Neutral citation number: [2011] EWHC 2937 (Admin)

Case No: CO/1269/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Sitting at:
Leeds Combined Court Centre
1 Oxford Row
Leeds
West Yorkshire
LS1 3 BG

Date: 6th December 2011

Before :

HIS HONOUR JUDGE JEREMY RICHARDSON QC

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Between :

R (on the application of) ABC (A MINOR) (AFGHANISTAN)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Ms Melanie Plimmer (instructed by **Harrison Bundy Solicitors**) for the Claimant
Mr Jonathan Auburn (instructed by the **Treasury Solicitor**) for the Defendant

Hearing dates: 7th November 2011

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JUDGMENT

His Honour Judge Jeremy Richardson QC:

Introduction

1. This application for judicial review raises important issues about how the Secretary of State for the Home Department (the Home Secretary) should deal with young persons who arrive in the United Kingdom and claim asylum when it is asserted they have committed a serious crime abroad. In the factual context of this case, that issue is not merely an interesting academic question – but a real and truly difficult matter affecting the life of a 16 year old youth. I remind myself I am not the decision maker; I am simply deciding whether the decision of the Home Secretary was lawful. I shall refer to the Home Secretary hereafter as SSHD. I appreciate the decisions in this case were taken by officials acting on her behalf.

2. There are three preliminary observations I should make at the outset of this judgment.

3. First: I do not doubt the difficulty of the decision that has to be made in this case and cases like it. Some decisions made by ministers, or officials on their behalf, are fairly straightforward, but on occasion the decision is truly difficult. It is important for the court to acknowledge the conscientious way in which officials endeavour to do what is right in accordance with the law (which frequently requires detailed analysis of facts and the interpretation of far from straightforward legal principles). The officials in this case have been conscientious in their endeavour. The issue relates not to their industry, but whether the decisions are lawful.

4. Second: it cannot be disputed that any country has a perfect right to exclude persons who seek to use their country as a hiding place from justice in another country. Various international obligations applicable to the United Kingdom (to which this country has freely submitted) make it plain beyond doubt that the UK (through the SSHD) is entitled to exclude humanitarian relief or asylum to individuals in respect of whom there is serious belief: (a) to have committed war crimes or crimes against humanity; or, (b) to have committed a serious crime; or, (c) to have committed an act contrary to the purposes and principles of the United Nations. These guiding principles are enshrined in the **Convention Relating to the Status of Refugees of 1951 (Cmd 9171)** (the Refugee Convention); see in particular Article 1F. The principles are also repeated in slightly different terms (albeit with identical effect) in a European Union directive, namely **Council Directive 2004/83/EC** (the Council Directive); see in particular Article 12.2. For the sake of absolute clarity these international obligations have been incorporated into UK domestic law by the **Refugee or Person in Need of International Protection (Qualification) Regulations 2006** [made under section 2(2) of the **European Communities Act 1972** (the Qualification Regulations)]; see in particular paragraph 7. No one doubts that alleged war criminals and those who are alleged to have committed serious crimes should not regard countries like the UK as a safe haven. Such individuals (providing they have been lawfully adjudged as being in the exempted category) are not entitled to the protection of the Refugee Convention or the Council Directive. Ministers have a right to exclude such individuals from the protective mechanisms under these international obligations. I fully accept the argument that the UK should not be seen as an easy place to peddle spurious human rights arguments and thereby admit serious

criminals. Equally, the UK is a country that respects human rights when genuine. The reconciliation of these two concepts is not always easy. The role of this court is purely to apply the law.

5. Third: Article 1F of the Refugee Convention; Article 12.2 of the Council Directive; and paragraph 7 of the Qualification Regulations are applicable to everyone including children; but it is always worth any decision maker remembering, and having well to the forefront of his or her mind, that in the case of a young person the primacy (not supremacy) of welfare considerations should be manifest. What might be regarded as the right approach for an adult is not always the right approach for a child or young person. This obligation to discharge immigration and asylum decision making, having regard to the need to safeguard and promote the welfare of children, arises in express terms pursuant to section 55 of the **Borders, Citizenship and Immigration Act 2009** (the 2009 Act).

6. In this case the claimant is now aged 16 years. He was aged 14 when the alleged crime occurred. Even though cases of this kind are usually referred to by initials rather than the full name of the claimant, I feel that an additional layer of protection is required here, and for that reason have decided an order under section 39 of the **Children and Young Persons Act 1933** must be made so that there may be no reporting of the claimant's name or anything else calculated to identify him. In consequence, I shall camouflage certain facts within this judgment which might reveal too much. Indeed, I propose to refer to the claimant as ABC. His real initials should not be referred to hereafter if this case is either reported or the subject of any appellate proceedings. There is no harm by indicating he comes from Afghanistan. Beyond that, details about him need to be camouflaged. I would regard it as a serious contempt of court for anyone to disobey the order I make in this case under section 39.

