Upper Tribunal
(Immigration and Asylum Chamber)

HKK (Article 3: burden/standard of proof) Afghanistan [2018] UKUT 00386 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On Thursday 21 June 2018

Determination Promulgated

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Before
THE HONOURABLE MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE PERKINS
UPPER TRIBUNAL JUDGE SMITH

Between

H K K

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Bedford, Counsel instructed by Sultan Lloyd solicitors
For the Respondent: Mr S Najib, Counsel instructed by Government Legal Department

(1) It has long been a requirement, found in the case law of the European Court of Human Rights ("ECtHR"), for the government of a signatory state to dispel any doubts regarding a person's claim to be at real risk of Article 3 harm, if that person adduces evidence capable of proving that there are substantial grounds for believing that expulsion from the state would violate Article 3 of the ECHR.

(2) This requirement does not mean the burden of dispelling such doubts shifts to the government in every case where such evidence is adduced, save only where the claim is so lacking in substance as to be clearly unfounded.

(3) Article 4.5 of the Qualification Directive (Council Directive 2004/83/EC) provides that, where certain specified conditions are met, aspects of the statements of an applicant for international protection that are not supported by documentary or other evidence shall not need confirmation.

(4) The effect of Article 4.5 is that a person who has otherwise put forward a cogent case should not fail, merely because he or she does not have supporting documentation. Nowhere in the Directive is it said that a person who has documentation which, on its face, may be said to be supportive of the claim (eg an arrest warrant or witness summons), but whose claim is found to be problematic in other respects, has nevertheless made out their case, so that the burden of disproving it shifts to the government.

(5) When national courts and tribunals are considering cases in which the ECtHR has decided to embark on its own fact-finding exercise, it is important to ensure that the ECtHR's factual conclusions are not treated as general principles of human rights law and practice.

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. As this is a protection claim, it is appropriate to make that order. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. This is the decision of us all. The section dealing with the burden and standard of proof was primarily written by Lane J and the remainder of the decision was written by UTJ Smith. The section setting out the submissions concerning the facts of the case was drafted shortly after the hearing.

BACKGROUND

2. The Appellant appeals against a decision of First-Tier Tribunal Judge Moan promulgated on 21 November 2016 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 19 May 2016 refusing his protection claim. The Appellant was granted discretionary leave to remain on the basis of his age until 22 January 2017 (under paragraph 352ZC of the Immigration Rules). His appeal therefore concerns only his protection claim.

3. The Appellant is a national of Afghanistan born on 22 July 1999. He entered the UK clandestinely in 2015. He claimed asylum on 26 August 2015. At the time of his claim, the Respondent's decision and the hearing and decision of the First-tier Tribunal he was aged under eighteen. By the time of the hearing before us, the Appellant had reached his majority but that is only relevant in the event that we find a material error of law in the Decision and have to re-make the decision for ourselves (for reasons we will come to).

4. The Appellant claims that his father was a member of the Taliban (having been forcibly recruited by them), that his parents were killed by the Taliban and that the Taliban had tried forcibly to recruit the Appellant. He claims that he is at risk of forcible recruitment by the Taliban on return to his home area (Nangarhar). The Respondent did not accept that the Appellant's father was associated with the Taliban and rejected the claim of forced recruitment as being inconsistent with the background evidence about the activities of the Taliban. The Respondent also rejected the Appellant's claim that his parents were killed by the Taliban due to inconsistencies in the Appellant's account.

5. In relation to risk on return, the Judge found that, as a young man with no family in Kabul, it would not be reasonable for him to stay there alone but that, as he has family in Nangarhar Province, those family members could assist him to return to that area. The Judge discounted the failure of the Respondent to carry out family tracing as not relevant to the protection claim. She also considered whether there was a risk of a breach of Article 15(c) of the Qualification Directive by reason of the general level of violence in Afghanistan and in particular the Appellant's home area but rejected that claim also based on the extant country guidance which the Judge found not to be displaced by the later background and expert evidence relied upon by the Appellant.

6. Permission to appeal was refused by First-tier Tribunal Judge J M Holmes on 9 December 2016 and by Upper Tribunal Judge Southern on 31 January 2017. However, following a successful judicial review challenge to Judge Southern's decision, on 22 November 2017, the Vice President of the Tribunal granted permission to appeal.

7. The matter comes before us to decide whether the Decision contains a material error of law and, if we so find, either to re-make the Decision ourselves or remit the appeal to the First-tier Tribunal to do so.

DECISION AND REASONS

Ground One: The Burden and Standard of Proof in Article 3 Claims

8. An appellant in a human rights appeal who asserts that his or her removal from the United Kingdom would violate Article 3 of the ECHR must establish that claim. In other words, the appellant bears the burden of proof. The standard of

proof requires the appellant to show a "reasonable likelihood" or "real risk" of Article 3 harm.

9. The Immigration Appeal Tribunal so held in Kacaj (Article 3 – Standard of Proof – Non-State Actors) Albania* [2001] UKIAT 00018 ("Kacaj"). At paragraph 12 of its determination, the IAT said that "the standard may be a relatively low one, but it is for the applicant to establish his claim to that standard".

10. Section 107(3) and (3A) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides that practice directions made under section 23 of the Tribunals, Courts and Enforcement Act 2007 may require the First-tier Tribunal and the Upper Tribunal to treat a specified decision of, amongst other bodies, the Immigration Appeal Tribunal, as authoritative in respect of a particular matter.

11. Practice Direction 12 of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal provides that a reported determination of, inter alia, the IAT which is "starred" shall be treated as authoritative in respect of the matter to which the "starring" relates, unless inconsistent with other authority that is binding on the Tribunal.

12. It is undisputed that Kacaj is "starred" for what it says in paragraph 12 of the determination. There is no domestic case law that is inconsistent with Kacaj. On the contrary, the higher courts consistently follow the same approach. Thus, for example, in AM (Zimbabwe) and Another v Secretary of State for the Home Department [2018] EWCA Civ 64, Sales LJ held:-

> "16. It is common ground that where a foreign national seeks to rely upon Article 3 as an answer to an attempt by a state to remove him into another country, the overall legal burden is on him to show that Article 3 would be infringed in his case by showing that there are substantial grounds for believing that he would face a real risk of being subject to torture or to inhuman or degrading treatment in that other country …"

13. In the light of this, Mr Bedford accepts, as he must, that the Appellant has a burden to discharge. He submits, however, that what he describes as the "standard direction on appeal against the refusal of an international protection claim" needs modification in order to take account of what he says is the "clear and consistent" line that has emerged from the European Court of Human Rights in the past decade. In this regard, Mr Bedford places particular reliance upon the judgment of the Grand Chamber in JK and Others v Sweden (Application no. 59166/12) ("JK"), given on 23 August 2016.

