

Case No: CO/9591/2012

Neutral Citation Number: [2013] EWHC 2316 (Admin)

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

Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham

Date: 31/07/13

Before :

MR JUSTICE HICKINBOTTOM

Between :

THE QUEEN
on the application of RAHIM HASHEMI

Claimant

- and -

(1) THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
(2) THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Defendants

Becket Bedford (instructed by **Sultan Lloyd**) for the **Claimant**
Jim Tindal (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing date: 22 July 2013

Judgment

Mr Justice Hickinbottom:

Introduction

1. The Claimant, an Afghan national, arrived in the United Kingdom in August 2009, and claimed asylum. That claim was refused, as were his claims for leave on the grounds of humanitarian protection and human rights; but he was granted leave to remain until he was 17½ years old by reference to his deemed age, under the Secretary of State's policy to grant such leave to unaccompanied child failed asylum seekers. The Claimant did not seek to appeal against the refusal of that first asylum claim; but he made a second claim, on essentially the same grounds (i.e. asylum, humanitarian protection and human rights), just before he was 18 years old. That was also refused, as was his subsequent appeal to the First-tier Tribunal and his application for permission to appeal to the Upper Tribunal. He was removed to Afghanistan on 19 November 2012.
2. In this claim, the Claimant challenges the decision of the Upper Tribunal to refuse permission to appeal. He contends that the Upper Tribunal failed properly to take into account two relevant considerations, namely that the Secretary of State had failed in her obligations to the Claimant as an unaccompanied minor asylum seeker, in (i) failing to take steps to trace his family in Afghanistan, and (ii) failing to provide him with an effective remedy under European Union law by not allowing him to appeal the refusal of his second asylum claim whilst he was still a child.
3. He also contends that his removal was in any event unlawful, as it was effected without the Secretary of State making any lawful decision to remove him.

Chronology

4. The chronology is crucial for a proper understanding of why this claim has developed as it has. Particularly important is the correlation of events and decisions that specifically affected the Claimant, and various rulings of tribunals and the courts in other cases with regard to matters of principle or otherwise general application.
5. The Claimant applied for asylum on the day he arrived in the United Kingdom, 18 August 2009. He said he was about 14 years old – his date of birth was consequently deemed to be 1 January 1995 – and he was an orphan. He had lived with his parents and two brothers. Although the evidence is not entirely consistent, both brothers appear to have been older than he. His father had been a commander in the Gulbaddin, but he never spoke about it and the Claimant was unable to give any details as to what his father did in that group. They had lived in Mizayan until about a year before he fled, when they had moved to somewhere in Kunar Province where he and his brothers were restricted to the house. His parents had been killed in an incident at his home, after which, he said, he saw them both dead on the living room floor. He did not know who the perpetrators were. His brothers had disappeared, and he did not know whether they were alive or dead. He said he had not made any attempt to find them, and he did not know how to do so. His interviewer explained that the Red Cross had some facility to trace relatives. The Claimant said that he had no one else in Afghanistan who could care for him or protect him from harm, and he could not provide any further information concerning his relatives there.

6. His application for asylum was therefore made on several bases. If he were to be returned to Afghanistan, he said he feared the people who killed his parents; he feared indiscriminate violence; and, without anyone to care for him and protect him, he feared abuse as an orphaned child.
7. In a letter of 16 February 2010, a caseworker with the UK Border Agency (“the UKBA”) on behalf of the Secretary of State found the Claimant’s account to be neither coherent nor plausible, and that he would not be at risk of return to Afghanistan, even as a child. The letter noted that the only information the Claimant had given about his brothers was that he last saw them in Afghanistan, and he had made no attempt to trace them: but, as he had brothers in Afghanistan, he would have support on return. The caseworker apparently thought that the Claimant would be able to trace his brothers, but was unwilling to disclose information to enable the Secretary of State to do so. In any event, he refused the Claimant’s claim for asylum, and his claims for humanitarian protection and for leave on human rights grounds.
8. However, under the discretionary leave policy set out in APU Notice 3/2007 (30 March 2007) (“the Unaccompanied Asylum Seeker Child Policy”), issued by the Secretary of State, where (a) an unaccompanied minor failed with claims for asylum and humanitarian protection, and (b) the Secretary of State was not satisfied that adequate reception and accommodation arrangements were in place in the proposed country of return, discretionary leave would be granted for three years or until the applicant was 17½ years old whichever was the sooner. The Claimant was duly granted leave to remain until 1 July 2012, when, on the basis of his deemed birth date of 1 January 1995, he would turn that age.
9. The Claimant, who was legally represented at the time, had a right of appeal against that decision to refuse his asylum claim. Section 83 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) provides that:
 - “(1) This section applies where a person has made an asylum claim and (a) his claim has been rejected by the Secretary of State, but (b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate).
 - (2) The person may appeal to the [First-tier] Tribunal against the rejection of his asylum claim.”

However, the Claimant did not exercise that right.

10. On 26 January 2011, Solihull Metropolitan Borough Council, which had responsibility for the Claimant as a child, reassessed his date of birth as 1 November 1993, making him 17 years of age and putting the date on which he would attain the age of 17½ as 1 May 2011, rather than 1 July 2012 which had been based on the earlier assessment.
11. That age reassessment decision meant that, under the Unaccompanied Asylum Seeker Child Policy, the Claimant’s discretionary leave to remain would expire on 1 May 2011. Unfortunately, due to delays by both the local authority and the Secretary of

State, the Claimant was not informed of that until a letter dated 8 August 2011. That letter said:

“The re-assessment of your age took place on 26 January 2011. This was prior to the expiry of your leave on 1 May 2011. However, there has been a delay in (a) receiving the age assessment from Solihull Council, and (b) [on] the part of the [UKBA] in implementing the outcome of your new age and in reviewing the amount of Discretionary Leave you qualify for. In order to avoid any potential disadvantage to you it has been decided that, if you submit the necessary form to apply to extend your leave within the next two weeks, your case will be dealt with as being an in-time application. If you do not submit the necessary form to apply to extend your leave within the next two weeks your case will be dealt with as being out of time. In the event of you failing to apply for an extension of your leave you will be expected to leave the UK as soon as possible.

Subject to you applying for an extension of your leave within the next two weeks, your case is being treated as if you had a period of leave remaining. Therefore there is no statutory right of appeal, there being an in-country right of appeal only where all [emphasis in the original] existing leave is being taken away.

A revised immigration status document will be issued to you shortly. You should submit this document with any application for further leave.”

12. That letter requires some explanation.

- i) A person may be given leave to enter the United Kingdom (or, if already here, leave to remain) for an indefinite or limited period (section 3(1) of the Immigration Act 1971 (“the 1971 Act”). The Claimant was given leave for a limited period, i.e. until 1 July 2012.
- ii) When leave is granted for a limited period, it may be varied by extension (section 3(3)(a)).
- iii) Section 4(1) provides:

“... [T]he power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a)..., shall be exercised by the Secretary of State; and, unless otherwise allowed by or under this Act, those powers shall be exercised by notice in writing given to the person affected...”.

Further, regulation 4(1) of the Immigration (Notices) Regulations 2003 (SI 2003 No 658) provides (so far as relevant to this claim):

“... [T]he decision-maker must give written notice to a person of any immigration decision... taken in respect of which is appealable.”

iv) Where an application to extend the period is made and not determined before the leave expires, then the period of leave is automatically extended until the application is determined or withdrawn (section 3C(1) and (2)(a)), including for the period in which an appeal against a refusal to vary might be brought (section 3C(2)(b)) and, if an appeal is brought, whilst that appeal is pending (section 3C(2)(c)).

v) By section 82(1) of the 2002 Act, an appeal to the First-tier Tribunal is granted in respect of, amongst others, the following decisions listed in section 82(2):

“(d) refusal to vary a person’s leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain

(e) variation of a person’s leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain

...

(g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1971... (control of entry: removal)

...

(ha) a decision that a person is to be removed from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006... (removal: persons with statutorily extended leave)...”.

For decisions described in section 82(2)(d), (e) and (ha), there is a right to an in-country appeal; but for a decision described in section 82(2)(g), the right is generally to an out-of-country appeal only (section 92(1) and (2)). However, where the applicant has made an asylum or human rights claim whilst in the United Kingdom, then a decision that a person is to be removed by way of directions under section 10 is subject to an in-country appeal (section 92(4)(a)), unless the Secretary of State certifies the asylum and human rights claims to be clearly unfounded (section 94(2)).

vi) Section 47(1) of the Immigration, Asylum and Nationality Act 2006 (“the 2006 Act), as enacted, provides:

“Where a person’s leave to enter or remain in the United Kingdom is extended by section 3C(2)(b)... of the [1971 Act], the Secretary of State may decide that the person is

to be removed from the United Kingdom, in accordance with directions given by an immigration officer if and when the leave ends.”

