Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03866/2013

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Sent**
on 6th December 2013	**on 23rd January 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

M S F
(Anonymity order in force)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Selway of hallidayreeves Law Firm
For the Respondent: Mrs Rackstraw – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. On the 9th August 2013, at a hearing at North Shields, it was found that First-tier Tribunal Judge Holmes erred in law in proceeding to determine this appeal when there was, in law, no jurisdiction to do so. Paragraph 12 of the error of law finding is in the following terms:

> 12. The difficulty with the above is that it is not clear on what basis the First-tier Tribunal considered they had jurisdiction. The effect of section 83 is to arguably specifically exclude by statute any right of appeal against the

> decision made in this case. Indeed in the letter granting a period of discretionary leave dated 11th April 2013 it is clearly stated that the decision is not an appealable decision. A statement by a party or purported agreement cannot confer statutory jurisdiction and the decision of 3 May cannot confer jurisdiction if none exists.

2. The matter comes before me today for the purposes of a resumed hearing.

Discussion

3. The Appellant claimed asylum on 9th November 2011. His claim was refused on the 26th March 2013 although he was granted discretionary leave until 25th December 2012, a period of eight months. Section 83 of the Nationality, Immigration and Asylum Act 2002 applies where a person has made an asylum claim and his claim has been rejected by the Secretary of State but 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. Section 83 (2) states that such a person may appeal to the Tribunal against the rejection of his asylum claim. The effect of the statutory provisions is that a person who has a claim rejected but who is granted leave to remain for a period of less than one year has no right of appeal.

4. Mr Selway submitted that notwithstanding the above statutory provisions the fact the First-tier Tribunal have made a decision on the appeal means the Upper Tribunal cannot say that Tribunal does not have jurisdiction. I find such a submission has no merit. In Virk v Secretary of State for the Home Department [2013] EWCA Civ 652 it was held that although the SSHD had failed to raise before the First-tier Tribunal the issue of that Tribunal's jurisdiction to entertain a family's application for leave to remain, the Upper Tribunal was entitled to dismiss the family's subsequent appeal against the First-tier Tribunal's decision on the basis that the First-tier Tribunal had not had jurisdiction, notwithstanding that the point had not been raised below. In Virk it was said "Statutory jurisdiction cannot be conferred by waiver or agreement; or by the failure of the parties or the tribunal to be alive to the point". It was also said however that if the issue had not previously been raised then fairness required that the parties should be given the opportunity to address it.

5. In this case the jurisdictional point was taken by the Respondent, as a reading of the papers clearly demonstrates, and there is no merit in a claim this is an issue that the Upper Tribunal are prevented from considering further. In relation to the challenge by Mr Selway that this is not a 'Robinson obvious point' it is clear from the facts this is an arguable issue and can be taken of the Upper Tribunals own motion.

6. Mr Selway refers in his skeleton argument to delay by the Respondent which he claims has resulted in prejudiced to his client. The Appellant claimed asylum on the 9th November 2011, was assessed by Social Services on 16th April 2012, was

interviewed on 23rd May 2012, but the decision to refuse was not issued until the 26th March 2013 at which point the discretionary leave was granted. Mr Selway argues that if the decision had been made earlier, as the Appellant's age was accepted, the period of discretionary leave would have exceeded 12 months giving rise to a right of appeal. He argues that section 83 coupled with the principle of prejudice does not preclude his client from appealing.

7. The issue of delay in considering claims by Afghan minors has been considered by the Court of Appeal on a number of occasions and in relation to other claims within this jurisdiction. I have not been referred to any authority supporting the proposition that a right of appeal specifically excluded by statute can be conferred in such circumstances. There has been no challenge to the legality of the decision or refusal to grant a right of appeal by way of judicial review. In relation to any alleged prejudice, the Appellant has been granted a period of leave, and has now applied to vary that leave so as to permit him to remain which, if refused, will give rise to a statutory right of appeal. Whilst the Applicant is not able to appeal this refusal of his asylum claim there is no indication that he will not be able to have the merits of his case considered at a later date by the Tribunal in an appeal against an appealable immigration decision, as confirmed by Mrs Rackstraw.