14. According to Mr Bedford, JK holds that the burden on applicants for international protection is discharged when they adduce evidence which is "capable of proving" a real risk on return. At this point, the burden shifts to the government to dispel any doubts or uncertainty.

15. Mr Bedford further submits that:-

"Any new or modified direction in the Tribunal on the burden and standard of proof must take account of the effect of the Supreme Court decision in *R (Kiarie); R (Byndloss) v SSHD* … [2017] UKSC 42 at [54], [35] that for the purposes of section 82 [of the 2002 Act] any proposed appeal must be taken to be arguable in the absence of a certificate that it is clearly unfounded."

16. The "hard" form of Mr Bedford's submission (to adopt his own description) is, accordingly, that whenever the respondent decides not to certify a human rights claim (at least, one involving international protection), that claim must, logically, involve "evidence capable of proving" the appellant's case, with the result that the ensuing appeal is one in which the respondent necessarily bears the burden of dispelling "any doubts about it".

17. To use again Mr Bedford's terminology, the "softer" version of his submission acknowledges that, even where a claim is not certified as clearly unfounded, the appellant may, in certain circumstances, bear the burden of proof throughout. However, as we understand him, Mr Bedford submits that an appellant whose case is not confined to his or her own statements but is supported by documentary or other evidence, has discharged the burden, so that it is for the respondent to dispel any doubts or uncertainty. Mr Bedford relies, in this regard, on Article 4.5 of the Qualification Directive (Council Directive 2004/83/EC).

Article 4.5 of the Qualification Directive

18. Article 4 of the Directive provides as follows:-

"***Article 4***

Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in paragraph 1 consist of the applicant's statements and all documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

   (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.

4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;

(b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established." (our emphasis)

19. Article 4.5 is given direct effect in the United Kingdom by paragraph 399L of the Immigration Rules:-

"339L It is the duty of the person to substantiate the asylum claim or establish that they are a person eligible for humanitarian protection or substantiate their human rights claim. Where aspects of the person's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met:

(i) the person has made a genuine effort to substantiate their asylum claim or establish that they are a person eligible for humanitarian protection or substantiate his human rights claim;

(ii) all material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given:

(iii) the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;

(iv) the person has made an asylum claim or sought to establish that [they are] a person eligible for humanitarian protection or made a human rights claim at the earliest possible time, unless the person can demonstrate good reason for not having done so; and

(v) the general credibility of the person has been established."

The UNHCR Note on the Burden and Standard of Proof

20. As we shall see, Article 4 was considered by the ECtHR in JK. So too was the UNHCR Note on Burden and Standard of Proof in Refugee Claims, where we find the following:-

"6. According to general legal principles of the law of evidence, the burden of proof lies on the person who makes the assertion. Thus, in refugee claims, it is the applicant who has the burden of establishing the veracity of his/her allegations and the accuracy of the facts on which the refugee claim is based. The burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached. In view of the particularities of a refugee situation, the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated.

…

10. As regards supportive evidence, where there is corroborative evidence supporting the statements of the applicant, this would reinforce the veracity of the statements made. On the other hand, given the special situation of asylum-seekers, they should not be required to produce all necessary evidence. In particular, it should be recognised that, often, asylum-seekers would have fled

without their personal documents. Failure to produce documentary evidence to substantiate oral statements should, therefore, not prevent the claim from being accepted if such statements are consistent with known facts and the general credibility of the applicant is good.

11. In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts and the known situation in the country of origin. Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.

12. The term 'benefit of the doubt' is used in the context of standard of proof relating to the factual assertions made by the applicant. Given that in refugee claims, there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all factual assertions are true, there would normally be an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant. Where the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim; that is, the applicant should be given the 'benefit of the doubt'."

Strasbourg case law

21. The first applicant in JK was a citizen of Iraq who claimed to be in need of international protection, but whose claim was rejected by Sweden on the basis that he had not shown that he was at real risk of serious harm in Iraq, were he to be returned there. The ECtHR referred to Saadi v Italy (Application no. 31201/06) as stating that the relevant standard of proof in Article 3 cases of this kind is whether "substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country".

22. Paragraphs 91 to 98 of the judgment in JK need to be set out in full:-

"91. Regarding the burden of proof in expulsion cases, it is the Court's well-established case-law that it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3; and that where such evidence is adduced, it is for the Government to dispel any doubts about it (see *F.G. v. Sweden*, cited above, § 120; *Saadi v. Italy*, cited above, § 129; *NA. v. the United Kingdom*, cited above, § 111; and *R.C. v. Sweden*, cited above, § 50).

92. According to the Court's case-law, it is incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail (see *Said v. the Netherlands*, no. 2345/02, § 49, ECHR 2005-VI). The

Court, however, acknowledges the fact that with regard to applications for recognition of refugee status, it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if such evidence must be obtained from the country from which he or she claims to have fled. The lack of direct documentary evidence thus cannot be decisive *per se* (see ***Bahaddar v. the Netherlands***, 19 February 1998, § 45, ***Reports*** 1998-I, and, ***mutatis mutandis***, ***Said***, cited above, § 49).

93. Owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof. Yet when information is presented which gives strong reasons to question the veracity of an asylum-seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions (see *F.G. v. Sweden*, cited above, § 113; *Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, 8 March 2007; and *S.H.H. v. the United Kingdom*, no. 60367/10, § 71, 29 January 2013). Even if the applicant's account of some details may appear somewhat implausible, the Court has considered that this does not necessarily detract from the overall general credibility of the applicant's claim (see *Said*, cited above, § 53, and, *mutatis mutandis*, *N. v. Finland*, no. 38885/02, §§ 154-155, 26 July 2005).

94. As a general rule, an asylum-seeker cannot be seen as having discharged the burden of proof until he or she provides a substantiated account of an individual, and thus a real, risk of ill-treatment upon deportation that is capable of distinguishing his or her situation from the general perils in the country of destination.

95. Moreover, although a number of individual factors may not, when considered separately, constitute a real risk, the same factors may give rise to a real risk when taken cumulatively and when considered in a situation of general violence and heightened security (see *NA. v. the United Kingdom*, cited above, § 130). The following elements may represent such risk factors: previous criminal record and/or arrest warrant, the age, gender and origin of a returnee, a previous record as a suspected or actual member of a persecuted group, and a previous asylum claim submitted abroad (see *NA. v. the United Kingdom*, cited above, §§ 143-144 and 146).