In 2011, the Secretary of State took the view that, when an in-time application was made to extend a period of leave, section 47 enabled her to issue a single decision letter both refusing the application and making a removal decision. That was certainly the intention of the provision (see statement of the Minister for Justice Baroness Ashton of Upholland when introducing the relevant amendment to the Immigration, Asylum and Nationality Bill in the House of Lords, Hansard 7 February 2006, cols 520-1, quoted by Sullivan LJ in Secretary of State for Justice v Ahmadi [2013] EWCA Civ 512 (“Ahmadi CA”) at [30]).

- vii) It was also the view of the Secretary of State that, when a decision was taken to curtail discretionary leave under the Unaccompanied Asylum Seeker Child Policy because of (e.g.) a revised assessment of date of birth, that leave was curtailed at the date of decision, irrespective of notification to the relevant individual. On that basis, the Claimant’s leave was terminated on 1 May 2011; and so, in August 2011, he was in the United Kingdom unlawfully, and liable to be the subject of a removal decision under section 10 of the 1971 Act. Furthermore, if, as a result of the 8 August 2011 letter, the Claimant had applied for variation of leave by way of extension, because on that premise by then he did not have leave, the provisions for automatic statutory extension in section 3C of the 1971 Act would not have applied.
 - viii) To avoid those unfortunate and (because the Claimant was entirely unaware that his leave had been curtailed) unfair consequences, the 8 August 2011 letter said that the Secretary of State would treat an application to vary leave by way of extension as “in time” if it was submitted within two weeks. This was done by effectively extending his discretionary leave to remain until a date two weeks after the letter, i.e. 22 August 2011. Although the letter is not a model of clarity (and no further document is within the papers before me), this seems to me to be evident from the last paragraph of the letter quoted above: the “revised immigration status document” that was to be submitted with any application for further leave, it seems to me, being a reference to a document granting leave until that date so that any application made before that date would be “in time”. In any event, even if my understanding of that reference is wrong, I am quite satisfied that, on its true construction, the 8 August 2011 letter had the effect of extending the Claimant’s period of discretionary leave to 22 August 2011.
 - ix) Therefore, the Claimant had a choice. If he made an application to vary before that date, then the automatic statutory extensions of his leave under section 3C of the 1971 Act would apply. If he did not, then, after 22 August 2011, he would be in the United Kingdom unlawfully, and liable to be the subject of a removal decision under section 10 of the 1971 Act.
13. The Claimant did in fact make an application for variation of his leave on 12 August 2011, thereby attracting the automatic extension provisions. The application, which was heavily supplemented by further evidence and submissions on 6 September 2011,

was made on asylum, subsidiary protection and human rights grounds, and on the basis of a contention that he was still under 18 years of age and therefore entitled to an extension of his discretionary leave under the Unaccompanied Asylum Seeker Child Policy.

14. It was during the Secretary of State's consideration of that application that, on the basis of his re-assessed age and thus on 1 November 2011, the Claimant did turn 18. At that date, the Claimant's application for leave was still awaiting decision.
15. The application was refused on 11 January 2012, in a letter accompanied by a notice which, in line with the Secretary of State's understanding of her powers under section 47 of the 2006 Act (see paragraph 12(vi) above), purportedly both refused to vary his leave to remain and recorded a decision to remove the Claimant from the United Kingdom.
16. The Claimant was entitled to an in-country right of appeal in respect of both the decision to refuse to extend his leave to remain and the section 47 removal decision (see paragraph 12(v) above), a right of appeal which he exercised, again relying on asylum, humanitarian protection and human rights grounds. He does not appear to have contended that (i) outside those grounds and irrespective of his status as a child, he was entitled to discretionary leave; or (ii) the removal decision was unlawful because it was incorporated in the same notice as the refusal to vary leave.
17. The appeal was heard by Immigration Judge Hawden-Beal on 12 March 2012, when the Claimant was legally represented. On 23 March 2012, the judge promulgated a determination refusing the appeal on all grounds. She found that the Claimant had attained 18 years on 1 November 2011; and, even taking into account that the Claimant was a minor when he claimed asylum and hence giving him the benefit of doubt in respect of his lack of detail in his account (paragraph 39), she found that, even if his family had been killed as he had described, he would not be at risk in Kabul. In respect of efforts to trace the Claimant's family, the judge said this (at paragraph 40);

“I accept during the period of his discretionary leave to remain from February 2010 to May 2011, the Secretary of State has made no effort to trace his family; but equally neither has the [Claimant]. He says in evidence that he has an appointment this week with the Red Cross but he has known his status in the United Kingdom was precarious since August 2011 when he was told that his discretionary leave had ended early and he did nothing about trying to trace his family. Indeed, this was noted in the first reasons for refusal letter in February 2010 at paragraph 46 and so the [Claimant] has been on notice since then that the Secretary of State has concerns over the lack of attempt to try and trace his family, either here or in Afghanistan. However the [Claimant] has only acted upon it some two years later. He says he has asked about his maternal uncle [who, the Claimant said, lived in the United Kingdom] in the local Mosque but no one knows him. There is no evidence before me that he has asked the Mosque to send that request to other Mosques in the country [i.e. in the United Kingdom].”

It is important to note that the judge refused the appeal against the removal decision on its merits, as well as the decision not to extend the Claimant's leave.

18. The Claimant sought permission to appeal, which was refused by the First-tier Tribunal (Immigration Judge Blandy) on 11 April 2012.
19. To put it into the proper chronological context, there was then a relevant – indeed, for the purposes of this claim, important – judicial decision promulgated by the Upper Tribunal (Senior Immigration Judge Lane), on 14 May 2012, namely Ahmadi (s47 decision: validity: Sapkota) [2012] UKUT 147 (IAC) (“Ahmadi UT”). This case determined that, essentially because of the effect of section 4(1) of the 1971 Act and regulation 4(1) of the Immigration (Notices) Regulations 2003 (both quoted at paragraph 12(iii) above), a decision to curtail leave or not to vary leave is not “made” until written notice of it is given to the relevant individual. Consequently, because (a) a section 47 removal decision can only be taken after leave to remain is extended by virtue of section 3C(2)(b) of the 1971 Act; (b) leave to remain can only be extended on that basis in a period in which an appeal against the decision regarding leave “could be brought”; and (c) such an appeal can only be brought after the person has been given notice of the decision on leave, as the headnote of Ahmadi UT records:

“... The current practice of the Secretary of State to incorporate both decisions in a single notice is accordingly incompatible with the relevant legislation. As a result, the present usefulness of section 47 [which was specifically designed to enable the refusal to vary and a removal decision to be put into a single document] is highly questionable.”

Therefore, whilst a single notice which purported both to refuse an application to vary leave or to curtail leave, and record a decision to remove, was effective in respect of the leave decision, it was ineffective in respect of the removal decision (confirmed in Adamally and Jaferi (section 47 removal decisions: tribunal procedures) [2012] UKUT 414 (IAC)). The decision of the Upper Tribunal was confirmed by the Court of Appeal, in Ahmadi CA. A new version of section 47(1) was substituted by section 51 of the Crime and Courts Act 2013, which received Royal Assent on 25 April 2013; but the new version has no role to play in this claim.

20. Ahmadi had two potentially important effects in this case. First, insofar as the letter of 8 August 2011 suggested that the Claimant's discretionary leave to remain was or could have been effectively terminated on 1 May 2011 (when he attained the age of 17½ years on the basis of the new age assessment), rather than 1 July 2012, it was wrong, as a matter of law. Any curtailment could not have been effective before the date of the written notice contained in the letter of 8 August 2011. Second, whilst the letter of 11 January 2012 remained effective in its refusal of the Claimant's application for a variation of his leave to remain by way of an extension, it was not effective as a decision to remove.
21. I do not have the Claimant's application to the Upper Tribunal for permission to appeal, but I understand it was made both out-of-time and after the promulgation of the determination in Ahmadi UT on 14 May 2012. On 20 July 2012, the Upper Tribunal (Senior Immigration Judge Kekić) extended time, but refused permission to

appeal Judge Hawden-Beal's refusal of the Claimant's appeal. In these proceedings, it is that decision to refuse permission to appeal which is challenged.

