



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/13273/2015

THE IMMIGRATION ACTS

Heard at Field House
On 20 June 2018

Decision & Reason
Promulgated
On 23 October 2018

Before

THE HONOURABLE MR JUSTICE LANE
UPPER TRIBUNAL JUDGE PERKINS
UPPER TRIBUNAL JUDGE SMITH

Between

M A (EGYPT)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bedford and Mr M Uddin, Counsel instructed by Sultan Lloyd solicitors

For the Respondent: Mr S Najib, Counsel instructed by Government Legal Department

Anonymity

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

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. It is appropriate to continue the 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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION

1. This is the decision of us all. The section dealing with the applicable 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 made concerning the facts of the case was drafted shortly after the hearing.

BACKGROUND

2. The Appellant is a national of Egypt born in January 2001. He arrived in the UK in August 2014, aged thirteen years. He claimed asylum on the following day. He initially claimed to be Syrian but subsequently disclosed his true identity. His claim now is based on a dispute relating to land he claims to have inherited from his parents. He says that this dispute led to threats to his life which forced him to leave Egypt where he was living with his uncle and sisters. He claims that both his parents are dead. On a more general level, the Appellant also claims that he has lost contact with his uncle and siblings in Egypt, that he would be forced to live alone in Cairo as a result and would be destitute. He claims to be entitled to humanitarian protection on that account.
3. The Appellant appeals against the Respondent's decision dated 13 November 2015 refusing his protection and human rights claim.
4. By a decision promulgated on 19 May 2016, the Appellant's appeal was initially allowed by First-tier Tribunal Judge Graham to the extent that the case was remitted to the Respondent for reconsideration. However, that decision was set aside by Upper Tribunal Judge Rimington on 3 August 2016 on the basis that the Tribunal had acted outside its jurisdiction by allowing the appeal on that basis. The appeal was remitted to the First-tier Tribunal to decide afresh.
5. The Appellant's appeal was dismissed by First-tier Tribunal Judge Robertson by a decision promulgated on 21 March 2017. By a decision promulgated on 8 December 2017, Upper Tribunal Judge O'Connor found an error of law in the First-tier Tribunal's decision and set the First-tier Tribunal's decision aside. He directed that the decision should be re-made by the Upper Tribunal.
6. The appeal in this case was conjoined with another appeal raising the same issue concerning the appropriate burden and standard of proof in relation to protection appeals. That is the Appellant's ground one in this case. We deal with that ground first before proceeding to re-make the decision as the issue of the correct burden and standard of proof is relevant to our determination of the claim.

BURDEN AND STANDARD OF PROOF

7. 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.
8. 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”.
9. 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.
10. 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.
11. 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 ...”
12. 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.

13. 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.

14. 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.”

15. 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”.

16. 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/AEC).

Article 4(5) of the Qualification Directive

17. 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)

18. Article 4(5) is given direct effect in the United Kingdom by paragraph 399L of the Immigration Rules :-

"399L 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

19. 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

20. 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".

21. 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."

22. 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."

23. 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".

24. 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).
25. 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.
26. 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.
27. 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.
28. 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”.
29. 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”.
30. The court came to the conclusion that the applicant had given a credible account and was at real risk if returned to Iran.
31. 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”.

32. 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).”

33. 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.

34. 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).

35. 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).

36. 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."

37. 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).

38. 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)

39. 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".

40. 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.

41. 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.”

42. 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

43. 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 Lambeth [2006] UKHL 10.

44. 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.
45. 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.
46. 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.
47. 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.
48. 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.
49. 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).
50. 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.

51. 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.
52. 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.
53. 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.
54. 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.
55. 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.
56. 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.
57. We turn to the "softer" version of Mr Bedford's submissions. This involves an analysis of Article 4.5 of the Qualification Directive.
58. 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.
59. 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.

60. 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.
61. 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.
62. 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.
63. 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”.
64. 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.
65. For the above reasons, the burden and standard of proof to be applied in this case are as we have summarised at [7] above.