7. This case does not concern an individual alleged to be a war criminal; and, therefore, the only relevant international provisions relevant to this case are Article 1F(b) of the Refugee Convention; Article 12.2(b) of the Council Directive and paragraph 7 of the Qualification Regulations. In reality the issue in this case arises under paragraph 339D of the **Immigration Rules** which embody the above international and domestic law. The impact of section 55 of the 2009 Act is also highly relevant to this case.

The Application for Judicial Review

8. The claimant is a citizen of Afghanistan. He is aged 16 and arrived in the United Kingdom on 16th May 2010 when he was aged 14. He applies for judicial review of the decision of the SSHD to: (1) exclude him from asylum and humanitarian protection, and; (2) refuse to grant him discretionary leave to remain in the United Kingdom. The basis of the decision is that he is alleged to have committed a serious crime whilst in Afghanistan. The decision is incorporated in three separate letters of the SSHD on 11th November 2010; 21st December 2010; and a further letter of 2nd August 2011 (see infra) written after the commencement of proceedings.

9. The application for judicial review was commenced on 10th February 2011. The claimant was given permission to apply for judicial review by His Honour Judge Gosnell following an oral hearing on 28th June 2011 on two grounds:

(1) The SSHD was wrong to exclude the claimant from humanitarian protection on the grounds he had committed a serious crime; and,
(2) The SSHD was wrong to exclude the claimant from discretionary leave until he is aged 17 ½ having regard to section 55 of the 2009 Act and the decision of the Supreme Court in ***ZH (Tanzania) v Secretary of State for the Home Department*** **[2011] UKSC 4.**

10. In simple terms the SSHD has removed the claimant from the realm of a potential asylum and humanitarian protection, and discretionary leave because it is asserted he has committed a serious crime in Afghanistan. This decision was somewhat modified by the SSHD on 2nd August 2011. It has been decided that it is unsafe to remove him to his country of origin at present, but this decision will be reviewed every 6 months by the SSHD. The claimant is currently residing in a childrens' home operated by the social services department of one of the larger cities in northern England.

11. I propose to divide this judgment in to the following sections for ease of reference:

(1) Introduction

(2) The Application for Judicial Review

(3) The Basic Facts

(4) The Decisions of the Secretary of State

(5) The *Serious Crime* Issue

(6) The *Section 55* Issue

(7) Conclusion

12. I have been considerably assisted by counsel in their written and oral submissions in resolving this case. It enabled the case to proceed with expedition at the hearing on 7th November 2011. I decided to reserve judgment given the importance of the decision for the 16 year old claimant. The precise issues in this case have not been, I am told, the subject of any previous decision of this court in relation to a young person. Upon any analysis the claimant is in a truly difficult position many miles from his homeland and has been placed in a form of limbo by the decisions of the SSHD not knowing for more than 6 months at a time what his future holds.

The Basic Facts

13. The SSHD has made it clear, in a letter written on her behalf on 11th November 2010, that the credibility of the claimant is not seriously disputed. That was an entirely reasonable decision as the claimant has stated a number of things which might be regarded as against his interest – and therefore rather more likely to be true. Consequently, the facts of this case are not in dispute.

14. The claimant made a statement for the purposes of his asylum claim which sets out much of the history. It was recited at some length in the initial letter of the SSHD (11th November 2010) and can be further distilled as follows:

    (1) The claimant is the son of a religious mullah who was desirous of his son following the same path. The family lived in Afghanistan (I do not need to set out the details although the SSHD set out much detail as to the location and ethnicity of the claimant). The family consisted of the claimant's mother and father together with other half and full siblings. Certain older half-brothers were not well disposed to the young claimant.

    (2) The father and the older half-brothers would not let the claimant attend school and insisted he attend the madrassa for morning religious instruction. During afternoons the claimant was forced to make rugs. Younger brothers were subject to the same regime.

    (3) The claimant was subject to beatings by the older half-brothers. This included punching and kicking. On one occasion the claimant asserted he was burned by a cigarette which is evidenced by a scar on his arm. Additional assaults were visited upon the claimant which resulted in other injuries and scars. If the account of the claimant is accurate (which I have no reason to doubt) he was subjected to systematic and repeated serious assaults by his older half-brothers which resulted in scars upon his body and other injuries. During these attacks he never defended himself.

    (4) In early 2010 the claimant snapped. He was being subjected to an assault when a half-brother (who I shall call X) was beating him on his wrist with a stick whilst at home during a rug making session. The claimant tried to defend himself and grabbed a brick which was ordinarily used to prop up the rug-making table. He struck X on the head with the brick rendering him unconscious. There were two witnesses – X's wife and his sister. A taxi was summoned and X was removed to hospital.

    (5) The claimant was understandably scared, fearing that other half-brothers would be after him, and so made off taking with him some money which was secreted in a tea-pot. He remained with other family members well-disposed to the claimant. It appears that X died in hospital having fallen into a coma. The claimant feared certain family members would be a threat to his life.

