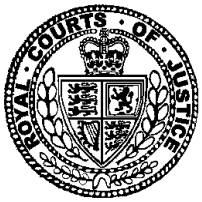

Neutral Citation Number: [2019] EWCA Civ 914

Case No: C5/2017/2195

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Hanson
PA/04165/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE LINDBLOM
and
LORD JUSTICE FLAUX

- -

Between:

KA (AFGHANISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Becket Bedford (instructed by Sultan Lloyd) for the Appellant
Nicholas Chapman (instructed by the Government Legal Department) for the Respondent

Hearing date: 2 May 2019

- -

Approved Judgment

Lord Justice McCombe:

1. This is the appeal of KA, an Afghan national, born on 30 September 2000. He is now, therefore, 18 years of age. He appeals (with permission granted by me on 30 July 2018) from the decision of 24 May 2017 of the Upper Tribunal (Immigration and Asylum Chamber) (Upper Tribunal Judge Hanson) ("UT"). The UT dismissed KA's appeal from the decision of the First-tier Tribunal (Immigration and Asylum Chamber) (First-tier Tribunal Judge A.M.S. Green) ("FTT") of 25 October 2016 which had dismissed his appeal from a decision of the Respondent of 11 April 2016 refusing his claim to asylum.

2. KA arrived in this country on 10 October 2015 (i.e. aged 15) and made his asylum claim on that day. As an unaccompanied minor, he was granted discretionary leave to remain in the country until 30 March 2018, six months before his 18th birthday. His claim was made on the basis of imputed political opinion in the light of the circumstances of his life in Afghanistan and of his departure from there as related by him.

3. KA said that he was an only child and had lived in Molayan Kelai in Baghlan, Afghanistan. His father was, he said, a soldier in the Afghan national army. KA claimed that the Taliban had sent three threatening letters (of the character described as "night letters" in the objective evidence) to his family home requiring his father to leave the army or for him and the family to face adverse consequences. KA originally said that the letters were all sent on the same day and that on that very day the Taliban had attacked the family home. He said that he had been awakened by gunfire and had then been approached by an unidentified man, who spoke Farsi/Uzbek and was told that his life was in danger and that he should leave with him. He did so and left Afghanistan thereafter on an unspecified date.

4. KA said that he feared return to Afghanistan because he would then be forcibly recruited into the Taliban. He claimed that removal to his country of origin would breach his rights under Articles 2, 3 and 5 of the European Convention on Human Rights ("ECHR").

5. The Respondent's letter refusing the asylum claim sets out what were believed to be KA's movements following his departure from Afghanistan. This involved travel to Karachi in Pakistan, through Baluchistan and Iran and finally to Turkey where he remained for about three years. He travelled from there to Hungary, where the Respondent contended in 2015 he made an asylum claim, the outcome of which he was unaware. KA said he had been forcibly finger-printed but had not made any such claim. It appeared to be common ground before us that, if KA was right about this part of the history, his presence in Hungary as an unaccompanied minor would have been treated as an asylum claim, whether expressly made by him or not.

6. In reaching the refusal decision, the Respondent said that, in assessing the claim, allowance had been made for the fact that KA would have been under 13 years old at the time of the incident in which the Taliban were said to have attacked his family home. However, KA's account of his father's army service was vague; he did not know when the father had joined up or what he did. The Respondent did not accept that the father was a member of the army at all. It was noted that KA was unable to explain why the Taliban would have sent three letters on the same day and yet still have attacked the family home, without waiting to see if their demands, that the father desist his army

service, had been met. This was found implausible. There had been no claim that the Taliban had tried to recruit KA; that claim was thought to be entirely speculative. Adverse credibility findings were made by the Respondent (expressly pursuant to section 8(4) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act")) on the basis that an asylum claim had been made in Hungary. KA had not waited for the outcome of that application and KA had travelled through France and other European countries on the way to the UK.

7. The Respondent's view was that KA would not be of interest to the Taliban and that he did not have any characteristics which would attract adverse attention from the Afghan authorities. The view was that KA could safely return to Kabul (as opposed to his area of origin) at the age of 18; the Afghan state had a functioning police force which could afford protection if required. The private life claims under Article 8 of the ECHR were rejected.

8. KA appealed to the FTT. For the appeal, KA produced a witness statement in which he said that the letters from the Taliban, which he had relied upon in his claim, had in fact been received in the course of a week, rather than having been sent on one day, as recorded in the asylum interview notes. He said that in Turkey he had got into a dispute with "some boys" and that he had been stabbed; he had then decided to leave Turkey. KA did not give evidence at the hearing, even to the limited extent of confirming his witness statement.