EVIDENCE

66. We had before us a consolidated bundle of documents containing the following:
- (a) Three witness statements from the Appellant dated 25 November 2014, one undated (and unsigned) entitled “Rebuttal Statement” and a supplementary statement dated 4 January 2018;
 - (b) Letters in support of the Appellant from his social worker and foster carer;
 - (c) Various documents relating to the Appellant’s educational achievements in the UK;

(d) Background material concerning the situation in Egypt ([B/55-236]).

67. Mr Bedford indicated that he would not be calling the Appellant to give oral evidence. We received submissions from both parties. We refer to the evidence and submissions so far as relevant to our decision. We have had regard to all the submissions and evidence when reaching our decision.

THE APPELLANT'S PROTECTION CLAIM: DISCUSSION AND CONCLUSIONS

68. We begin with the Appellant's age. The Appellant is now aged seventeen and a half years. As we note above, Mr Bedford did not call the Appellant to give oral evidence. As we understood his reasons those are unconnected with the Appellant's age or ability to give evidence.

69. However, it is important that we keep in mind the Appellant's age at the time of the events which he claims occurred and at the time of his interviews since at all material times, he was a child and quite a young child. His age may account for discrepancies between the accounts he has given at various times and may also explain any failure to provide detail when first asked about his claim.

Individual Protection Claim: Land Dispute

70. Taking first, the Appellant's claim to be at individual risk, he says that this is on account of a feud with another family at the heart of which is land which he inherited from his father. The Appellant says that his parents passed away when he was aged twelve years. He says that he and his two sisters then moved in with his uncle.

71. As Mr Bedford submitted, once the Appellant had admitted his true nationality and identity, he has since been consistent about the core of his claim to be at risk on account of this land dispute.

72. A number of discrepancies were identified by the Respondent. Mr Bedford pointed out that the Respondent had failed to take account of the Appellant's age when he made the claim, that he was in foster care, learning a foreign language and recalling events from two years previously.

73. Mr Najib set out at some length the reasons why the Respondent says that the Appellant's claim should be disbelieved. We set out below those submissions and (where appropriate) we record also the Appellant's written evidence in answer to those submissions. We have also set out our findings in relation to each aspect relied upon.

74. The Appellant provided a wholly false account at screening stage. He said he was Syrian. That claim indicated a degree of planning to make a false claim. The

Appellant has not explained why he did not claim asylum in Italy and France and has also given inconsistent accounts of how he left Egypt. In one account, he says that he just followed others in his group. In another, he says he was told by the group to say he was from Syria and they gave him the information in order to make that claim. He then says that it was a man in France who gave him the details about Syria. He now says that his uncle told him to come to the UK and to claim to be from Syria.

75. The Appellant points out that, as a child, he did not know anything about asylum or the procedures for claiming. He says that the authorities in Italy and France did not inform him of those procedures and he just followed others who were coming to the UK. He now regrets claiming to be from Syria but says that he was simply doing as he was advised to do.
76. Although we note the inconsistencies between the accounts given by the Appellant as to who told him to claim what, we do not place weight on those. As a child, it is perhaps understandable that he would follow instructions he was given as to what to do when he arrived, whoever gave those instructions. It is also understandable that he would not wish to say who told him to lie.
77. The Appellant claims that both his parents have died but has provided no evidence that this is the case. He remained in contact with his uncle he says until February 2016 and could therefore have provided some evidence. A similar point is made about the lack of documentation regarding the ownership of land.
78. The Appellant has been legally represented, it appears, from an early stage. The firm which currently represents him were on record for him at the time of his asylum interview and the Appellant said (in the interview record) that his solicitor helped him to complete the SEF. An experienced practitioner would recognise the advantage to be gained from substantiating the claim so far as possible. However, there is nothing to suggest that the Appellant was asked to provide such additional evidence and, as a child, he could not be expected to know that he should do so.
79. The Appellant has changed his account about the reasons why he ceased education. First, he said that this was for financial reasons. Then he said it was because of the risk to him from the family involved in the feud. Then he concluded that it must have been because of that risk. As a child, it is plausible that he would not have known why he was taken out of school. He says in his statement that he now thinks there were two reasons but it may not have occurred to him at the time that it was the risk which was the main reason ; indeed, at the time when he was taken out of school he claims not to have known about that risk.
80. However, at the same time as asserting that he was prevented from going to school because of the risk, the Appellant also says that he was not prevented from