    (6) It is plain that other family members assisted the claimant leave Afghanistan by bus for Pakistan. When he arrived there other family members assisted the claimant to travel to another nearby country (it is unnecessary to set out the details). Whilst there the claimant spoke to his mother who reported the half-brothers were looking for him

together with the police. He was advised not to return as the mother was being subjected to assaults as were his other brothers.

(7) The claimant travelled to the United Kingdom (UK) having passed through other European countries. He was brought to the UK by someone acting on behalf of family members who were well disposed to the claimant.

(8) It is believed the claimant's mother has now removed to Pakistan, although it is far from clear where she is located. The claimant has not had contact with her in any meaningful way since early 2010.

(9) The claimant applied for asylum on 16th May 2010 when he arrived in the UK. He was aged 14 at the time.

(10) He has been placed in the care of a local authority during this time. I was pleased that he came to the hearing on 7th November 2011. I trust he will be at the handing down of this judgment or will be told the result of this case very speedily. It was decided that he did not need the assistance of the Official Solicitor as he is represented by lawyers who are experienced in the law applicable to the circumstances of this case.

(11) It is right to say that the claimant expanded upon the above facts in his asylum interview on 4th August 2010. It is unnecessary to set out the expanded details as to do so runs the risk of identifying him. I have read the details and it is right to say the SSHD has accurately summarised the import of all the factual material at her disposal.

The Decisions of the Secretary of State

15. The SSHD wrote three letters in response to the application of the claimant. These letters (embodying decisions) have been the subject of scrutiny in this case. The basis of the claim for asylum was the assertion there was a well-founded fear of persecution under the terms of the 1951 United Nations Convention. The SSHD considered, quite apart from asylum, the question whether the claimant was eligible for humanitarian protection under Articles 2 or 3 of the European Convention of Human Rights (ECHR). She also considered the question of discretionary leave. The letters reveal the course of events and I shall refer to each in turn. The basic argument of the SSHD is that they reveal a continuum of reasoning confirming the initial decision (subject to the modification in August 2011).

11th November 2011

16. The first letter was written on 11th November 2011. The application for asylum was refused. That letter covered nationality, ethnicity, and the issue of the parental domestic violence. The issue of the criminality surrounding the killing of the half-brother was then addressed. At paragraph 35 the SSHD wrote:

> "In considering the above, by your own admission, you have killed your brother, *albeit unintentionally*." (emphasis mine)

The letter continues with references to the Afghan Penal Code and concludes the claimant could be prosecuted as teenager for accidental murder through beating. If convicted he would be subjected to a period of quarantine. That form of punishment was considered, and reference was made to the Human Rights Report on Afghanistan by the State Department of the United States of America in 2009. The SSHD concluded that the conditions of detention to which the claimant would be sent were such that Article 3 of the ECHR was engaged and would have been breached if he should be returned to Afghanistan.

17. The SSHD decided that the asylum claim was not well founded, and the humanitarian claim was excluded by operation of Paragraph 339D of the Immigration Rules on the basis that there were serious reasons for considering that the claimant had committed a serious crime. The issue of discretionary leave was considered and granted upon a limited basis for 6 months.

18. The SSHD mentioned – almost in passing – section 55 of the 2009 Act.

19. An appeal was launched against the decision of the SSHD to the First Tier Tribunal of the Immigration and Asylum Chamber which was determined against the claimant in the sense that the Immigration Judge found that he could not appeal because the rules only provide for appeals if the discretionary leave was granted for a period in excess of 12 months – which is not the position here.

21st December 2010

20. Following that decision further representations were made to which response was made on 21st December 2010. The argument advanced by the claimant was that if he was returned to Afghanistan he would be in effect an orphan in his own land. This was rejected by the SSHD. The 6 month period of discretionary leave was, however, confirmed. The SSHD purported to apply the provisions of section 55 of the 2009 Act.

21. The application for judicial review was thereafter launched having utilised the Pre-Action Protocol. Permission was refused on a paper application on 15th April 2011. The application was renewed and granted at an oral hearing before His Honour Judge Gosnell on 28th June 2011. A further letter was sent in the unfolding deliberations of the SSHD.