9. In the FTT the Respondent relied upon the change in KA's account about the letters, along with the other features set out in the decision letter. It was submitted that claims by KA to have lost touch with his family were in reality based on the fact that money had been paid to an agent to get KA to this country and the family did not want to lose out on that investment if the asylum claim were to be refused. It was argued that KA's account had been fabricated and that he was still in contact with the family or could be in contact if he wanted to reach them[1].

10. It was argued for KA, by the solicitor then appearing for him, that KA could not be expected to have a detailed recollection of the material events, given his age at the time, and that he could not know all the background to the raid on his family home by the Taliban. Apart from being fingerprinted in Hungary, it was denied that he had claimed asylum there. (In the witness statement, there was nothing said about time spent in Hungary or what had happened there.) Reliance was also placed upon a report by Dr Liza Schuster of the School of Social Sciences in the University of London, relating to a deteriorating security situation and a general lack of safety of persons in Afghanistan, including in Kabul.

11. The key submission for the Respondent in the FTT (and later before the UT and in this Court) is that KA's account was simply not credible and that the FTT was entitled so to find.

12. In assessing that submission, the FTT said this (at paragraph 12 of the decision):

> "12. …Questions of credibility are matters for the Tribunal and I must be cautious in rejecting as incredible an account by an

[1] c.f. *EU (and others) v SSHD* [2013] EWCA Civ 32 at [10].

> anxious, young and inexperienced asylum seeker, whose reasons for seeking asylum may well be expected to contain inconsistencies and omissions in the course of its revelation to the authorities and investigation on appeal. In *R (on the application of Ngirincuti) v Secretary of State for the Home Department* [2008] EWHC 1952 (Admin) Blake J observed:
>
> > "most people who have experience of obtaining a narrative from asylum seekers from a different language or different culture recognise that time, confidence in the interviewer and the interview process and some patience and some specific direction to pertinent questions is needed to adduce a comprehensive and adequate account."
>
> The Tribunal has noted that it is
>
> > "perfectly possible for an adjudicator to believe that a witness is not telling the truth about some matters, has exaggerated the story to make his case better, or is simply uncertain about matters, but still to be persuaded that the centrepiece of the story stands".
>
> I also recognise that a person may be disbelieved entirely about his or her claimed history of persecution but still be found to be at risk of being persecuted in the future."

13. With regard to the sojourn in Hungary, the FTT proceeded on the basis that no asylum claim was made there, as KA's representative had contended. The FTT said, with reference to section 8 of the 2004 Act, (at paragraph 13):

> "13. …The Appellant failed to claim asylum in several safe third countries including Hungary before coming to the United Kingdom. Indeed he wears [sic] finger printed in Hungary. He also lived and worked in Turkey for three years. He left that country because he says that he was stabbed but I have seen no supporting evidence to support that. He could and should have claimed asylum earlier and this has damaged his credibility. Had he travelled without such a lengthy sojourn in Turkey I would be more amenable to his explanation and the suggestion that he had no choice because of the role of the agent in his life the influence that he exerted."

14. The FTT's conclusion was that KA's claim indeed lacked credibility and the decision put it this way in paragraph 14:

> "14. I did not have the benefit of hearing the Appellant giving evidence. Had I done so, I would have been able to assess his evidence and how it stood up to cross examination. He was present at the hearing and there was no obvious reason why he did not give evidence. There was no suggestion that he suffered

> from mental health issues that would make it very difficult to give evidence. There was no evidence about his peace of mind being disturbed. He is 16 years old and could have testified. Instead, he simply chose to say nothing. He did not adopt his witness statement. Under the circumstances, I give his his [sic] witness statement very little weight. I have not even seen copies of the alleged Taliban letters. I simply to [sic] not believe what he is saying about the letters or that his father was threatened or that he was even in the army."

Before proceeding further, it seems strange to me how the FTT could have regarded the absence of copies of the letters from the Taliban as having any bearing upon the matter. In the circumstances described by KA, it would scarcely have been possible for him to get hold of the letters so that copies could be placed before a hypothetical court in a far off country.

15. The FTT reviewed KA's case that there was a risk of forcible recruitment into the Taliban and the UT Country Guidance decision in *HK & ors. (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG* [2010] UKUT 378 (IAC). In its instant decision the FTT drew from this that, while forcible recruitment could not be discounted, evidence was required to show a real risk to the specific child in issue. It noted that no such evidence had been produced in this case. It said further that KA would not be required to return until he was 18 years old; he would no longer be a child. He could also avoid recruitment in Logar [sic: his home area was in fact Baghlan] as he could have the alternative of remaining in Kabul. (In due course in the UT, it was accepted for the Respondent that the FTT had been in error in this part of its decision in focussing upon matters beyond the situation at the date of the FTT hearing.)