8. Mr Selway also relied upon an argument that Article 39(2) is relevant as the denial of a right of appeal under section 83 is incompatible with European Union law, in particular the requirement for an effective remedy contained in Article 39 of Directive 2005/85/EC. This issues was considered by the High Court in R (on the application of S) v First-tier Tribunal [2012] EWHC 1815 (Admin), decided in July 2012. This is a judicial review claim which failed. In delivering judgment Mrs Justice Cox stated:

54. **Discussion and Conclusions**

55. The rights of appeal contained in sections 82, 83 and 83A of the 2002 Act constitute the measures implementing the obligations of the United Kingdom under Article 39 of the Procedures Directive. The "immigration decisions", listed at paragraphs (a) to (k) of section 82(2), give a general right of appeal where the decision means that the person has no legal basis for remaining in the UK, or that they are to be removed or deported. Under section 83 a person whose claim for asylum has been rejected, but who has been granted leave to remain on another basis for a period exceeding one year, may appeal against the rejection of their asylum claim. Under section 83A an appeal may also be brought by a person whose asylum claim has been accepted but who is subsequently the subject of a decision that he/she is not a refugee and continues to have leave to enter or remain other than as a refugee. Section 84 makes specific provision for the grounds of any appeal.

56. The right of appeal that Parliament has afforded to people whose asylum claim has been rejected is therefore not a general right of appeal, but accrues only to those who have been granted leave to enter or remain for a period of more than one year in aggregate. A person whose claim for asylum is refused, but who is granted five months discretionary leave to remain, has no right of appeal unless he is granted a further period of leave, which extends beyond the one year period, although he may bring an application for judicial review to challenge the refusal of asylum.

57. In the case of unaccompanied children, the reason why no removal decision is issued at the same time that their asylum claim is rejected is because of the Secretary of State's policy not to remove

unaccompanied, asylum-seeking children whose claims have been rejected until such time as they are no longer under 18 years old, unless there are adequate reception arrangements in the country of return.

58. In this case it is common ground that, following the "immigration decisions" made on 2 March 2011, the Claimant exercised, and is continuing to exercise his statutory right of appeal. It is also clear, in my view, that notwithstanding the rejection of his asylum claim, any decision to remove him during the period of his discretionary leave to remain would afford him a right of appeal in respect of both his removal and his underlying claims for asylum or humanitarian protection. Section 84(1)(g) specifies, as a ground of appeal under section 82(1), the fact that removal would breach the United Kingdom's obligations under the Refugee Convention, or would be unlawful as being incompatible with the appellant's rights under the European Convention on Human Rights. The right of appeal that the Claimant has now exercised is therefore one which is inherent in the statutory scheme, there having been a decision to refuse him an extension of leave and to remove him.

59. On this analysis the Claimant's contention, as advanced by Mr Jacobs on his behalf, is effectively that, because he was precluded from exercising a statutory right of appeal against the refusal of his asylum claim immediately, and until such time as there was an appealable "immigration decision" made in his case, he has been denied an effective remedy as required by Article 39.

60. Since permission to apply has been granted in this case, I deal with the claim on the basis that, notwithstanding the fact that it may now be academic, the issues raised are important and merit consideration. However, since permission was granted, the issues have been fully considered and determined by Lindblom J in **TN v Secretary of State for the Home Department** [2011] EWHC 3296 (Admin), in which he concluded that TN (a child) was not denied an effective remedy; and that sections 82 and 83 are not inconsistent with Article 39, or with any other provisions of the Directives comprising the European asylum system. Permission to appeal to the Court of Appeal has been given in that case, but the appeal has not yet been heard or decided.

61. In submitting that Lindblom J was wrong Mr Jacobs contends primarily that Article 39 requires immediate access to a statutory right of appeal against the rejection of the Claimant's asylum claim. Recognition of refugee status is a declaratory act and any delay or uncertainty, caused because a child cannot forthwith exercise an appeal on the merits of his claim, deprives him of important rights under the Refugee Convention. Such delay and its emotional impact, until such time as he can exercise an appeal against what is in any event a later, different decision, are not in his best interests as a child.