22. Within days, on 25 July 2012, judgment was handed down in another case important for this claim, KA (Afghanistan) and Others v Secretary of State for the Home Department [2012] EWCA Civ 1014; [2013] 1 WLR 615. The facts of the eight consolidated appeals were essentially similar to the Claimant's case. Each appellant arrived in the United Kingdom aged 15 or 16 years, and claimed asylum. In each case, the Secretary of State refused the asylum claim, but granted discretionary leave to remain until the individual was 17½ years old. Before reaching 18, each appellant made another application for asylum and humanitarian protection, which was considered by the Secretary of State on its merits and refused. Appeals were unsuccessful. However, it was claimed before the Court of Appeal that, although not entitled to asylum or humanitarian protection, each appellant was entitled to indefinite leave to remain by reason of the Secretary of State's breach of her duty to endeavour to trace their respective families. I shall return to this duty and the court's legal analysis of it in KA (Afghanistan) when I deal with the Claimant's ground of challenge made on a similar basis to that raised in the Court of Appeal (see paragraphs 32 and following below). I raise KA (Afghanistan) now, not because of its legal analysis, but for its factual findings. The court found that the Secretary of State had been guilty of a systemic breach of her duty to endeavour to trace the family members of unaccompanied minor asylum seekers in Afghanistan:

“... because she adopted the policy of granting them leave to remain until they reached the age of seventeen and a half, whereafter any further application would be considered on its merits. By that time, of course, the duty to endeavour to trace would be close to expiration because of the imminence of majority” (at [16] per Maurice Kay LJ, giving the judgment of the court).

It was expressly held that the Secretary of State did not discharge her duty merely by informing a child of the facilities of the Red Cross (see [24(1)]).

23. Again, this judgment had a potential effect on the Claimant's case, because his application for leave to remain and the various appeals had been determined without the benefit of this guidance, or the subsequent judgment of EU (Afghanistan) and Others v Secretary of State for the Home Department [2013] EWCA Civ 32, in which a differently constituted division of the Court of Appeal applied the principles set out in KA (Afghanistan) (which, as an individual case, settled) to the remaining appeals before the court. It is that which forms the basis of first of the Claimant's grounds of challenge to the Upper Tribunal's refusal of permission to appeal.
24. To complete the chronology, following the exhaustion by the Claimant of his rights of appeal, on 29 August, the Secretary of State set removal directions to Kabul for 12 September 2012. That notice is headed: “Removal Directions: Issued under paragraphs 9-10A of schedule 2 to the Immigration Act 1971, section 10(1) of the Immigration and Asylum Act 1999 and section 47 of the Immigration, Asylum and Nationality Act 2006”. After details of the directions, the notice states: “This is NOT an appealable decision” (emphasis in the original).

25. This claim for judicial review was issued on 11 September 2012. An injunction to restrain removal until the determination of this claim or further order was refused that day by His Honour Judge Cooke sitting as a judge of this court, but granted that evening by McFarlane LJ. Consequently, the Claimant was not removed on 12 September. On 17 October, the Secretary of State having lodged summary grounds, Silber J refused permission to proceed, declared the claim to be totally without merit and directed that a renewal should be no bar to removal. New removal directions were set on 2 November for the Claimant's removal to Kabul on 19 November 2012: I do not have a copy of those further removal directions, but understand they were in similar form to those made in September. A new application for an injunction restraining removal was refused by Judge Cooke on 19 November, on essentially the same grounds as Silber J had refused permission to proceed earlier; and the Claimant was removed to Kabul later that day.
26. However, the application for permission was renewed; and, on 23 March 2013, with his usual determination and eloquence, Mr Bedford persuaded me that this claim was arguable, and I gave permission to proceed.

The Grounds of Challenge

27. As I have indicated, Mr Bedford challenges the lawfulness of two decisions.
28. First, he submitted that Judge Kekić erred in refusing permission to appeal the decision of the Judge Hawden-Beal of 2 March 2012, because she failed to take properly into account two relevant considerations, both failures on the Secretary of State's part to fulfil her obligations towards the Claimant as an unaccompanied minor asylum seeker; namely obligations (i) to take steps to trace his family in Afghanistan (Ground 1), and (ii) to provide him with an effective remedy under European Union law by not allowing him to appeal the refusal of his second asylum claim whilst he was still a child (Ground 2).
29. Second, he submitted that, in any event, the Claimant's removal was unlawful because no valid removal decision was ever taken by the Secretary of State: there was therefore no underlying decision to remove the Claimant that could support the administrative directions under which he was in fact removed (Ground 3). He put this as a challenge to the Secretary of State's decision to set removal directions without any valid underlying decision to remove him – hence the Secretary of State's place as Second Defendant to the claim. Mr Tindal for the Secretary of State, however, submitted that, in substance, the challenge is again to the refusal of the Claimant's application to the Upper Tribunal for permission to appeal against the First-tier Tribunal's refusal of his appeal against the Secretary of State's decision to remove him made on 11 January 2012; although even if not, he submitted that (i) the removal was lawful, and (ii) if not lawful, in the circumstances no relief should be afforded the Claimant.
30. Insofar as these challenges are to the refusal of the Upper Tribunal to grant permission to appeal from the First-tier Tribunal, then such challenges can of course only be made on second-tier appeal grounds, i.e. on the basis that the challenge not only discloses a error of law on the part of the relevant decision-maker but raises an important point of principle or practice, or there is some other compelling legal reason

to allow the challenge to proceed (R (Cart) v Upper Tribunal [2011] UKSC 28 and R (PR) v Secretary of State for the Home Department [2011] EWCA Civ 988).

31. I will deal with these three grounds in turn.

Ground 1: The Failure to Fulfil the Duty to Endeavour to Trace

32. Article 3(1) of the United Nations Convention on the Rights of the Child (“UNCRC”) provides:

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

In the specific context of immigration decisions taken by the Secretary of State, this is reinforced by section 55 of the 2009 Act (ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4). Of course, even where the best interests of a child threatened with removal would be served by him remaining in the United Kingdom, those interests are only a primary consideration, i.e. a starting point: they may be overridden by other factors, including the maintenance of proper immigration control (see, e.g., in the context of the duty to endeavour to trace, DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305 at [78]-[79] per Lloyd LJ).

33. In furtherance of this norm, article 19(3) of Council Directive 2003/9/EC (“the Reception Directive”) provides:

“Member States, protecting the unaccompanied minor’s best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to 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”.

34. This has been transposed into domestic law by regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005 No 7), which, so far as relevant to this claim, provides:

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

(2) In cases where there may be a threat to the life or integrity of the minor or the minor’s close family, the Secretary of State shall take care to ensure that the collection, processing and circulation of information concerning the minor or his close

family is undertaken on a confidential basis so as not to jeopardise his or their safety.

(3) For the purposes of this regulation –

(a) an unaccompanied minor means a person below the age of eighteen who arrives in the United Kingdom unaccompanied by an adult responsible for him whether by law or custom and makes a claim for asylum;

(b) a person shall be an unaccompanied minor until he is taken into the care of such an adult or until he reached the age of 18 whichever is the earlier;...”.

35. In respect of Ground 1, Mr Bedford’s submissions were essentially as follows.

- i) In breach of this duty to endeavour to trace, the Secretary of State failed to take steps to trace the Claimant’s family members when he was a minor.
- ii) Mr Bedford conceded that this did not automatically result in the Claimant being entitled to indefinite leave to remain: his concession was appropriate, because such a contention did not survive KA (Afghanistan). The Secretary of State (and on appeal, in her shoes, the relevant tribunal) must assess the disadvantage, if any, the applicant has suffered as a result of such a breach of duty.
- iii) In this case, Mr Bedford submitted that the Claimant had suffered prejudice, namely he was deprived of potential evidence that his parents were indeed dead and his brothers indeed missing which would or might have supported his credibility generally, and specifically his claim for asylum as an unaccompanied child with no adequate reception facilities available to him in Afghanistan.
- iv) Mr Bedford submitted that the Claimant had “an unanswerable or at least compelling claim to asylum as an orphan for whom the possibility of his safe reception by surviving family members was not or could not be verified” (skeleton argument, paragraph 9). On that basis, he flirted with the submission that, in the circumstances, the Claimant ought to be granted asylum now. However, his primary submission was based upon the premise that, as the Claimant was over 18 when the Secretary of State determined his second asylum application, he could not then have been granted asylum on the basis that he was a child who, as such, would face persecution if returned to Afghanistan. Nevertheless, as the Claimant, prior to attaining the age of 18, would have obtained refugee status had the Secretary of State complied with her obligation to endeavour to trace, he ought now to be given “corrective leave” to remain in the United Kingdom on the basis of the principle formulated in R (Rashid) v Secretary of State for the Home Department [2005] 2005 EWCA Civ 744; [2005] Imm AR 608.

36. These submissions were densely argued, being put forcefully and at length by Mr Bedford. However, I find them unconvincing, for the following reasons.