16. As for contact with his family, the FTT said this (at paragraph 16):

> "16. In *AK* [sic: *HK*] the Tribunal said that where a child has close relatives in Afghanistan who have assisted him in leaving the country, any assertion that such family members are un-contactable or are unable to meet the child in Kabul and care for him on return, should be supported by credible evidence of efforts to contact those family members and their inability to meet and care for the child in the event of return. I accept that the Appellant has family in Afghanistan who arranged for an agent to remove him to this country. However, he says that he has lost contact with his family. In view of the fact that I do not accept that the Taliban threatened his father I am not prepared to accept that he has lost contact with his family or he does not know their whereabouts. I have no reason to believe that the Appellant's family would be unable to meet him and care for him in Kabul on his return or that he would be forced to live alone if he returns to Afghanistan. He would not be an orphan and he would not be returning as an unaccompanied child. He would be returning as a single able-bodied adult."

(Again, of course, the decision (in part) relied erroneously upon the situation when KA would have reached adulthood.) It was noted that, in earlier authority, the UT had said that the level of violence in Kabul and the privations of the poor and of the number of internally displaced persons (IDPs) living there did not generally make return to Kabul unsafe or unreasonable. The FTT rejected a submission for KA that it should depart from the country guidance on this point.

17. The FTT judge considered the report of Dr Schuster and also Eligibility Guidelines and other materials from the UNHCR. He cited a number of extracts from them, which had been relied upon for KA. The conclusion reached was expressed in paragraph 20 of the decision as follows:

> "20. I believe that the Appellant is frightened of the mere possibility of ill-treatment or forcible recruitment on account of the unsettled situation in his country. He would not be of interest to the authorities as a potential insurgent or foreigner and he would not be targeted and subjected to inhumane treatment. Although he would be a man of military age on his return, I do not accept on the objective evidence that he would be at risk of forcible recruitment either by AGEs or ALP in Kabul. His fear is purely generalised and not specific to him. He would be returning to Kabul as a single, able-bodied man and may be able to subsist without family and community support in Kabul in an area that has necessary infrastructure and livelihood opportunities to meet the basic necessities of life and are under effective government control. For the reasons given above I do not, in any event, believe that he has lost contact with his family and he should be able to call upon their support on relocating."

18. Permission to appeal to the UT was refused by the FTT (FTT Judge Saffer) on 22 November 2016. It was, however, granted by the UT itself (UT Judge Coker) on 21 February 2017. The reasons were:

> "1. It is arguable the First-tier Tribunal judge failed to give adequate or any regard to the appellant as a child; failed to give adequate or any regard to Turkey not being a signatory to the Refugee Convention and the shortcomings of the Hungarian asylum system; that he assessed the evidence on the basis the appellant would be returning to Afghanistan as a 'man' rather than a minor, failed to assess the reasonableness of return to Kabul.
>
> 2. All grounds arguable. Permission is granted."

In presenting in writing the proposed grounds of appeal to the UT, Mr Bedford included, as ground 3, the following:

> "3. At [13] the learned Judge erred in treating A's credibility as damaged for not claiming asylum in asylum in Hungary or Turkey when:

> - the High Court ruled on 5 August 2016 there was evidence of systemic failings and deficiencies in the Hungarian asylum system: *Ibrahimi & Abasi v SSHD* [2016] EWHC 20148 (Admin)
>
> - Turkey is not a signatory to the refugee convention and as such it is not a safe third country within the meaning of article 27 of Directive 2005/85/EC."

19. In its decision under appeal, the UT noted the acknowledged error of the FTT in failing to consider the situation pertaining at the date of the hearing, rather than upon a hypothetical return by KA to Afghanistan when he became an adult. The issue on the appeal, said the UT judge, was the materiality of that error.

20. As for the failure to give evidence, the UT said that the FTT had not found KA untruthful because he had not given oral evidence. The FTT had said simply that it had not been able to see KA's account tested by cross-examination. The FTT had made observations as to the fitness of KA, then 16 years old, to give evidence. It had deployed these features not to disbelieve KA's account, but to explain why his witness statement would be afforded little weight. The UT's conclusion on this point appears at paragraphs 18 and 19 of the decision as follows:

> "18. Whether an individual gives evidence is a matter for them although what weight shall be given to material made available is for the Judge, provided it is shown the Judge considered the evidence with the required degree of anxious scrutiny and has given adequate reasons for findings made, as the Judge arguably did. To the extent this is a weight challenge, the appellant has failed to make out any arguable legal error in the approach adopted by the Judge when assessing the weights [sic] to be given to the appellant's evidence. Similarly, the Judge does not seek corroborative evidence but observes that he has not seen copies of alleged Taliban letters which is factually correct. In light of the fact little weight could be given to the evidence which was not tested under cross examination and in the absence of any evidence other than that referred to by the Judge, the Judge was entitled to conclude that he did not find the appellant's father's activities in the army, to be convincing. It is arguable the Judge was entitled to apply little weight to the assertion made such as to conclude that he did not believe the appellant's account.
>
> 19. If a witness fails to attend the hearing, or attends but elects not to give oral evidence, they must accept that the Judge can only arrive at findings based upon the evidence the Judge accepts he or she can attach due weight to."

