist of lengthy quotations from caselaw and objective evidence which were not always relevant or applied to the facts of the case. For example, one applicant mentioned in his asylum interview that he suffered from headaches, depression and anxiety. Two whole pages of his refusal discussed Article 3 ECHR medical claims, including long quotes from *N v UK* and reference to *D v UK*, though it is evident that medical grounds were not being advanced as the basis of his claim.

If the longer letters showed a more thorough Home Office consideration of asylum claims, it would be welcomed. However, a 30-page refusal letter featuring extensive passages of caselaw that are not applied to the specific facts, or indeed are clearly not relevant, cannot be in a child's best interests. An experienced legal representative would identify the important legal and factual issues. But a young person without legal representation, or even their social worker, may be intimidated by the length and apparent legal erudition and believe it to be unchallengeable.<sup>68</sup>

In only 9 of our cases did the Home Office consider whether the child was a **member of a particular social group**, following LQ. In only some cases where a client's family were involved in a blood feud was the client identified as potentially belonging to a particular social group. In **Case 3**, the refusal letter relied on *Skenderaj*<sup>69</sup> rather than the more recent case of *Fornah*<sup>60</sup> to reject the claim.

Most refusals found that there was a **sufficiency of protection** or that **internal relocation** to Kabul was safe for the young person, relying on standard paragraphs from *Horvath*<sup>61</sup> and *Januzi*,<sup>62</sup> *RQ (Afghanistan)*<sup>63</sup> and country information extracts, without relating either the cases or the country information to the particular facts of the client's case. In 2009 the UNHCR had highlighted the lack of child-sensitive reasoning when considering internal relocation.<sup>64</sup> Yet refusals seen from 2012 still do not properly determine the best interests of the child when considering internal relocation. In **Case 6**, assessed as 16 and with evident but undiagnosed comprehension issues, the refusal stated: *'you are considered to be a fit and healthy individual who can reasonably be expected to support himself upon return as an adult'*.

Refusals did not generally consider **Humanitarian Protection**. In 2011 only 10 out of 1356 initial decisions for minors were granted humanitarian protection, including only one from Afghanistan.<sup>65</sup> This amounts to 0.7% of initial decisions and is surprising given there is significant objective evidence documenting the widespread general violence that children and young people can be subjected to in Afghanistan.

**Case 19** described how his whole family except for him and his father had been killed, how there was still fighting between Taliban and British forces in his area, and that his father had sent him away as he was unable to keep him safe. His claim was not considered under Article 15c of the Qualification Directive. He was deemed to be an economic migrant, despite the refusal letter's citing the UNHCR handbook<sup>66</sup> definition at para 62: 'a person who is motivated by **exclusively** economic consideration is an economic migrant' (writers' emphasis).

This appears to show a lack of appreciation of the complex reasons why young people are leaving Afghanistan and that an individual's journeys may be motivated by a combination of protection needs and economic reasons.

#### d Best interests of the child

Article 3(1) of the UN Convention of the Rights of the Child states that:

*'In all actions concerning children, whether undertaken by a public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.*

When the UK ratified the Convention in December 1991 it entered a reservation to allow it not to apply the convention to decisions concerning young people and children subject to immigration control. This changed in November 2008 when the UK, following domestic and international pressure, removed the reservation.

The principle is that young people should be treated as children first and migrants second, and that ascertaining their best interests is a primary consideration when making an immigration decision that affects them. This principle has been introduced into primary legislation in the Borders, Citizenship and Immigration Act 2009 s55. In *ZH (Tanzania)*<sup>67</sup> the Supreme Court gave clear guidance on how decision-makers should approach the consideration of a child's best interests. In that judgment Lord Kerr stated emphatically (para 46):

*'...Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them...'*

However, it is questionable whether this duty is being carried out.

Nine of our clients' first refusals were made before the 2009 Act came into force. In only 5 of the remaining cases were the 'best interests of the child' mentioned. Consideration was often very brief, the facts of the individual case were not specifically considered, and in only two did the decision-maker make a determination of the child's best interests.

**Case 7** was found not credible and told that in any event he would receive protection in Afghanistan or could internally relocate to avoid a fear of forcible recruitment to the Taliban. A single paragraph is given to his 'best interests', stating:

*'In coming to this decision, regard has been given to the statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children, "Every Child Matters: Change for Children", issued under s55 of the Borders, Immigration and Citizenship Act 2009. Your general needs have been considered and no specific matters requiring consideration have been identified other than the need to ensure you have access to suitable medical care whilst resident in the UK'.*

For one client his best interests were determined to be 'to return to Afghanistan where you would be able to continue living with people from your own ethnicity and community' – and then he was then granted 13 months' discretionary leave on the basis of inadequate reception conditions in Afghanistan.<sup>68</sup> For another it was to be granted 3 years discretionary leave (at the age of 13) with a view to return to Afghanistan when adequate reception facilities become available. Given the current situation in Afghanistan, that is unlikely to be soon. It is questionable whether an uncertain immigration status could truly be the best interests of a child aged 13.

Several refusal letters sought to distinguish the facts of the young person's case from the lead cases of *LD*<sup>69</sup> and *ZH (Tanzania)* – (cases which concern family life and not unaccompanied children). However, the refusal letters failed to make a determination of the particular child's best interests, or explain why it should be overruled by the public interest of immigration control.

In the subsequent refusals of HPDL applications many of the young people were by then over 18 and thus were not subject to a further 'best interests' consideration.

## SECTION B: EVIDENCE FROM THE ASYLUM PROCESS AS EXPERIENCED BY OUR CLIENTS (CONT)

But **Case 10**, who was 17 and 10 months and therefore still a child, was told in a confusing section of his refusal letter that *'you would then no longer meet the UN Convention definition of a child'* and therefore the caselaw of *DS* *'will no longer be applicable in your case'*. This same argument appears in **Case 18**, another 17 year old who was told that he *'would no longer meet the definition of a child'*. Those decision-makers effectively decided that the s55 duty gradually fades away as the child approaches 18 – or that it did not matter, since the applicant would not be removed until he was over 18.<sup>70</sup>

A round table participant noted instances where best interests arguments were used against the applicant, where a request to delay a decision to wait for further evidence was refused, on the basis that it was in the child's best interests to achieve a quick decision.

In a number of recent cases the higher courts have questioned the appropriateness of a Home Office policy which assumes that discretionary leave is necessarily in the best interests of a young child. *SM & Ors v Secretary of State for the Home Department* [2013] EWHC 1144 concerned accompanied children who were aged between 6 and 10 years old. It was accepted that a blanket policy of granting successive periods of 30 months discretionary leave to children whose future was likely to be in the UK did not comply with the s55 duty to have regards to their best interests. These children had been allowed to remain on Article 8 grounds so it had been recognised that they were likely to remain in the UK. Importantly though, it was acknowledged that it cannot be in the best interests for young children to grow up with the anxiety caused by the need to make regular and uncertain applications for DL in order to remain in the UK.<sup>71</sup>

This approach suggests that 'best interests' considerations should more fully take into account the need to find a durable solution for those who arrive in the U.K at a young age and who are unlikely to be able to be reunited with their family.<sup>72</sup>

### e The tracing of family members

Our cases show that the Home Office does not have a consistent approach to the issue of tracing, but their admitted inability to trace families in Afghanistan does not stop the issue being used to provide further reasons for refusal.

Following the judgment in *KA (Afghanistan)*, the Home Office issued guidance<sup>73</sup> which sets out to caseowners the duty to trace family members as soon as possible after the claim for asylum is made. It advises that family tracing duties may entail contacting the family by telephone, contacting the family via a village elder following assistance from the British Embassy or High Commission, or commissioning a third party such as the High Commission or tracing organisation to undertake tracing. In cases where decisions had yet to be made or where appeals were pending the Home Office began asking clients if they would like assistance to trace their family members. This led to decisions being withdrawn in some cases awaiting a strong appeal, leading to a further delay before a new decision was issued.

Most of the cases in our sample were from the time period where the Home Office was systematically failing to attempt any tracing of family members. This means they were all potentially within the scope of the judgment of *KA*.

In **Case 10** the refusal simply stated:

#### *Family Tracing*

*The findings of DS (Afghanistan) v SSHD [2011] EWCA Civ 305<sup>74</sup> [concerning the duty to trace] have been considered with regards to your claim. You stated that social services have offered to help you send a letter if you wanted to.*

More recently the Home Office has addressed this issue, providing a 'tracing proforma' and asking the child if they would like assistance to trace their family, but in no case was there any evidence that the Home Office had taken any steps to assist with tracing beyond advising the client about the Red Cross Tracing Service. **Case 7's** refusal acknowledged that tracing in Afghanistan is beyond the ability of the UK Government at present:

*'Unfortunately due to the size of the staff in the Foreign and Commonwealth office in Kabul it is not possible to trace people in Afghanistan. However, once resources become available attempts will be made to trace your family ...'*

Another refusal (**Case 6**) stated:

*In respect of family tracing in Afghanistan, UKBA have contacted the Afghan government to establish if they have a national database of their citizens. The Afghan government have confirmed that at present time that they do not hold a national database. The FCO is not currently resourced to permit further enquiries at this time, but will endeavour to assist if you wish them to do so if resources allow in future.*

Yet the inability of the UK to trace the family is not held to prevent the young person from making their own tracing efforts, and if they do, they must be able to return.

