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## Family Tracing 2

26<sup>th</sup> September 2012

Version 2 – we have improved the Red Cross information, with thanks to the British Red Cross, who helped us make it better.

The May 2012 “Family Tracing” information sheet [<http://tinyurl.com/9c5t8sa>] provides information about family tracing in the cases of separated child asylum-seekers. This information sheet provides further information about this subject, following the judgment of the Court of Appeal in *KA (Afghanistan) & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 1014. That judgment is available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2012/1014.html>

### **KA (Afghanistan) – the facts**

This case concerned several separated child asylum-seekers from Afghanistan. Each had been refused asylum and granted discretionary leave to remain to age 17½ years on the ground that there were no adequate reception arrangements for their return to Afghanistan (see the “Discretionary Leave & Separated Children” information sheet [<http://tinyurl.com/c8vamq9>]). Each had applied to extend that leave to remain, and this had been refused. Their appeals against this refusal were dismissed by the First-tier Tribunal, and then by the Upper Tribunal. They appealed to the Court of Appeal. Their appeals before the Court of Appeal related to the duty upon the UK Border Agency (on behalf of the Secretary of State) to try to trace the family of a separated child asylum-seeker.

### **KA (Afghanistan) – the decision**

The first issue for the Court of Appeal was whether the UK Border Agency had discharged the duty to try to trace the appellants’ families. However, a question which was not raised in the case was whether the duty to try to trace family members was appropriately a duty for the UK Border Agency or for others – e.g. those responsible for child protection. The Secretary of State argued that the duty had been met by the UK Border Agency informing each child of the tracing facilities of the Red Cross (see below). The Court described that as arguing that the Secretary of State or UK Border Agency was “*entitled to do next to nothing*” (paragraph 16) and rejected it. In practice, the UK Border Agency had been ignoring this duty on the basis that it would grant discretionary leave to the child until he or she was close to adulthood, when the duty would come to an end. Having found that the duty had not been met, the second issue for the Court of Appeal was as to the effect of the failure to meet that duty in relation to the asylum appeals. The Court decided that the failure could be relevant to considering either or both of the following (paragraph 24):

- a claim to asylum, whether on refugee and/or humanitarian protection grounds the duty upon the Secretary of State regarding the safety and welfare of the child (see the August 2009 “Children – New Statutory Duty” information sheet [<http://tinyurl.com/7qboqrt>]).

The Court of Appeal gave particular consideration to how the failure could be relevant to considering an asylum claim, and how the First-tier Tribunal (Immigration and Asylum Chamber)

should consider the failure in relation to asylum appeals (paragraph 25). The Court did not say very much about how the failure could be relevant, but explained that the degree of relevance would depend on the facts of any particular case. It would likely be highly relevant in the case of a child who had given “*a credible and cooperative account of having no surviving family left in Afghanistan or of having lost touch with surviving family members and having failed, notwithstanding his best endeavours, to re-establish contact.*” On the other hand, it might be of much less relevance in the case of a child “*whose claim to have no surviving family in Afghanistan is disbelieved and in respect of whom it is found that he has been uncooperative so as to frustrate any attempt to trace his family.*”

The Court of Appeal also said that a child who would be at risk of harm if returned did not cease to be at risk in the same circumstances merely because he or she had turned 18 (paragraph 18). More generally, the age a person appears to be or may be assumed to be is more important than how old he or she is.

### **Conclusions**

The following conclusions may be drawn from the *KA (Afghanistan)* judgment. The duty to try to trace family is a significant duty. The duty is not met merely by informing a separated child or his or her legal representative of the facilities of the Red Cross. That a child has no family to return to in his or her country of origin may, subject to the evidence as to the general and child-specific conditions in that country, be very relevant to whether the child is at risk of persecution or some other form of harm if returned there. For example, the conditions in Afghanistan continue to show that it is a country where the absence of family is likely to increase the risk to the child if he or she were to be returned, and may be a factor establishing a risk of harm to the child. Accordingly, absence of family may be relevant to concluding that a child is a refugee (a person at risk of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion) or entitled to humanitarian protection (a person at risk of some other serious harm).

### **What to do in such cases now?**

Where the UK Border Agency has refused asylum to a separated child, but has not met the duty to try to trace family, this may undermine the decision to refuse asylum. This may still be relevant even after the child has become an adult. This may be raised on any appeal.

If the child has had an asylum appeal dismissed, in circumstances where the UK Border Agency had failed to meet this duty and the First-tier Tribunal did not consider that failure, this may undermine the effect of any dismissal of the appeal. If an appeal is still outstanding, it may be necessary to consider raising new grounds before the tribunal or court relating to the failure to meet the family tracing duty. If an appeal is no longer outstanding, options that may be considered include seeking permission to appeal to a higher tribunal or court (including out of time), making further representations to the UK Border Agency or bringing judicial review proceedings.

There may be many cases of separated children refused asylum, some of whom are still children and some of whom are now 18 years or older, in respect of whom the UK Border Agency has not met the duty to seek to trace the child’s (or former child’s) family. They should seek legal advice.

### **Red Cross**

Information about the family tracing facilities of the Red Cross are available at:

[http://www.redcross.org.uk/~media/BritishRedCross/Documents/What%20we%20do/Finding%20missing%20family/Guidelines%20for%20Restoring%20Family%20Links%20for%20Unaccompanied%20and%20Separated%20Children\\_May%202012.pdf](http://www.redcross.org.uk/~media/BritishRedCross/Documents/What%20we%20do/Finding%20missing%20family/Guidelines%20for%20Restoring%20Family%20Links%20for%20Unaccompanied%20and%20Separated%20Children_May%202012.pdf)

Children may have concerns as to whether the information needed to try and trace family will be kept confidential from others in their country of origin. In some cases, this may be relevant to why a separated child may be afraid to disclose details necessary for the Red Cross to try and trace his or her family, as there is a fear that this may put their family at risk. It is also important that those advising, supporting and representing separated children remember that, while they may be able to help children access the tracing services of the Red Cross, it is for each child to decide whether tracing is what he or she wants to do. There may be good reasons why a child does not want to do this and, in any case, it is his or her choice. The British Red Cross offers its tracing services on an independent, neutral and humanitarian basis to restore contact between family members in accordance with its own long-standing principles and practice.