going out in the immediate neighbourhood. That is in spite of claiming that the other family is so powerful that they would be able to trace him in Cairo. We do not accept as plausible that the Appellant's uncle would allow him to go out in the local area if he was being kept out of school because of the risk. Whilst the reason is a matter for the Appellant's uncle, the Appellant has not changed his evidence that he was allowed to go out within the neighbourhood whilst being told he could not go to school or the land ([10] of the Rebuttal Statement). It is implausible that, if the Appellant was taken out of school because of the feud, his uncle would not have also prevented him from going out in the immediate area.

81. There is an inconsistency between the Appellant claiming to be at risk and the lack of risk to the other family members. He does not say that the other family threatened his father. Nor is it said that the other family targeted his mother after his father's death. The Appellant says that his mother died six months after his father. Although the Appellant says that his sisters inherited a lesser share of the land, they were still beneficiaries but it is not said that his sisters were threatened.
82. We note the Appellant's explanation for this. He says his uncle told him that only males would be threatened. We were not taken to any background material to show that this is the way in which land feuds are conducted in Egypt. We note also that the Appellant was able to remain in Egypt for some time after his father's death (he says his father dies when he was aged twelve and therefore in 2013; he did not leave Egypt until 2014).
83. If there were a genuine land dispute, the other family would have targeted the Appellant's father before him, would have taken advantage of the Appellant's father's death to target his mother before her death or would have made threats to the Appellant's uncle since he was looking after the Appellant and his siblings who owned the land thereafter and/or targeted the Appellant himself in the period before he left Egypt.
84. There is an inconsistency in the Appellant's evidence about how the land was used. The Appellant says that his father farmed it to provide food for the family. The impression given is that it was a small plot used only for that purpose. However, that is said by the Respondent to be inconsistent with the interest shown in it by the other family. We place little weight on that inconsistency. There is likely to be a cultural difference between the way in which people regard agricultural land in rural Egypt and what might be the position in the UK. What might appear to be only land suitable for subsistence farming might still be viewed as valuable in that environment.
85. The Appellant says that the family did not use the land after his father died but at the same time says that he became aware of the risk because the crops were burned. In his Rebuttal Statement, the Appellant says that his evidence about this has been misunderstood ([3]). He says that "we" had started to use the land to grow produce "before the problem had started" but were unable to do so

thereafter because the other family burnt the land. That is though inconsistent with his evidence that he did not know about the threats until his uncle told him about them. We note the inconsistency asserted by the Respondent about when his uncle told him about the feud (one week before he left or two to three weeks) but that is not a significant difference and we do not take it into account.