*'It is noted that you claim not to know the whereabouts of your family within Afghanistan and it is noted that you have attempted to contact your family via the Red Cross.... It is therefore considered that you are trying to locate your family and that you can be reunited with them upon your return to Afghanistan'.*

Several young people 'declining' assistance with tracing had this turned against them. **Case 12** declined an offer of help tracing his family as he was in contact with them and knew that they were residing illegally in [country X]. He was criticised in the refusal letter for *'failing to adduce evidence that they were illegally resident in [X]'*. He later maintained he had thought that the offer of help to trace his family was a genuine offer of help which he did not need. He did not realise he had to agree to tracing in order to allow the UKBA to contact them to verify their status. The tribunal judge in his case also blamed the young person for not providing the Home Office with the information they needed to trace his family.

In contrast, **Case 17** was told in his refusal letter that as he had confirmed in his asylum interview that he was in contact with his mother, the case of *DS* (and hence the Home Office duty to trace) did not apply to him.

In **Case 13** the Home Office transfers the blame for their inability to trace family members on to the child. In this case the young person had provided the name of his village (there was no house number or street number) but the Home Office claimed that they were unable to locate it using two websites. The refusal letter stated:

*It is considered that you have failed to provide complete and accurate information with sufficient detail with which UKBA could endeavour to trace your family after you lost contact with them. It is considered that you have failed to discharge the duty placed on you in KA. (writers' emphasis)*

(A simple internet search by these writers confirmed the location of the client's village from the information he had provided to the Home Office).

We conclude that the problems noted by the UNHCR in the assessment of young peoples' asylum claims were prevalent in our study and have arguably led to a number of young people receiving inadequate decisions. The round table participants all agreed that there is a clear tendency for the Home Office in refusal letters to use the tracing issue against applicants.

## 5 Legal representation

Upon arrival young people claiming asylum are generally referred by Social Services or immigration officials to one or other local legal aid firm. The largest legal aid immigration provider in Kent, Refugee and Migrant Justice, went into administration in July 2010, and as a result their clients had to be transferred to alternative providers. In some cases the young people's files were transferred to London firms. From our sample, a client of another local provider which closed down had a period with no representative, and then 2 further representatives. Several of the young people in our sample had sought legal advice from 2, 3 or more legal representatives during the course of their asylum claim. The 20 cases we examined therefore contained examples of work from a range of legal aid providers, some local and some from further afield.

It has long been recognised that good quality legal advice at an early opportunity can have a decisive impact on asylum claims.<sup>75</sup> The Immigration Law Practitioners Association (ILPA) best practice recommendations and evidence from other studies emphasise the need for legal representatives to build the client's case from the beginning. This arguably requires:

- working diligently with the client on their initial asylum statements, dealing with all discrepancies and illegalities arising from any earlier interviews;
- advising them in detail and preparing them fully for their asylum interview;
- making immediate representations after the interview to deal with any 'discrepancies' which arose during the interview;
- providing relevant supporting objective information.

ILPA has commented that the asylum and immigration system has the least formal specialised provision for young people.<sup>76</sup> A Refugee Council report<sup>77</sup> found that the quality of legal representation received by separated children is extremely varied – and young people are not generally able themselves to recognise poor practice. Problems identified include legal representatives' lack of experience in interviewing children, lack of understanding of child-specific forms of persecution, and the failure to explain complex issues in a way that children can understand. Further, there is little joined-up provision of advice in immigration and community care. Not all immigration caseworkers can advise on challenging age assessments, and some young people do not receive adequate or any advice on their right to challenge them.





## SECTION B: EVIDENCE FROM THE ASYLUM PROCESS AS EXPERIENCED BY OUR CLIENTS (CONT)

### a Not appealing the first refusal

In our sample, 10 out of 12 clients who could have appealed their first refusal, all represented at the time, did not appeal. Of these 1 subsequently obtained another legal representative who challenged a formal refusal of funding and appealed out of time. The others had waited until they were refused an extension of their discretionary leave before appealing. Of the 2 who did appeal their first refusal of asylum, one had no choice as he had not been granted any leave.

Of the 17 clients who were granted a right of appeal following the refusal of an extension of leave, all appealed the refusal, including those who had previously not appealed when they had the opportunity. 13 of these clients were subsequently represented at appeal, 4 of whom by firms who took on the cases after they had been **merits failed**<sup>78</sup> by other firms.

Evidently some advisers recommend accepting the grant of DL until 17 ½ and advising the young person that if they are subsequently refused further leave, they can appeal against that refusal. However where the young person is over 18 when next refused, representatives often then assess the merits of the case as less than 50% and cease to represent them.

At the point of refusal of further leave, these applicants have lost the advantages of having their claims considered by a judge while they are still a child. This is of particular importance for those from countries such as Afghanistan where belonging to the 'particular social group' of unaccompanied or orphaned children amounts to a Convention ground, while country guidance cases assert that it is safe for adults over 18 to return. Because of these legal findings, young people from Afghanistan are less likely to succeed on a subsequent appeal than if they had appealed the initial decision.

Furthermore, the Home Office evidently consider a failure to appeal the first refusal as an acceptance of its terms. Typical paragraphs in subsequent refusals of applications for further leave read:

*'It is also noted that you did not appeal against the decision to refuse your asylum claim, and it is considered therefore that you accepted the reasons contained within the RFR letter dated XXX.'*

*'You had a right of appeal against this decision which you did not exercise and it is therefore considered that you accepted the reasons for refusal as contained within that letter' (Case 12).*

### b Merits assessment

Some clients had been merits failed at the first refusal stage, either because 'a Convention reason could not be identified', or because of 'poor performance' in their Home Office interview and poor credibility allegations. One provider's CW4 decision<sup>79</sup> stated that it was in the client's best interests not to appeal.

Legal Services Commission guidance allowed legal representatives to consider the merits of a child's asylum appeal differently from an adult's case. If a Convention reason can be clearly identified CLR should normally be granted to a child,<sup>80</sup> since their case will satisfy the merits test to at least 'borderline'.<sup>81</sup> Providers should therefore not be refusing CLR just because the Home Office disputes the applicant's credibility.

Different providers have evidently been taking a different approach to assessing the merits of children's appeals, with some being prepared to take on appeals that other firms have rejected. Furthermore, some firms are willing to take on and make fresh claims following the dismissal of an appeal and the refusal of further legal aid by a previous representative. However it is unfortunate that young people are forced to move from one legal aid provider to another in order to receive representation for an appeal.

At the round table discussion we explored the reasons why representatives may advise a young person against appealing. It emerged that some social workers and support workers are concerned that forcing a young person to give evidence before an immigration tribunal would not be in their interests: and some representatives are concerned that any negative findings made in a first appeal would irretrievably damage any later appeal, following the *Devaseelan*<sup>82</sup> guidelines. However the majority of round table participants held that it is almost always an advantage for nationals of countries such as Afghanistan who have arguable asylum claims to go before a tribunal based on the risks faced by a returning child, and for the appeal to be heard at a time closer to the events which led to his decision to flee their country. Success rates from practitioners' experiences in such 'first appeals' were reported to be overwhelmingly higher than in appeals against refusals of further leave.<sup>83</sup> It was also noted that Social Services' task of looking after these children is more straightforward where the children win an appeal and obtain refugee leave.

The round table participants put in a strong plea for representatives to *represent their client*, to take their instructions carefully in a way and at a level appropriate to the child, and not to act as a quasi-judge, for example referring to an applicant's 'poor performance' in their asylum interview or their 'failure' to provide any evidence for their claim.

## SECTION B: EVIDENCE FROM THE ASYLUM PROCESS AS EXPERIENCED BY OUR CLIENTS (CONT)

### Examples of merits failed cases

**Case 17** was assessed on arrival as 16. He submitted his Afghan ID card, but the Home Office rejected the document. It is not clear if he was advised on challenging his age assessment. His asylum claim was that his father was deceased, he had lost contact with his mother and he had been mistreated and feared being killed by other family members who wished to take his land. He was refused asylum but given just over 1 year's discretionary leave with a right of appeal. He was told by his representatives that the Home Office had decided that his claim did not engage the Convention, that his cousins could not be regarded as viable actors of persecution, and that he could internally relocate to avoid them. He was refused legal aid and told that he would have to pay for representation at an appeal.

If he had appealed and been accepted as credible, he should have been found to be at risk as an unaccompanied child, and relocation to Kabul to be unsafe. However he did not appeal, and his application for further leave was refused. He appealed against this and was granted funding by different representatives who also obtained a medical age assessment. His appeal was heard nearly 2 years after he had arrived in the UK by which time he was over 18 according to his assessed age. He was found to be an adult, his claim was not believed and his appeal was dismissed.