21. The UT rehearsed again the areas upon which the respondent had formed an adverse view of KA's credibility and found (in paragraph 21 of the decision) that KA and his representatives were well aware of those matters, giving them every opportunity to call KA to give his account before the FTT. It was noted that the FTT was alive to the age

factor which bore upon the question of whether to reject the credibility of a young person's account of events and the need to exercise caution in this respect.

22. With regard to the impact on KA's credibility arising from the factors mentioned in section 8 of the 2004 Act, the UT decision said this (in paragraph 24):

> "24. It is accepted Turkey is not a signatory to the Refugee Convention meaning the appellant is unable to claim asylum in that country, but the Judge does not specifically claim that the appellant should have claimed asylum there. There appears to be a contradiction in the Judge noting the respondent's claim that the appellant had claimed asylum in Hungary when he was encountered on 29 August 2015 but was unaware of the outcome of the application as he left the country to come to the UK, rather than availing himself of the protection of the authorities in Hungary. The appellant would have been unaware of the decisions of the High Court in relation to difficulties within the Hungarian asylum system and indeed appears to have engaged with the authorities by making an asylum claim without evidence of his experiencing any difficulties. This is therefore not a decision made in relation to a person who did not make a claim but rather a person who did claim asylum but then chose to pursue his claim elsewhere, namely in the United Kingdom. The Judge's conclusions in relation to section 8 of the 2004 Act have not been shown to be infected by arguable material error on the facts. In any event, the Judge did not make the adverse credibility findings based upon the Section 8 elements only but clearly found that the appellant's behaviour contributed to the adverse credibility findings."

23. I would note immediately that the UT here says that KA claimed asylum in Hungary. However, the FTT had said that KA had "failed to claim asylum in several safe third countries, *including Hungary*" (emphasis added). Further, as already mentioned, it was common ground before us that, whether expressly made or not, KA would have been treated in Hungary as if he had made such a claim: see paragraph 5 above.

24. The UT also held that the FTT judge had been entitled to find that KA was in truth in contact with his family and would not be returned to Afghanistan, in particular to Kabul, without family support. In sum, the UT upheld the FTT's finding that there was,

> "…no credible real risk of persecution in…Afghanistan…and that any potential risk in the appellant's home area [was] mitigated by the availability of an internal flight option which the appellant had not shown was unreasonable or unfair….".

25. Permission to appeal to this court was refused by UT Judge Hanson. The core of his reasons appear in paragraphs 4 to 6 of the relevant section of his refusal decision of 10 July 2017 as follows:

> "4. …It was found he had family in Afghanistan to whom he will be able to turn for assistance. Insufficient evidence was provided

> to find that as a child within the protection of the family unit the appellant was entitled to a grant of international protection.
>
> 5. Insufficient evidence was adduced to find it would be unreasonable in all the circumstances for the appellant to internally relocate to Kabul [28]. The case law relied upon by the appellant was specifically commented upon in [30 – 31].
>
> 6. The Grounds fail to establish why a Court of Appeal decision is necessary to determine whether Section 8 of the 2004 Act has application where an individual does not give oral evidence, as the question is whether there was sufficient evidence to establish whether Section 8 was engaged, which need not necessarily be oral, which clearly existed in this case. There was adequate evidence to warrant Section 8 being found to be engaged as was the appellant claiming asylum in Hungary but failing to await the outcome of his application before travelling to the UK."

Permission to appeal was granted by my order of 30 July 2018.