96. The Court notes that it is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings. Asylum-seekers are normally the only parties who are able to provide information about their own personal circumstances. Therefore, as far as the individual circumstances are concerned, the burden of proof should in principle lie on the applicants, who must submit, as soon as possible, all evidence relating to their individual circumstances that is needed to substantiate their application for international protection. This requirement is also expressed both in the UNHCR documents (see paragraph 6 of the UNHCR Note on Burden and Standard of Proof in Refugee Claims and paragraph 196 of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, both referred to in paragraphs 53-54 above) and in Article 4 § 1 of the EU

Qualification Directive, as well as in the subsequent case-law of the CJEU (see paragraphs 47 and 49-50 above).

97. However, the rules concerning the burden of proof should not render ineffective the applicants' rights protected under Article 3 of the Convention. It is also important to take into account all the difficulties which an asylum-seeker may encounter abroad when collecting evidence (see *Bahaddar*, cited above § 45, and, *mutatis mutandis*, *Said*, cited above, § 49). Both the standards developed by the UNCHR (paragraph 12 of the Note and paragraph 196 of the Handbook, both cited in paragraphs 53-54 above) and Article 4 § 5 of the Qualification Directive recognise, explicitly or implicitly, that the benefit of the doubt should be granted in favour of an individual seeking international protection.

98. The Court notes that, as far as the evaluation of the general situation in a specific country is concerned, a different approach should be taken. In respect of such matters, the domestic authorities examining a request for international protection have full access to information. For this reason, the general situation in another country, including the ability of its public authorities to provide protection, has to be established *proprio motu* by the competent domestic immigration authorities (see, *mutatis mutandis*, *H.L.R. v. France*, cited above, § 37; *Hilal*, cited above, § 60; and *Hirsi Jamaa and Others*, cited above, § 116). A similar approach is advocated in paragraph 6 of the above-mentioned Note issued by the UNHCR, according to which the authorities adjudicating on an asylum claim have to take "the objective situation in the country of origin concerned" into account *proprio motu*. Similarly, Article 4 § 3 of the Qualification Directive requires that "all relevant facts as they relate to the country of origin" are taken into account."

23. At paragraph 102, the ECtHR considered the significance of past ill-treatment:-

> "102. The court considers that the fact of past ill-treatment provides a strong indication of a future, real risk of treatment contrary to Article 3, in cases in which an applicant has made a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue. In such circumstances, it will be for the government to dispel any doubts about that risk."

24. At paragraph 106, having noted that the existence of a risk of ill-treatment, so far as the ECtHR was concerned, must be assessed primarily with reference to the facts known or which ought to have been known to the Contracting State at the time of expulsion, the court nevertheless noted that, since the applicants had not yet been deported, "the question whether they would face a real risk of persecution upon their return to Iraq must be examined in the light of the present day situation".

25. The ECtHR then embarked on that task. It could see "no reason to cast doubt on the [Swedish] Migration Agency's findings that the family have been exposed to the most serious forms of abuses … by Al-Qaeda from 2004 to 2008" (paragraph 114). The applicants' account of what happened between 2004 and 2010 was, the ECtHR considered, "generally coherent and credible" and "consistent with the

relevant Country of Origin Information". This meant that it was "therefore for the government to dispel any doubts about that risk" (paragraphs 114, 115).

26. Looking at the most recent objective international human rights sources, the ECtHR considered that there were deficits in both the capacity and integrity of the Iraqi security and legal system (paragraph 120) and that, overall, there was a real risk that the Iraqi state would not be able to protect the applicants.

27. That was the majority view of the ECtHR, reached by ten votes to seven. Judge Ranzoni, in a dissenting opinion, considered that paragraph 102 of the majority judgment lacked sufficient reasoning and diverged from Article 4.4 of the Qualification Directive in a number of respects.

28. RC v Sweden (Application no. 41827/07) is a judgment of the third section of the ECtHR. It concerned an individual, RC, who was present in Sweden and claimed to be in need of international protection from the authorities in Iran. Before the First Instance Migration Court in Sweden, the credibility of RC was examined. Two of the three judges of that Court found RC's account was incredible; but one dissented from that conclusion.

29. At paragraph 50 of its judgment, the ECtHR noted that it was "frequently necessary to give" asylum seekers the "benefit of the doubt" when it comes to assessing credibility of statements and documents; but that when there were "strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies".

30. Beginning at paragraph 52, the ECtHR began its own assessment of RC's credibility. It noted that one of the Migration Court judges had considered the applicant to have given a credible account of events. The ECtHR found that a medical certificate put before the Migration Board gave a "rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture" and that, in the circumstances, it was for the Board "to dispel any doubts that might have persisted as to the cause of such scarring". The ECtHR held that the Board should have "directed that an expert opinion be obtained as to the probable cause of the applicant's scars".

31. The court came to the conclusion that the applicant had given a credible account and was at real risk if returned to Iran.

32. In a dissenting opinion, Judge Fura said he was not convinced that the applicant had made out a *prima facie* case, even having regard to the medical certificate. Judge Fura did not agree that the certificate meant the authorities should have directed an expert opinion to be obtained. On the contrary, Judge Fura said he "would be reluctant to give any specific instructions to the domestic authorities as to what procedural measure to take and even less willing to advise on what conclusions to draw from certain evidence introduced in a case where I have not had the benefit of seeing the parties and in which the relevant events took place a long time ago".

33. In FG v Sweden (Application no. 43611/11), a judgment of the Grand Chamber given on 23 March 2016, the ECtHR had this to say on the burden of proof:-

> "120. Regarding the burden of proof, the Court found in *Saadi v. Italy* (cited above, §§ 129-32; see also, among others, *Ouabour v. Belgium*, no. 26417/10, § 65, 2 June 2015 and *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 261, ECHR 2012 (extracts)), that it was in principle for the applicant to adduce evidence capable of proving that there were substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3; and that where such evidence was adduced, it was for the Government to dispel any doubts raised by it (ibid., § 129). In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the destination country, bearing in mind the general situation there and his personal circumstances (ibid., § 130). Where the sources available describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (ibid., § 131). In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the above-mentioned sources, that there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned (ibid., § 132)."

34. Applying this approach to the facts of FG, who had sought international protection in Sweden alleging a fear of the authorities in Iran (both as regards alleged political activities and because of a sur place conversion to Christianity), the ECtHR held that the Swedish authorities had not erred in their approach. FG's application was, accordingly, dismissed.

35. In MA v Switzerland (Application no. 52589/13), a second section judgment handed down on 18 November 2014, the ECtHR placed emphasis on the fact that neither the Migration Board nor the Federal Administrative Court of Switzerland had challenged the authenticity of a court summons, originating in Iran, put forward by MA in connection with his protection claim. Having carried out its own analysis, the ECtHR concluded that the applicant had adduced evidence capable of proving that there were substantial grounds for believing that, if expelled, he would be at real risk of Article 3 ill-treatment and that he "must be given the benefit of the doubt with regard to the remaining uncertainties. The government on the other hand have not dispelled any doubts that the applicant would face such treatment" (paragraph 69).