**Case 19** was assessed by KSS as 16½ (he claimed 15). He feared indiscriminate violence in Afghanistan, after his family and home were destroyed in a rocket attack. He had no contact with any other family and lived in a particular volatile area of Afghanistan. He was advised that his claim did not engage the Refugee Convention, and that to qualify for Humanitarian Protection he would need to show 'a sustained pattern or campaign of persecution directed at him which was knowingly tolerated by the authorities, or which they could not protect him from'. No consideration was given to Article 15c Qualification Directive<sup>64</sup> or to child-specific forms of persecution as in LQ Afghanistan. The Home Office had made no attempts to trace his family. He was refused funding to appeal, and advised to wait to apply for an extension of leave. That was refused, and he was then granted funding by different solicitors to appeal that refusal. He is now over 18 on his own claimed age and his appeal has still not been heard.

**Case 11** claimed to be 15½ when he arrived in the UK. He was age assessed as 17. He feared being killed as a result of a family blood feud in which he feared being targeted in a revenge killing. He was refused funding, his representative advising that his claim did not engage the Convention, that he had 'failed to demonstrate' that he could not relocate within Afghanistan, and there was 'a lack of evidence' for his claim. Different representatives granted funding and represented at his appeal.

These examples show that in some cases representatives are failing to identify appropriate Convention reasons or other legal arguments, and applying the wrong standard of proof in adopting the Home Office demand for evidence.

### Common problems in case preparation

Referring to the standard ILPA Best Practice literature<sup>65</sup> and to each client's formal documents, we identified the following issues:

- Lack of detail in SEF or accompanying statements;
- Providing a document (such as a Taskera<sup>66</sup>) without evidence of how it was obtained, or without any prior independent check on whether the document was genuine;
- Providing no objective supporting evidence;
- Failing to identify which Convention reason or humanitarian protection ground was engaged, or wrongly stating the applicable test; not giving detailed reasons on internal relocation or lack of sufficiency of protection, no detailed application of cases such as *LQ Afghanistan*, or relevant Home Office guidance, no detailed application of the 'best interest' duties to the child. In none of our cases, even where the child claimed to be 13 or 14, was it argued that a grant of discretionary leave until 17½ might not be in their best interests.
- Not obtaining the local authority's age assessment as soon as possible after the beginning of the case; only challenging the age assessment on an appeal against a refusal of further leave.
- Providing little or no further evidence or argument with applications for further leave.
- Failing to pursue apparent errors of law: in two cases the appellants had been found credible, under 18 and at risk on return at the date of hearing, but the appeals dismissed because the appellants would not be returned until they were adults. In neither case was this error of law pursued.

Other studies provide confirmation that many children are being wrongly advised at this stage.<sup>87</sup> The Refugee Council's own advisers felt that some representatives seemed to feel there was less need to make a strong case for young people, as almost all are granted DL until 17½.<sup>88</sup> They noted that children are often told they have no chance of winning their appeal, and are merits failed by their representative, requiring a desperate search for alternative legal advice. In some cases children are being advised to accept their discretionary leave to remain, and to wait to make an extension application, without being advised that the likelihood of an extension application being granted is small.

## 6 Tribunal determinations<sup>89</sup>

There is currently a right of appeal against refusal of asylum for minors who have been refused asylum with no leave to remain, or who have been refused asylum but granted discretionary leave for over a year.<sup>90</sup> In 8 of our cases the young person was refused but granted discretionary leave for less than a year and had no right of appeal. To have their cases considered by an independent tribunal, those young people had to wait until they were 17½, apply for an extension of leave, wait for a refusal and then appeal that refusal.<sup>91</sup> In most of our sample, by the time any appeal was heard the appellants had turned 18 and were thus no longer considered a child.

Of those who did appeal their first refusal some were allowed on a technical ground and referred back for a further decision from the Home Office. Some were allowed on the basis that the Home Office had not relied on a Merton-compliant age assessment when assessing age. In these cases, after a delay, a further decision was made simply relying on the original refusal. In others the case was allowed because the decision was a dual decision (ie both a decision to refuse to vary leave and a removal decision taken under the Immigration and Asylum Act (IAA) 2006 s47) and so was arguably unlawful.<sup>92</sup> Again there was a lengthy delay before a further decision was made, and so those appellants too were over 18 by the time their appeals were heard.

For all of these reasons, potential child refugees are being denied a prompt and effective remedy against defective Home Office decisions.

**Case C** received a decision early in 2010. He appealed and the appeal was allowed and remitted back to the Secretary of State as a Merton-compliant age assessment was not before the judge. However a new decision was not made until over a year later. The application was refused and he had to appeal again.

**Case A** received a decision in early 2012. That decision was withdrawn after an appeal was allowed on the dual decision point and remitted to the Secretary of State. A new refusal decision was not made for six months.

We do not believe that it can be in a child's best interests, and it is not in accordance with Home Office policy on the handling of claims by unaccompanied children, for this kind of delay to occur. There is no good reason why a decision which clearly received careful Home Office consideration immediately before a hearing date could not be remade within a few weeks.

The problem of dual decisions has now been addressed by the amendment to s47 IAA 2006 made by s51 Crime and Courts Act 2013. However, delays arising from Home Office failure to obtain Merton-compliant age assessments have not been addressed.

It was evident that judges have not been taking a consistent approach to the lack of a Merton-complaint assessment. Some proceed with the substantive appeal, accepting the client's account of his age in the absence of a Merton-compliant assessment (**Case W**), others accept the Social Services age assessment even though a Merton-compliant age assessment was not produced (**Case A**), and others remit the case for a new decision to be made on the basis of a full age assessment (**Case C**).

### a Most appeals dismissed for 'incredibility' and 'implausibility'

Our sample showed tribunal judges' heavy reliance on 'inconsistencies and implausibilities' to dismiss young people's asylum appeals. Summarising the 14 cases with dismissed appeals, if we put aside case I, where the Determination refers to 'a significant, unarguable inconsistency', and Case X (found to be 'inconsistent and incoherent'), the remaining clients' appeals were dismissed for:

- 'vagueness' (**Case T**, who was unrepresented);
- incredibility (**Cases D, B, Q** (who was unrepresented) and **W**);
- implausibility (**Cases P, C, A, E, V, S**).

While some of the 'incredible' and 'implausible' findings were foreseeable, and some applicants may have been better served by more thorough case preparation or an appeal against an earlier refusal, we believe that many people both outside and inside the immigration and asylum law environment would be bemused by some of the tribunal judges' reasoning and leaps in logic. We believe that if the UNHCR guidelines on assessing children's asylum claims had been fully followed the outcomes may have been different.

## SECTION B: EVIDENCE FROM THE ASYLUM PROCESS AS EXPERIENCED BY OUR CLIENTS (CONT)

What is remarkable, and most damaging for the appellants, is the seeming ease with which different tribunal judges move from arguably reasonable negative findings (*'you have not shown to the requisite standard of proof that you have lost touch with your family'*) not just to a positive finding that the appellant *'is in contact'* with his family, but a clear finding that he could definitely rejoin them and return home. Similarly, an appellant found not to be at risk on return *'must'* be an economic migrant, and appellants assessed as older than their claimed age must have *'lied'* about their age.

### One appeal was dismissed even though the Appellant was believed:

**Case F:** (*Appeal v 2nd decision; advised not to appeal 1st decision. No new evidence or argument provided with 2nd application*). He was found by the tribunal judge to be under 18 at the date of hearing and at risk from Taliban in his home area. Nevertheless his appeal was dismissed *'because by the time he would be returned, he would be over 18 and could be safely returned to Afghanistan'*.

### Three cases were appealed to the Upper Tribunal (UT):

**Case G:** This appeal had been allowed, as the Appellant was believed to be at risk in his home area, and that it would be unreasonably harsh to expect a child to relocate to Kabul. The SSHD appealed to the UT on the basis that the IJ's finding that the Appellant had been inconsistent about evidence of trying to trace his family meant that the finding that he could not safely relocate was an error of law. The UT so found, and his application to the Court of Appeal was briskly dismissed.

**Case B:** appealed to UT on the grounds that insufficient weight had been given to the appellant's medical report. Permission was refused by FTIAC but granted by UTIAC, but the appeal dismissed: no error of law.

**Case F:** This case was appealed to the UT on the basis of not seeing the full Merton -compliant age assessment. Permission was granted but the case dismissed on the basis that, in fact, the Appellant's solicitor had previously seen the age assessment, but had not challenged it. No one, including two UT judges and two firms of solicitors, noticed a different arguable error of law.