26. In the grounds presented to this court, Mr Bedford argued three broad points. First, it was submitted that the FTT had failed properly to apply the Practice Direction "First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses" of 30 October 2008 [2009] 1 WLR 332 ("the PD") and the Joint Presidential Guidance Note 2 of 2010 ("the Guidance") in determining KA's credibility and the impact of the inconsistency in his accounts about the Taliban letters, appearing respectively in his interview and in his witness statement. Linked to this point, it was submitted that the FTT, in assessing the evidence of a vulnerable child, had failed to apply the principles stated in this court in the later case of *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123. Secondly, it was said that the FTT failed properly to assess whether KA had failed to take advantage of a reasonable opportunity or opportunities to claim asylum (within the meaning of section 8 (4) of the 2004 Act) and the findings of the High Court as to the inadequacy of Hungarian asylum procedures and as to the dangers of "refoulement" emerging from the decision of Green J (as he then was) in *R (Ibrahimi) v Secretary of State for the Home Department* [2016] EWHC 2049 (Admin). Thirdly, it was argued that section 8, when applied to a minor, was incompatible with Article 8.4 of the Dublin III Regulation 604/2013 allowing unaccompanied children to make an asylum claim in any Member State of the European Union. I will address these grounds in turn.

27. On the first ground, Mr Bedford referred to the Guidance, which was in place at the time of the FTT hearing and to the decision in *AM* which post-dated that hearing. He submitted that the FTT decision did not sufficiently address the vulnerability of KA who was 16 at the time of the hearing and was only 15 when initially interviewed by officials. He argued that, irrespective of any other vulnerability (such as mental illness, which was particularly prominent in the *AM* case), by reason of KA's age alone, the FTT should have made a more thorough and cautious assessment of his credibility and of the inconsistencies that had emerged, in particular with regard to the timing of the three Taliban letters. He submitted that there was extensive guidance from these various sources which showed how the tribunals should approach the management of evidence from vulnerable witnesses, including children, and that the FTT decision did not

indicate that sufficient measures had been taken to balance KA's vulnerability against potential deficiencies in his various accounts.

28. Mr Bedford referred us to various parts of the PD and of the Guidance, but particularly to those features of them mentioned in the judgment of Sir Ernest Ryder in *AM*. He took us to paragraphs 13 to 15 of the Guidance which state:

> "13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.
>
> 14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those [who] are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
>
> 15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and this whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind."

Mr Bedford also stressed the passages appearing in paragraphs 31 and 32 of Sir Ernest's judgment as follows:

> "31. The Practice Direction ('PD') and the Guidance Note ('Guidance') provide detailed guidance on the approach to be adopted by the tribunal to an incapacitated or vulnerable person. I agree with the Lord Chancellor's submission that there are five key features:
>
> (a) the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance paras 4 and 5);
>
> (b) a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that 'the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so' (PD para 2 and Guidance paras 8 and 9);

> (c) where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD paras 6 and 7 and Guidance para 10);
>
> (d) it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance paras 10.2–15); and
>
> (e) relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A paras 22–27).
>
> 32. In addition, the Guidance at paras 4 and 5 makes it clear that one of the purposes of the early identification of issues of vulnerability is to minimise exposure to harm of vulnerable individuals. The Guidance at para 5.1 warns representatives that they may fail to recognise vulnerability and they might consider it appropriate to suggest that an appropriate adult attends with the vulnerable witness to give him or her assistance. That said, the primary responsibility for identifying vulnerabilities must rest with the appellant's representatives who are better placed than the Secretary of State's representatives to have access to private medical and personal information. Appellant's representatives should draw the tribunal's attention to the PD and Guidance and should make submissions about the appropriate directions and measures to be considered eg whether an appellant should give oral evidence or the special measures that are required to protect his welfare or make effective his access to justice."

29. Reliance was further placed upon parts of rule 14 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014/2604 as follows:

> "(1) Without restriction on the general powers in rule 4 (case management powers), the Tribunal may give directions as to—
>
> (a) issues on which it requires evidence or submissions; …
>
> … (e) the manner in which an evidence or submissions are to be provided, which may include a direction for them to be given—
>
> (i) orally at a hearing; or
>
> (ii) by witness statement or written submissions; and
>
> (f) the time at which any evidence or submissions are to be provided. …"

30. Mr Chapman, for the Respondent, pointed out that none of these points had been made to the UT on KA's appeal. In short, he relied upon what the FTT said in paragraph 12 of the decision to demonstrate that the judge was clearly aware of KA's vulnerability as a child appellant and of the caution needed in assessing his credibility.

31. I have given careful consideration to the submissions of Mr Bedford on this ground of appeal, but I have reached the conclusion that they should not be accepted. In particular, counsel and the court are in difficulty in acceding to such criticism of the FTT's approach to KA's vulnerability and the application of the PD and the Guidance, since neither counsel appeared in the FTT (where both parties had different representatives). We are, therefore, entirely uninformed as to what the judge and/or the parties may have said or done to address these matters when KA's then representative (not Mr Bedford) decided not to call him to give evidence.