36. Judge Kjølbro gave a dissenting opinion. He said that an assessment of the credibility of a claimant's account "is an essential and important element in the processing of asylum cases. This is, in many cases, a difficult exercise in which many factors have to be taken into account" (paragraph 2).

37. At paragraph 4, Judge Kjølbro said:-

> "Owing to the risk of abuse of the asylum system and fabricated stories from asylum seekers, who have often been assisted by professional human traffickers deriving profit from the desperate situation of vulnerable individuals, it is legitimate for asylum authorities to submit the account given by asylum seekers to a thorough examination in order to assess the credibility of their statements. In doing so it is important, amongst other things, to ascertain whether the account given by the asylum seeker, in particular concerning the core elements of the motives for seeking asylum, is consistent and coherent."

38. Judge Kjølbro noted that the Migration Board had had the benefit of seeing the applicant in person "which is an important element in assessing the reliability of an asylum seeker's motives" (paragraph 5). The authorities in Switzerland considered that the applicant had not given a plausible explanation for inconsistencies and discrepancies. Judge Kjølbro considered that the majority judges were "acting as a "fourth instance" in its assessment of the reliability of the applicant's statements" (paragraph 6).

39. He also found that the importance attached to documents by the majority was problematic" in that:-

> "It is well-known in asylum cases that it is often easy to get hold of forged and fraudulently obtained official documents … If the account given by an asylum seeker is credible, documents in support of the statement are often of less importance. On the other hand, if the account given by an asylum seeker is clearly unreliable, documents will frequently be incapable of dispelling the doubts concerning its credibility." (paragraph 7)

40. Judge Kjølbro concluded by saying that, in his view, having regard to the "subsidiary role of the court", the majority had not given a "sufficient basis for overturning the assessment of the domestic authorities as regards the credibility of the applicant's asylum story".

41. In Paposhvili v Belgium (Application no. 41738/10), given on 13 December 2016, the Grand Chamber of the ECtHR examined the threshold in an Article 3 case, involving a claim by a person that to remove him from Belgium would lead to a real risk of serious harm as a result of a deterioration in his medical condition, where that condition could not be said to be attributable to the authorities of the country to which he was proposed to be returned.

42. We are not here concerned with that aspect of the judgment. Rather, Mr Bedford draws attention to paragraphs 186 and 187, which contain what, by now, can be seen to be standard statements of the ECtHR regarding the burden of proof:-

> "186. In the context of these procedures, it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *Saadi*, cited above, § 129, and *F.G. v. Sweden*, cited above, § 120). In this connection it should be observed that a certain degree of speculation is inherent in the preventive

purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment (see, in particular, *Trabelsi v. Belgium*, no. 140/10, § 130, ECHR 2014 (extracts)).

187. Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it (see *Saadi*, cited above, § 129, and *F.G. v. Sweden*, cited above, § 120). The risk alleged must be subjected to close scrutiny (see *Saadi,* cited above, § 128; *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 214, 28 June 2011; *Hirsi Jamaa and Others*, cited above, § 116; and *Tarakhel*, cited above, § 104) in the course of which the authorities in the returning State must consider the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances (see *Vilvarajah and Others*, cited above, § 108; *El-Masri*, cited above, § 213; and *Tarakhel*, cited above, § 105). The assessment of the risk as defined above (see paragraphs 183-84) must therefore take into consideration general sources such as reports of the World Health Organisation or of reputable non-governmental organisations and the medical certificates concerning the person in question."

43. We have already observed that, in paragraph 16 of the judgments in AM (Zimbabwe), Sales LJ stated that the overall legal burden is on an applicant for international protection relying upon Article 3 to show that there are substantial grounds for believing that person would face a real risk of being subjected to treatment contrary to that Article, in the event of removal. Sales LJ then said the following:-

> "In *Paposhvili,* at paras. [186] – [187] … the Grand Chamber of the ECtHR has given guidance how he may achieve that, by raising a prima facie case of infringement of Article 3 which then cast an evidential burden onto the defending state which is seeking to expel him."

Discussion

44. It is trite law that the obligation of courts and tribunals in the United Kingdom is to "take into account any … judgment, decision, declaration or advisory opinion of the European Court of Human Rights …" (section 2(1)(a)) of the Human Rights Act 1998). United Kingdom courts and tribunals should, however, generally follow any clear and consistent approach of the ECtHR (particularly, of course, its Grand Chamber). However, that will not be the position if and in so far as the domestic court or tribunal in question is bound by the principle of *stare decisis* to follow the decision of a higher court or tribunal, even though this may be contrary to the Strasbourg approach: Kay v London Borough of Lambert [2006] UKHL 10.

45. It is quite clear from RC v Sweden (paragraph 50) and FG v Sweden (paragraph 120) that JK v Sweden introduces no new approach to the issue of the burden of proof in Article 3 cases. The requirement of a government to dispel doubts, where an applicant adduces evidence "capable of proving" that there are

substantial grounds for believing expulsion would violate Article 3, has been a feature of the ECtHR jurisprudence for some considerable time.

46. Whilst that means, of course, that Strasbourg has indeed maintained a consistent approach over a significant period of time, Mr Bedford must face the question of why, if his interpretation of the ECtHR's approach is correct, the startling consequences for United Kingdom immigration law and, no doubt, much of the law of other EU States have not been identified before now.

47. The fact of the matter is, we find, that there is no justification for Mr Bedford's contention that evidence "capable of proving" a claim constitutes the same or even a similar threshold for determining whether a claim is so lacking in substance as to be clearly unfounded within the terms of section 94 of the 2002 Act.

48. In JK, the ECtHR cited (without evident disapproval) both the passages from the UNHCR guidance on the benefit of the doubt, which we have set out above, and also certain provisions of the Qualification Directive including, importantly, Article 4. The UNHCR Note does not say the burden always shifts to the government in question except where the claim is, on any view, hopeless. We shall have more to say on Article 4 of the Qualification Directive in a moment; but, for the present, we observe that Article 4.5, on its face, shares nothing in common with Mr Bedford's primary submission.

49. Accordingly, if Mr Bedford's primary or "hard" submission were right, we would expect to see the majority of the ECtHR explaining why they had seen fit to depart from both the UNHCR Note and Article 4 of the Qualification Directive. However, one looks in vain for any such explanation.

