

ILPA information sheet

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Family Tracing 3

This information sheet builds on the information provided in the information sheets Family Tracing, 28 May 2012, which can be found at <http://www.ilpa.org.uk/data/resources/14774/12.05-Family-Tracing.pdf>, and Family Tracing (2) 19 September 2012 which can be found at <http://www.ilpa.org.uk/resources.php/15388/family-tracing-2>

Background

The Secretary of State's duty to endeavour to trace family members for separated children claiming asylum is set out in the above information sheets and not repeated here. Also see Sonali Naik's paper for ILPA's Refugee Children's Project on Family Tracing located at <http://www.ilpa.org.uk/resources.php/17498/family-tracing-recent-developments-in-the-law-and-ensuing-issues-6-november-2012-by-sonali-naikbr->

In *KA (Afghanistan) & Ors v Secretary of State for the Home Department [2012] EWCA Civ 1014* the Court of Appeal considered what should be done in cases where the Secretary of State had failed to try to trace the families of children from Afghan who were now adults. The main question that the Court was looking at was whether the young adults should be given leave to remain to compensate for the effects of the earlier failure to try to trace which 'has or may have deprived [the appellant] of access to the best evidence with which to prove their case'. The Court held that in certain circumstances an appellant should be granted leave in these cases. Thus the case was not primarily about family tracing in general and did not give detailed guidance on what the Secretary of State has to do try to trace family members. Such guidance as it did give is considered in the Family Tracing 2 Information Sheet. Having established the general principles in the *KA* case, the Court then considered the individual children in the case known as "KA II" but called *EU (Afghanistan) & ors v SSHD [2013] EWCA Civ 32*.

EU (Afghanistan) & Ors v SSHD [2013] EWCA Civ 32 (31 January 2013)

EU was one of the appellants in the original *KA* group of cases and, despite the name change, this is essentially the same group of cases. The Court of Appeal applied the principles established in *KA*.

In all of the cases the Court held that the Secretary of State's failure to discharge her duty to endeavour to trace family members had made no difference to the final result in the case. The reasons were different for each young person. They were:

1. *AK* had failed to provide information relating to his family and therefore the Court did not think the Secretary of State could have done much more;
2. *AR* left the United Kingdom before the appeal;
3. In *EU* and *SU*'s cases the Tribunal did not believe that they were not in touch with the family. Therefore the breach of the duty to trace was irrelevant.

The risk on return is to be assessed as of the date of the decision, whether that decision was

being made by the Secretary of State or the Court. The risk on return should not be decided on the basis of looking at the previous failures of the Secretary of State.

The Court did not deal with family tracing or the Secretary of State's duty to trace in any detail. The judgment does not discuss in any detail how the Secretary of State's failure can be reconciled with her duties under section 55 Borders, Citizenship and Immigration Act 2009 to take into account the need to safeguard and promote the best interests of children.

What next?

Lots of questions surrounding the Secretary of State's duty to trace are still unanswered. The principle that there is a duty to 'endeavour to trace' a separated child's family is maintained. How this duty is discharged in practice and the practical effect of failure to discharge the duty is yet to be set out in any detail. The following is worth bearing in mind:

- KA left open the possibility that it would be right to grant indefinite leave to remain to a person where failure to endeavour to trace that person's family had affected the outcome of their case. While none of appellants in the *EU* cases were successful in arguing that the failure to endeavour to trace had affected the outcome in their cases, it remains open to a future appellant to make the same argument and succeed. See the Family Tracing 2 information sheet.

Permission to appeal to the Supreme Court has been sought in this case.

In respect of applicants who are now making claims for asylum, the Secretary of State has a duty to endeavour to trace their family members. Please refer to Family Tracing 2 19 September 2012 link above.