### b How did the Tribunal deal with the tracing issue?

**Case G:** At the first-tier tribunal, the Appellant's account was found to be broadly consistent, and the Respondent's arguments on discrepancies and alleged implausibilities not to be compelling. He was found to be at risk on return, on the basis that he was at risk in his home area, and that his relocation to Kabul, as a minor, was held not to be reasonable. But the IJ had also found there to be a discrepancy between his claim that he had tried to trace his family and the written evidence which showed only that an appointment had been made with the Red Cross.

The Secretary of State appealed, and the UT found that the Appellant had not shown, as required by *HK and others*,<sup>93</sup> that his family could not be traced and would not be able to meet him and care for him on return, and therefore *'he has family whom, in the absence of credible evidence to the contrary, I find would be available to him on return and will provide him with assistance'*. Additionally, by the time the UT decided the case, he was an adult. The Appellant applied to the Court of Appeal, but was briskly dismissed, with an order prohibiting a request for an oral hearing or any application to the Supreme Court.

**Comment:** this case in particular demonstrates the clear conflict between the determination in *HK and others*, which appears to place the burden of family tracing on the minor, and *KA*, which shows that the burden lies clearly on the Secretary of State. It also shows the great logical leap from finding that someone has not shown that their family cannot be traced, to their definitely having family who could definitely meet him and care for him on return.

**Case P:** The tracing issue was considered in detail with reference to *KA*, concluding: *'I find that the appellant is at the latter end of the spectrum,<sup>94</sup> in that he has lied about his age, provided a fabricated asylum claim which contained no detail as to the address, contact details or whereabouts of any of his surviving relatives...'*

**Case A:** In relation to the tracing duty, the Appellant explained that he had not completed the form provided by the Respondent, since he did not need help with tracing his family, because he knew where they were and was in contact with them. This answer led to the Immigration Judge deciding that *'he had not adduced .. evidence that his family had not been registered with [another country X's] authorities to acquire legal status there'*, and finding

*'no reason why, upon enquiry by the Respondent, the Appellant could not have at once provided such particulars as he had of the family's whereabouts in [X], demonstrating the credibility of the claims made by him as to their whereabouts and the legitimacy or otherwise of their stay in [X]. I find that the reasons for failing to provide those particulars, which draw upon fine distinctions for a young man who claims he was uneducated, illiterate and innumerate, further undermine his plausibility and credibility..'*

The tribunal in **Case E** relied on *HK and others* to make the logical jump from *'you have not proved you cannot contact with your family'* to *'you are in contact with your family and can rely on them when returned home'*.

The next section examines how the Courts have dealt with the family tracing issue since *KA*.



SECTION C:  
'CORRECTIVE  
REMEDY' AND FAMILY  
TRACING: LEGAL  
DEVELOPMENTS  
FROM *KA* ONWARDS

## 1 Court of Appeal judgments: *EU (Afghanistan)*<sup>95</sup> and afterwards

All our clients potentially came within the scope of *KA*. However, following the start of this project, the court in *EU (Afghanistan)* decided the remaining 6 appeals heard in *KA*. This judgment, delivered by Sir Stanley Burnton LJ, noted disapproval at the principle established by *Rashid*, took a very restrictive approach to the reasoning in *KA*, and dismissed the remaining appeals. We now critically discuss in detail the legal reasoning of the Court of Appeal in both *KA* and *EU* and in subsequent cases.

The critical paragraph in *KA (Afghanistan)* (para 25) introduced the ‘hypothetical spectrum’:

*... There is a hypothetical spectrum. At one end is an applicant who gives a credible and cooperative account of having no surviving family in Afghanistan or of having lost touch with surviving family members and having failed, notwithstanding his best endeavours, to re-establish contact. It seems to me that, even if he has reached the age of 18 by the time his appeal is considered by the tribunal, he may, depending on the totality of the established facts, have the basis of a successful appeal by availing himself of the Rashid/S principle and/or section 55 by reference to the failure of the Secretary of State to discharge the duty to endeavour to trace. In such a case Ravichandran would not be an insurmountable obstacle. At the other end of the spectrum is an applicant whose claim to have no surviving family in Afghanistan is disbelieved and in respect of whom it is found that he has been uncooperative so as to frustrate any attempt to trace his family. In such a case, again depending on the totality of established facts, he may have put himself beyond the bite of the protective and corrective principle. This would not be because the law seeks to punish him for his mendacity but because he has failed to prove the risk on return and because there would be no causative link between the Secretary of State’s breach of duty and his claim to protection. Whereas, in the first case, the applicant may have lost the opportunity of corroborating his evidence about the absence of support in Afghanistan by reference to a negative result from the properly discharged duty to endeavour to trace, in the second case he can establish no such disadvantage. At this stage, when we have not heard oral submissions on the facts of their cases, it is inappropriate to say where on the spectrum each of these appellants lies.*

The court allowed one appeal, leaving the remaining cases to be decided on their individual facts at a further hearing. *EU (Afghanistan)*, heard by a differently-constituted Court of Appeal including Kay LJ, decided the remaining 6 appeals heard in *KA*. Each was held to fall at the wrong end of Kay LJ’s ‘hypothetical spectrum’ having been found by the tribunal to have given untrue accounts, or otherwise been uncooperative in relation to tracing their families.

Sir Stanley Burnton LJ stated in para 6:

*‘...I do not think that the Court should require or encourage the Secretary of State to grant leave in circumstances either in order to mark the Court’s displeasure at her conduct, or as a sanction for her misconduct...’*

In para 10 he stated:

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

The principles emerging from *KA* and *EU* were summarised in the Upper Tribunal determination of *SHL (Tracing obligation/Trafficking) Afghanistan*.<sup>96</sup> Unfortunately this reported case proceeded without the appellant or any representative. The appellant, an orphan, feared Taliban recruitment, and claimed he had been trafficked for forced labour. He had asked the Red Cross to trace his uncle, but with no success. The UT found him to be credible, accepted he was a minor with no family to return to, accepted his reasons for leaving and accepted that he had been forced to work in the UK, but decided that since he was over 18 he could relocate to Kabul. The failure to attempt to trace was irrelevant since he had no family and this was an accepted fact. Importantly, the Upper Tribunal held that *EU (Afghanistan)* marked a retreat from the ‘corrective principle’ of *Rashid*, stating that ‘*the judgment in EU re-emphasises the need for the claimant to establish a proper foundation for the grant of one of the available forms of protection*’. The tribunal quoted with approval Sir Stanley Burnton LJ’s comments in *EU* para 6 that the court should not require the SSHD to grant leave as a sanction for her misconduct.

## SECTION C: ‘CORRECTIVE REMEDY’ AND FAMILY TRACING: LEGAL DEVELOPMENTS FROM KA ONWARDS (CONT)

In relation to family tracing, the key principles emerging from these cases are:

- The onus is on the child to make out their asylum claim to the required standard of proof.
- An unaccompanied child can constitute a particular social group for the purposes of the Refugee Convention (LQ) and may be subject to serious harm on return depending on their individual circumstances (*AA (unattended children)*).
- There is no bright line at which the risk of persecution ceases at the 18th birthday. Apparent or assumed age is more important. (*KA*)
- Where a family assisted a child to travel to the UK, any assertion that family members are unable to meet them on return must be supported by credible evidence of efforts to contact those family members. In principle an adverse finding can be made from a failure by a child to try to trace their family. (*HK*)
- The SSHD’s duty to trace is an active duty which goes beyond informing the child of the existence of the Red Cross tracing service (*DS*)
- The tracing duty may be relevant to the judicial consideration of the asylum claim. Failing to make efforts to trace the child’s family could deprive the child of an avenue for corroborating their case (*DS/HK/KA*)
- A breach of the tracing duty does not without more betoken an error of law by the SSHD giving rise to a corrective remedy or vitiate any ensuing determination of the first tier tribunal. (*SHL para 28*)
- Neither European nor domestic law prescribes any sanction, remedy or consequence for such a failure. (*SHL para 28*)
- The child must show the causative link between the SSHD’s failure to trace and his claim to protection (*KA/EU*)

Of the *EU* appellants, the decision on *QA* is particularly dismaying.<sup>97</sup> He was 14 when he arrived, his account of fearing persecution from Hezb-e-Islami was believed, and he was found to be at risk on return. This had been overturned by the Upper Tribunal on the basis that the first tier judge should have considered internal relocation, since by the time of the appeal the Appellant had turned 18. The UT had also found that his ‘refusal’ to use the Red Cross to trace his family (because of a stated fear that any enquiries would place his mother at risk) amounted to a failure to co-operate with family tracing, and so the SSHD’s failure to attempt to trace had no relevance to the asylum claim.

### 2 Family tracing and the ‘corrective remedy’ principle since *KA* and *EU*

The Court of Appeal judgments in *KA* and *EU*, and their application by the Upper Tribunal in *SHL*, are problematic for a number of reasons. First, those cases consider the applicability of the ‘corrective remedy’ principle in relation to family tracing, a distinct type of obligation imposed by an EU Directive, for which there is no penalty or sanction for failure to comply. And the underlying facts (whether the child is in touch with his family, etc) are hard to know, so that a higher court considering whether to apply a corrective remedy has to rely on tribunal findings which our research shows are likely to be marred by unreliable negative credibility decisions. In contrast, in relation to the other litigated issues (flawed age assessments subsequently corrected, Home Office failure to grant DL to a minor, unlawful reliance on illegal entry interviews), it is easier to establish the effects of past errors or illegalities committed by the Secretary of State. In those types of cases therefore the fact of injustice suffered by an applicant, and the need for a remedy, is clearer.