62. In any event, he submits, **TN** is to be distinguished on its facts. In that case the issue was whether a child asylum-seeker without more than a year's discretionary leave to remain will not have an effective remedy unless he has the chance to appeal to the FTT before the time comes when he is no longer a child. In the present case, the Claimant's entitlement to refugee status is dependent on his ethnicity and nationality, in line with Darfurian refugees of all ages. His fear of persecution will therefore subsist until conditions in Darfur change. He is therefore entitled to a remedy which affords him an immediate right of appeal on the merits against the refusal of his asylum claim.

63. I have considered Mr Jacobs' submissions with care, but I cannot accept them. I find myself fully in agreement with the reasoning of Lindblom J in **TN** , in concluding as I do that the Claimant in the present case has not been denied an effective remedy as required by Article 39(1).

64. As is recognised at recital 27 to the Procedures Directive, the effectiveness of the remedy provided, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole. Drawing attention to this at paragraph 85 of his judgment in **TN**, Lindblom J said as follows:

"In my judgment, Mr Najib [for the Secretary of State] was right to submit that the effectiveness of the remedies afforded under sections 82 and 83 of the 2002 Act, both generally and for a particular group of applicants – in this instance, failed asylum seekers aged between 16½ and 17½ with a grant of no more than a year's discretionary leave – must be considered not in isolation but in the

context of the domestic system of immigration control as a whole. This approach is consistent with the jurisprudence of the European Court of Justice, seen for example in *Peterbroeck Van Campenhout* [(1995) ECR 1-4599]. In that case, in paragraph 14 of its judgment, the court held that the exercise of determining whether a national role of a Member State renders an EU law impossible or excessively difficult requires the procedure to be viewed as a whole, taking into consideration 'the basic principles of the domestic legislation'."

65. Taking that approach, he held that the provisions of section 83 could not be said to have deprived TN, or others who are in a similar situation to his, of an effective remedy of the kind to which Article 39 (1) refers.

66. Concluding that TN had had an effective remedy throughout, Lindblom J held (at paragraph 84) that the existence of an effective remedy does not depend on an asylum-seeker having either an immediate right of appeal on the merits against the refusal of asylum, or a status that affords him rights and benefits equivalent to those enjoyed by a refugee. Article 39(1) does not stipulate that the remedy "before a court or tribunal" must necessarily consist of, or include a right of appeal to a tribunal on the merits, exercisable when the initial decision to refuse asylum is made. In deciding whether there is an effective remedy, the fact that such a decision holds in prospect a statutory appeal against a refusal to extend leave and, in that appeal, to have the merits of the asylum claim fully considered, cannot be ignored. Whilst a remedy, in order to be effective, must be adequate and available to the person who needs it within a reasonable time, a timely remedy is not synonymous with an immediate appeal.

67. Further, Lindblom J held that, under Article 39, the concept of an effective remedy is not limited to a right of recourse to a court or tribunal. In the circumstances contemplated in Article 39(5) an effective remedy is deemed to exist on the basis of status alone. Where, during the period of his discretionary leave, a person claiming asylum enjoys a status which "offers the same rights and benefits under national and Community law as the refugee status by virtue of [the Qualification Directive]", his status is itself, for him, an effective remedy.

68. Acknowledging the significance of refugee status to the person who has it, and for as long as he has it, and the valuable benefits which accompany it, he held that the phrase "the same rights and benefits" in Article 39(5) does not mean rights and benefits identical in every respect, but those that are in substance the same. In practical terms, in his day to day life, he considered that a 17 year old child with discretionary leave to remain is at no real disadvantage to a child of the same age with refugee status. The length of a person's stay is not material in itself. That someone with refugee status can remain for 5 years, while a child can remain with discretionary leave only until he is 17½, does not materially affect the quality of the protection they each enjoy while in the United Kingdom.