32. I note further, however, that in paragraph 32 of the judgments in *AM*, Sir Ernest Ryder pointed out that the primary responsibility in identifying vulnerabilities rests upon an appellant's representatives. There is no indication that the advocate representing KA made any particular submissions directed to the question of whether the decision not to call him as a witness was linked in some way to vulnerability, beyond the known fact that he was a minor[2].

33. In my judgment, it is clear that the FTT sufficiently took into account KA's age and weighed that in the balance in considering the accounts that he had given and his overall credibility. That is plain from paragraph 12 of the decision and, if that feature were the only attack on the FTT's assessment of KA's credibility, I would be inclined to hold, in agreement with the UT, that the FTT had been fully entitled to come to the conclusion that it did on that part of the case, subject, however to ground 2 to which I now turn.

34. The relevant parts of section 8 are as follows:

> "8 Claimant's credibility
>
> (1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies. …
>
> (4) This section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country. …
>
> (7) In this section- …
>
> "safe country" means a country to which Part 2 of Schedule 3 applies."

[2] Since the hearing we have been referred to a decision of this court in a different procedural context, making somewhat similar points: see *Anderson v Turning Point Eespro* [2019] EWCA Civ 815, at [27] and [30] – [32] which I do not think takes the argument further in the present case.

Schedule 3 paragraph 2 states that Part 2 applies to (among other countries) Hungary and France.

35. In rejecting KA's asylum claim, the Respondent's letter included the following passage dealing with the impact of s. 8 of the 2004 Act on his credibility:

> "Section 8 Consideration
>
> 30. In determining your asylum and human rights claim, consideration has been given to section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and the Court of Appeal case of JT Cameroon, which provides that a deciding authority shall take account of the following behaviour, as potentially damaging to your credibility.
>
> 31. Section 8 (4) of this act states that 'this section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country. It is noted that you travelled through France and various other European countries on your way to the UK. You failed to make a claim for asylum in any of these countries. You did however claim asylum in Hungary when you were encountered on 29/08/2015. However you are unaware of the outcome of this application and in any case you fled the country to come to the UK rather than avail yourself in the protection of the authorities in Hungary. Your behaviour is considered to fall within this section of the act and as a result of your actions your credibility has been damaged under section 8 (4) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004."

36. I have already quoted above paragraph 13 of the FTT decision and paragraph 24 of the UT decision, where the s. 8 issue was addressed.

37. Mr Bedford argued that the Respondent's decision and FTT's analysis of whether KA had in reality failed "to take advantage of a reasonable opportunity to make an asylum claim or a human rights claim while in a safe country" were entirely insufficient. No attempt had been made to assess what realistic chance KA had to make an effective claim to asylum, whether in Hungary or elsewhere.

38. Mr Bedford referred us also to passages in the judgment of Green J in *Ibrahimi*. That case was concerned with the danger of "chain refoulement" of asylum seekers from Hungary to countries such as Serbia, Macedonia, Greece and Turkey and the risk of removal from those countries to Iran. Green J held that there was a real risk of the beginning of such refoulement from Hungary on the evidence before him.

39. Mr Chapman was at pains to point out that there is no suggestion in KA's case of him being removed to Hungary where he would be at risk of the specific refoulement danger identified by Green J. Any removal from the UK would be to his country of origin, Afghanistan. Further, the 2004 Act informs the court conclusively that Hungary is a "safe" country and that the FTT could quite properly consider what it took to be a failure

to claim asylum in Hungary (see again paragraph 13 of the decision) as reflecting adversely against KA in the credibility balance.

40. Mr Chapman also took us to *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878 where Pill LJ, giving the leading judgment with which Laws LJ and Carnwath LJ (as he then was) agreed, set out how s. 8 was properly to be applied by fact finding tribunals. At paragraph 21, Pill LJ said this:

> "21. Section 8 can thus be construed as not offending against constitutional principles. It is no more than a reminder to fact-finding tribunals that conduct coming within the categories stated in s 8 shall be taken into account in assessing credibility. If there was a tendency for tribunals simply to ignore these matters when assessing credibility, they were in error. It is necessary to take account of them. However, at one end of the spectrum, there may, unusually, be cases in which conduct of the kind identified in s 8 is held to carry no weight at all in the overall assessment of credibility on the particular facts. I do not consider the section prevents that finding in an appropriate case. Subject to that, I respectfully agree with Baroness Scotland's assessment, when introducing the Bill, of the effect of s 8. Where s 8 matters are held to be entitled to some weight, the weight to be given to them is entirely a matter for the fact-finder."

41. Mr Chapman argued that the FTT properly took the failure to claim asylum into account in the correct manner and that the UT was correct to note that there was no evidence that KA was deterred from making a substantive application in Hungary by any of the factors identified by Green J in *Ibrahimi*.