37. An asylum application must be determined by reference to the circumstances at the date of consideration, whether that consideration is by the initial decision-maker, the First-tier Tribunal or the Upper Tribunal (R v Secretary of State for the Home Department ex parte Ravichandran [1996] Imm AR 97, confirmed in KA (Afghanistan) at [2] and in EU (Afghanistan) in which, at [34], Sir Stanley Burnton described this as a “fundamental principle of asylum law and practice”). Mr Tindal for the Secretary of State submitted that that principle of domestic law is at least consistent with the European law requirements of Council Directive 2004/83/EC (“the Qualifications Directive”). Article 13 of that Directive provides that Member States “... shall grant refugee status to a third country national... who *qualifies* as a refugee” (emphasis added); and, as Mr Tindal stressed, article 4, which provides that the assessment of an application for international protection is to be carried out on an individual basis and includes taking into account the applicant’s age, is also entirely in the present tense. I agree that the so-called Ravichandran principle is consistent with the European law requirements: in none of the many cases to which I was referred has the contrary been suggested.
38. The Ravichandran principle means that, once the Claimant had attained his majority, although his second asylum claim had been made when he was under 18, it had to be decided on the basis that he was an adult, albeit a young adult: the claim had to be determined on the circumstances as they were at the time of the decision, not on circumstances as they were at the time of his application or on any other notional circumstances. Mr Bedford’s lack of enthusiasm in pursuing a submission to the contrary was well-founded.
39. However, in support of his primary submission that discretionary leave ought now to be granted, Mr Bedford relied upon “the corrective principle” as illustrated, if not formulated, in Rashid. In that case, the applicant was an Iraqi Kurd who was refused asylum in 2001 and, on appeal, in 2002, at a time when, had the Secretary of State’s policy as to Iraqi Kurds been applied, he would have been granted asylum, because Kurds were inherently at risk of persecution in Iraq under the regime of Saddam Hussein. However, that policy was unfortunately not then applied, as it ought to have been. When, on a second application, the Claimant sought to have it applied, Saddam Hussein’s regime had fallen, the risk for Kurds on returning to Iraq had diminished and the Secretary of State’s policy had accordingly changed. Applying the Ravichandran principle, the Secretary of State and, on appeal, the tribunals refused the claim. In the Court of Appeal, Pill LJ (with whom May LJ agreed) found that serious errors of administration had resulted in “conspicuous unfairness” to the applicant, amounting to an abuse of power (see [34]). Although not awarding the applicant asylum (as the judge at first instance had done), Pill LJ noted that the Secretary of State had a “residual or general power” to grant indefinite leave under sections 3 and 4 of the 1971 Act; and he concluded that the court should grant “such relief as it properly and appropriately can”. In the event, the court made a declaration that the applicant was entitled to indefinite leave.
40. Mr Bedford contended that the same analysis applied here. The Secretary of State had acted in abuse of her power and unlawfully in failing to endeavour to trace the Claimant’s family members in Afghanistan. That gave rise to “conspicuous unfairness” to the Claimant – or at least some prejudice or disadvantage to him, which, on the basis of SL (Vietnam) v Secretary of State for the Home Department

[2010] EWCA 225 at [33] per Jackson LJ, he submitted was sufficient. As in Rashid, the Claimant ought to be awarded indefinite leave to remain. The First-tier Tribunal, and in its turn the Upper Tribunal on refusing permission to appeal, erred in not taking into account properly the Secretary of State's breach of this duty – as Mr Bedford accepted, unsurprisingly, as both decisions were pre-KA (Afghanistan); but nevertheless, he submitted, unlawfully. The Cart test was satisfied because of the change in law which has occurred since the First-tier Tribunal determination, as a result of KA (Afghanistan), meant that there was a compelling legal reason to allow the challenge to proceed.

41. The relationship between Rashid and Ravichandran has been illuminatingly considered in a number of recent cases: R (S) v Secretary of State for the Home Department [2007] EWCA Civ 546 (the analysis of Carnwath LJ (as he then was) in that case having been recently approved by the Court of Appeal in KA (Afghanistan) and EU (Afghanistan): see EU (Afghanistan) at [4(1)] per Sir Stanley Burnton), R (S, H and Q) v Secretary of State for the Home Department [2009] EWCA Civ 142 and R (AA (Afghanistan)) v Secretary of State for the Home Department [2012] EWCA Civ 1643. From those cases, the following propositions can be derived.

- i) As I have already described, a decision as to whether leave to remain should be granted should be made on the basis of circumstances as they stand at the date of the decision. Where an appeal is before a tribunal, the relevant date is the date upon which that tribunal considers matters.
- ii) However, where there has been past unlawful conduct on the part of the Secretary of State that gives rise to present injustice to the applicant, that may be a material consideration to a decision now. But the relevant decision-maker (i.e. the Secretary of State or, on appeal, the tribunal) is only required to take into account past conduct of the Secretary of State where (a) that conduct was unlawful: “abuse of power” does not add to that as a proposition, “abuse of power” merely defining unlawfulness in a public law sense; and (b) the conduct must be taken into account to avoid unfairness to the applicant.
- iii) With regard to the requirement that the conduct must be taken into account to avoid unfairness to the applicant, two notes of caution. First, in AA (Afghanistan) (at [17]), Laws LJ referred to the need to avoid “conspicuous unfairness” to the applicant. This phrase appears to derive from Rashid, where Pill LJ (at [34]), referred to serious errors of administration in that case having “resulted in conspicuous unfairness to the claimant”. However, in S, Carnwath LJ explained that this simply meant the conduct led to unfairness to such an extent that the conduct was unlawful in a public law sense. In the Claimant's case on this ground, the unlawfulness derives from the Secretary of State's failure to comply with her obligation to endeavour to trace the Claimant's family. Conspicuous unfairness to the Claimant is not a necessary element for a finding of unlawfulness on the part of the Secretary of State here, as it was in Rashid. In SL (Vietnam) (at [33(ii)]), Jackson LJ appears to have considered mere “prejudice” to the applicant sufficient. It is not necessary in this case for me to determine whether the unfairness to the applicant must be at or above a particular threshold. In the Claimant's favour, and without determining the point, I shall proceed on the basis that any disadvantage of substance is sufficient. Second, in SL (Vietnam) (again, at [33(ii)]), in respect

of what must be taken into account, Jackson LJ used the phrase “*past* prejudice suffered” (emphasis added) as a result of the unlawful conduct; but it seems to me that, as Carnwath LJ indicated in S at [47], the disadvantage to the applicant has to be current, even if arising from past conduct.

- iv) Although for reasons to which I shall come the result of this case would be the same even if the court had to take its own view on whether a failure to take into account disadvantage to the applicant resulting from the unlawful conduct of the state, the established law is that, in respect of a challenge on the basis that the decision-maker has failed to take into account such a factor, the court will only intervene on traditional public law grounds, the question being: “Would it be so unfair to proceed without due regard to the factors relied on that no reasonable Secretary of State would take such a course?” (AA (Afghanistan) at [17] per Laws LJ, with whom Sullivan LJ and McCombe J (as he then was) agreed). If the factor is taken into account, the weight to be given that factor is of course a matter for the decision-maker.
- v) In accordance with usual public law principles, where the decision-maker has erred in law in not taking past conduct into account as a currently material factor, then the court will send the matter back to the decision-maker for reconsideration and redetermination, unless the decision-maker could only properly exercise his discretion in one way.

42. Applying those principles to this case:

- i) The Secretary of State clearly had a duty to endeavour to trace the Claimant’s family members in Afghanistan.
- ii) However, Mr Tindal submitted that, in the circumstances of this case, there was no breach of that obligation, because there were no sensible steps that the Secretary of State could take to trace the Claimant’s relatives in Afghanistan, on the information available to her. The only available information was from the Claimant himself, which was to the effect that his parents were dead, having been killed in 2007-8: his brothers had disappeared at that time: he last saw his brothers at an unspecified address in Kunar Province about 8 months before he arrived in the United Kingdom, the family having lived at Mizayan previously: he had no other relatives in Afghanistan: he had refused (or, at least, failed) to cooperate with the Red Cross in tracing his relatives in Afghanistan: and he was unable to provide any further information. In the context of his asylum claim as a child, Mr Tindal suggested that it was not in the Claimant’s interests to cooperate in tracing any relatives in Afghanistan.
- iii) That submission has some force. But, in any event, KA (Afghanistan) emphasised the need for an applicant to establish disadvantage as a result of any breach of the duty to endeavour to trace family members (see [25]-[26] per Maurice Kay LJ); and I am certainly unpersuaded that the Claimant has suffered any real disadvantage as a result of any breach of that duty here. Any breach simply has no causal potency or relevance in this case.
- iv) Mr Bedford submitted that the Claimant was deprived of potential evidence supporting his version of events that his parents were indeed dead and his

brothers indeed missing, which, he submitted, would or may have supported his credibility generally (child asylum seekers being generally afforded more benefit of doubt and leeway in relation to credibility, because of their age: see AA (unattended children) Afghanistan CG [2012] UKUT 16 (IAC)), and specifically his claim for asylum as an unaccompanied child with no adequate reception facilities available to him in Afghanistan (children being a social group for asylum purposes, such that a claim for asylum can be made on the basis that a child as a child is at risk on return: see LQ (age: immutable characteristics) Afghanistan [2008] UKAIT 5 (AIT) (“LQ (Afghanistan)”).