69. Considering that it was unnecessary to go as far as deciding that the grant of discretionary leave to a child asylum-seeker confers on him rights and protections tantamount to those enjoyed by a refugee, and which are not such as to fall outside the ambit of Article 39(5), he held that:

"In my view it is necessarily implicit in the provisions of Article 39 that, in gauging the effectiveness of a remedy before a court or tribunal, one can and should consider the degree to which the person to whom that remedy is available has a status with rights and benefits matching those of a refugee. Although the rights and benefits of a child with discretionary leave and those of a child refugee are not in all respect exactly alike, I think the practical similarities between them serve to reinforce my conclusion that in both cases there is an effective remedy sufficient to satisfy paragraph 1 of Article 39. I should make it plain, however, that even if I were wrong about this I would still conclude that the claimant has an effective remedy complying with Article 39(1)."

70. I agree with these conclusions and with the reasoning which underpins them. The remedies that Lindblom J found to be available to someone in TN's position, and to be effective remedies under Article 39, were (a) the statutory appeals that he would be able to bring against subsequent "immigration decisions", on an application to extend his leave or against subsequent removal directions following an unsuccessful appeal; and (b) an application for judicial review of the Secretary of State's decision to reject his asylum claim and grant him discretionary leave for a shorter period than that which would enable him to pursue a statutory appeal.

71. In this context, as is clear from paragraph 92 of his judgment, Lindblom J considered that judicial review, whilst not an appeal on the merits, was nevertheless a remedy with considerable range which was available to a disappointed applicant for asylum.

72. I respectfully agree with that conclusion. In principle, and notwithstanding its limitations, as submitted by Mr Jacobs, I consider that the availability of judicial review can be relied upon as going to the provision of an effective remedy. The statutory right of appeal cannot be said to be the only means of giving effect to the right under Article 39. There is certainly nothing in the text of Article 39 to exclude the possibility of challenging the refusal of asylum by way of judicial review. Consistent with recital 27 and the need to consider the administrative and judicial system as a whole, the Report of the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC (COM (2010) 465 final) refers in this respect, in the case of the United Kingdom, to the role of both specialist tribunals and courts of general competence, the latter by reference expressly to "decisions which can only be subject to judicial review" (see paragraph 5.3.1).

73. Further, whilst his observations to this effect were obiter, Sedley LJ said as follows on this point in **HH (Somalia) v SSHD** EWCA Civ 426:

> "It appears to us that the intention of the Qualifications and Procedures Directives is to require a member state to make a decision on entitlement within a reasonable time of the application and to allow the issues raised in it to be subject to an appeal. We do not consider that the fact that an appeal from removal direction is by way of judicial review rather than statutory appeal is, of itself, an insuperable objection."

74. As Lindblom J pointed out at paragraph 92, judicial review is a remedy before a court; and it is one which enables the court to grant relief where the process of decision-making is flawed by an error of law or procedure, or where the decision to refuse asylum has unreasonably or unlawfully denied the claimant that which he is entitled to by law. A claimant may argue that there has been a failure to act in accordance with the requirements of statute or legal principle, or that the policy for handling asylum claims has been misconstrued or applied arbitrarily. Whilst it is not, as Lindblom J rightly acknowledges, an appeal on the merits, its range is nevertheless considerable. As Ms Rhee points out, it was conceded on behalf of the claimants in **FA (Iraq)** that judicial review was an effective remedy in the context of a challenge to a decision to refuse subsidiary protection status (see paragraph 13 of the judgment of the Supreme Court [2011] UKSC 22).

75. In the present case, in my view, nothing turns on the fact that the Secretary of State made no reference in her decision letter to judicial review as a route by which to challenge her decision to refuse asylum. I do not consider that there is any breach of Articles 9 and 10. The question in the present case is not whether the Claimant is ever able to challenge the adverse asylum decision and, if so, how. Rather, it is whether, in circumstances where he is unable to exercise a statutory right of appeal until there has been an appealable "immigration decision", he can challenge any resulting prejudice which may be caused to him in the intervening period, including a challenge by way of judicial review. It seems to me that such a challenge would have been available to this Claimant if he had been denied a material benefit to which he was entitled during that period, for example under section 20 of the Children Act 2009.