Secondly, precisely because the assessment of the impact of the failure to trace in relation to young Afghan asylum-seekers depends on credibility findings, such assessment is inescapably infected by the whole gamut of factors identified in our research and in the other reports we have cited – factors entirely beyond the control of most applicants. Thus Kay LJ’s ‘hypothetical spectrum’ is unexceptionable in its own terms. Of course a child who has obstructed attempts to trace his family must have *failed to prove a risk on return, and cannot establish [any] such disadvantage* from an institutional failure to endeavour to trace his family. It may seem that this also applies to the *HK* view, repeated in *EU* by Sir Stanley Burnton LJ, that someone whose family paid for their journey must be able to show that their family can no longer support them. This, taken in its own terms, appears simply to spell out the burden of proof in such cases.

However, both those Court of Appeal judgments comprehensively fail to take account of research evidence showing that the very process which determines where a child will fall on the ‘hypothetical spectrum’, ie the child’s asylum determination process, is fraught with errors, not all from the Secretary of State. For all the reasons set out in our research findings, it will often be unsafe and unjust to place young people on Kay LJ’s spectrum by reference to the findings of fact in their tribunal determinations. But this is precisely what has happened to the appellants in *EU*, and in subsequent cases.



Far from recognising this as a problem, the Court of Appeal itself appears to be affected by the same 'culture of disbelief' and penchant for relying on 'incredibility' and 'implausibility' as the Home Office and tribunal. What Burnton LJ says in *EU* para 10 about the motivations of Afghan families, or the likelihood of cooperation about the proposed return of their children, is simply an assertion or an opinion of a judge, not based on evidence presented in that court.<sup>98</sup> That opinion has now effectively attained the status of a country guidance finding applying to all Afghan families. It is also concerning that the Upper Tribunal should use *SHL*, a case in which neither the Appellant nor his representative appeared, to interpret those Court of Appeal cases for the Tribunal, and effectively close off the corrective principle even for appellants found credible.<sup>99</sup>

Given these decisions, it is not surprising that subsequent Court of Appeal cases demonstrate the very circular reasoning we identified in Tribunal determinations in the cases in our study. In *AA (Iran)*<sup>100</sup> it was argued that if the Home Office had carried out its tracing duty it could not have been found that he still had contact with his family. Tracing may also have produced material supporting his claim to face persecution because of his father and uncle's political activities. Kay LJ rejected this, arguing that the claim had been categorically rejected in its own terms, and once rejected, "it was a short step to the inexorable inference that the appellant had not lost contact with the family whose whereabouts remain known to him" (para 15). The circularity is clear:

- a an appeal is dismissed on credibility grounds;
- b it is *inferred* that the appellant has not given true information about his family;
- c which leads to a *finding* about his family;
- d tracing may have produced evidence to challenge the judge's overall credibility assessment;
- e but because of the *finding* regarding his family it is decided that family tracing would have been unsuccessful, so no loss has arisen from the failure to trace.

*AA v SSHD*<sup>101</sup> was an attempt to challenge this circular reasoning. It was argued that tracing could have helped verify the appellant's asylum claim and led to different findings of fact. The Court of Appeal rejected submissions that in 2013 the SSHD was still systematically and deliberately failing to endeavour to trace, but did find that not beginning the tracing process until just before a decision to refuse asylum was a breach. The breach was held to be inconsequential, since the appellant was unable to provide enough information to enable the SSHD to trace his family, so compliance would have made no difference. In response to that, expert evidence was submitted showing that family tracing was possible in Afghanistan. The court considered whether the tracing duty

required steps such as asking embassy staff to contact village elders in the appellant's home area. The court decided that tracing was a sensitive matter touching on the relationship of the UK and Afghan Governments and resource allocation considerations, and so the SSHD 'must necessarily enjoy a wider margin of appreciation'.

The court in *AA v SSHD* also again made clear that the duty to obtain information in order to determine a child's best interests did not require the SSHD herself to investigate the child's asylum claim – the burden of proof remains with the applicant.<sup>102</sup> In Part 4 we will consider whether, when considering children's claims, an adversarial system that places the sole burden on the child is truly compatible with a system that is also supposed to consider their best interests.

Thus it appears that this line of cases has shifted focus from a proper consideration of the child's asylum claim, or of his best interests. Courts now routinely find that because a family member paid for a child's journey X years previously, it must be assumed that they will be able to receive the child back into their care: and conclude that, because a child cannot prove that they are not in touch with their families, they must be in touch, and therefore can be returned and their families will meet them and take care of them. None of that is evidence, only supposition, but to defeat those arguments needs good preparation.

### 3 Should the courts act as a sanction against the Secretary of State?

Recent judgments considering 'legacy' cases<sup>103</sup> show a lack of appetite in the higher courts for an expansion of the *Rashid* 'corrective principle', certainly where the issue is 'only' the random exclusion of a claimant from a backlog-clearing programme. However, in *SHL*, a child accepted to have been trafficked to the UK, found to be under 18 on arrival, largely credible, and with no relatives to return to, was yet denied refugee status, because by the time his asylum claim was conclusively determined he was over 18. As with some of our sample, had their cases been promptly and appropriately handled upon arrival when they were younger children, they may well have been granted refugee status. Clear errors of law and procedure had arguably been made during the processing of these claims. In his recent report<sup>104</sup> the Independent Chief Inspector of Borders and Immigration said:

*Asylum claims made by unaccompanied children are some of the most sensitive cases dealt with by the Home Office. They are a particularly vulnerable group and for that reason their applications are subject to specific procedural safeguards.*

## SECTION C: ‘CORRECTIVE REMEDY’ AND FAMILY TRACING: LEGAL DEVELOPMENTS FROM KA ONWARDS (CONT)

A legal error in determining an individual claim of this kind is clearly different in quality from the kind of administrative randomness complained of in legacy cases. Arguably it is different even from the mischief suffered by *Rashid* and *R (S)*, where bureaucratic workflow management led to their cases among hundreds of others not being considered under the correct policy.

Where the detriment arises from an error in deciding or making a judicial determination on an individual claim requiring ‘anxious scrutiny’, a failure to apply any corrective remedy in our view arguably presents a problem for the rule of law itself. Given the evidence, from more than this research, of poor-quality determination of young people’s asylum claims, Sir Stanley Burnton’s and other judges’ unwillingness to use the courts as a sanction against the Secretary of State<sup>105</sup> looks particularly problematic. Poor handling of a child’s asylum claim leads in these types of cases to a decision that is far more difficult to appeal once the young person has turned 18 and no longer entitled to the additional protections appropriate to minors. There is no other remedy available to these young people,<sup>106</sup> and given the worsening situation in Afghanistan it is unsurprising that many remain in the UK unlawfully.

In the 2012 case of *AA (Afghanistan)*<sup>107</sup> Laws LJ held that where it is alleged that the decision maker has failed to take into account past unlawful conduct the court will only intervene on traditional public law grounds. This leaves the weight to be placed on the unlawful conduct to be decided by the same decision maker who itself committed the unlawful conduct.

Those ‘corrective remedy’ arguments have been made in a number of recent reported cases, with facts similar to those in our sample, but few, whether on the family tracing point or in relation to other historical illegalities, have been successful. The cases below show that the courts’ approach to corrective remedies has hardened, and even in successful cases the relief granted is uncertain.

In *Jabarkhail*,<sup>108</sup> it was acknowledged by the court that had the SSHD tried and failed to trace the 15 year old claimant’s family, and that this could have corroborated his claim to be an unaccompanied child, which should have led to a grant of asylum. However:

*‘...that loss of a possibility does not amount to the establishment of a disadvantage or prejudice of the sort contemplated by KA and EU that would justify departing*

*from the decision that, on the basis of the present facts and circumstances there was no risk to the claimant if he returned to Afghanistan’. (para 31)*

*Mamour*<sup>109</sup> was accepted on appeal to be 16. However, in breach of Home Office policy, he was not granted any leave. A fresh claim was rejected and the applicant (now well over 18) was removed. A High Court judge accepted that the SSHD failure to grant leave had been unlawful, but did not order the appellant’s return to the UK, and made it clear that he did not require the SSHD to grant leave, only to reconsider the representations according to policy.