86. It is though not plausible that the Appellant would not have known of the risk earlier if the other family was attacking the land; at the very least, it would have prompted him to ask his uncle why this was happening. It is also implausible, as we have already noted, that, if the other family were genuinely interested in the land, they would not have taken it earlier, either when the Appellant's father was alive or immediately after his death.
87. The Respondent points to a further inconsistency arising from the burning of the crops because the Appellant says he did not report that because the other family were politically influential but then says that he did not know who had burned the crops. He says in his first statement that he does not know whether his uncle reported this to the authorities ([9]). We accept that, as the Appellant was a child, it would be more likely that the Appellant's uncle would report the problem. There is no evidence one way or another whether he did so.
88. However, we regard as embellishment what the Appellant says in his witness statement about the identity and reach of the other family.
89. We begin with what the Appellant says about that family. In his first witness statement, he said that he does not know who they are. He says he only knew what his uncle told him and he had not told the Appellant who wanted to harm him. At interview, at first, he said that he did not know who they were or if they were powerful. He said his uncle told him only that it was a large family. The Appellant has now said that they are a very famous and powerful family who would be able to track him down in Cairo, that they may have been responsible for the killing of government officials and are linked with the drugs trade ([15] of the Rebuttal Statement).
90. In the Rebuttal Statement, the Appellant says that he could not remember the name until it came to his mind at interview. Before that, he says he had forgotten. He says that "it just happened to be that I was able to recall the name of the family that my uncle had told me about." Mr Becket said that the inconsistency at interview arose because the Appellant thought he was being asked for the family's first names. In order to consider the Appellant's explanation, it is necessary to look at the questioning relating to this topic at interview as follows:

"[Q97] Did he [the uncle] say who these people were?

[A] No

[Q98] Did you ask him?

[A] I did. He said I don't know them.

...

[Q127] Who do you fear?

[A] I don't know them.

...

[Q138] Are the people who want the land powerful?

[A] I don't know.

[Q139] What makes you think they have power or influence to find you in Cairo or Alexandria?

[A] My uncle told me they are a big family.

[Q140] So it is a family who want your land – correct?

[A] I don't know. They want to take land. Full stop.

[Q141] You said they were a big family?

[A] I don't know how they would take it. They are big families and taken anything they want.

[Q142] How do you know they are [?] families?

[A] They are well known but you don't know which of them.

[Q143] Name of the family?

[A] ZUKUM

...

[Q149] In your witness statement you said you did not know who the people were. Today you say they are a well known political family. Why not mention this before?

[A] All I know they are well known people. I don't know what they do for a living.

[Q150] But why not mention their name on witness statement?

[A] I don't know them, their names. I didn't see them before.

[Q151] How did you learn they were called Zukum?

[A] If I say this family well known. I don't know names.

[Q152] How know named Zukum?

[A] If I know names I would have told you.

[Q153] You said they were called Zukum?

[A] I know they are from Zukum family but I don't know names.

[Q154] How know this?

[A] My uncle told me. This is small family. This is big family.

[Q155] You didn't mention this when I asked you what uncle said?

[A] He told me a long time ago."

Although we accept that the latter part of this exchange might suggest that the Appellant thought he was being asked for specific names (as Mr Becket suggested), as Mr Najib pointed out, that does not explain why in the earlier part of the exchange the Appellant did not volunteer the name of the family but later gave it. Nor does it explain why he said that his uncle had not told him the name of the people threatening him (which is consistent with what he said in his first statement).

91. As a child, as Mr Najib pointed out, it might be expected that the Appellant would be able to give more detail at an earlier stage (while memories are fresher) rather than less. Whilst we accept that the impact of a traumatic journey might impact on the ability to remember, we find it wholly implausible that a person, child or not, would in the course of the same interview say that he knew nothing of those at the source of his problems and then go on to say that he knew who

they were and that they were influential. Nor does the Appellant explain how he knows what is said at [15] of his Rebuttal Statement about the extent of that influence. We do not accept the Appellant's evidence on this point.