76. In general terms, as recital 11 recognises, and in accordance with the EU principle of national procedural autonomy, whilst asylum claims should be decided as soon as possible, the organisation of the processing of such claims should be left to the discretion of each Member State, so that they may prioritise that processing in accordance with national needs, taking into account the standards laid down in the Directive.

77. In accordance with that approach I accept Ms Rhee's submission that Article 39 does not reflect an immediate and unqualified right to challenge an adverse asylum decision. In particular, whilst Article 39(2) requires Member States to make provision for time limits within which applicants must exercise their right to an effective remedy, there is no requirement that the court or tribunal must examine the asylum decision within a particular period. Article 39(4) provides only that Member States may lay down time limits for the court or tribunal to examine the decision.

78. In addition, in the absence of any EU rules of procedure governing the matter it is for each Member State to decide which courts or tribunals are to have jurisdiction to establish detailed procedural rules governing actions for ensuring the judicial protection of individual rights under EU law, subject to the EU law requirements of equivalence and effectiveness (see **Case C-312/93 Peterbroeck van Campenhout & CIE** [1995] ECR 1-4599).

79. The question is therefore whether this Claimant has suffered any prejudice, or has been prevented from enjoying any substantive right protected under EU law as a result of being unable immediately to exercise a statutory right of appeal against the rejection of his asylum claim on 10 June 2010.

80. In submitting that he has, Mr Jacobs argues that the Claimant is entitled to refugee status if he is able to prove to the requisite standard that he is a member of the Berti tribe. The denial of a right of appeal on the merits, during the nine month period before the decision of 2 March 2011, prevented him from being able to establish his right to recognition as a refugee under the Convention. It is unnecessary for him to show any particular prejudice in the intervening period because this denial is in itself sufficient to demonstrate prejudice and to constitute an impermissible impediment to the enjoyment of a substantive right under both EU and international law. The effect of reliance on a subsequent decision as a means of providing a merits appeal amounts to a fundamental breach of his right to an effective remedy under Article 39, because any subsequent decision is by its very nature a different decision, which takes different factors into account. The United Kingdom is, he submits, under an obligation to give effect to the Refugee Convention in a manner which, absent compelling policy considerations, treats all asylum applicants equally. No such policy considerations exist in this case.

81. The question whether someone has refugee status is, I accept, a matter of real importance. Once that status is recognised, all the benefits of the Refugee Convention are immediately available to them. The uncertainty attaching to lack of status will then be replaced by all the rights and benefits which attach to refugee status. That, as Lord Hope observed in **Fornah (FC) v Secretary of State for the Home Department** [2006] UKHL 46, is "…a very substantial benefit which is well worth arguing for." Mr Jacobs drew attention in addition to similar observations in **Adan v SSHD** [1997] 1 WLR 1107 (Simon Brown LJ) and **Saad, Diriye and Osorio v SSHD** [2001] EWCA Civ 2008, [2002] INLR 34 (Lord Philips MR).

82. However, like Lindblom J before me, albeit on different facts, I am not persuaded that this Claimant's inability to appeal immediately against the refusal of his asylum claim, until he was issued with a decision to remove him, can be said in itself to amount to a breach of his right to an effective remedy. Whilst I acknowledge the importance of his right to recognition as a refugee, on the evidence before me in this case his inability to appeal against the rejection of his claim in June 2010 was not causative of any prejudice in terms of any alleged impediment to him in not being able to avail himself of any of the benefits of refugee status.