- v) However, first, as Mr Tindal properly stressed, the information upon which any tracing enquiries could have been made by the Secretary of State was very sparse. I have already described the relevant information the Claimant gave (see paragraph 42(ii) above). It is clear that he was unable or unwilling to add to that information – Mr Tindal suggested that the Claimant may have thought that it was not in his best interests to give any further information, but whether the Claimant failed to give any further information because he did not have any, or because he was unwilling to give further information, is not to the point – and it has not been suggested that there was any source of information about the Claimant’s relatives other than the Claimant himself. On the basis of the information available to the Secretary of State from the Claimant, any sensible steps to trace the Claimant’s relatives were all but impossible; and it seems to me almost inconceivable that any further information, positive or negative, would have resulted from any steps the Secretary of State might reasonably have taken to trace the Claimant’s relatives. It is for the Claimant to show he was disadvantaged by any breach of the duty; and on the balance of probabilities – indeed, by some considerable margin – I am not persuaded that, had the Secretary of State taken the steps it is contended she ought to have taken, they would have produced any further information.
- vi) In any event, even if, contrary to my firm view, some steps to trace might reasonably have been made by the Secretary of State and some information thus elicited, it is difficult to see how that information would have assisted the Claimant. If his brothers had been found and if they were able to look after him, he would have been liable to return to Afghanistan. If they had not been found, then he would have been granted discretionary leave until he reached adulthood, the leave he was in fact granted. Mr Bedford submitted that attempts to trace his parents and brothers may have added to his credibility, if enquiries provided evidence that his version of events was true; but Judge Hawden-Beal, whilst clearly being sceptical about parts of the Claimant’s account, found that any assailants of his parents did not know and would not be able to identify the Claimant, and he had no political profile in Afghanistan at all (see, especially, paragraphs 41 and 43 of her determination). His credibility as to events in Afghanistan was not, therefore, crucial to or determinative of the judge’s determination. Insofar as the Claimant was deprived of a decision on his second asylum claim whilst he was child, I deal with that below in the context of Ground 2.
- vii) Mr Tindal submitted that, although of course each case is fact-specific, the Claimant’s case on duty to endeavour to trace is no stronger than that of the

claimant in QA (Afghanistan), one of the individual claims heard with EU (Afghanistan) in which, as in this case, the claimant had turned 18 by the time the matter was determined by the First-tier Tribunal. I agree. In the case of QA (Afghanistan), the claimant refused to provide information to the Red Cross or other organisation so as to enable his mother to be traced, so that Sir Stanley Burnton (giving the judgment of the court) said (at [34])”

... [I]t is impossible to see that the Secretary of State’s breach of the duty to endeavour to trace is relevant to his case.”

As in this case, it seems to me that that conclusion was provoked, not by the lack of cooperation of the applicant in itself, but by the inconceivability that, on the information which was in fact available to the Secretary of State, endeavours to trace family members would result in further information of any possible assistance.

- viii) Whilst Judge Hawden-Beal had in mind that the Secretary of State had a duty to attempt to trace the Claimant’s family – she expressly refers to it in paragraph 21 of her determination – neither she nor Judge Kekić had the benefit of KA (Afghanistan), which found that the Secretary of State had systemically breached that duty, because that appeal was not decided until their respective decisions. Furthermore, Judge Hawden-Beal did not know that reference of a child to the facilities of the Red Cross was, alone, insufficient to fulfil the obligation on the Secretary of State to endeavour to trace relatives, which also derived from KA (Afghanistan); and, in paragraph 40 of her determination, she emphasised the failure of the Claimant to make efforts to trace his family. I therefore accept that the judge did not apply the law with regard to the duty to endeavour to trace family members, as set out in KA (Afghanistan) and EU (Afghanistan). She was of course not at fault, because those cases were not decided until after here determination; but, in failing to apply the guidance in those cases, she erred in law.
- ix) However, it is very clear that that error was not material. For the reasons I have given, any breach of that duty was immaterial in this case, because the steps that the Secretary of State ought to have taken would not have resulted in any information relevant to the Claimant’s claims for leave, on the ground of asylum or otherwise; and, even if they had resulted in some information being forthcoming, that information would not have assisted the Claimant or possibly led to his claim for leave to remain being determined in any other way than it in fact was.
- x) The Claimant having suffered no substantial disadvantage as a result of any unlawfulness on the part of the Secretary of State, there was no material consideration in respect of it to be taken into account in determining his claim for leave, on any ground. Consequently, Rashid has no part to play in this case. I am entirely sure that, had Judge Hawden-Beal and, in her turn, Judge Kekić had the benefit of KA (Afghanistan) and the cases that followed it, and knew of the requirement to assess the current injustice to the Claimant resulting from the past conduct of the Secretary of State, their decisions would not have been any different.

43. Ground 1 consequently fails.

Ground 2: The Failure to Provide an Effective Remedy

44. Article 39 of the Procedures Directive, cross-headed “The Right to an Effective Remedy”, requires Member States to ensure that applicants for asylum have a right to an effective remedy before a court or tribunal, in respect of a decision taken on their application for asylum (article 39(1)(a)) and a decision to withdraw refugee status (article 39(1)(e)). The decisions caught by those provisions are only those which are substantive, i.e. decisions which determine the grant or withdrawal of refugee status on the merits, or for formal or procedural reasons in such a way as to preclude any decision on the substance: decisions which are merely preparatory to such decisions are not covered (Samba Diouf v Ministere du Travail, de l’Emploi et de l’Immigration EUCJ Case C-69/10; [2012] 1 CMLR 8).
45. The particular form of remedy is a matter for each Member State, which has autonomy in such matters subject only to the principles of effectiveness (i.e. national rules may not render the exercise of rights conferred by EU law virtually impossible to achieve or excessively difficult to access) and equivalence (i.e. national rules must not be less favourable than those governing comparable domestic actions) (see FA (Iraq) v Secretary of State for the Home Department [2011] UKSC 25 at [11]-[12] per Lord Kerr).
46. The requirements of the right were recently considered in Samba Diouf, at [61]:
- “... The right to an effective remedy is a fundamental principle of EU law. In order for that right to be exercised effectively, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons...”.
47. Although article 13 of the Qualification Directive requires Member States to grant refugee status to an individual who qualifies as a refugee, procedure being generally within the ambit of Member States, the Directive does not impose any time-limit on the making of an asylum decision (article 23(2)): it is for Member States to provide for time-limits and other rules to enable the applicant to exercise the right (article 39(2)). The effectiveness of remedy depends on the administrative and judicial system of each Member State seen as a whole (paragraph (27) of the preambles).
48. Mr Tindal submitted, correctly, that this means that effective remedies would include both an appeal to a tribunal against the asylum decision itself, and a judicial review of the merits of such a decision which is sufficient to enforce EU rights if incompatible with them. Mr Bedford accepted – and, indeed, relied heavily upon – the proposition that, where an asylum claim had been made at a time when asylum might have been granted, but refugee status was no longer available (because, e.g., by the time of the relevant decision, circumstances in which asylum could be granted no longer applied), either an appeal to the tribunal or judicial proceedings which might result in the grant of indefinite leave, rather than asylum status, would be an effective remedy.

49. Article 23 of the Procedures Directive, “Examination procedure”, requires Member States to process applications for asylum in an examination procedure (article 23(1)), which they “shall ensure... is concluded as soon as possible, without prejudice to an adequate and complete examination”; and, although the Directive imposes no time-limit upon the making of a decision, when no decision has been taken within six months, the applicant has to be informed of the delay, with information as to when a decision might be expected (article 23(2)).
50. In making any immigration decision that impacts upon a child, then the best interests of that child are a primary consideration, each Directive confirming that it respects the fundamental rights and the principles recognised by the Charter of Fundamental Rights (see, e.g., preamble (8) of the Procedures Directive; and preamble (1) of the Qualification Directive). Preamble (14) of the Procedures Directive states (immediately after reference to the need for an effective remedy in preamble (13)):

“In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability. In this context, the best interests of the child should be a primary consideration of Member States.”

Article 17, “Guarantees for Unaccompanied Minors”, requires Member States to ensure unaccompanied child asylum seekers have representation and/or assistance “as soon as possible”.