2nd August 2011

22. The final letter of importance was sent on 2nd August 2011 which was described as a *supplemental letter*. This was written after the judicial review proceedings had been instituted. The letter reiterated the previous decisions to refuse asylum and exclude humanitarian protection and sought to "clarify the reasons why (he was) excluded from the grant of Humanitarian Protection and

Discretionary Leave as an Unaccompanied Asylum Seeking Child and further consideration of (his) case under section 55 of the (2009) Act"

23. The serious crime aspect of the case was revisited; it was pointed out that there is no definition of serious crime in any statute, although section 72 of the **Nationality and Immigration Act 2002** was used as guidance in that a crime warranting a sentence in excess of 2 years is regarded as a particularly serious crime under that Act. Attention was also called to certain case law where it was asserted the SSHD did not have to have evidence of proof of guilt, but simply evidence which strongly pointed to guilt. The SSHD then sought to re-analyse the circumstances of the case, having previously referred to the *unintentional killing* of the deceased half-brother by the claimant in the original decision letter of 11th November 2010. The revised position was:

    (1) The claimant admitted killing his half-brother;

    (2) If tried in the UK he would have been in all likelihood convicted of manslaughter "*unless you could prove a defence*"

    (3) At this point of paragraph 12 of the letter the SSHD suggests the claimant (if on trial in this country) would have to show that he acted in lawful self-defence. Certain Court of Appeal decisions were referred to purporting to support the SSHD's analysis of English law.

    (4) The SSHD refutes the suggestion that self-defence would avail the claimant in an English court.

    (5) The partial defence of provocation was then covered. The SSHD doubtless made reference to the old law because the claimant's half-brother was killed before the change in the law on 4th October 2010. The new defence is covered by section 54 of the **Coroners and Justice Act 2009** (the partial defence to murder: loss of control). This was mentioned by the SSHD.

    (6) Reference was also made to the **Code for Crown Prosecutors** as when to institute a criminal prosecution for murder.

    (7) Without any detailed analysis of the facts, the SSHD concluded there were serious grounds for considering that in the UK the claimant would be tried for murder and convicted of manslaughter. It was also reiterated that under Afghan law he would be guilty of a crime and sentenced to some form of detention for at least two years

    (8) The SSHD applied paragraph 339D and concluded – again – that Humanitarian Protection was excluded. However, as the removal to Afghanistan would engage Article 3 (due to the appalling conditions set out in the US State Department review – *supra paragraph 12*) the claimant cannot be removed.

(9) Consequently, discretionary leave to remain would be granted for 6 months at a time. The letter states:

> "------ should circumstances change you can be removed at the earliest safe opportunity. You will not be removed from the United Kingdom whilst ever it is considered that this would result in a breach of your rights under the Human Rights Act. Given that you have left your country following the killing of your step-brother (the SSHD means half-brother), there are perfectly legitimate public policy reason for not wishing someone who has admitted to committing such a crime to remain in the UK for longer than is necessary. Furthermore it is considered that regular reviews of your case every six months will allow the (SSHD) to handle your case appropriately without causing you material prejudice."

(10) The SSHD then referred to ***ZH (Tanzania)*** and section 55 of the 2009 Act and concluded at the age of 15 (as he then was) the claimant would be criminally liable, but that his "best interests" required the rolling programme of 6 month reviews. This state of affairs would continue until "such time as there has been a change in circumstances that would mean (the claimant) could be safely removed to Afghanistan"

(11) The SSHD asserts this strikes the right balance between the claimant's welfare and the policy goal of ensuring the UK provides no safe haven for serious criminals.

24. It is unnecessary to set out the entirety of the original claim for judicial review as permission has only been granted in respect of two issues which I shall now cover. I do not need to set out the defence of the SSHD – except to comment the claim has been vigorously defended.

The *Serious Crime* Issue

25. It is permissible for the SSHD to exclude any individual from asylum and humanitarian protection when a conclusion is reached that there are serious grounds for the belief the person has committed a serious crime abroad. This is embodied in Paragraph 339D of the Immigration Rules which provide (so far as relevant to this case) that the SSHD may exclude subsidiary protection "where there are serious reasons for considering that (the claimant) has committed a serious crime". The legal derivation of this provision within the Immigration Rules has already been set out (see paragraph 4 supra).

26. I have been referred to a number of guidelines in respect of this provision from a variety of sources all designed to demonstrate that a restrictive interpretation should be placed upon this international exclusionary clause. I have had the **UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees** called to my attention – in particular paragraph 2. The

guidelines were promulgated on 4th September 2003 and suggest strongly that the rationale behind such exclusions from protection should only apply to those who have committed grave acts who do not deserve international protection as refugees. The guidance also covers those who have committed serious non-political crimes and must not be allowed to abuse the system of asylum in order to avoid accountability for their acts.