83. Having been allowed to remain in the United Kingdom until 11 November 2010 when, on the Secretary of State's assessment, he would be 17½ years old, he was able to apply to extend his leave, and he did so apply. The decision on that application was an "immigration decision" affording him a statutory right of appeal on the merits, which he has exercised. The Tribunal hearing that appeal considered the substance of his claims for asylum or humanitarian protection and will do so again when re-considering them following his successful appeal to the Upper Tribunal. As Lindblom J observed at paragraph 93:

    "A remedy in this form is entirely effective for someone whose claim for asylum has been turned away by the Secretary of State. It is no less effective a remedy for the fact that the applicant's right of appeal lies only against a further decision of the Secretary of State."

84. In my judgment, it is therefore necessary for this Claimant to show that he has suffered some particular form of prejudice in being denied the right to exercise a statutory right of appeal against the earlier refusal of his claim for asylum.

85. In this respect I accept that, in cases involving a child, the need to have regard to his best interests means that careful consideration must be given to all matters relevant to his care and welfare. In **ZH (Tanzania) v Secretary of State for the Home Department** [2011] 2 WLR 148 **...**Supreme Court) Lady Hale said as follows in relation to section 55 of the 2009 Act:

"**23** For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3.1 of the UNCRC: '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.' This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.'

24 Miss Carss-Frisk acknowledges that this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be 'in accordance with the law' for the purpose of article 8.2. Both the Secretary of State and the tribunal will therefore have to address this in their decisions.

25 Further, it is clear from the recent jurisprudence that the Strasbourg court will expect national authorities to apply article 3.1 of UNCRC and treat the best interests of a child as 'a primary consideration'. Of course, despite the looseness with which these terms are sometimes used, 'a primary consideration' is not the same as 'the primary consideration', still less as 'paramount consideration'."

86. I accept that the Court should acknowledge, even where it may not be articulated, some degree of anxiety on the part of a child of the Claimant's age, as a result of the rejection of his asylum claim and his inability to pursue an appeal on the merits where he has leave to remain for less than one year. In general terms delay prolongs uncertainty and is likely to increase anxiety.

87. Ms Rhee is right, however, to point to the fact that, by virtue of this Claimant's status as a child with discretionary leave to remain, he has throughout been entitled to receive care and welfare support from the local authority, as a child in need and irrespective of his status, under the relevant provisions of the Children Act 1989. Further, he was able to take employment, or set up in business or undertake any professional activity, with or without the help of Job Centre Plus, as well as apply for a place on a government-sponsored training scheme. He could, throughout his period of leave, use the NHS, social services and other local authority assistance, as necessary; and he could travel within the Common Travel Area. As Lindblom J observed, both a Convention travel document, to which a refugee is entitled, and a certificate of travel, which a person with discretionary leave may be given, allow the recipients to travel outside the United Kingdom and to return, without having to seek further leave.

88. The decision letter of 10 June 2010 highlighted the various benefits to which the Claimant would be entitled whilst he had leave to remain in the United Kingdom. It is not legitimate, in these circumstances, to refer to him as being "in limbo" during this period, as Mr Jacobs suggested, and there is no evidence showing that there was in fact any adverse impact on his emotional state or well-being as a result of his inability to appeal to the FTT until there was a decision to refuse an extension of his leave and to remove him.

89. Indeed, Mr Jacobs frankly acknowledges that there is no evidence that this Claimant was in any way prejudiced in relation to any of these entitlements, or indeed in any other way, enabling him to point to specific benefits attaching to refugee status which were denied to him in the intervening period.

On the contrary, it is clear that the Claimant has been receiving appropriate support from the relevant local authority throughout.

90. Mr Jacobs also accepts that, once he was able to appeal, this Claimant was then able to establish his ethnicity before the Tribunal. He does not seek to distinguish **TN** on the basis of any particular prejudice said to have been suffered by this Claimant.

91. As Ms Rhee points out, the position in relation to unaccompanied minors is distinguishable from that which governs adult asylum-seekers. Children are carefully excluded from the ambit of the provisions in Schedule 3 to the 2002 Act, removing various asylum seekers or failed asylum seekers from eligibility for support under section 17. This, I agree, is a clear legislative indication that even children of failed asylum seekers should be entitled to have access to section 17 support (see **VC v Newcastle City Council [2011]** EWHC 2673 (Admin). The cases of **Fornah** and others, referred to above, and all of which were carefully considered in **TN**, are therefore distinguishable. I do not accept the submission that the failure to afford this Claimant a right of appeal in June 2010 meant that there was a failure to act in his best interests.