51. Mr Bedford submitted that it is in the best interests of an unaccompanied minor asylum seeker to have his or her claim for asylum determined whilst a child, because a child has two benefits over an adult to which I have already referred (see paragraphs 35(iii) and 42(iv) above): (i) in the assessment of credibility, a child is generally afforded more benefit of doubt and leeway, and (ii) it is open to a child to contend that, children being a social group for asylum purposes, he or she is entitled to asylum as child, unaccompanied in the United Kingdom and with no adequate reception facilities in his or her country of origin. In support of his proposition, he relied upon cases such as the recent judgment of the Court of Justice of the European Union in MA, BT and DA v Secretary of State for the Home Department [2013] EUCJ C-648/11.
52. Indeed, he submitted that the proposition was recognised in the Secretary of State’s own policy documents. He referred to APU Notice 3/2007 (see paragraph 8 above), which, at paragraph 5, states that discretionary leave to remain for an unaccompanied minor asylum seeker will end when the child is 17½ years of age “to enable the [UKBA] to deal with any application to extend or to vary leave and any subsequent appeal prior to the young person turning 18, providing more clarity to the young person about their future”. He also referred to the Secretary of State’s Instruction, “Processing an Asylum Application from a Child” (version 5, 11 August 2010). That stresses the best interests of the child, and how they should be considered. Paragraph 1.3 states:

“Article 3 of the UNCRC obligates the UKBA to ensure that the best interests of the child are a primary consideration in all actions concerning the child. This guidance must be read with this principle clearly in mind and the understanding that Best

Interests is a continuous assessment that starts from the moment the child is encountered and continues until, such time as a durable solution has been reached.”

There follows a lengthy narrative on the statutory duty to promote the welfare of children under section 55 of the 2009 Act, including the statutory guidance issued by the Secretary of State in respect of that duty including, specifically:

“Children should have their applications dealt with in a way that minimises the uncertainty that they may experience.”

The Process Map annexed to the Secretary of State’s Instruction indicates that, on an asylum claim by an unaccompanied child, a decision should be made within 41-45 days.

53. However, I do not find the European authorities directly in point. For example, MA, BT and DA concerned Council Regulation (EC) No 343/2003 (the Dublin II Regulation), and the comments of the court were focused on the issue of possible delay in the determination of an unaccompanied child’s asylum claim by removing him to another state under that Regulation, and the importance of ensuring “prompt access to the procedures for determining refugee status” (see [61]), which reflects article 17 of the Procedures Directive (see paragraph 50 above).
54. Nor am I convinced that the domestic documents to which Mr Bedford referred have quite the force for which he contends. The APU Notice 3/2007, as submitted by Mr Tindal, hardly amounts to a guarantee that all claims made by 17½ year old asylum seekers will be determined (including any and all appeals) by the time the applicant turns 18; and the Instruction Process Map is expressly merely “indicative of best practice”, with variations said to be expected as a result of intake fluctuations and available operational resources. Furthermore, as I have indicated, the Directives do not require an asylum application – even an application by an unaccompanied child – to be determined, by initial administrative decision or by judicial process, within a particular time. Nevertheless, I accept that an unaccompanied child asylum seeker enjoys some advantages over an adult: over and above the two relied upon by Mr Bedford, he or she also enjoys the benefit of the obligation imposed on the State to endeavour to trace family members in the country of origin (see paragraphs 32 and following; above, and also R (TN (Afghanistan)) v Secretary of State for the Home Department [2011] EWHC 3296 (Admin) at [96] per Lindblom J). I shall proceed on the basis that it is in the best interests of an unaccompanied child asylum seeker to have his or her asylum claim determined before the age of 18.
55. In relation to Ground 2, Mr Bedford made the following submissions.
 - i) The Secretary of State’s ploy in her letter of 8 August 2011 of offering to extend leave if the Claimant made an application to vary his leave within 14 days could not overcome the fact that his leave was curtailed from 1 May 2011. The letter expressly referred to “the expiry of your leave on 1 May 2011”. Consequently, the Claimant had a right of appeal as from 1 May 2011.
 - ii) Alternatively, his leave was brought to an end by the letter of 8 August 2011, giving him a right of appeal from that date.

- iii) Contrary to regulation 4(1) of the Immigration (Notices) Regulations 2003 (quoted at paragraph 21(iii) above), the Claimant was not notified of that right of appeal, whenever it arose. Had he been notified, he would have exercised that right of appeal; and his appeal would have been concluded by the time he turned 18, on 1 November 2011.
 - iv) In any event, he lodged his appeal on 12 August 2011, and that appeal ought to have been finally determined by 1 November 2011.
 - v) In not determining the appeal to a conclusion by his eighteenth birthday, the Secretary of State acted unlawfully.
 - vi) As a result, either (i) the Claimant's application ought to have been determined on the basis he was still a child, thereby giving him an effective remedy; or, alternatively and as Mr Bedford's primary submission, (ii) as the reason it was not so determined was the failure of the Secretary of State as a result of which the Claimant has lost an otherwise unarguable or at least compelling right to refugee status, the Claimant ought to be given indefinite leave on the basis of the Rashid principle.
56. Mr Bedford, again, made these submissions with force; but, again, I am unpersuaded by them, for the following reasons.
57. It is worthy of note that the Claimant did, of course, as a child, have a right of appeal against a decision to refuse him asylum status, namely against the refusal in February 2010. He was then legally represented. He did not take advantage of that opportunity. On the basis of what is before me, we do not know why. Mr Bedford speculated that the reason for the Claimant not appealing may have been because of a simple mistake by his solicitors; or, alternatively and at the other end of the spectrum, because he took a deliberate decision not to do so as he was aware that a second asylum claim at the expiry of the discretionary leave he had been granted would in fact be dealt with on its merits and he would have a right of appeal from that. I must not speculate; although it is worth marking that:
- i) There is a presumption that the Claimant was properly advised and, albeit he was a child, he took an informed and advised decision as to the course he wished to take in respect of an appeal. There is no evidence at all that the solicitors here made any mistake of professional judgment or otherwise.
 - ii) Each of the claimants in the eight claims that were considered in KA (Afghanistan) and EU (Afghanistan) seem to have been in the same position as the Claimant – in having an initial asylum claim rejected but with a grant of discretionary leave until the age of 17½ years; no appeal, but a second asylum application at the age of 17½ - but the Court of Appeal does not appear to have regarded their failure to appeal against the first refusal as in point, perhaps on the basis that they could properly expect to have a second application for asylum dealt with on its merits when their discretionary leave came to an end.

In any event, it certainly seems curious to me that the Claimant now complains of not having had an appeal against refusal of his asylum claim determined as an unaccompanied minor, when he eschewed an earlier opportunity to make exactly such

an appeal which would undoubtedly have been determined prior to him achieving adulthood.

58. In any event, leaving that to one side, the reassessment of the Claimant's age in January 2011 was clearly not an asylum decision for the purposes of article 39 of the Procedures Directive, being, at its highest, merely a preparatory step towards an asylum decision. Should authority be required for that proposition, R (Kadri) v Birmingham City Council [2012] EWCA Civ 1432; [2013] 1 WLR 1755 at [39] provides it.
59. Nor was the decision to curtail the Claimant's discretionary leave an asylum decision, although again it may be regarded as preliminary to a further asylum application and so perhaps preparatory to a later asylum decision.
60. The delay in communicating the decisions to reassess the Claimant's age and to curtail his discretionary leave was, no doubt, very unfortunate; but it was not unlawful. Neither decision fell within the EU Directives concerning asylum (notably the Qualification Directive and the Procedures Directive), because they were not asylum decisions and were not made in the context of an asylum application. In progressing the application, there is no evidence that the Secretary of State did not properly take into account the best interests of the Claimant as a child: he was effectively guaranteed leave to remain whilst he was a child, and any decision concerning prioritisation of claims would have to take into account that, and his approaching adulthood. Nor did the delay undermine the principle of effectiveness, neither rendering it "virtually impossible or excessively difficult" for the Claimant to exercise his rights as an asylum seeker. At the time those decisions were made, the Claimant had no extant asylum appeal or application, although it was open to him to have sought to appeal against the February 2010 refusal of asylum (if necessary, out of time) or make another asylum claim, as a child, whenever he wished.
61. In any event, the 8 August 2011 letter enabled him to make a further asylum claim, with full rights of appeal, which opportunity he took. Mr Bedford criticised the letter for not overtly and unambiguously curtailing the Claimant's discretionary leave, which would have given him, in August 2011, a right of appeal. If an appeal had been made then, he might have had a determination before his birthday, on 1 November 2011. But, leaving aside the inherent optimism in that assumption, that submission fails to take account of what that letter did. It did not, as Mr Bedford submitted, rob the Claimant of the opportunity of an early appeal; if he had not made a second asylum claim within the fortnight allowed, then his leave would have come to a complete and prompt end, not at 8 August but as at 22 August 2011, and he would have had the right of appeal Mr Bedford now, with hindsight, craves. The letter merely gave the Claimant another option, namely, by extending the Claimant's discretionary leave to 22 August 2011, to enable him to make an in-time application to vary his leave to remain by way of extension. As such, the letter was clearly intended to, and did in fact, protect the Claimant's interests, not derogate from them: it did not take any of the Claimant's options away, but rather added another, valuable option to have an in-time application with in-country appeal rights attached which, unsurprisingly, the Claimant chose to pursue.
62. As I have explained, although the Secretary of State understood that the Claimant's leave had otherwise expired on 1 May 2011, we now know (from Ahmadi) that the

curtailment of leave could only be effective from the date of notification, i.e. 8 August 2011. For the reasons I have given, on its true construction, that letter in any event extended that leave to 22 August 2011. There was no break in leave that could have given rise to a right of appeal, until the Claimant's second asylum claim was rejected in January 2012.