27. I have also been referred to the decision of the Supreme Court in ***R (JS) (Sri Lanka) v Secretary of State for the Home Department*** **[2010] UKSC 15** where the case of an alleged war criminal was considered when the SSHD had concluded he was complicit in such crimes. The decision of the SSHD was quashed, but useful guidance was given by the court as to how to approach these difficult issues. It is to be remembered that was a war crime case arising from Article 1F(a) and not with ordinary, but serious, crimes under Article 1F(b). Lord Brown of Eaton-under-Heywood made it clear that the concept of serious reasons for considering that a person has committed a serious crime sets a standard above mere suspicion. I accept that case makes it clear, albeit in a different context, the SSHD must act with scrupulous care when deciding whether to apply the exclusionary rules. I have also been referred to a New Zealand case ***S v Refugee Status Appeals Authority*** **[1998] NZLR 91** which suggests that all the facts and circumstances must be looked at when deciding the *serious crime* point; this includes an examination of: (a) the elements of the crime; (b) the factual matrix; (c) the circumstances of the alleged offender, and; (d) the level of punishment to be inflicted if convicted: see in particular the judgement of Mr Justice Henry (giving the judgment of the Court of Appeal) at paragraph 8. At a superficial level this chimes in a discordant way with the UNHCR Guideline which demands a proportionate approach of the decision maker so that an evaluation of the gravity of the alleged crime is weighed against the consequences of exclusion for the individual in question. I am persuaded the approach of the New Zealand Court of Appeal is to be preferred in its interpretation of the pure *serious crime* point under Article 1F(b) for, as the judgment makes clear at paragraph 21, the article is clear and unambiguous not requiring special meaning or the insertion of qualifying words. Mr Justice Henry clearly stated:

> "Whether a crime is to be categorised as serious is to be determined by reference to the nature and details of the particular offending, and its likely penal consequences. It does not depend upon, nor does it involve a comparative assessment of its own gravity with the gravity of the perceived persecution if return to the homeland eventuates"

The court continued by pointing out that New Zealand had other obligations under torture conventions which remained unaffected by the exclusionary provision. Likewise, in the UK if the exclusionary provision obtains, it in no way affects other obligations imposed under the ECHR or elsewhere.

28. I am satisfied the policy of the SSHD in applying international obligations at paragraph 17.3 of the SSHD's Guidelines is consistent with those obligations in relation to children. It is worth setting out the paragraph in full:

> "Children are not exempt from the exclusion clauses. However, it is important that (the SSHD) carefully consider the specific context of each case, for example the child's age and maturity, when considering how far the individual should be deemed liable for their actions. It is always important to treat each case on its merit. Personal circumstances, such as age or psychological functioning, may be relevant when investigating the level of knowledge a person had of what they were participating in as well as the child's ability or power to take alternative action."

That, in my judgment, is a clear indication that the SSHD (more accurately those charged with these decisions on her behalf) must look at each individual case as whole, viewing a raft of relevant case specific factors affecting the matter, when assessing the question whether there are serious reasons to believe that a serious crime has been committed. Certain it is, the SSHD must not simply look at the label attached to the alleged crime or the basic asserted facts. A much broader approach needs to be taken as I shall come to explain. The guidance in paragraph 17.3 correctly emphasizes this concept. The only matter that troubles me is that the welfare principle contained within section 55 of the 2009 Act is not specifically called to the decision maker's attention.

29. The real issue in this case is whether the SSHD has lawfully applied the policy, and more important, paragraph 339D, to the claimant. It is argued the SSHD has not shown that that there are serious reasons for believing the claimant has committed a serious crime in that she has not properly evaluated the whole surrounding circumstances, and, even at one point, regarded the killing as being unintentional. It is also argued that the analysis of the potential defences has been defectively undertaken. It is said there is procedural unfairness in that a number of issues relating to potential defences were not covered in the interview conducted for the purposes of the asylum claim. The submission is that the decision to exclude protection under paragraph 339D is irrational and ***Wednesbury*** unreasonable.

30. The SSHD argues very simply that the decision is lawful, rational and reasonable on the basis that there is a clear admission by the claimant of killing his half-brother and looking at both Afghan and English law there is enough material for the SSHD to believe he has committed a serious crime. It is averred that the SSHD does not have to conduct a mini-trial; she merely has to ask herself whether there are serious reasons for believing a serious crime has been committed. The SSHD has argued that there has been no procedural unfairness as what seems to be suggested by the claimant is that he is entitled to provisional findings whereas he has been afforded every opportunity to set out his case.

31. I have very much abbreviated the full submissions of counsel on both sides. They are much more fully adumbrated in the skeletal arguments (which I will not set out) and were, additionally, developed in the course of oral argument. I trust I will be forgiven for not reproducing those arguments here. I have considered the arguments on each side of this case with great care.

32. In my view the case is not as complex as at first blush it seemed to be. The international guidance is a useful sub-stratum to the essential issue the SSHD has to decide, but in the final analysis the only question that has to asked in a case of this kind is this: is there material before the minister that justifies a serious belief (much more than a suspicion) that the individual who claims protection has committed a serious crime? That question requires the minister to look at all the circumstances of the case; not just the nomenclature of the crime and the basic scenario. Because a serious crime is the trigger of the exclusion, the whole factual and legal matrix must be evaluated with care and some precision. A starting point must be a correct analysis of the law in this country and the country where the crime is said to have occurred. The individual factual matrix of the alleged crime must be examined with care; which must include any points advanced as providing a potential defence (both legal and factual). The age and circumstances of the alleged offender are also important. The likely punishment, if found guilty, is also to be considered. I also regard it as being important that the minister keeps a sense of proportion and balance about the case. It is only when the matter has been examined in this way may the decision be regarded as lawful. It must be a *serious crime* – that goes, almost, without saying – but the whole circumstances must be evaluated, as I have described, before concluding there is a serious belief that the individual in question has committed a serious crime. The nomenclature of the crime is of less importance than the circumstances of the crime properly evaluated as I have heretofore set out. An acute sense of the reality is a useful lodestar when considering this broad tapestry of factors. Some cases will be able to be analysed in a very straightforward way – others less so.