42. Before stating my own conclusion on this ground, I think it is helpful to note what Green J did say about the situation in Hungary. He said this in paragraph 159 of his judgment:

> "159. ***Presumption of compliance is rebutted***: Hungary is an EU state to whom the presumption of compliance *prima facie* exists and the Secretary of State places heavy reliance upon this fact. However, in my judgment the presumption cannot stand, even if it could have stood as of the date of the impugned decisions. Since that date much has changed. The EU Commission has opened the pre-formal infraction procedure against Hungary and the UNHCR has expressed concerns which on their face are very serious. Hungary has also taken steps to effect removals to Greece knowing full well that the Strasbourg Court (in *MSS*) has concluded that Greece is not to be treated as a safe country. The conclusion of the EU Commission and the UNHCR is that a person removed to Hungary will be subject to an asylum and judicial supervision procedure under which that person's true asylum case and any properly grounded fears of refoulement to Iran might *not* be fairly and effectively assessed. The overall context of the asylum law reforms in Hungary also needs to be taken into account. The Claimants have placed significant

> reliance upon the general anti-immigrant climate which they say pervaded the approach of the Hungarian Government: See Evidence Summary at Annex 1 paragraphs [43] - [49]. Care is of course required: political rhetoric does not necessarily translate into action particularly in a state governed by the rule of law. Whilst not all of the reforms to the Hungarian asylum rules are relevant to the facts of this case (such as the border reforms) the broader context is of a state that is prepared to adopt an asylum regime which is deliberately designed to deter immigrants and to weaken judicial supervision with a view to removing those who are temporarily present in Hungary to third countries. In these circumstances the submission that the presumption that Hungary *qua* EU Member State adheres to the *acquis Communitaire* and can be relied upon to respect relevant international law and ECHR rights of the Claimants cannot carry much weight. The objective facts suggest otherwise. In such circumstances it is necessary to look carefully at the facts and assess the risk of refoulement or treatment contrary to the ECHR without applying any presumption."

There is more, to similar effect, in the ensuing paragraph as to "deficient procedural guarantees" with regard to asylum processes in Hungary.

43. The question before the Respondent and before the FTT, in deploying s. 8 at all, was whether KA had failed to take advantage of a reasonable opportunity to claim asylum in a safe country as s.8(4) requires. Hungary and France are by statute "safe" countries for these purposes, but the decision maker and the fact-finding tribunal have still to decide the consequences of such "safe country" status and whether a particular claimant has had a reasonable opportunity to claim asylum in such a country.

44. In my judgment, the FTT analysis of this question, such as it was, was perfunctory. There was no attempt to look into KA's circumstances in Hungary or in any of the "several safe third countries" to which reference was made but which remained unidentified. Clearly, in paragraph 13 the FTT did not think that the forcible finger-printing of KA in Hungary was a real asylum claim, whatever the Respondent may have thought, since the judge says expressly that KA failed to apply for asylum in safe countries including Hungary. There is no consideration given to the realistic chances KA had to claim asylum in the other unidentified countries and over what period and in what circumstances. The reference to Turkey (not a statutory "safe" country) in that paragraph of the decision is opaque at best. Yet nonetheless the brief conclusion is reached that the failure to claim asylum earlier had damaged KA's credibility.

45. It seems to me that the Respondent's decision on this part of the claim and paragraph 13 of the FTT decision come close to concluding that mere presence in a statutory "safe" country, without making an asylum claim, can amount to a failure to take up a reasonable opportunity of making one. That would not be an application of the statutory test in s. 8(4) in the case of an adult claimant, let alone in the case of a child.

46. To be fair to the Respondent, the refusal decision was reached a few months before the decision in *Ibrahimi*. However, it had been argued a month or so before that decision was made and the criticisms being levelled against the Hungarian asylum processes

must have been well within the knowledge of the Respondent's department. To be fair too to the FTT, *Ibrahimi* (decided two months before the hearing) does not appear to have been cited to the judge. Nonetheless, even without reference to the case, I consider that the FTT should have considered more fully what reasonable opportunity KA had had to claim asylum earlier, whether in Hungary or elsewhere. I find it difficult to see what the sojourn in Turkey had to do with the matter.

47. I would add that irrespective of Mr Bedford's third point, as to the compatibility of s.8(4) with Article 8.4 of the Dublin III Regulation, it is clear that an unaccompanied minor (with no family connection in the EU) is entitled to make an asylum claim in any EU country without risk of being returned to the EU country in which he or she made his or her first footfall or his or her first asylum claim: see *R (MA(Eritrea) & ors.) v Secretary of State for the Home Department* (CJEU – June 6, 2013) Case C-648/11 [2013] 1 WLR 2961, especially paragraphs 55 to 66 of the judgment.[3] In such a case, one might expect a decision maker not to be over-exacting in downgrading a child's credibility for having failed to make earlier claims in other countries. In my judgment, the question of failure to make an earlier asylum claim might be thought to attract less adverse weight in the case of an unaccompanied minor than in other cases.