50. It is manifest from the ECtHR's analysis of the personal circumstances of the applicants in JK, which begins at paragraph 112, that the applicants had, according to the majority of the court, produced strong or compelling evidence of real risk on return. In particular, emphasis was placed by the majority upon the findings of the Migration Agency that JK's family had been exposed to "the most serious forms of abuses" by Al-Qaeda and that the latter's threats had continued after 2008. Furthermore, JK's account was "consistent with relevant Country of Origin information available from reliable and objective sources" (paragraph 114).

51. It was on this basis that the majority of the court concluded, at paragraph 115, that it was for the Swedish Government to dispel any doubts about the risk to the applicants. Even so, however, a violation of Article 3 was found by only ten votes to seven.

52. RC v Sweden was not a Grand Chamber case. In reaching its conclusion on credibility, the majority of the ECtHR was impressed by a medical report, which said that RC had been tortured.

53. When national courts and tribunals are considering cases in which the ECtHR decides to embark on its own fact-finding exercise, it is important to ensure that the ECtHR's factual conclusions are not treated as general principles of human rights law and practice.

54. Indeed, judicial conclusions of fact will often have little light to shed on those general principles, for the simple reason that, whatever standard of proof is in play, it is quite possible for different judges to reach different but valid conclusions on the same evidence. We see this graphically demonstrated in the dissenting judgments recorded above.

55. In RC, Judge Fura gave a strong dissenting opinion, in which she disagreed with the significance placed by the majority on the medical report. In MA v Switzerland, Judge Kjølbro explained cogently why he took issue with the significance afforded by the majority to the court summons from Iran.

56. We are, of course, well aware of the status of minority opinions. They nevertheless reinforce the point that different judges, properly applying a particular standard of proof, can legitimately reach different conclusions on the evidence.

57. It is, therefore, not possible to find support for Mr Bedford's primary submission from the ways in which, in these cases, the members of the ECtHR have gone about their fact-finding tasks. In particular, there is nothing in the cases to suggest that the court regards the threshold of "evidence capable of proving …" as a low one, let alone so low as to catch only cases that are bound to fail, on any rational view.

58. We turn to the "softer" version of Mr Bedford's submissions. This involves an analysis of Article 4.5 of the Qualification Directive.

59. The first point to mention is one which we have already touched upon; namely, that Article 4.5 is, on its face, wholly inconsistent with Mr Bedford's "strong" version. Mr Bedford, however, submits that the effect of Article 4.5 is as follows.

60. The provision applies only in cases where an applicant's statement is not "supported by documentary or other evidence". Article 4.5 explains the circumstances in which the absence of such evidence can, in effect, be set to one side and the applicant's claim still accepted as satisfying the burden and standard of proof. Where, however, an applicant does have such documentary or other evidence, in addition to his or her own statement, Mr Bedford submits that the corollary of Article 4.5 is the applicant is thereby entitled to succeed.

61. We do not accept this interpretation. Article 4.5 means what it says. A person who, in respect of each of sub-paragraphs (a) to (e), has put forward a cogent claim should not fail, merely because he or she does not have supporting documentation. Nowhere in the Qualification Directive is there to be found any statement to the effect that a person who has documentation which, on its face,

may be said to be supportive of the claim (for example, an arrest warrant or witness summons), but whose claim is found to be problematic in other respects, has nevertheless made out their case, so that the burden of disproving it shifts to the government.

62. Although it was not cited before us, we observe that in KS (Benefit of the Doubt) [2014] UKUT 00552 (IAC), the Upper Tribunal held that "the ambit of Article 4.5 is limited to cases of non-corroboration/confirmation" (paragraph 85). We agree with that finding.

63. Nothing we have said is intended to diminish the importance of Article 4.5 in the circumstances in which it applies. Those circumstances must, however, be kept in mind. Article 4.5 has no application outside them.

64. In Tanveer Ahmed [2002] UKIAT* 00439, the Immigration Appeal Tribunal in a "starred" decision, held that it is unnecessary for the respondent to allege that a document relied on by an individual is a forgery, in order to resist the submission that the document must be given weight by the Tribunal. Accordingly, as set out in summary in paragraph 38 of the IAT's determination: "It is for an individual claimant to show that a document on which he seeks to rely can be relied on".

65. There is nothing in the Strasbourg case law or the Qualification Directive to call that statement into doubt. What the Strasbourg case law does demonstrate is that, where a judicial fact-finder is satisfied that a document adduced by an applicant in evidence is reliable, then this *may* mean that the government in question will be required to show why the applicant is, nevertheless, not at real risk. Depending on the circumstances, that may require the government to make its own enquiries regarding the document. However, as can be seen from the dissenting judgments in the Strasbourg cases, there is, emphatically, no "bright line" rule that governs judicial fact-finding in this area.

66. For the above reasons, we are satisfied that the Judge applied the correct burden and standard of proof as set out at [4] to [6] of the Decision. The summary there given is consistent with what we say at [8] above.

67. Before we turn to ground two, we need to deal with another issue which Mr Bedford raised for the first time in the Appellant's statement of case which concerns the Judge's approach to the Appellant's position as a child and whether his age was properly taken into account when the Judge reached her credibility findings. We refuse permission to the Appellant to raise this ground (insofar as permission was formally sought which it was not). This issue was not raised in either set of grounds of appeal and permission to appeal was not therefore granted on that ground. In any event, as Mr Najib for the Respondent pointed out, the Judge has dealt with the Appellant's age at the time of his claim and the events which led to it and has reached her credibility findings with that factor in mind (see in particular [17] and [18] of the Decision).

Ground Two: Application of Background Evidence

68. Turning then to the Appellant's ground two, that focusses on the risk to the Appellant himself of forcible recruitment by the Taliban. The Appellant says that he falls within an established risk category as identified by the UNHCR in its reports dated 2013 and 2016. He says that the Judge has erred in her conclusion at [13] and [18] of the Decision by finding that the up-to-date and relevant background information was at odds with the Appellant's claim to be at risk of forcible recruitment by the Taliban in Nangarhar Province.

69. The paragraphs of the Decision which are criticised by the Appellant in this regard are [13] and [18] as follows:

> "[13] The Appellant had said in his asylum interview that lots of young men from the village were forced to take part in fighting by the Taliban. The background material suggests that forced recruitment was a rare occurrence and only usually occurred from refugee camps. The Appellant's father was not a medic and had no particular value to the Taliban, as was the case for the Appellant. It was difficult to reconcile the evidence from the Appellant that there had been many forced recruits from his village with the background material suggesting otherwise.
> …
> [18] I have considered the Appellant's material claims in accordance with paragraph 339L of the Immigration Rules and noting that he was 16 years of age at the time of his asylum interview. He was not consistent as regards some very significant features of his claim. The discrepancies about whether his father arranged the agent or his father's friend, he only mentioned in his screening interview that his mother had been killed and his assertions of forced recruitment run counter to the background material available. I have also noted the inconsistencies outlined in his age assessment and have discounted the explanation that this was due to interpreting difficulties, noting the nature and extent of the inconsistencies. I am unable to find the Appellant credible and cannot accept his material claims. As such, I find that the Appellant does not have a well-founded fear of persecution should he return to Afghanistan. I do not accept that his parents were killed by the Taliban, that his father was a forced recruit or that the Taliban attempted to recruit the Appellant. He is not at risk from Taliban retribution or from the authorities or community implying his allegiance to the Taliban."