92. The Respondent points out that the Appellant could avoid the risk, if genuine, by selling the land or not using it. The Appellant says that there would be no problem if the land was not used ([5] of the Rebuttal Statement). However, that assertion is contradicted by the fact that the Appellant's father was not targeted when he was using the land to grow crops and also that the Appellant claims to have been at risk at a time when the land was, he says, not being used. When asked why he did not just give up the land to avoid the risk, the Appellant said that the family needed it as farmers. However, as the Respondent points out, that is inconsistent with the Appellant's case that it was not used and also with the fact that he left Egypt to avoid the risk which would mean that the land would not be used. Although, as the Appellant points out, he cannot answer for the actions of the other family since he left Egypt, it is notable that he does not say that the other family has taken the land since he left.
93. The Appellant also said that he could not sell the land because his sisters were minors at the time. He does not explain the relevance of that since he too was a minor at that time. The Appellant does not give any evidence about any attempts to dispose of the land nor point to any background evidence suggesting that his and his sisters' ages would make it difficult for them to sell the land. We accept that, as the Appellant was not an adult at the time, if the land was to be sold, it would be his uncle who would have to instruct someone to take that course. However, it is not clear why his uncle would not do so if, as the Appellant says, it was not possible to usefully farm the land because of the problems encountered from the other family and the holding of that land was causing a risk (on the Appellant's case).
94. The Appellant says that his uncle was not threatened. The Respondent also says that this is implausible because the Appellant says that his uncle only became aware of the risk because he was told about it by others in the community. The Appellant did not know the identity of these other people. He does not know how they came to know about the risk. We recognise that the Appellant will not himself know how his uncle came to know about the risk, who told him etc. That is something which only the Appellant's uncle would know unless the Appellant had asked him about it. However, we return to the point above that, if there were a genuine risk on this account, his uncle also would have been targeted or at least threatened directly. If the other family genuinely wanted the land for itself, it is not plausible that they would not have gone directly to the person or people who could transfer the land to them.
95. We recognise that the Appellant has been consistent in his claim to have been targeted because of the land dispute. We also accept that, as a child, the Appellant might not be aware of all the details about the threats and risk to him.

However, for the reason we give above, his account is implausible and inconsistent in certain significant aspects. Some of the inconsistencies cannot simply be explained away by his age. For the reasons we give above, we do not accept his account as credible.

General Protection Claim: Risk as a Lone Child on Return to Home Area/Cairo

96. The Appellant claims that he has lost contact with his family in Egypt, in particular his uncle who cared for him before he came to the UK.

97. The Respondent says that his account about how this came about is implausible and incapable of belief.

98. We begin by setting out what the Appellant now says about when he lost contact and how. That is in his supplementary statement dated 4 January 2018:

“[4] I have had no contact with my maternal uncle since early 2016. I would like to clarify that I left Egypt with a small mobile phone which I lost in Italy. In Italy with the assistance of people I managed to purchase another mobile phone where I had my uncle’s number stored. I would also keep my uncle’s number recorded on a piece of paper in my pocket. Upon entering the UK after approximately 5 months unfortunately I lost that mobile too. But I did manage to contact my uncle a few times on this 2nd phone but soon after my uncle stopped answering my calls. I do not know why. I do not know how I lost the 2nd mobile. I then purchased another (3rd) small mobile in the UK. I never stored my uncle’s number on this 3rd mobile as I was worried that again I may lose this mobile too. I feared for my uncle’s safety. I confirm that I never contacted my uncle on this number. Thus there would be no reason for his number to appear in the ‘call log history’. I understand that I have dialled my uncle’s number many times in the past but cannot recall the number. I always kept his number on a piece of paper and left the paper in my jeans which were washed. The paper with the number was torn and the number was illegible. I ask the Tribunal to note that I have since lost my 3rd mobile and now purchased a 4th mobile. I have been forthcoming about this and not concealed any information from the Home Office. I have not contacted my uncle and worried for his safety. He could have possibly relocated elsewhere or even be displaced. His current location is unknown to me. I do not know how the Home Office expect me to return to Egypt to my uncle if I do not know where he is.”

99. As Mr Najib pointed out, the Appellant does not say how he was able to get his uncle’s number when he got a new phone. It may be that the Appellant means that he was able to put the number on the phone from the piece of paper with the number which he claims to have since lost when his trousers were put in the washing machine. We do not place weight on that as reason not to accept what the Appellant says.