33. When a child or young person is placed within the frame of paragraph 339D it is vital that section 55 is properly considered. I remarked earlier in this judgment (see paragraph 5 *supra*) that these decisions need to be viewed with section 55 well in mind. What might be right for an adult is not always replicated for a child or young person. A carefully calibrated decision needs to be made depending upon the age and maturity of the child or young person in question coupled with an analysis of the factual and circumstantial matrix taken as a whole. A child's welfare, as I shall come to explain, does not override everything else as, for example, in child care proceedings where section 1 of the **Children Act 1989** demands welfare to be the courts paramount consideration. In the context of asylum, immigration and nationality, consideration of a child's welfare, needs to be given a pivotal position, albeit it is not the paramount concern of the court.

34. I appreciate the SSHD cannot be expected to conduct a mini-trial of the allegations. All that is demanded is a serious belief that a serious crime has been committed. A serious belief is more than mere suspicion, and requires the minister to view the whole picture and to demonstrate that she has viewed the whole tapestry (the *broad tapestry approach*). The minister is not required to conclude one way or the other whether the claimant is guilty, but she is required to view all the relevant factors upon the broad tapestry before

reaching a conclusion. There must be manifest consideration of the broad tapestry.

35. I can well see that an allegation of any form of homicide is likely to be taken very seriously, but it is too simplistic, in my judgment, to say that all allegations of crimes involving the death of an individual are a *serious crime* as defined by paragraph 339D. A careful analysis of culpability is required viewing the broad tapestry in that process.

36. The decision in this case has been consistent, but it is argued there has been a drip-feed series of reasons which are inconsistent and exemplify a constant shift by the SSHD to justify the original decision.

37. I have come to the conclusion that the reasons of the SSHD for the decision to invoke paragraph 339D have altered, in that they have expanded beyond recognition from those advanced as justifying the decision at the outset of the process. The reasons given in August 2011 purported to be supplemental to those given in November 2010. In my judgment they were not supplemental at all; they were different reasons, quite apart from whether they were lawful in any event.

38. In November 2011 the SSHD simply sets out the facts of the case and concludes the claimant killed his half-brother and would be likely to be convicted under Afghan law of "Accidental Murder by Beating". A very clear indication is given that the SSHD accepted, as of November 2010, that the killing was accidental. There is no analysis of the case even in the most rudimentary of ways in accordance with paragraph 17.3 of the guidance set out by the SSHD herself in relation to children. The broader tapestry, which I have indicated has to be examined with care, was simply ignored – certainly, it was not referred to in the decision. If the SSHD accepted the killing was unintentional, then it was not open to her to conclude that there was a serious belief that a serious crime was committed. A serious crime plainly demands a high level of culpability. If an otherwise criminal act is unintentional, then the culpability is of a low order or even extinct. In the November 2010 decision there is simply no analysis of the situation by the SSHD in respect of the potential defences and the wider tapestry relevant to the case. The decision seems to be predicated upon the notion that the claimant is guilty of a low culpability homicide related crime because he admitted being the cause of the death of his half-brother. There is simply no coverage, let alone analysis, of the culpability of the claimant, or even reference to the guidance of the SSHD herself in paragraph 17.3 in relation to young persons and children.

39. The decision contained in the letter of 22nd November 2010 falls to be quashed if it stood alone as the reasons for the decision to apply paragraph 339D. The reasons were inadequate and demonstrably failed to view the case in accordance with the law.

40. Matters do not end there. The decision in December 2010, frankly, adds little and purports to support the November 2010 decision. There is nothing within

that letter which provides any form of comfort or salvation in respect of the earlier unlawful decision.

41. The August 2011 letter purports to provide supplemental reasons. In truth it has the redolence of a completely fresh approach. I doubt it would have saved the day – but it certainly does not save the day when the analysis of the relevant English criminal law is fatally misrepresented – as in my judgment it was.

42. The letter asserts to set out the law relating to self-defence and provocation. Unfortunately, the law is misstated. It is not for a defendant in a criminal case to establish that he was acting in lawful self-defence; it is for the prosecution to eliminate the defence. That principle is elementary: see ***R v Lobell*** **[1957] 1 QB 547**. The question of reasonable force is now covered by section 76 of the **Criminal Justice and Immigration Act 2008**. Those provisions came into force on 14th July 2008. I will not set out those detailed provisions, but they effectively reflect in statutory form the oft quoted pronouncement of the Privy Council on self-defence in the case of ***Palmer v R*** **[1971] AC 814**.