70. In support of this ground, the Appellant relies in particular on the UNHCR reports on Afghanistan in 2013 and 2016 which expressly deal with this topic. It is important therefore to start by setting out precisely what the UNHCR said in those reports. Both reports were apparently before the Judge.

71. The 2013 report deals with this issue at [3] of the "Potential Risk Profiles" under heading of "Men and Boys of Fighting Age" in the following terms:

> "In areas where AGEs [Anti-Government Elements] exercise effective control, they are reported to use a variety of mechanisms to recruit fighters, including

recruitment mechanisms based on coercive strategies. In a traditional form of war mobilization knows as *lashkar*, every household is expected to contribute a man of fighting age. In areas where AGEs exercise effective control, as well as in IDP settlements in Afghanistan, they are reported to use threats and intimidation to enforce this mechanism to recruit fighters for the insurgency. People who resist recruitment are reportedly at risk of being accused of being a government spy and being killed or punished. There are reports of families linked to the insurgency giving boys to AGEs as suicide bombers, in the hope of gaining status with the AGE in question.

ALP [Afghan Local Police] commanders have also been reported to forcibly recruit local community members, including both adult men and children, into ALP forces.

In light of the foregoing, UNHCR considers that, depending on the specific circumstances of the case, men and boys of fighting age living in areas under the effective control of AGEs, or in areas where pro-government forces and AGEs are engaged in a struggle for control, may be in need of international refugee protection on the ground of their membership of a particular social group. Depending on the specific circumstances of the case, men and boys of fighting age living in areas where ALP commanders are in a sufficiently powerful position to forcibly recruit community members into the ALP may equally be in need of international refugee protection on the ground of their membership of a particular social group. Men and boys who resist forced recruitment may also be in need of international refugee protection on the ground of their (imputed) political opinion. Depending on the specific circumstances of the case, family members of men and boys with this profile may be in need of international protection on the basis of their association with individuals at risk."

72. In the 2016 report, in the equivalent section, under the heading "Men of Fighting Age, and Children in the Context of Underage and Forced Recruitment" UNHCR says that "[i]ncidents of forced recruitment of children are said to be subject to widespread underreporting" and that recruitment of children by all parties to the conflict is "reported to be observed throughout the country". With that introduction, UNHCR goes on to say this:

> "(a) Forced Recruitment by AGEs
>
> In areas where AGEs exercise effective control over territory and the population, they are reported to use a variety of mechanisms to recruit fighters, including recruitment mechanisms based on coercive strategies. Persons who resist recruitment, and their family members, are reportedly at risk of being killed or punished.
>
> AGEs are reported to continue to recruit children, both boys and girls, to carry out suicide attacks and as human shields, as well as to participate in active combat, to plant IEDs, to smuggle weapons and uniforms, and to act as spies, guards or scouts for reconnaissance."

73. Having updated its earlier guidance in relation to underage recruitment by the Afghan Government forces (which has led to a law being put in place to prevent it), the report finishes with the following summary:

> "In light of the foregoing, UNHCR considers that, depending on the specific circumstances of the case, men of fighting age and children living in areas under the

effective control of AGEs, or in areas where pro-government forces, AGEs and/or armed groups affiliated to ISIS are engaged in a struggle for control, may be in need of international refugee protection on the ground of their membership of a particular social group or other relevant grounds. Depending on the specific circumstances of the case, men of fighting age and children living in areas where ALP commanders are in a sufficiently powerful position to forcibly recruit community members into the ALP may equally be in need of international refugee protection on the ground of their membership of a particular social group or other relevant grounds. Men of fighting age and children who resist forced recruitment may also be in need of international refugee protection on the ground of their (imputed) political opinion. Depending on the specific circumstances of the case, family members of men and boys with this profile may be in need of international protection on the basis of their association with individuals at risk."

74. Interestingly, unlike the 2013 report, the 2016 report does not specifically highlight under-age and forced recruitment by AGEs as a problem under the heading in relation to children (although does mention it in the summary). However, in consequence, the source documents underlying the UNHCR guidance in 2016 do not include those at [356] of the source documents underlying the 2013 report which identify specific incidents involving the recruitment of children by AGEs. The only source material identified in the 2016 report summary under the heading of "Children" is a cross-reference back to the section we identify above which is not itself sourced by reference to reports of individual incidents. We surmise though that this may be because, in the view of UNHCR, such incidents are underreported.

75. On this topic, our attention was also drawn to what is said by the European Asylum Support Office in its Country of Origin Information Report entitled "Afghanistan Recruitment by armed groups" dated September 2016 ("the EASO report") at [1.5.5] under the heading "Nangarhar":

> "Borhan Osman explains that in some areas where the Taliban is facing opposition and pressure from local anti-Taliban forces, it needs to assert itself in the role of protector and may put some pressure on communities to contribute – financially or by providing fighters. This is the case in Nangarhar where it is confronted with Islamic State groups. In this case, the Taliban liaised with tribal elders from the Khogyani tribe and organised a couple of large gatherings in which it explained that the tribe, the area, and their properties were under attack from foreigners (Pakistani militants rebranding themselves as Islamic State). In these gatherings the Taliban relies on religious discourse, appeal to honour of the people, cultural codes etc to create a consensus among the tribal elders to get their support. It asks for money, food, other supplies and recruits. However, asking for recruits is a last resort. The Taliban prefers to fight itself and will only ask local leaders to provide their local fighters in cases of severe shortage. The Khogyani elders agreed to support the Taliban against IS by providing supplies and not giving shelter to Islamic State fighters. In case of unexpected attacks at night, they might have asked for a couple of men (4-5) per village in order to be able to repel the attack but this mobilisation would have been temporary because the Taliban would move in its mobile special forces in the following days to fight back. Osman explains that he

did not know about such a particular case but this is how it would happen according to his information."

76. Unsurprisingly, this evidence is relied upon largely by the Respondent. As Mr Bedford pointed out, the source of this evidence is only one telephone interview with one gentleman in April 2016. We do note though that Mr Osman is an Afghan expert in the Afghanistan Analysts Network who is said to have been studying the Taliban very closely. We note also that the report contains more detailed particulars of how the Taliban operates in the specific home area of the Appellant than does either the 2013 or 2016 report of the UNHCR which is vague and applies more generally.