63. Mr Bedford's real complaint is that the Claimant's second asylum application, made on 12 August but supplemented substantially on 6 September 2011, was not determined by the Secretary of State until 4-5 months later, on 11 January 2012; and, in the meantime, on 1 November 2011, the Claimant turned 18.
64. However, as I have indicated, the Procedures Directive is careful to leave time limits and period to Member States; the domestic provisions set no rigid time limit for the determination of an asylum claim; and the relevant policy sets only guidance. The Claimant's application was extensive. The reply on 11 January 2012 was full; and, although it referred to the earlier refusal in February 2010, it was clearly a fresh substantive decision. That is why it gave rise to a further right of appeal. Again, there is no evidence that the Secretary of State did not have proper regard for the best interests of the Claimant's status as a child, the end of which was rapidly approaching. Consequently, in my judgment, it is not arguable that the delay in disposal by the Secretary of State was unlawful. If the Claimant had considered that it was, or that the State was obliged to determine the claim by 1 November 2011, then it was open to him to seek relief from this court by way of judicial review. He did not.
65. In accordance with Ravichandran, once the Claimant had turned 18 years of age on 1 November 2011, his claim for leave to remain fell to be assessed, not on the notional basis that he was still a child, but on the actual basis that he was, at the time of the decision, a young adult.
66. Determining the claim after the Claimant was 18 meant that he was open to the three strands of disadvantage to which I have referred above (see paragraph 54).
67. First, with regard to the potential benefit a child has from the Secretary of State's obligation to endeavour to trace his or her parents, I have already dealt with that as an issue in Ground 1: the Claimant was not put at any disadvantage by any failure breach by the Secretary of State of that obligation (see paragraph 42 above).
68. Second, with regard to the benefit of doubt and leeway a child has in respect of credibility, (a) an eighteenth birthday is not to be seen as a bright line, particularly where, as in the Claimant's case, his precise date of birth is unknown and fixed by way of a reasonably blunt assessment (EU (Afghanistan) at [34] per Sir Stanley Burnton); it is unrealistic to consider that the Claimant's credibility would have been judged differently at (say) the end of October 2011, rather than ten weeks later in early January 2012: (b) Judge Hawden-Beal did in fact take into account the fact that the Claimant was a minor when he claimed asylum, and did give him the benefit of the doubt as to lack of detail in his claim (see paragraph 39 of her determination): and (c) in any event, although the judge was sceptical of some aspects of his version of events, the Claimant's credibility was not determinative of his claim (see paragraph 42(vi) above).

69. Third and finally, relying on LQ (Afghanistan), Mr Bedford submitted that, “at all times before his majority, [the Claimant] had an unanswerable or at least compelling claim to asylum as an orphan or as an orphan for whom the possibility of his safe reception by surviving family members was not and could not be verified” (skeleton argument, paragraph 9). That claim was frustrated by the Secretary of State’s unlawfulness in not taking steps to trace his family members in Afghanistan (dealt with above: see paragraphs 32-43) and in not ensuring that the claim was determined by his eighteenth birthday.
70. Mr Tindal submitted that that was an oversimplification of the authorities of which LQ (Afghanistan) was one. I agree: in my view, Mr Bedford’s submission properly reflects neither the law, nor the facts of this particular case.
71. Refugee status is granted only where ill-treatment in the relevant country of origin is for one of the reasons set out in article 1A(2) of the Geneva Convention relation to the Status of Refugees, which include “membership of a particular social group” by virtue of an immutable characteristic. LQ (Afghanistan) held, simply, that a person’s age is an immutable characteristic for these purposes, as, although age changes over time, one can oneself do nothing to change what it is at any particular time. It might be thought that that is a fairly modest proposition. The tribunal dealt with the issue in a modest determination of only seven paragraphs.
72. LQ (Afghanistan) meant that asylum could be claimed by a child, as a child; important in the particular case, because the immigration judge below had found that there would be no reception facilities in Afghanistan for the applicant and that, as an orphaned child, he would, on all the evidence, be the subject to risks of the exploitation and ill-treatment. However, LQ (Afghanistan) is not authority for the proposition that children (even if orphaned) cannot be returned to Afghanistan: it is not a country guidance case to that effect, the onus remains on the claimant to make good his asylum claim, and each case will depend upon its own individual circumstances (including the child’s age and to where he would be returned within Afghanistan) and the findings of fact made by the Secretary of State or (in its turn) the tribunal (see, e.g., AA (unattended children) Afghanistan CG [2012] UKUT 16, HK (Afghanistan) and Others v Secretary of State for the Home Department [2012] EWCA Civ 315 at [34]-[38] per Elias LJ, and SHL (Tracing obligation/Trafficking) Afghanistan [2013] UKUT 312 (IAC)). The risks to which the Claimant would have been subject if returned when just past his eighteenth birthday were of course considered by Judge Hawden-Beal: she concluded that, if returned to Kabul, the Claimant would be safe and not at risk of persecution or ill-treatment. Subject of course to the issues in this claim, that conclusion is unchallenged and now unchallengeable. Given that there is no bright line at an eighteenth birthday, there does not appear to be any evidence that the Claimant would have been more likely to have been the subject of ill-treatment if returned to Afghanistan when he was just under 18 years old, than if he were returned when just over.
73. In any event, even if, prior to 1 November 2011, the Claimant’s asylum claim had been determined in his favour on the basis that, as an orphaned child, he would be liable to ill-treatment on return, his status as a refugee would then be dependent upon him being a child. As comprehensively discussed by Lindblom J in TN (Afghanistan), when the Claimant ceased to be a child, his status would be liable to review and revocation. Mr Bedford responds by submitting that, if the Claimant had

been given asylum in (say) October 2011, then the burden on any review and revocation would rest upon the Secretary of State rather than the Claimant, upon whom of course it fell in the application for asylum itself. However, looking at the determination of Judge Hawden-Beal as a whole, it is entirely unrealistic to suggest that, in this case, the burden of proof would have been determinative: on any review on the basis that the foundation of the Claimant's asylum status (i.e. his minority) had gone, in (say) January 2012, the result could only have been revocation of the Claimant's asylum status.

74. Consequently, in pursuing this claim on the basis that the Claimant is entitled to indefinite (or, indeed, any) leave to remain on the basis of Rashid, the Claimant faces two insuperable difficulties. First, the Secretary of State has not acted unlawfully in failing to determine the Claimant's asylum claim before he turned 18. Second, and in any event, the Claimant has suffered no real disadvantage as a result of any failure.
75. Therefore, in summary:
- i) The Claimant had a right of appeal in respect of the refusal of his first asylum claim in February 2010. That claim was made on an identical basis to his second claim. He did not exercise that right.
 - ii) If the Claimant considered that the Secretary of State was legally obliged to determine his second asylum claim (with or without the appeals process) whilst he was a minor, then it was open to him to have required that of the Secretary of State and to have judicially reviewed any refusal. He did not pursue that course either.
 - iii) Vitally, in respect of the 11 January 2012 refusal of his asylum claim, (a) the Secretary of State was correct in considering the Claimant's claim on the basis of matters as they stood at the date of her decision, including on the basis that the Claimant was, by the time of the decision, an adult; (b) the Claimant had a right of appeal against that refusal, which he exercised: the tribunals too were correct in considering matters (including the Claimant's age) at the date of their respective decisions; and (c) in addition, the Claimant had the right to claim indefinite leave on the basis that, on the basis of all material considerations (including the fact that, as a result of the Secretary of State's unlawful conduct, the Claimant suffered detriment from the failure to determine his asylum claim whilst he remained a child). It is of course not to the point that the Claimant's appeal failed, and that in the event the refusal of his asylum claim made as a child provides no support for any claim that he should have discretionary leave to remain now.

In all the circumstances, I am not satisfied that the Claimant has been left without an effective remedy in respect of his claim for asylum.

76. For those reasons, in my judgment, Judge Hawden-Beal made no error in her determination, nor was the Upper Tribunal's refusal of permission to appeal in error.
77. Ground 2 consequently fails.

