



24 June 2015

PRESS SUMMARY

TN and MA (Afghanistan) (Appellants) v Secretary of State for the Home Department (Respondent) [2015] UKSC 40

AA (Afghanistan) (Appellant) v Secretary of State for the Home Department (Respondent) [2015] UKSC 40

On appeal from [2013] EWCA Civ 1609 and 1625

JUSTICES: Lord Neuberger, Lady Hale, Lord Wilson, Lord Hughes and Lord Toulson

BACKGROUND TO THE APPEALS

TN, MA and AA: (a) are Afghan nationals; (b) were smuggled into the UK as unaccompanied minors; (c) claimed asylum here; and, (d) had their accounts disbelieved and their claims rejected.

TN travelled to the UK in August 2010 and was arrested on 8 September 2010. TN's agreed date of birth is 1 January 1994. MA arrived in the UK on 27 July 2009. He claimed to be 13 years old but was assessed to be 16 and given a notional birth date of 1 January 1993. AA arrived in the UK in mid-2011 and was, subsequently, arrested by the police. AA's accepted date of birth was 29 December 1995. They all claimed asylum on the asserted basis that if they returned to Afghanistan they would be in danger from the Taliban, the government and/or the police.

When making these asylum decisions, the Respondent had to comply with the three EU Directives harmonising the asylum systems of the EU Member States: the Reception Directive (2003/9/EC), the Qualification Directive (2004/83/EC) and the Procedures Directive (2005/85/EC).

Article 19.3 of the Reception Directive requires Member States to "*endeavour to trace the members of [the unaccompanied minor's] family as soon as possible*". The Respondent failed to do this in making the decision to reject the Appellants' asylum claims.

Article 39 of the Procedures Directive requires Member States "*to ensure that applicants for asylum have the right to an effective remedy before a court or a tribunal against a decision taken on their application for asylum*". Sections 82 and 83 of the Nationality, Immigration and Asylum Act 2002 ("NIAA") (as in force at the material time) allow an appeal of an asylum rejection only in certain circumstances. The relevant circumstances are where the applicant no longer has leave to enter and remain in the UK, where a decision to remove the applicant has been made, or where the applicant has been granted leave to enter or remain in the UK for over one year. Otherwise, the decision can only be judicially reviewed.

In accordance with the Respondent's published policy, TN, MA and AA were granted discretionary leave to enter and remain in the UK until the age of 17 years and six months. As TN and MA were aged over 16 years and six months when their asylum applications were rejected, they could not appeal their asylum decisions (although they could: (a) judicially review it; and/or, (b) appeal the length of their discretionary leave) as they did not fall within the section 82 and 83 NIAA circumstances. They could only appeal the asylum rejection when a decision to remove them had been taken - at the end of their discretionary leave - at which point they would be unable to rely on their age as a ground for claiming refugee status.

TN and MA appealed the length of their discretionary leave and judicially reviewed their exclusion from an appeal until their removal, arguing this violated their rights to an effective remedy under

article 39 of the Procedures Directive. TN's appeal as to the length of discretionary leave was allowed by the Upper Tribunal but the Court of Appeal dismissed the other appeals.

AA appealed pursuant to section 83 NIAA. Along with TN and MA, he argued that the Respondent's failure to carry out her tracing duty vitiated her decision to reject the asylum claims. Moreover, if the Respondent had complied with her tracing duty it would have produced evidence to support their accounts which the Respondent had disbelieved. The Court of Appeal also dismissed these appeals.

JUDGMENT

The Supreme Court (with Lord Toulson giving its judgment) unanimously dismisses the appeals.

REASONS FOR THE JUDGMENT

Right to an effective remedy issue

TN's and MA's right of appeal to the tribunal was not immediate but was still effective. The deferment was not for long and there were understandable reasons for it. For example, where there is a surge of asylum applications following short-term crisis conditions in a particular country it is not in the public interest, or the interest of the applicants, for tribunals to become clogged with cases which are due to be reviewed before long in any event [32].

Although it was argued that TN and MA would thereby be deprived of the ability to argue that they should be protected on the basis of the status as minors who were effectively orphans, when it comes to the kinds of risk including forcible recruitment and sexual exploitation "persecution is not respectful of birthdays". In any event, any entitlement to refugee status on the basis of age would be time-limited in the same way to correspond with the attendant risk [33].

As a result, it is not necessary to consider whether judicial review provides an effective remedy [34].

Tracing issue

The principle established in the case of *Ravichandran* is sound; asylum appeals should be determined by reference to the situation at the time of the appellate decision rather than by reference to the situation at the time of the original decision [70]. The exception to this established in the case of *Rashid* – that an abuse of power by the state enables the court to intervene to give appropriate relief to compensate a past breach of duty even if the asylum applicant is presently no longer in need of protection – lacks a satisfactory principle, is unclear and should no longer be followed [71-72].

In deciding whether to accept an applicant's account, the tribunal must act on the evidence before it with no presumption of credibility. The fact that the Respondent fails properly to discharge her tracing obligation does not affect this [72-73]. Given that MA's and AA's accounts were disbelieved by the Upper Tribunal, their appeals should not have been allowed merely by reason of the Respondent's breach of her tracing obligation [74]. The purpose of tracing a child's family is for the child's welfare in promoting reunification, not for the purpose of gathering evidence, although it may lead to that result. The child should be consulted about tracing before any steps are taken [69]. Neither MA nor AA gave any information from which their family could be traced and the conclusion that their accounts lacked credibility was properly open to the Upper Tribunal. In relation to TN's discretionary leave application, the Respondent can now re-take her decision pursuant to these principles [74].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.uk/decided-cases/index.html