77. Mr Najib also drew our attention to the section of the EASO report which sets out the views of Dr Giustozzi, an expert who is familiar to this Tribunal and who has given expert evidence about Afghanistan to the Tribunal. His views are set out at 1.5 where this is said:

> "Antonio Guistozzi says that in Afghan social structures decisions are made by heads of families, tribal elders and community leaders… The decision to mobilise fighters is made by them and Afghans do not refer to 'forced recruitment', as they do not think in terms of individual rights. The decisions made by leaders are legitimate and accepted by the social units (family and tribe). Therefore 'forced recruitment' is a concept that does not stem from the Afghan social context."

78. That view is underpinned by what is said by Ms Gossman of Human Rights Watch reported also in that section.

79. As Mr Najib observed, there is some disagreement between EASO and UNHCR about what is understood to be forced recruitment. That can be seen from the criticism made by EASO at [1.5] of its report of the UNHCR update in 2014 reporting on recruitment by insurgents. EASO criticises those reports on the basis that they "do not mention what is exactly understood by 'forced recruitment' and there is no information on what actors were involved or on the prevalence of it".

80. Mr Najib also drew our attention to the Home Office Operational Guidance Note for Afghanistan reissued in February 2015 ("the OGN"). At [3.10.15] to [3.10.17] of the OGN, the report refers to a Danish report issued in May 2012 following a fact-finding mission to Afghanistan which is there cited as follows:

> "[3.10.15] The same Danish report states "UNHCR referred to a leaked ISAF report on the state of the Taliban in relation to the change of strategy of the Taliban. According to this report, the Taliban do not have difficulties in recruiting people for their force. They have many volunteers and there is a willingness to join the movement. The Taliban may recruit collectively in the villages by offering education to poor people's sons and by brain washing people." "Based on its research, Co-operation for Peace and Unity" (CPAU) stated that poverty, unemployment, and a desire for higher social status in the community, rather than ideological reasons, are the main factors driving the recruitment to the Taliban.

[3.10.16] The EASO report (referred to in 3.10.4) provides a comprehensive insight into the Taliban, a history of the conflict in Afghanistan and recruitment strategies. It notes that "Local and autonomous commanders, tribal structures and religious clerics are the main channels through which recruitment is facilitated within Afghanistan. As a general principle, it could be stated that the local cell – commander, tribe, family or madrassa – is the basic recruitment hub. In general, the direct use of coercion or retaliation for refusing enlistment by the Taliban is not typical for the current Afghan insurgency. There are cases of forced recruitment, but these are considered as exceptional. To gain support and recruit fighters, they relied on economic needs, fear and coercion, pride and honour, tribe and tradition, religious persuasion etc. Clerics played an indispensable role in the recruitment processes." In its summary the EASO report states "Other sources stated explicitly that force or coercion were not used for recruitment in their provinces: Ghazni, Herat and Logar. Sources discussing the general situation in Afghanistan commonly state that coercion is rare in the recruitment process. They sometimes refer to locations where it did happen: refugee camps and areas under strong influence of the Taliban. One source mentioned that the Taliban recruited porters and medical staff by force in areas under their control. Some sources gave arguments against forced recruitment: it would alienate communities or there is no need for it, since the Taliban dispose of sufficient volunteers.

[3.10.17] In July 2012 UNHCR welcomed the EASO report and noted "The report focusses on forced recruitment by the Taliban and concludes that the Taliban only uses forced recruitment exceptionally. The report defines "forced recruitment" narrowly, limiting its scope of application to situations where individuals are forced to join the Taliban under the use or threat of immediate violence. The report does not include in this definition Taliban recruitment mechanisms based on broader coercive strategies, including fear, intimidation and the use of tribal mechanisms to pressurize individuals into joining the Taliban. The report's conclusion that forced recruitment is the exception rather than the rule should therefore not be taken to apply to these other forms of coercive recruitment. In circumstances where recruitment is based at least in part on fear, intimidation, tribal pressures or other coercive elements, it is exceedingly difficult to make a clear-cut distinction between individuals joining the Taliban voluntarily and individuals being forcibly recruited. Where Afghan asylum-seekers claim to have fled forcible recruitment by the Taliban, decision-makers in EU Member States will need to identify the precise nature of the coercion of which the applicant complains and decide the case on the basis of the applicant's individual circumstances. Amnesty International expressed concern that the term "forced recruitment" is defined narrowly in the EASO report: "In its conclusion the EASO does not acknowledge the situations of persons joining or supporting the Taleban as result of indirect methods of intimidation such as through instilling fear among the local population by threatening night letters, killing individuals, including children, perceived as spies or supporters of the government, the extortion of fines, as well as pressuring individuals to join the Taliban through tribal, family and religious mechanisms, and other indirect means of coercion. Also, in the current context of reintegration and reconciliation efforts with the Taliban, it is expected that more people, including members of ethnic minority groups, may submit to Taliban demands, fearing reprisals."

Mr Najib also drew our attention to the UNHCR July 2012 paper entitled "Forced recruitment by the Taliban in Afghanistan: UNHCR's perspective" from where the UNHCR comments there incorporated are taken.

81. In its conclusion, the OGN states as follows:

> "[3.10.18] **Conclusion**. The risk from anti government groups will be highest in the areas where they operate or have control. Caseworkers will need to take into account the most up to date country information, the nature of the threat and the particular profile of the claimant. For applicants who can demonstrate a well-founded fear of persecution for reason of their imputed political opinion and who are unable to acquire protection or relocate internally, a grant of asylum will be appropriate.
> [3.10.19] Forced recruitment by Taliban military commanders, leaders or fighters (i.e.situations where individuals or their families are directly approached and forced to join up under threat of retaliation or violence if they refuse) has to be considered as exceptional. The risk will be highest in areas where armed anti-government groups are operating or have control and in refugee camps but the evidence of recruitment driven more by broader coercive strategies, such as economics, fear, intimidation, pride and honour, religious persuasion and the use of tribal mechanisms to pressurise individuals into joining the Taliban, rather than by force."

82. Mr Najib also reminded us that the case of HK and others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC) ("HK and others") remains extant country guidance to which we need to have regard. That country guidance remained binding on Judge Moan unless displaced by later material. Mr Najib drew our attention to what is said at [2] of the headnote as follows:

> "While forcible recruitment by the Taliban cannot be discounted as a risk, particularly in areas of high militant activity or militant control, evidence is required to show that it is a real risk for the particular child concerned and not a mere possibility."

83. That conclusion is underpinned by [29] to [39] of the decision which refers at [39] to there being "anecdotal evidence" of forcible recruitment by the Taliban in parts of Afghanistan but no more. We accept of course that the decision is now of some antiquity relating to the position in 2010. It has not though been overtaken by later country guidance.