Ground 3: Failure to Make a Valid Removal Decision

78. Ground 3 is somewhat more conceptually straightforward.
79. Mr Bedford put it thus. In the letter of 11 January 2012, under the provisions of section 47 of the 2006 Act (quoted at paragraph 12(vi) above), the Secretary of State purported both to refuse the Claimant's application for varied leave by way of extension, and to decide to remove him. The decision to remove him in that letter was ineffective (Ahmadi). No other decision to remove him has been made. Therefore, the removal directions set administratively on 2 November 2012, under which the Claimant was in fact removed, had no lawful decision to remove underlying them. A decision to remove the Claimant, as someone in the United Kingdom with no leave to remain, would have had to have been taken under section 10 of the 1999 Act. He was entitled to a right of appeal to that decision and, because he had made an earlier asylum and human rights claim, he had a right to an in-country appeal (see paragraph 12(v) above). In those circumstances, the Secretary of State ought to be required to take steps to return the Claimant to the United Kingdom, to enable him to exercise that appeal right.
80. In my view, these submissions have more force than those in respect of Grounds 2 and 3. In particular, I accept the following:
- i) The removal decision, given within the letter of 11 January 2012 under section 47 of the 2006 Act, was ineffective or at least challengeable, for the reasons set out in Ahmadi. Because of the very restricted scope of section 47 as explained in Ahmadi, the time for making and notifying a removal decision under that statutory provision was short. In fact, no other removal decision has ever even purportedly been given under section 47.
 - ii) However, section 10(1)(a) of the 1999 Act provides that:

“A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if... having only a limited leave to enter or remain, he... remains beyond the time limited by the leave...”.
 - iii) After his appeal rights had been exhausted, as a person unlawfully in the United Kingdom, the Claimant was subject to removal under section 10. Indeed, the removal directions of 2 November 2012 could only have been given under that provision.
 - iv) Directions for removal under section 10 require a decision by the Secretary of State to remove the individual who is unlawfully in the United Kingdom, in the form of a decision to issue removal directions. That is an important decision, because it triggers an obligation on the part of the Secretary of State to consider various factors that are relevant to the decision of whether or not to issue removal directions. By paragraph 395C of the Immigration Rules:

“Before a decision to remove under section 10 [of the 1999 Act] is given, regard will be had to all the relevant factors known to the Secretary of State, including: (i) age; length of residence in the United Kingdom; strength of

connections with the United Kingdom; personal history, including character, conduct and employment records; (v) domestic circumstances; previous criminal record and the nature of any offence which the person has been convicted; compassionate circumstances; (viii) any representations received on the person's behalf...".

- v) In this case, as I have indicated, the Secretary of State did make a decision to remove in the letter of 11 January 2012, but that was done under section 47. For the reasons given in Ahmadi, that decision was challengeable. No decision to remove could have been made under section 10 at that time, because the Claimant then had leave to remain which was only brought to an end when he received that letter.
- vi) There is no evidence that a decision to issue removal directions under section 10 was ever made. Although Mr Tindal submitted that the decision was incorporated into the removal direction notices served, that cannot be right; because those notices each said, "This is NOT an appealable decision" (emphasis in the original), and a decision to remove under section 10 is an appealable decision (see paragraph 12(v) above).
- vii) The Claimant was therefore removed as the result of a process that was on its face unlawful, thereby depriving him of a right of appeal which would in the Claimant's case, because of his asylum and human rights claims, have been in-country (again, see paragraph 12(v) above).
- viii) In those circumstances, in terms of relief, this unlawfulness of process is:

"... the starting point.... It is a factor telling strongly in favour of ordering the person's return, so as to restore him to the position he should have been in under the statute and would have been in if the Secretary of State had acted lawfully" (YZ (China) v Secretary of State for the Home Department [2012] EWCA Civ 1022 at [49] per Richards LJ).
- ix) Mr Bedford additionally relied upon the comment in Adamally and Jaferi at [24], to the effect that it cannot be presumed that a new decision as to removal will be the same as a previous decision.

81. However:

- i) Each of the two decisions contained within the Secretary of State's letter of 11 January 2012 – the decision to refuse to vary the Claimant's leave by way of extension, and the decision to remove him – were appealable decisions (sections 82(1) and 82(2)(d) and (ha) of the 2002 Act: see paragraph 12(v) above).
- ii) Both were appealed, and both dealt with by Judge Hawden-Beal in the First-tier Tribunal (see paragraph 6 of her determination). The issue of the lawfulness of the removal decision was not raised or dealt with by the judge.

That is no surprise: the appeal was heard and her determination promulgated before that in Ahmadi UT.

- iii) The issue does not appear to have been raised by the Claimant in his late application to the Upper Tribunal for permission to appeal. That application was made after the promulgation of Ahmadi UT. No issue being raised in the grounds of appeal, it was of course not referred to by Judge Kekić when she refused the application.
- iv) However, the validity of the removal decision having been the subject of the Claimant's appeal to the First-tier Tribunal, having been determined by Judge Hawden-Beal, and permission to appeal having been refused by both the First-tier and Upper Tribunals, the Claimant's challenge now is not in substance to the Secretary of State's reliance on the 11 January 2012 decision to remove or to her failure to make a valid removal decision; but rather to the Upper Tribunal's refusal of permission to appeal Judge Hawden-Beal's decision that the removal decision was good. That is a Cart issue: Judge Kekić decision to refuse permission to appeal can only be challenged on the basis that, not only did she err in law, but it raises an important point of principle or practice that requires consideration, or there is some other compelling legal reason to allow the challenge to proceed.
- v) Judge Kekić's decision did not err in law in the sense that she was not bound to consider a ground of appeal not raised. Further, it raises no important point of principle or practice that requires consideration: the law following Ahmadi is quite clear, particularly following the confirmation of that decision recently in the Court of Appeal. However, Mr Bedford submitted that there was a compelling reason for allowing the challenge to proceed, namely because, not to do so, will rob the Claimant of an in-country right of appeal to which he would otherwise have been entitled. That, he submitted, would be unjust.
- vi) However, attractive as that argument might be at first blush, I do not consider that it is good, for two reasons. First, although Judge Hawden-Beal did not have the advantage of the learning in Ahmadi UT, the Claimant (who was legally represented) did at the time he made his application to the Upper Tribunal for permission to appeal. He did not rely upon the unlawfulness of the removal decision then. There is no good reason why he should not have done so. Second, Judge Hawden-Beal did consider the merits of the challenge to the removal decision in her determination, and found them to be wanting – that she did so might explain – indeed, that might explain why the Claimant did not rely upon that the unlawfulness of the removal decision. In particular, she effectively took into account the matters she would have been required to have taken into account the factors set out in paragraph 395C of the Immigration Rules, especially in paragraphs 48-50 of her determination, albeit, there, in the context of the Claimant's claim under article 8 of the European Convention on Human Rights. The Claimant does not suggest that circumstances have changed since that decision. On the basis of the judge's determination, it is inconceivable that an appeal against a new removal decision under section 10 would (or, reasonably, could) have met, or now meet, with success. In those circumstances, the Claimant has suffered no

injustice, and indeed no disadvantage at all, by virtue of the Secretary of State's failure to make a further decision under section 10 to remove him.

- vii) Even if I am wrong in considering that this is a Cart issue, the substantive result of this claim would be the same. Relief in this court is always discretionary; and, even if the Secretary of State had acted unlawfully in failing to make a valid removal decision and even if that had resulted in the Claimant being deprived of an in-country appeal before the First-tier Tribunal and/or the Upper Tribunal, given that he has already had the merits of such an appeal considered and determined by the tribunal, I would not have exercised my discretion to require the Secretary of State to take steps to return the Claimant to the United Kingdom and/or to enable him to exercise any rights of appeal he might otherwise have.
- viii) In coming to that conclusion, I note that in YZ (China) Richards LJ stressed that, although when an individual has been removed on the basis of an unlawful procedure that weighs heavily in favour of ordering his return, cases are fact-sensitive and the court's discretion is "a wide one" (see [49]). In this case, there is no evidence at all that the Secretary of State (e.g.) deliberately delayed in any aspect of any procedure, so that the Claimant reached maturity before a decision was taken in respect of his (second) asylum claim, which would clearly be a material factor. Furthermore, one circumstance in this case, is that, prior to the removal of the Claimant, Silber J had determined that all three of this claim were not only unarguable, but totally without merit, and had expressly directed that a renewed application for permission should not act as a bar to removal; and Judge Cooke had also considered the grounds unarguable, and had refused to restrain removal by way on injunction. The Secretary of State was therefore entitled to consider that the Claimant's removal appeared to be lawful at the time it was effected, which is a material factor (see YZ (China) at [51] per Richards LJ).
- ix) Therefore, in all the circumstances of this case, I am quite sure that denying the Claimant substantive relief would result in no injustice to him, and, even if he had made good this ground, it would not have been appropriate to award him substantive relief.

82. For those reasons, Ground 3 also wholly fails.

Conclusion

83. Having been unpersuaded that any of the grounds relied upon are made good, I shall dismiss the claim.