43. Confidence is not inspired by the author of the August 2011 letter when the law is misrepresented upon such a fundamental issue. The letter goes on to cover the question of provocation. The bold assertion is made that the claimant would, at least, be found guilty of manslaughter if tried under English law. There is no reference to *slow burn* provocation or any analysis of the situation through the prism of a 14 year old boy.

44. The simple fact of the matter is the SSHD was trying to justify the decision that was taken in November 2010 and in so doing: (1) failed to address the case in accordance with an accurate statement of English law on the issue of self-defence; (2) gave no analysis of the factors relevant to the question of provocation in English law – not even a rudimentary excursion into the issue having regard to the history; and (3) failed to address the broad tapestry of the case as I am convinced is demanded by the law. The issue of the welfare of the claimant does not even appear to have been placed in the equation in relation to the issue under paragraph 339D.

45. In making these observations I am fully aware the SSHD is not required to conduct a mini-trial of all the issues and form a view as to the guilt of the claimant or any person in a like position to the claimant. However, that does not relieve the SSHD of making an analysis and evaluation of the case in the broad tapestry approach that I have concluded is her duty.

46. It may be the decision would be the same if a proper analysis of the case is undertaken on this point. It is not for me to make that decision. I have simply stated what needs to be addressed by the SSHD in this case and other like cases. I simply observe that the issue becomes ever more difficult the longer after the alleged crime the issues are considered.

47. I am not going to devote much time to the issue of shifting sands argument advanced by the claimant beyond that which I have already stated. I take the

view the SSHD realised the paucity of analysis and endeavoured to bolster the initial decision. In so doing an incompatible series of reasons were produced when contrasted with the original version. Furthermore, the subsequent reasons were as legally defective as the first. It really is quite unfair to a youth in the position of this claimant to change tack as much as was done in this case. I feel it is not placing his welfare in a pivotal position for the SSHD to alter course in the way that occurred here.

48. Quite whether the SSHD will be able to conclude in the future that the claimant is within the category whereby paragraph 339D may be invoked, when all the circumstances are viewed, is perhaps debateable – and not a debate I must enter. I am simply completely satisfied the extant decision of the SSHD on this point cannot stand.

49. I shall now address the argument in relation to section 55. This issue arises in the event I am wrong about the *serious crime* point as the SSHD has decided in her August 2011 letter to have a 6 month rolling review of discretionary leave.

The *Section 55* Issue

50. It is plain that there is an obligation upon the SSHD to place the welfare of a young person well to the fore of decision making. Parliament has made this clear is section 55 of the 2009 Act. This has been recently considered by the Supreme Court in ***ZH (Tanzania)*** (supra). Consequently, I do not feel it incumbent upon me to analyse the situation in any great detail. The real issue for me is whether the SSHD has applied the established law to the facts of this case correctly.

51. Section 55 provides (so far as relevant to this case):

> "The (SSHD) must make arrangements for ensuring that – (a) [her functions in relation to immigration and asylum] are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom" [an amalgam of sections 55(1)(a) and 55(2)(a)].

52. In ***ZH (Tanzania)*** the Supreme Court were asked to decide how section 55 should be approached in a case far removed from the facts of this case, but to which the section was relevant. I call attention to the judgments of Lady Hale at paragraph 33, Lord Hope of Craighead at paragraph 44, and Lord Kerr of Tonaghmore at paragraph 46 in particular. I take the correct interpretation of section 55 to be as follows in the factual matrix of this case:

    (1) The SSHD must place the welfare of the claimant into the wide tapestry she is required to consider in relation to the *serious crime* decision she has to make.

    (2) In other aspects of her asylum and immigration decision making relating to the claimant she must also consider the welfare of him.

(3) When his welfare is considered it is not to be regarded as the paramount consideration of the minister, or of the court, as a case under the Children Act 1989, but as a high ranking matter to be considered with other factors.

(4) It is not a supreme consideration, but a factor of the highest rank which should only be displaced, or rendered of lesser importance, if there are very strong countervailing factors.

53. It will be remembered that in relation to the *serious crime* decision I was far from satisfied the SSHD properly addressed the section 55 point at all. It is a factor that has to be placed in to the broad tapestry when making a decision whether to invoke paragraph 339D.

54. The SSHD has determined a rolling 6 month review as the proper way forward and has reached this conclusion based upon what she asserts to be section 55 welfare considerations. The claimant argues this simply does not pass muster, whereas the SSHD argues that case law has approved the policy of 6 monthly reviews in cases analogous to the claimant's: see ***R (N) v Secretary of State for the Home Department*** **[2009] EWHC 1581 (Admin)**. The argument is expanded upon in the skeletal argument which I have considered with some care. I make it plain that I am not in any way seeking to deprecate or revise the approach adopted by Mr Justice Collins in the ***R (N)*** case. I can well see why such a policy is regarded as sound for an adult. What is right for an adult is not always right for a child or young person.