100. The Appellant says that he has never had his uncle’s contact details on his third phone. However, as the Respondent points out, even if the Appellant did not store the number, if the Appellant’s uncle contacted him, his number would

show on the call history. The Appellant does not say in his statement whether his uncle has contacted him since he obtained the third phone. However, he says that he lost the second phone about five months from his arrival in the UK. That would be in about February 2015. The Appellant says however in his statement that he lost contact with his uncle in early 2016. If that is so, then his uncle must have contacted him since he obtained the third phone.

101. The Appellant's assertion that he last contacted his uncle in early 2016 may be inconsistent with what he told the age assessors in March 2015 (that he had not had contact for some time). However, that is not necessarily the position if he had resumed contact thereafter. In his substantive asylum interview, in June 2015, the Appellant said that he was in contact with his uncle "once a month" [Q46] and that his uncle contacts him. He said that he did not have the number stored on his then current phone (presumably the third phone) because he had forgotten and deleted all the numbers. However, it does not explain why the number would not have appeared in the call history log.
102. As Mr Najib pointed out, the Appellant's only family (on his account) are his uncle and sisters in Egypt. We agree with Mr Najib's submission that, in such circumstances, it is wholly improbable that the Appellant would have carelessly deleted the only contact details he held for that family. As Mr Najib submitted, and we accept, it is more likely that the Appellant did so by design to avoid the authorities contacting his uncle.
103. That does not though take the Respondent home on his case because the issue is whether the Appellant has the ability to contact his uncle now and, if not, the situation that the Appellant would face on return to Egypt.
104. On the issue of fact relating to whether the Appellant has indeed lost contact with his uncle, Mr Bedford directed our attention to the findings made by the previous Judges. Dealing first with Judge Graham's initial decision, the Judge does not make findings one way or another. She finds that what the Appellant says about when contact was lost is consistent as between his (first) statement and the evidence from his social worker and that this was in early 2016. As we have already noted, that is to some extent undermined by the chronology he now gives about the various phones. The Judge takes account of the Appellant's age when dealing with this issue at [34] of the decision but then goes on at [35] to decide it by reference to what the Respondent had or had not done in relation to tracing. There is no finding one way or another whether the Appellant still had contact at that stage although we accept that it is unlikely that the Judge would have determined the appeal as she purported to do if she were satisfied that the Appellant was still in contact as there would be no need for tracing if he was to be returned to his family in Egypt. The lack of finding on this issue is moreover one of the reasons why Judge Rimington found it necessary to remit the appeal.

105. In relation to Judge Robertson's decision, the finding is set out at [25(VIII)] as follows:
"...I find, to the lower standard of proof, that it is reasonably likely that the Appellant has been and still is in contact with his uncle but he does not want to provide a number for him to hamper the Respondent's efforts to trace his uncle because he is now aware that it enhances his chances of being given leave to remain in the UK..."
106. We reject the gloss which the Appellant seeks to put on this finding as submitted by Mr Bedford that, because the Judge has determined the issue only on the lower standard which is less than the balance of probabilities, what the Judge in fact found is that it is more likely than not that the Appellant has lost this contact.
107. It is of course the case that the earlier decisions have been set aside and none of the findings are preserved. Having regard to what we say above about the implausibility of the Appellant's account as to his ability to contact his uncle, we find his evidence on this aspect not to be credible. It follows that we do not accept that he does not retain that contact (or at least the ability to make that contact). We therefore find that the Appellant can return to his home area of Egypt (where we have found that he is not at risk) and can return to his family there.
108. In case we are wrong about that, though, we go on to make findings about what the position would be if the Appellant cannot be returned to his family in Egypt. The Appellant is still a minor. As such, although we note that he is only six months from his eighteenth birthday, he is still in the position of an unaccompanied asylum-seeking child.
109. Mr Najib made the submission that we should decide this issue on the basis and assumption that the Appellant will not be returned to Egypt until after his eighteenth birthday. We were initially not disposed to accept that submission, inconsistent as it is on the obligation on us to decide all issues as at date of hearing.
110. We have though come to the conclusion that on this point, that is not the right approach on this issue. That arises because of the Respondent's guidance entitled Children's Asylum Claims (published on 9 October 2017). Our attention was not drawn to this guidance by either party but it is a publicly available document which, as the Respondent's own guidance about how asylum claims from children should be handled, is clearly relevant to this case.
111. At page [67] there is a section dealing with the obligation on caseworkers to consider reception arrangements. In the introductory section, the guidance states that "[t]he Home Office has a policy commitment that no unaccompanied child will be removed from the UK unless the Secretary of State is satisfied that safe

and adequate reception arrangements are in place in the country to which the child is to be removed”.