92. Referring to the extracts from Hansard relating to the passage of section 83, as set out above, Mr Jacobs submits that the justification for the exemption in that section, as identified by Pill LJ in **FA (Iraq) v SSHD** [2010] 1 WLR 2545, namely that it was "…presumably to ensure that cases which the Secretary of State is, in any event, going to reconsider in the near future do not have a right of appeal which may be ongoing at the same time as the Secretary of State is reconsidering the position" did not apply in the Claimant's case.

93. He submits that the Secretary of State has consistently maintained that the Claimant is not a member of the Berti tribe and is therefore not entitled to any international protection, as demonstrated by her refusal to extend leave in March 2011. Thus, there is no policy based justification for withholding this Claimant's appeal rights in the present case. The effect of sections 82 and 83 is that the Claimant has been treated differently from any other de facto refugee from Darfur solely on account of being aged between 16½ and 17½ years old on applying for asylum. The failure of the Secretary of State to provide the same access to a merits based appeal as any other refugee is disproportionate.

94. I cannot accept this submission. This Claimant was granted discretionary leave to remain for a period of five months until he was due to turn 17½, as it was then believed. It was therefore highly likely that, as in fact transpired, he would apply to extend his leave and his case would be reconsidered, or he would be issued with a removal decision, at which point he would in any event be afforded a right of appeal. The rationale underlying section 83 does therefore apply in his case and the attack on the justification for, and proportionality of, any discriminatory treatment in his case must fail. In any event section 83 does not, in my view, give rise to any allegation of discrimination, whether on grounds of age or any other ground.

95. Mr Jacobs no longer pursues the submission originally made that section 83(1) breaches the EU principle of equivalence. Rather, he submits that the fact that the Claimant's only remedy in that intervening period, before there was an appealable immigration decision, was to apply for judicial review rendered the exercise of his rights under EU law excessively difficult. That, however, is not the right question. The correct question is whether his enjoyment of his underlying EU rights has been rendered excessively difficult by the relevant statutory provisions. For all the reasons set out above the answer to that question is in the negative.

96. In my judgment the FTT was entitled to conclude that there was no exercisable appeal before it on 2 August 2010. The Claimant has not been denied an effective remedy but has, on the contrary, availed himself of his effective remedy in exercising his right to appeal against the immigration decision of 2 March 2011. The provisions of sections 82 and 83 of the 2002 Act are not inconsistent with Article 39, as informed by the Charter of Fundamental Rights; and there is no basis upon which the statutory provisions could be said to have operated in a way which failed to safeguard the best interests of the Claimant as a child seeking asylum. This Claimant has in no way been discriminated against or unlawfully disadvantaged as a result of the relevant statutory provisions. His claim for judicial review therefore fails.

9. The Court of Appeal also recently delivered their judgment on this issue in the case of TN (Afghanistan) & MA (Afghanistan) v SSHD [2013] EWCA Civ 1609. The issues before the Court of Appeal are summarised in paragraph 7 of the judgment of Lord Justice Maurice Kay as follows:

> The grounds of appeal in these cases were explained in a series of skeleton arguments written by Mr Becket Bedford, the most recent of which is dated 4 October 2013, some six days before the hearing of the appeal. The first and principal ground of appeal is that, by granting them DLR for less than a year, the Secretary of State unlawfully denied the appellants an effective remedy to which they are entitled as a matter of European law. In other words, it was unlawful to create a situation in which, by granting DLR for less than one year, the Secretary of State ensured that there could be no appeal to the FTT while the appellants were still under 18 and protected by the tracing obligation and section 55 of the Borders Citizenship and Immigration Act 2009, as explained by the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 WLR 148. Secondly, the appellants were not only denied an effective remedy by way of appeal. They were thereby disadvantaged in relation to the remedy with which they were provided because of the limitations of judicial review. The third issue is whether what is sometimes called "corrective relief", emerging from cases such as *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744 and *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546, is a sufficient remedy. In this context, Mr Bedford invites us to revisit *R (R v Secretary of State for the Home Department, ex parte Ravichandran (No.1)* [1996] Imm AR 97 and, if necessary, to refer the point to the Court of Justice of the European Union (CJEU). Fourthly, the appellants seek to rely on the Charter of Fundamental Rights of the European Union (the Charter). Finally, he invites us, if appropriate, to remit TN's damages claim to the Administrative Court.