55. I take the view that decisions relating to children and young persons must be viewed through the section 55 prism as I have set out (supra at paragraph 52).

56. I regret to say that the decision reached in this case, in the factual matrix of a by now, 16 year old youth, estranged from the well-disposed members of his family (including, and especially, his mother) for well in excess of 12 months has not demonstrably placed his welfare in a pivotal position when deciding the rolling 6 month reviews. It is simply argued that things might change and it may then be possible to reunite him with his family or send him to Afghanistan or another country. That might be all well and good for an adult, but it has not been demonstrated by the SSHD how this advances or even acknowledges, let alone safeguards or promotes the welfare of the claimant as required by section 55.

57. Two matters immediately spring to mind as not having been addressed.

58. First: the claimant is now 16 – he was 14 when he arrived in the UK. I am unable to see how the welfare of a 16 year old youth is best promoted by forcing him to anxiously face the prospect or spectre of removal from the UK every 6 months. The stress of this constant re-appraisal of his life is hardly conducive to the promotion of his best interests. This has not been addressed. I am convinced an argument that to place him in this situation is likely to be very deleterious to his mental well-being could be realistically advanced. It has certainly not been addressed. The claimant has been forced into a form of

limbo by the decision of the SSHD. I fail to see how that can be suggested to advance the best interests of a 16 year old youth. He is entitled – is he not – to have some notion of what his future holds? If one couples that to the estrangement from his family – wherever they are – and in particular his mother – the psychological and emotional consequences for a young person are almost palpable. This is particularly so as the claimant has confessed to killing his half-brother.

59. Second: let us not forget he is asserted to have committed a crime (quaere a *serious crime*) in Afghanistan. It is axiomatic to say that a fair trial needs to be conducted within a reasonable time of the alleged commission of it, and the longer the delay the greater likelihood of unfairness. The point is he either needs to be returned forthwith – which cannot occur because of the Article 3 issue (plainly correctly decided by the SSHD on the material before her about the conditions in Afghanistan that would face the claimant) – or, quite frankly, the decision to review the case periodically (thereby occasioning delay) is contributing to the unfairness of potential future proceedings in Afghanistan. The minister is, in the factual matrix of this case, in an unenviable situation.

60. The difficult issues I have identified have not been addressed. Indeed, I am far from satisfied the welfare of the claimant – taken as a whole – has been at all adequately addressed. It must hereafter.

61. The high water mark of the SSHD's consideration of section 55 is the passing reference to the fact that a child's welfare is not a trump card and the minister has tried to strike the right balance between welfare and public policy considerations. That analysis of the law and the circumstances of this case simply will not do. The SSHD has fallen into error by inadequately addressing the section 55 point in the way she should when considering both the *serious crime* point and the *discretionary leave* issue. I have seen no material which begins to suggest the SSHD has properly addressed the welfare of the claimant in any aspect of the decision making. The SSHD has, therefore, not taken into account something that should have been and is in these circumstances to be regarded as having acted in a way that is ***Wednesbury*** unreasonable. The decision making has been truly disjointed.

62. Consequently, even if I am wrong on the issue relating to paragraph 339D, the SSHD has made an unlawful decision in relation to discretionary leave (the 6 month rolling review) in the context of this claimant aged 16 years – 14 years when he came to the UK.

Conclusion

63. As I have sought to explain, it is my view the SSHD fell into error in her analysis of the situation in respect of this, by now, 16 year old youth in both parts of the decision in respect of which permission was granted.

64. In making this decision I am very cognisant of the truly difficult dilemma in which the SSHD finds herself in this case. It may be that the decision she reached could be justified if the broad tapestry approach is properly evaluated

when considering paragraph 339D. It may be that the discretionary leave decision to permit 6 monthly rolling reviews could be justified if greater analysis was undertaken of the full welfare interests of the claimant were analysed. On the other hand, it may be the SSHD simply has to acknowledge the fact the claimant is in the UK, and given the unusual circumstances of this case, there is no way of lawfully removing him to his homeland or reuniting him with his, by now, estranged and distant family (wherever they be).

65. Upon any analysis this case is tragic for all the key participants. The SSHD is in the unenviable position of having to make unenviable and truly difficult decisions. Whatever decisions are reached in the future they must be lawful. I regret to say the SSHD has far from persuaded me the decisions thus far can be so described. With that said I do not doubt the SSHD (the officials acting on her behalf) have conscientiously endeavoured to do what they feel is right, but they have fallen in to legal error as I have sought to explain.

66. These decisions will have to be taken again and I would have thought elementary fairness demands the claimant be permitted to make further representations to the SSHD before any decisions are made about his future.

67. For the reasons I have given the claimant's application for judicial review succeeds and the various decisions of the SSHD fall to be quashed. I shall now hear submissions as to the precise form of order to be made by the court.