112. If that unambiguous statement of policy requires further support, that is to be found at page [62] where it is stated that cases of removal of children aged over 17.5 years (as here) need first to be considered in line with the above policy commitment and “[w]here removal is not appropriate, children who are refused outright because they are over 17.5, but are under 18 years of age, will be liable for removal on turning 18”. In light of the stated policy commitment, the Appellant could challenge any attempt to remove him before his eighteenth birthday in January 2019.
113. We did not hear full argument about Mr Najib’s second point that we should not consider the Appellant’s protection claim based on this risk because he will not in fact be removed before he turns eighteen. Section 82 Nationality, Immigration and Asylum Act 2002 defines a protection claim as a claim that removal “would breach” the Refugee Convention or the Respondent’s obligations in relation to the grant of humanitarian protection. In circumstances where we did not hear full argument, we have decided that it is appropriate to determine this issue on the premise of removal as at date of the hearing before us.
114. In so doing, we accept Mr Najib’s submission that, simply because there is no contact between the Respondent and the Appellant’s family and because the Appellant would therefore be returned alone, does not lead to an automatic finding that a protection claim should succeed. We of course accept Mr Bedford’s proposition that the returning of a lone child to his home country can give rise to treatment contrary to Article 3 ECHR. However, whether that is a real risk depends on the evidence that such a risk exists for a minor alone returning to Egypt.
115. We have already determined that there is no risk to the Appellant in his home area and that he would be able to resume contact with his family in that area even if he has not maintained that contact since early 2016 as he claims.
116. Even if the Appellant’s family are no longer in that area and he has genuinely lost contact with them, it does not follow that he could not return to that area on his own or remain in Cairo.
117. Mr Bedford drew our attention to what is said in the US State Department report for Egypt dated 2015 ([B/129]). Whilst there is evidence there of abuse and exploitation of children, what is there said has to be read in context. There is reference to the struggles faced by so-called “street children” which applies to children who are displaced but it is also there said that many of those children are victims of violence and sexual abuse. It is not suggested that a child, particularly one approaching adulthood who has had the benefit of education in the UK over the past four years, would fall into that category simply by reason of his age. Put

another way, the report does not suggest that any child living alone in Egypt, particularly one aged nearly eighteen, would be at risk for that reason.

118. We accept, as the Appellant says at [5] of his supplementary statement, that he has been looked after by his foster mother and social worker whilst he has been in the UK and has formed a dependency on them. He might not find independence easy. However, we do not accept that the limited evidence such as it is gives rise to a real risk of ill-treatment contrary to Article 3 ECHR on return to Egypt, whether that be to the Appellant's home area or to Cairo. The evidence is simply insufficient to establish the risk to the high threshold which applies.