Social Services first assessed *AA*<sup>110</sup> as aged 19 but later accepted that he had been 15 on arrival. His claim was processed with no appropriate safeguards, refused, and he was not represented at his appeal. The Home Office delayed reconsidering his claim until after his 18th birthday and then refused to grant any leave because he was over 18. The High Court ordered the SSHD to grant 3 years’ DL following *AA* [2007].<sup>111</sup> In the Court of Appeal, Laws LJ held that the erroneous age assessment was not a circumstance that led to such conspicuous unfairness as to *require* a corrective remedy. He did suggest that the SSHD should consider if a decision before his 18th birthday might have produced a favourable outcome, but did not order any specific decision.

In *TN & MA v SSHD*,<sup>112</sup> it was argued that granting DL for less than a year with no right of appeal against first refusal deprived an applicant of an effective remedy under European law. This was rejected, as judicial review was held to be a sufficient remedy. For one appellant it was further argued that delaying the appeal until this young person had turned 18 disadvantaged him in terms of the assessment of credibility. This was dismissed as the rejection of his case had been well reasoned and unequivocal. Yet again an appellant was placed at the ‘wrong end’ of Kay LJ’s ‘hypothetical spectrum’.

*Hashemi v UT*<sup>113</sup> concerned a child without parents who arguably had a claim for refugee status as an orphan. He had not appealed his first refusal, and was over 18 when his appeal against his second refusal was heard. The court held that he had suffered no disadvantage by SSHD’s failure to trace, as he could give little information about his family. Crucially the judge noted that **‘there is a presumption the claimant was properly advised and took an informed and advised decision in respect of any appeal. There is no evidence at all that the solicitors here made any mistake of professional judgment or otherwise’** (para 57, *writers’ emphasis*). Our research shows that this presumption that young people make informed decisions about the conduct of their claim is unsafe.



#### 4 Too much reliance on ‘corrective remedies’? The importance of better case preparation and appealing the first refusal

The reported cases examined above show that strategic litigation aimed at finding corrective remedies for children has not been effective in holding the Home Office to account for past errors and illegalities. Nor has it led to better decision-making.

The above cases show how hard it is, and what litigation lengths must be gone to, for former child asylum-seekers to gain leave even where past illegalities are established. Even the cases that were partially successful, such as *Kuchiey*,<sup>114</sup> do not in practice create effective precedents for other young people.

Every applicant wishing to advance these arguments has to re-litigate the issue for themselves. With cuts to legal aid and changes to judicial review fees and funding, it will be difficult for those who have suffered a historical error of law or procedure to pursue litigation.

Halliday<sup>115</sup> has argued that judicial review as a method of ensuring executive accountability may have limited impact if the structural conditions in which the administration of law in government takes place is not conducive to the development of *legal conscientiousness*. Our research, along with the other quoted studies, shows that, in relation to young Afghan asylum-seekers, ‘legal conscientiousness’ is often downgraded, or even absent, from Home Office and even tribunal decision-making.

CONTINUED OVERLEAF



## SECTION C: ‘CORRECTIVE REMEDY’ AND FAMILY TRACING: LEGAL DEVELOPMENTS FROM KA ONWARDS (CONT)

In particular, the Home Office’s defensive response to the family tracing challenges in the short time between *DS (Afghanistan)*<sup>116</sup> (decided in 2011) to *AA (Afghanistan)*<sup>117</sup> (decided in 2013) has turned family tracing from a positive obligation to be used to further a young person’s best interests to yet another issue relied on by decision-makers and tribunal judges to assail young people’s credibility. A child’s good reasons for not wanting to trace a particular family member, or declining an offer to trace (in circumstances where tracing is admitted to be impossible) invariably leads to negative findings of fact for the child.

Practitioners at our round table discussion agreed that family tracing issues are still important and must be competently dealt with during case preparation. It is important that a tribunal sees all the client’s attempts to cooperate and the Secretary of State’s inaction. However, tribunal judges’ responses to this issue vary widely.<sup>118</sup>

The round table participants considered that people had unrealistic expectations in the wake of the *KA* decision. It is clear that only exceptionally will the courts order the Secretary of State to remedy past mistakes, noting that the political context is more hostile than in the days of *Rashid*. The participants nevertheless felt that breaches of procedural fairness in a given case are still important and practitioners should still consider making representations in relation to ‘illegal entry interviews’, as in *AN & FN*.<sup>119</sup> However, our conclusion from our research, supported by the majority of the round table participants, is that **the salient issues are to ensure that young people’s initial claims are well prepared, and that they appeal any first refusal while still a minor.**

SECTION D:  
AN ALTERNATIVE  
APPROACH TO ASYLUM  
DETERMINATION FOR  
CHILDREN AND  
YOUNG PEOPLE?

Currently we remain burdened with a system of asylum determination for unaccompanied young people which, though claiming to act in their best interests, in fact keeps the majority in a state of uncertainty and anxiety<sup>120</sup> by granting DL, a decision amounting to a stay of removal until they reach 18, at which point international conventions on the rights of the child cease to apply. It appears that there is a conflict between the need proactively to consider the child's best interests and an adversarial refugee determination procedure which places the burden of proof squarely on the child.<sup>121</sup>

Those with proactive and tenacious representatives and who manage to successfully navigate the asylum system may gain refugee status and the path to a sustainable future in the UK, while the rest remain in the ante-room to removal. This does not seem an appropriate way to address the challenges of the forced migration of young people from countries such as Afghanistan. We ask whether there should be *any* aspect of arbitrariness in deciding the future prospects of young people when it is an agreed principle to put their best interests first.

Several alternative approaches have been proposed to the handling of children's asylum claims, in which a child's best interests may constitute a ground of protection in its own right. Goodwin-Gill has argued that *'we should move beyond the blinkered notion that an answer to children in flight lies in refugee status determination'* and that the Convention on the Rights of the Child should lead to a total realignment of protection towards a complete welfare approach.<sup>122</sup> What is in the best interests of a child must be understood to include decisions and actions which will affect the child after the age of eighteen, and this should be the key focus when making decisions about their immigration status. It has been argued that a child is foremost a child, before he or she is a refugee, and protection needs should be assessed in the specific framework of the Convention on the Rights of the Child.

The Coram Children's Legal Centre held a round table discussion in December 2011 to discuss the development of a new model of assessment and status determination, better equipped to meet the needs and best interests of children and young people.<sup>123</sup> This suggested that a new international child protection division of the family court, freed from the political imperatives associated with immigration control and adopting a more inquisitorial, co-operative approach, whose primary function is to ensure that the best interests of children is met, may be a progressive alternative to the current refugee status determination procedure. In our view the principal, immediate, benefit would be the shift of burden of proof from the child applicant to a shared burden.<sup>124</sup> However, our round table participants felt that for those children and young people who qualify for international protection, a formal recognition of refugee status, and the concomitant leave to remain, is important.

The Upper Tribunal recently stated in *JS (Former unaccompanied child – durable solution) Afghanistan*<sup>125</sup> that **'This Tribunal is not concerned with future planning for the welfare of children. Our concern is whether the appellant is entitled to humanitarian protection or whether returning him will be in breach of Article 8' (para 35 – writers' emphasis)**. Given this admission, arguably a different tribunal is needed which will take a more holistic approach to the needs of unaccompanied children.

Our research shows clearly that such an approach is a long way from what happens to young asylum-seekers under UK procedures. The Immigration Bill, passing through parliament at the time of writing, shows no intention of adopting a more progressive approach to the consideration of unaccompanied minors' asylum claims.<sup>126</sup> Instead the UK, together with Norway, Sweden and the Netherlands, is currently involved in the European Return Platform for Unaccompanied Minors (ERPUM) which is seeking new ways to return minors to Afghanistan before they turn 18. In order to achieve this it is intended to develop ways of contacting the parents of asylum-seeking minors to facilitate return, or alternatively establishing 'dedicated care centres' in Afghanistan.<sup>127</sup> It is unclear to what extent the child's best interests will be considered when making any such decision.

## Conclusion

Our research examined the whole of the asylum process experienced by young people in Kent. Our evidence has supported concerns raised in a number of reports about different aspects of the asylum process for young people in the UK. Our intention at the outset was to assist as many clients as possible to make further claims, using 'corrective remedy' submissions where appropriate. During the course of the research, as the law has developed post-*KA*, the courts have shown themselves increasingly unwilling to intervene in such cases, with a dismaying reliance on credibility issues even in the higher courts. We doubt whether this litigation has had a positive impact on the 'legal conscientiousness' of the Home Office. In particular, the tracing duty, imposed for the purposes of safeguarding the best interests of minors, has become yet another aspect of the adversarial asylum process that can be used to young people's disadvantage.

Our research has reinforced the conclusions of many other cited reports, of the crucial importance of good early case preparation and appealing the first refusal. Analysing the 'asylum journey' experienced by our 'failed asylum-seeker' clients has been acutely frustrating for us as practitioners, as it is clear that in some cases the outcome would have been different had the cases been handled in a timely and legally correct way from the outset. As the conflict in Afghanistan continues, more young people continue to arrive in Kent and pass through the current flawed asylum process. A few will be fortunate and be recognised as refugees. The majority will make the transition into adulthood with continuing anxiety over their immigration status. With no real prospect of improving the asylum process, it is arguably time to give serious consideration to alternative models for the consideration of children's claims.