48. Before the UT, the *Ibrahimi* case was squarely raised in the grounds of appeal, but no reference is made to it in the decision. I do not accept Mr Chapman's submission that the case has little relevance to the present matter simply because it was largely dealing with the process of "chain refoulement", starting in Hungary and proceeding through other countries and leading to automatic return to Iran. In my judgment, Green J's analysis of the situation summarised in paragraph 159 of his judgment goes wider than that. He speaks of "…an asylum regime which is deliberately designed to deter immigrants and to weaken judicial supervision with a view to removing those who are temporarily present in Hungary to third countries". The idea that a 15 year old should be taken to have failed to take advantage of a reasonable opportunity to claim asylum in such a country, and that his credibility should be reduced by reason of such failure, is fanciful without further analysis.

49. Moreover, the question is whether there was a failure to avail oneself of an objectively reasonable opportunity. That does not engage the young person's unlikely subjective knowledge of English decided cases as the UT said in paragraph 24 of its decision.

50. I remain concerned, therefore, that the factor that the FTT ranged against the vulnerability of KA, in assessing his credibility, was the negative feature (as the judge took it to be) of the failure to claim asylum earlier and a somewhat automatic downgrading of credibility simply because of s. 8. In my judgment, for these reasons, the credibility analysis of the FTT (and the review of it in the UT) was flawed in law, and subject to Mr Chapman's submissions on the materiality of the error, the appeal would have to be allowed on that ground. Before addressing materiality, I will turn

[3] Article 8 (Minors) paragraph 4 provides as follows:

> "4. In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor."

briefly Mr Bedford's third ground (incompatibility of s. 8(4), in the case of a minor, with Article 8.4 of Dublin III).

51. On this ground, Mr Chapman accepted that the member state responsible for an asylum claim in the case of an unaccompanied minor (like KA) is indeed the state where the claimant is present and that such minors form a particularly vulnerable group. However, he argued that the fact that an unaccompanied minor should not be transferred from one country to another and that his or her claim should be adjudicated upon promptly, wherever he or she might be, says nothing as to whether it is reasonable for a tribunal of fact to draw an adverse inference as to credibility from a failure to seek asylum in countries in which the claimant has earlier been present.

52. I agree that there is nothing in principle wrong in such a tribunal taking into account in assessing credibility a failure to make an earlier claim to asylum in circumstances, where there was a reasonable opportunity to do so. That is what s. 8(4) indicates and, with Mr Chapman, I do not see anything incompatible with the Regulation in the section so providing and I would reject the third ground of appeal. However, as already indicated, the true question is whether in any particular case there has in reality been such a reasonable opportunity. In making that assessment, the tribunal cannot infer its existence from mere presence in a nominally "safe" country identified by the 2004 Act. It is on that basis that I find force in ground 2 of the grounds of appeal in this case. Just to give one example, there may well not have been an opportunity to claim asylum in a "safe" country through which a claimant has passed while concealed in the back of a lorry.

53. Finally, it was submitted by Mr Chapman that if we were to find any of the grounds of appeal made out as demonstrating an error of law, we should find that that error was not material and that we should dismiss the appeal accordingly. Mr Chapman argued that KA's account, whether in its original or corrected form, was simply incredible. That was because the account of the three letters followed by an immediate attack by the Taliban was fundamentally implausible. The same was to be said of the disappearance of KA's parents and the sudden involvement of the unidentified stranger, speaking what was to KA a foreign language, who had helped KA to flee the country. On any footing, said Mr Chapman, the asylum claim and the appeal was bound to fail because of this deficiency of credibility.

54. For my part, I recognise that point. However, I consider that for a vulnerable minor it would be unsafe to reject his appeal on credibility grounds when, as I have found, the Respondent and the FTT downgraded KA's credibility unjustifiably on the basis of an assessment contrary to the true test set out in s. 8(4) of the 2004 Act. It seems to me that KA's credibility was damaged and his witness statement was given little weight when an adverse credibility finding had been based, in an important respect, on an erroneous application of that provision.

55. For these reasons, I would allow the appeal and, subject to any further submissions of counsel on the appropriate procedure, I would remit the matter to a differently constituted FTT.

Lord Justice Lindblom:

56. I agree.

Lord Justice Flaux:

57. I also agree.