84. Although of course documents post-dating the Decision cannot inform the issue whether there is an error of law disclosed by the Decision, nonetheless, such documents can illustrate whether any error is or is not material. To that extent, we take into account also the most recent country guidance encompassed in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC) ("AS") and the Landinfo report entitled "Afghanistan: Recruitment to Taliban" dated June 2017 ("the Landinfo report") as relied upon by the Respondent.

85. We accept that the guidance in AS was largely concerned only with safety of return to Kabul. However, it has some relevance as follows.

86. First, the Tribunal expressly upheld the earlier country guidance in AK (Article 15(c) Afghanistan CG [2012] UKUT 163 (IAC). In consequence, the Appellant cannot argue that the level of indiscriminate violence in Afghanistan reaches the Article 15(c) threshold unless there is later material which shows that the position has changed, and that country guidance should not be followed.

87. Second, the Tribunal in AS upheld the earlier country guidance in AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC) which itself upholds HK and others to which we refer at [82] above. We have already cited the relevant paragraph of the headnote which continues to apply unless the Appellant can show by more recent material that the position has changed to such an extent that the country guidance should no longer be followed.

88. Third, the Tribunal, in AS, also heard evidence from Dr Giustozzi. At [84] of the country guidance decision, the position as to forced recruitment is summarised as follows:

> "In the Afghan context, there appears to be no agreement about the meaning of forced recruitment to armed groups, instead commentators refer to mobilisation of fighters and agreement within social structures for recruitment, albeit with the use of coercion, duress or force in some cases. There is also the possibility that the term forced recruitment necessarily applies to children because they're not old enough to make an informed choice as opposed to a more literal use of force for their recruitment."

89. Reference is there made to the divergence of expert opinion about what constitutes "forced recruitment" but, consistently with the material to which we have already referred that, in general, the evidence does not support a finding of recruitment by actual force. Although AS is predominantly concerned with safety on return to Kabul, we reject Mr Bedford's suggestion that the section dealing with the evidence about forced recruitment is narrowly confined to dealing with risks in the capital when that section is read as a whole. Although we recognise that what is said about the evidence of Ms Winterbotham might lend some support to the Appellant's case, we note from [62] of the country guidance decision that the Tribunal found that her evidence carried "far less weight" because of her approach.

90. Landinfo is Norway's Country of Origin Information Centre. Having drawn attention to what was said by UNHCR in its July 2012 paper to which we refer at [80] above and drawing attention again to the distinction between the approach of the various organisations to the definition of "forced recruitment" the report goes on to criticise the UNHCR 2016 report on which the Appellant here places reliance in the following terms [page 17]:

> "The claims are geographically delimited to "areas where AGEs exercise effective control over the territory and population". It is therefore difficult to know which areas UNHCR is referring to and whether the claim is valid only for such areas. Landinfo would also point out that UNHCR, by using the terms "reported" and "reportedly" seems to distance themselves from the validity of the substance in the documentation.
> The allegations of coercion are substantiated by references to documentation from both UNHCR itself, news media, the Afghan authorities and other international organisations such as Human Rights Watch (HRW) and International Crisis Group. In some cases, in Landinfo's opinion, there is little or no correlation between the UNHCR's assessments and the documentation (country information) presented. This applies to both the claim "[…] recruitment mechanisms based on coercive strategies" and the claim "[…] at risk of being killed or punished" (UNHCR 2016)."

91. The report goes on to consider other sources including the 2016 EASO report before again citing Dr Giustozzi's conversation with Landinfo itself in 2010 where he is said to have opined that the Taliban did not need to use coercion. Reference is made to an article written by him in 2011 where he states that:

> "Forced recruitment has not been a salient characteristic of this conflict. The insurgents have made recourse to it only very marginally, mainly forcing male villagers in areas under their control and not sympathetic to the insurgents' cause to serve as porters." [taken from page [18] of the Landinfo report]

92. The report goes on to note that information provided by Dr Giustozzi in 2015 did not differ from those views and that the views were confirmed by others who they had consulted.

93. We record that Mr Bedford did draw our attention to some material which he said showed that the general level of violence had changed for the worse since AK. Dealing first with the report of Dr Lisa Schuster (report dated December 2015 at [AB/46-86]), the Judge has dealt with what that shows at [33] to [40] of the Decision before reaching the conclusion at [41] that the Article 15 (c) threshold is not met. Mr Bedford also referred to a small number of press reports relating to violence in Nangarhar province which all post-date the Decision. The reports at [AB/88-90] record two attacks in Jalalabad at public places in May 2018 which killed nine and eight civilians respectively and injured over thirty and forty-five further civilians. The third report relates to the bombing of the car of a local official in the same month.

94. Mr Bedford also drew our attention to a report by the Institute for War and Peace Reporting (UK) at [AB/101-102] which also post-dates the Decision. We did not find that of much assistance to our consideration of the issues before us because although it deals with the case of two teenagers from Nangarhar who were recruited to fight for the Taliban there is no suggestion that this was forcible recruitment in the sense that the Appellant claims exists.

95. We return then to what is the central issue which is whether the Judge took into account the material before her when dealing with the issue of forced recruitment and whether, if she did not, such error is material. The Appellant's position is that what is said at [13] of the Decision does not show that the Judge took the background material into account at all, particularly the UNHCR reports of 2013 and 2016. The Respondent's position is that the Judge did take into account that material but did not need to cite it or deal with it expressly because the conclusions of UNHCR are not firm enough to warrant express mention and/or because those opinions are not consistent with the generality of the background evidence which supports the Judge's view that forced recruitment is not generally an issue which gives rise to a risk on return.

96. Having set out fully the material which was before the Judge, in particular the views expressed in the EASO report and the OGN, we have concluded that the Judge did not fall into error in this regard. Whilst, ideally, it may have been useful to refer to the fact that not all the background evidence points the same way and that there is a divergence of view as to what is encompassed within the definition of "forced recruitment", the Judge did not need to do so. The claim by the Appellant is that his father had been recruited to the Taliban by actual force, that he feared that the same would happen to him and that he would be killed or forced to act against his will as a suicide bomber. Such a fear, even if genuinely subjectively held, is not made out on an objective basis when the background evidence is considered, read as a whole.

97. For the above reasons, we are not satisfied that the Decision contains a material error of law. We therefore uphold the Decision.

DECISION

We are satisfied that the Decision does not contain a material error of law. We uphold the decision of First-tier Tribunal Judge Moan promulgated on 21 November 2016 with the consequence that the Appellant's appeal remains dismissed.

Signed

Upper Tribunal Judge Smith
Dated: 18 October 2018