THE APPELLANT'S ARTICLE 8 ECHR CLAIM: DISCUSSION AND CONCLUSIONS

119. Although there is no mention of an Article 8 claim in the Appellant's statement of case for the hearing before us, we did not understand the Appellant to have abandoned his previous case and there is nothing in Judge O'Connor's decision which suggests that the findings of Judge Robertson dismissing the Article 8 human rights claim were to be maintained. For completeness, therefore we turn to deal with that claim.
120. We begin with the Appellant's best interests as a child. Whilst on the one hand, he may well benefit, as he has done to date, from remaining in the UK, on the other, his family are in Egypt and it is in his best interests as a child to have contact with and live in a family unit. His best interests are probably to remain in the UK but only marginally so.
121. Even accepting that the Appellant's best interests are to remain in the UK, though, that is not the end of the Article 8 assessment. Much has been made in the appeal to date of the Respondent's policy in relation to unaccompanied asylum-seeking children and the assessment that such children should be given discretionary leave to remain until they are aged seventeen and a half. However, we are not concerned with what the Respondent should have done in the past but what the position is at the date of the hearing before us. At that date, the Appellant was only about one month from being aged seventeen and a half.
122. We do not accept that the Respondent's policy requires her to grant discretionary leave as at the date of the hearing for that reason. We have regard to the Respondent's guidance cited at [110] above and to paragraph 352ZC(a) of the Immigration Rules which provides that a child should be granted discretionary leave as an unaccompanied asylum-seeking child only where he/she would be under the age of seventeen and a half throughout the duration of the grant of leave. That does not apply to this Appellant.
123. We note what is said in the Appellant's supplementary statement about his relationship with his foster mother and social worker. We have read their

evidence which speaks of his “fantastic progress” particularly his educational achievements. We accept that he will have formed a relationship with his foster carers akin to that of parents and child. He has lived with them since September 2014 and therefore for nearly four years. We note what is said about the Appellant’s immersion in British culture.

124. However, the fact remains that the Appellant has his biological family members living in Egypt. For the purposes of this decision, we accept that he has lost his parents at a young age but he has an uncle who raised him thereafter for a year or so and he has two sisters with whom he grew up. We accept that the Appellant will find it difficult to leave behind his foster parents but we do not accept that the interference with that relationship formed over only about four years is sufficient to outweigh the public interest in immigration control in circumstances where the Appellant has no other basis of stay in the UK.

125. Turning to his private life, the Appellant has been in the UK for nearly four years. He is now aged seventeen and was aged thirteen on arrival. However, that is an insufficient period for him to succeed under paragraph 276ADE of the Rules.

126. We have considered whether it can be said that there are “very significant obstacles” to his integration in Egypt for the purposes of paragraph 276ADE. We do not accept that there are. The Appellant speaks the language and is used to the customs in Egypt. It may be that he has become accustomed to the culture here also but we do not accept that he would have lost his association with Egypt where he spent a much larger part of his formative years. As we note, he also still has family in Egypt.

127. That the Appellant cannot meet the Rules in relation to his private and family life is relevant also to our assessment of the position outside the Rules. We have already explained why we do not consider that the interference with his family life is sufficient to outweigh the public interest.

128. We do not accept either that the interference with his private life outweighs the public interest for the reasons which follow.

129. We accept that removal will cause some disruption to the Appellant’s private life. In particular, we note what is said about his educational achievements and plans for a future career. There may be some disruption to his desire to become a tradesman. Although no doubt such trades are still required in Egypt, there may be differences in the training available for those trades. We accept also that it may take the Appellant some time to readjust to the cultural differences between Egypt and the UK. The Appellant has not been in the UK for a lengthy period but, for a child, four years is still a long while. According to the evidence, though, he has adjusted well to the cultural differences in the UK (having started from a point of knowing no English or anything about the culture here). He can

therefore be expected to be able to adjust back to the culture with which he is familiar from his early years, with the assistance of his family in Egypt.

130. As we have already noted, the Appellant has no basis of stay in the UK. Having regard to Section 117B of the 2002 Act, the maintenance of effective immigration control is therefore in the public interest. The Appellant's private life has been formed at a time when his status here has been precarious. It is therefore to be accorded little weight.

131. Balancing all the factors to which we have had regard, we are satisfied that the decision to remove the Appellant is not disproportionate. The decision is therefore not unlawful as being contrary to the Human Rights Act 1998.

DECISION

The Appellant's appeal is dismissed on protection and human rights grounds.



Signed
2018

Dated: 18 October

Upper Tribunal Judge Smith