# NOTES

- 1 UASC (unaccompanied asylum-seeking minor) leave, introduced on 6/4/2014
- 2 The UK Border Agency was abolished on 31/3/2013. For simplicity, we refer to 'Home Office' throughout.
- 3 Children (Leaving Care) Act 2000. This act amends the Children Act 1989 by replacing provisions in section 24 on after care of children looked after by local authorities.
- 4 *KA (Afghanistan)* [2012] EWCA Civ 1014
- 5 See Acknowledgments, above
- 6 Asylum data immigration statistics, Home Office <https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2012-2>. It is well known that Home Office statistics cannot track applications through the process, so decisions made in a given year cannot be related to applications made in any particular previous period.
- 7 Statistics supplied by Kent Social Services in response to FOI request 16/07/13
- 8 Asylum data immigration statistics, Home Office: <https://www.gov.uk/government/publications/tables-for-immigration-statistics-april-to-june-2013>.
- 9 In the writers' experience, in very few cases (not just the cases in this study) has the Home Office made any enquiries or even referred to any information on the availability of social services in (any) country of origin.
- 10 Statement of changes to the immigration rules HC1039
- 11 It is important to note that 31 of these remained under 18 at the date of the decision, only 1 had turned 18 at the date of the decision
- 12 This is very similar to the total recognition rate of claims from adult asylum seekers from Afghanistan (16.6%) in the same year, see fn 8 above. [2012 stats]
- 13 The majority of these had arrived when under 18 but had turned 18 when they received the refusal decision.
- 14 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers From Afghanistan 2013
- 15 Of 19 decisions involving unaccompanied children from Afghanistan who were now over 18, only 2 were granted asylum and 17 were refused leave altogether (see statistics at fn5 above).
- 16 A project: 'Positive Futures', run by South East Strategic Partnership for Migration, with FCO funding, proposing a short period of training, then return to Afghanistan under the AVR scheme, is currently being evaluated.
- 17 Figures obtained on FOI request by Stop Deportations! <http://stopdeportations.wordpress.com/2013/06/13/charter-flight-stats-q1-2013/>
- 18 Referred to most recently in the House of Commons Home Affairs Committee's report on asylum HC 71, 11 October 2013
- 19 Although casework for unaccompanied child asylum cases was paid for at hourly rates, it seemed to the writers that some of the legal work looked as if it was being done under a fixed fee regime – see the section on legal representation.
- 20 See fn 4 above
- 21 Council Directive 2003/9/EC (the Reception Directive) art 19.3
- 22 *R (Rashid) v Secretary of State for the Home Department* [2005] INLR 550
- 23 *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546
- 24 See fn 22 above
- 25 See fn 23 above
- 26 *Ravichandran v Secretary of State* [1996] Imm AR 97
- 27 *R (Rashid)* para 36 see fn 22 above
- 28 The R(S) guidance was withdrawn on 20/12/2010 and is no longer on the UKBA website
- 29 Again in *R (S, H, Q v SSHD)* [2009] EWCA Civ 334 it was held that when the SSHD exercises her discretion whether to grant indefinite leave to remain, she should have regard to the 'correction of injustice caused by the previous unlawful failure to apply the policy'.
- 30 *AA (Afghanistan)* [2007] EWCA Civ 12
- 31 Home Office guidance to senior caseworkers & SAT (sic) when dealing with further representations in the light of the case of *AA (Afghanistan)* (Kent Law Clinic FOI request 23/4/13, replied to 4/7/13)
- 32 *SL (Vietnam) v SSHD* [2010] EWCA Civ 225
- 33 Procedural guidance was given by Stanley Burnton J (as he then was) in *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin). In March 2003 practice guidelines were published by the London boroughs of Hillingdon and Croydon that were approved by the High Court and became the legal standard for formal assessments known as Merton-compliant age assessments.
- 34 See below fn 47 [AN & FN]
- 35 *DS (Afghanistan) v SSHD* [2011] EWCA
- 36 See fn 21 above (reception D)
- 37 Asylum Seekers (Reception Conditions) Regulations 2005 2005/7
- 38 See fn 35 above
- 39 Borders, Citizenship and Immigration Act 2009 (BICA 2009) s55
- 40 *LQ (Age: immutable characteristic) Afghanistan* [2008] UKAIT 00005
- 41 A 'country guidance' case is a case chosen by the Immigration Tribunal (first tier or upper tier) to examine in detail the facts about a particular aspect of persecution in a particular country in great detail, and their findings of fact are binding on subsequent tribunal cases.
- 42 *AA (unattended children) Afghanistan* CG [2012] UKUT 16 (IAC) (headnote para (2)) held that '...the background evidence demonstrates that unattached children returned to Afghanistan ... may be exposed to risk of serious harm, inter alia from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection'.
- 43 *HK and others Afghanistan v. Secretary of State for the Home Department*, CG [2010] UKUT 378 (IAC)
- 44 *HK (Afghanistan) & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 315 para 34
- 45 Local organisations working with the target group made initial referrals, and these clients having received advice would then refer friends who were in a similar situation.
- 46 Screening interview and any other initial interview, SEF/statement, SEF/interview, Reasons for Refusal letters (RFRL), Applications for further leave, Determinations of first-tier tribunal, applications for permission to appeal and further determinations.
- 47 We do not believe that the recent inspection report by the Independent Chief Inspector of Borders and Immigration deals adequately with stakeholders' concerns about the handling of asylum applications from children, and appears to these writers to be dangerously complacent. ( *An Inspection into the Handling of Asylum Applications Made by Unaccompanied Children*, Independent Chief Inspector of Borders and Immigration, October 2013)
- 48 *AN (A child) & FA (A child) v SSHD* [2012] EWCA Civ 1636.
- 49 *Landing in Dover: The immigration process undergone by unaccompanied children arriving in Kent* Children's Commissioner, January 2012