10. On the issue of an effective remedy the Court found at paragraph 16:

> All this leads me to the clear conclusion that, in the context of these appeals, the availability of judicial review as a means of challenging the initial rejections of the appellants' claims meant that there was an effective remedy such as to satisfy the requirements of Article 39 of the Procedures Directive. Whilst it did not share all the features of a statutory appeal to the FTT – in particular, the process of a merits decision following the hearing of oral evidence – there is no requirement in the Procedures Directive or elsewhere that it should. The judicial review procedure falls within the margin of appreciation which is respected by recital (27) and Article 39.2 of the Directive. The fact that Parliament provides a two-tier appellate system located in specialist tribunals is nothing to the point. In many ways, they go further than the "minimum framework" (recital (5)) provided by the Procedures Directive. Parliament was entitled to define and restrict their jurisdiction provided that, where it is excluded, there is still an effective remedy elsewhere in the judicial system. I am quite satisfied that there is.

11. Claims to have suffered disadvantage were rejected [para 17-23] as were all the other argument relied upon by Mr Bedford. Lord Justice Beatson, at paragraphs 32 and 33, found:

> 32. I also consider that to regard the right of appeal after the short delay envisaged in cases such as these as inadequate and not an "effective remedy" could undermine the legislative decision to restrict the right of appeal under section 83 of the Nationality, Immigration and Asylum Act 2002 to those who have been given leave to enter for more than 12 months. That policy was not criticised by this court in *FA (Iraq) v Secretary of State for the Home Department* [2010] EWCA Civ 696. It serves the useful purpose of helping to avoid duplication between decision-making at first instance and on appeal in

> cases in which the Secretary of State will be reconsidering a person's position in the near future.
>
> 33. It may be the case that delaying an appeal until after a person's 18th birthday would mean that it would not be necessary for the best interests of that person as a child to be a primary consideration in the decision-making process pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009. But such applicants will, in the light of *KA (Afghanistan) v Secretary of State for the Home Department* [2012] EWCA Civ 1014, be treated as young people and their whole history will be considered. I am concerned that to regard the fact that an immediate appeal would be an appeal by a child whereas an appeal within what would otherwise be a reasonable period would be an appeal by a young adult as a reason for finding the remedy to be inadequate and not an effective remedy under Article 39 would be undesirable from a policy point of view. If it is not appropriate, for the reasons given in the cases referred to by my Lord at [25], to use a principle of "corrective relief" to confer a status which is not merited, then it is also arguably not appropriate to require the case of a person who will very shortly fall out of a category to be decided before he does so when his interim position is fully protected and where the result might be to confer a status which, although warranted for a few months, would not be merited thereafter.

12. I find no merit in the submission that the statutory provisions are contrary to European law as they deny the Appellant an effective remedy. In this case there has always been a possible remedy by way of judicial review of the decision which has never been exercised.

13. Having considered the competing arguments and the authorities relied upon by the advocates I find it not proved that the Appellant had a right of appeal on any basis to the First-tier Tribunal. Accordingly the determination of Judge Holmes is set aside. There are no preserved findings. I substitute a decision that as there is no jurisdiction to hear the appeal there is nothing for the Upper Tribunal to determine.

Decision

14. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. As there is no statutory right of appeal there is nothing extant to be determined.**

Anonymity.

15. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed……..
Upper Tribunal Judge Hanson
Dated the 16th January 2014