- 50 *Landing in Dover*, above, Section 4.5
- 51 Kent LIT to Elder Rahimi Solicitors 31 May 2013
- 52 Elder Rahimi Solicitors to Kent LIT and KSS, October 2013
- 53 Home Office APU guidance on age assessments
- 54 UNHCR Quality Initiative 6th report April 2009
- 55 Home Office asylum process guidance *Processing asylum applications from a child 13.1 first bullet point*.
- 56 The cases of *M.S.S. v. Belgium and Greece*, ECtHR Application no. 30696/09 and *N.S v Secretary of State for the Home Department* (C-411/10), held respectively that there was a risk of breach of art 3 ECHR for asylum-seekers in Greece, and that where Member States 'knew or ought to have known' that there is such a risk, it amounts to a breach of art 3 to purport to return an asylum-seeker to that country. Several of our clients had s8 A(TC)A 2004 findings made against them in relation to Greece despite these judgments.
- 57 *Considering the protection claim and assessing credibility* Home Office Asylum Process Guidance (UKBA website) paras 4.3.5, 4.3.6
- 58 The Chief Inspector's recent report (see fn 47 above) also criticises long refusal letters with containing irrelevant information, but makes no comment whatever on the reliance on 'incredibility and implausibilities' in coming to the decision.
- 59 *SSHD v Skenderaj* [2002] EWCA Civ 567
- 60 *K & Fornah v SSHD*[2006] UKHL 46
- 61 *Horvath v SSHD* [2000] UKHL 37
- 62 *Januzi v. Secretary of State for the Home Department & Ors* [2006] UKHL 5
- 63 *RQ (Afghan National Army – Hizb-i-Islami – risk) Afghanistan CG* [2008] UKAIT 00013
- 64 See fn 54 above, p22 UNHCR report
- 65 Statistics available at <https://www.gov.uk/government/publications/asylum-data-tables-immigration-statistics-january-to-march-2012-volume-3> Table as9q
- 66 *UNHCR Handbook on procedures and criteria for determining refugee status* (Geneva 1992) paras 62-64
- 67 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4
- 68 The Chief Inspector comments on a similar case example given at fig 28 of the recent inspection report (see fn 47 above page 57) suggesting that stating that 'a grant of DL was in the child's best interests at the present time' met the best interests duty.
- 69 *LD (Article 8 – best interests of child) Zimbabwe* [2010] UKUT 278
- 70 See the Chief Inspector's example referred to at fn 69 above
- 71 See also the case of *Y v SSHD* [2013] EWHC 2127 for consideration of the impact that an uncertain immigration status can have on the mental health of a young asylum seeker who was granted DLR on Article 8 grounds following a successful appeal. Upon judicial review the court recommended that the SSHD should consider granting ILR.
- 72 Contrast this with what the Courts have said in cases concerning older children – see *JS (durable solution)* (fn 125 below) and *AA (Afghanistan)* (fn 107 below)
- 73 *Interim guidance for asylum caseworking and appeals presenting staff on the court of appeal judgment on KA (Afghanistan) and others* (Kent Law Clinic FOI request)
- 74 See fn 35 above [DS]
- 75 For example, a Lord Chancellors Department report 1999, quoted in the Legal Services Commission's magazine *Focus* issue 26, 1999; a Constitutional Affairs Committee 2003-4 report *Asylum and Immigration Appeals; Evaluation of the Solihull Pilot for the UK Border Agency and the Legal Services Commission* Independent Evaluator Jane Aspden 2008.
- 76 *Working with children and young people subject to immigration control: Guidelines for Best Practice*, Crawley, H (2012) 2nd edition ILPA
- 77 *Lives in the Balance: The quality of immigration legal advice given to separated children seeking asylum* Refugee Council February 2011
- 78 This refers to the 'merits test' to which an appeal must be subjected before granting public legal funding to it. In general a claim must have a more than 50% chance of success, and a provider must win at least 40% of their appeals in any year. Research by Devon Law Centre (*Final report of the Asylum Appellate Project, Devon Law Centre March 2010*) showed that in fear of breaching the '40%' performance indicator, providers often wrongly refuse public funding in many appeals which would pass the 50% merits test. Their figures showed that approximately 80% of their sample had been wrongly refused legal aid. Some of the cases discussed in that report concerned children, but no separate statistics were kept). A continuation project by Refugee Action found that 64% of asylum applicants had been wrongly refused legal aid for their appeal. (*An interim external evaluation of Refugee Action's Access to Justice Project* Ceri Hutton and Sue Lukes, External Evaluators, October 2013)
- 79 Standard form for refusing Controlled Legal Representation (CLR) public funding for legal representation in an immigration or asylum appeal
- 80 Controlled Legal Representation – the form of legal aid for appeals.
- 81 *Working with refugee children: Current issues in best practice*, ILPA May 2011. See Legal Services Commission Funding Code chapter 29.29 (now difficult to access online), and Legal Services Commission Immigration Team Newsletter 20 June 2005 (on the ILPA website). Although note that the criteria for satisfying the merits test have recently been amended by the Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2014 SI2014/131
- 82 *Devaseelan v SSHD* [2002] UKIAT 000702 paras 39-42 set out Tribunal guidelines for dealing in second appeals with findings made on evidence presented in earlier appeals, confirming that findings made in earlier appeals are 'a starting-point'. In the view of most of the round table participants, some practitioners adopt an overly deferential approach to these guidelines.
- 83 One participant gave a success rate of 80%
- 84 Council Directive 2004/83/EC of 29 April 2004
- 85 Such as the ILPA publications *Making an asylum application – a best practice guide* Coker, Kelly, Soorjoo, ILPA 2002; *Representing at immigration appeals – a best practice guide* Coker, Gillespie, Shutter, Stanley; ILPA 2005, foreword by Mr Justice Collins; *The Detained Fast Track Process – a best practice guide* ILPA 2008; *Working with children and young people subject to immigration control – Guidelines for best practice* ILPA/Heaven Crawley 2012
- 86 Afghan identity document
- 87 *Navigating the system: Advice Provision for young refugees and migrants*, Coram Children's Legal Centre, May 2012, pp37-38,
- 88 *Lives in the Balance: the quality of immigration legal advice given to separated children seeking asylum* Refugee Council, February 2011, s 3.4 fourth para
- 89 In what follows we have applied a second level of anonymity to the cases to preserve confidentiality and yet provide enough detail from which to draw research conclusions.
- 90 Section 83 of the Nationality, Immigration and Asylum Act 2002
- 91 It is not known whether any of the representatives in those cases considered or advised about judicial review, but we saw no reference to post-refusal representations of any sort
- 92 This was before the cases of *Ahmadi* (s47 decision: validity; *Sapkota*) [2012] UKUT 00147 (IAC) and *Adamally and Jaferi* (s47 removal decisions: Tribunal procedures) [2012] UKUT 00414 (IAC) in which it was clarified that the judge could substantively determine the appeal against the decision to refuse leave.
- 93 See fn 44 above [HK]

## NOTES (CONT)

- 94 See Section 3 below
- 95 *EU (Afghanistan) & Ors v Secretary of State for the Home Department* [2013] EWCA Civ 32
- 96 *SHL (Tracing obligation/Trafficking) Afghanistan* [2013] UKUT 00312 (IAC)
- 97 We believe this appellant has appealed to the Supreme Court
- 98 Whereas objective evidence on child migration, from Afghanistan and elsewhere, shows that motivations and drivers are complex – see for example *Broken futures*: report from the *Youth on the Move* segment of the Refugee Support Network; *Complexities and Challenges in Afghan Migration: Policy and Research Event*: Maastricht University Policy brief no 14, 2013)
- 99 *SHL* (fn 96above) para 29, referring to *EU*, states: ‘*Arguably the most important feature of this decision is that it appears to give its quietus to (Rashid)...*’ Readers might contrast the fate of *SHL* with that of the appellants in the country guidance case of *HM (Iraq)*, for whom that CG determination was quashed in the Court of Appeal on the basis that a CG case should not proceed without there being a ‘proper contradictor’ (para 31, *HM (Iraq) & Anor v Secretary of State for the Home Department* [2011] EWCA Civ 1536.
- 100 *AA (Iran), R (On the Application of) v Upper Tribunal (IAC) & Anor* [2013] EWCA Civ 1523
- 101 *AA v SSHD* [2013] EWCA Civ 1625
- 102 See *SS (Nigeria)* [2013] for another case, albeit in the context of deportation proceedings, in which the Court of Appeal seeks to limit the SSHD’s duty to pro-actively obtain information that will facilitate a determination of the best interests of the child. This is a move away from the earlier position of *Tinizaray v SSHD* [2011] EWHC 1850 (Admin) and indeed Elias LJ’s comments in *HK* stating that ‘...the SSHD should obtain as much information as is reasonably possible to assist her in determining where those best interests lie’ (para 40)
- 103 *Mohammed v Secretary of State for the Home Department* [2012] EWHC 3091 (Admin), *R(on the application of Geraldo) v SSHD* [2013] EWHC 2763 (Admin), *DM Re Judicial Review* 2013 CSOH 114
- 104 See fn 47 above, Introduction, 1st para
- 105 See fn 95 above para 6
- 106 Academics and public law theorists may point to the Parliamentary Ombudsman service, but only one of the many limitations to that remedy is the lack of injunctive relief.
- 107 *The Queen on the application of AA (Afghanistan)* [2012] EWCA Civ 1643 para 18
- 108 *Jabarkhail, R (on the application of) v SSHD* [2013] EWHC 1798
- 109 *Mamour, R (on the application of) v Secretary of State for the Home Department (FCJR)* [2013] UKUT 86 (IAC)
- 110 See fn 107 above [aa laws]
- 111 See fn 30 above[AA 2007]
- 112 *TN & MA v SSHD* [2013] EWCA Civ 1609
- 113 *Hashemi v Upper Tribunal (IAC)* [2013] EWHC 2316
- 114 *Kuchiey* [2012] EWHC 3596 Civ
- 115 *Judicial Review and compliance with administrative law* Simon Halliday, Hart Publishing 2004
- 116 See fn 36 aboveDS
- 117 See fn 99 above AA 2013
- 118 One of the round table solicitors found in an appeal determination that he himself was held to have breached *his* duty to trace the appellant’s family.
- 119 See fn 45 Above
- 120 At the first symposium in the ‘*Uncertain Journeys*’ series Sue Clayton referred to her longitudinal study on Afghan young people in the UK which shows steady decline in their mental health as they approach 18, and the fear of refusal and removal looms over them. *A Credible Witness? Deconstructing the Narratives of Separated Children Seeking Asylum* 26 November 2013, Royal Holloway College, University of London, Garden Court Chambers, funded by ESRC
- 121 And none of the refusal letters or Tribunal determinations in our cases mentioned the *shared* duty to establish and evaluate all the relevant facts, as set out in the *UNHCR Handbook on procedures and criteria for determining refugee status* para 196
- 122 *Expert roundtable discussions on the UNCRC and its application to child refugee status determination and asylum process* Journal of Immigration Asylum and Nationality Law (2012)
- 123 *Promoting the best interests of the child in the UK asylum law and procedures*, Bolton, S (2012) Journal of Immigration Asylum and Nationality Law
- 124 For an example of particularly poor practice in the FTT (IAC) see ST (Child asylum seekers) Sri Lanka [2013] UKUT 00292 (IAC), in which a 10 year old whose account was not being contested by the Home Office was required by the judge to give evidence without a suitable interpreter and then had his account comprehensively discredited.
- 125 *JS (Former unaccompanied child – durable solution) (Afghanistan)* [2013] UKUT 568
- 126 Although a presumably unintended consequence of the proposal to abolish most appeal decisions may be that all minors refused asylum will receive an initial right of appeal (Immigration Bill part 2 s11).
- 127 *The deportation of unaccompanied minors from the EU: Family tracing and government accountability in the ERPUM Project* Refugee Studies Centre Workshop Report May 2013



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