



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-001945

First-tier Tribunal No: HU/54548/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 19<sup>th</sup> of October 2023**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**AYMEN MOHAMED NAGEEB HAFEZ ABDELRHMAN**  
**(no anonymity order made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R Wilcox, instructed by Sony Sadaf Haroon Solicitors

For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

**Heard at Field House on 11 October 2023**

**DECISION AND REASONS**

1. This is the re-making of the decision in the appellant's appeal, following the setting aside of the decision of First-tier Tribunal Judge Nightingale who had allowed the appellant's appeal on human rights grounds.

2. The appellant is a citizen of Egypt, born on 7 February 1979. He arrived in the UK clandestinely on 26 March 2011 and claimed asylum on 9 May 2011. He attended a screening interview on 9 May 2011 and then produced a statement setting out his

claim, dated 24 May 2011, following which he was interviewed substantively on 27 May 2011, claiming to be at risk from the Egyptian government.

3. The appellant claimed to have worked for the National Democratic Party (NDP), in the intelligence services, collecting intelligence on members of opposition parties such as the Muslim Brotherhood. He claimed to have become involved with the NDP in 2001 and to have initially held the job title Secret Information Collector. He claimed that, from 2003, he officially became employed in the Internal Affairs department of the NDP and worked for the General Body for Information Political Parties and Sources Section State Security Forces. He stated that, as a result of information he had gathered as an informer and passed on to a senior officer, many individuals were arrested, imprisoned and sometimes detained for a long time in prison and he heard that some were tortured and mistreated in prison. The appellant claimed that he was awarded for his loyalty in 2007 and was made a purchasing manager for a company, SEKEM, which was owned by a senior member of the NDP. He said that he experienced no problems in Egypt between 2007 and 2011 when the NDP was in power, but the situation changed in 2011 when prisoners escaped due to anti-regime riots, including some of those he had helped detain, and the regime of President Mubarak was falling. He started receiving death threats. He did not surrender to the Muslim Brotherhood who were by then in power and instead he fled the country on 5 March 2011, travelling to the UK via Turkey, Greece and France.

4. The appellant's asylum claim was refused on 29 January 2016. He was excluded from the protection of the Refugee Convention under Article 1F(a) on the basis that there were serious reasons for considering that he had committed crimes against humanity, as a result of his activities as an intelligence officer with the Egyptian security forces during the regime of President Mubarak. His case was accordingly certified under section 55 of the Immigration, Asylum and Nationality Act 2006. The appellant was also excluded from a grant of humanitarian protection for the same reasons. It was not considered, however, that he was at Article 3 risk on return to Egypt because the Muslim Brotherhood was no longer in power and because there had been a significant shift in the political system in Egypt. The respondent also considered the appellant's Article 8 claim in regard to his marriage to Hafswa Fara, whom he had married on 24 June 2014, but concluded that his removal from the UK would be proportionate.

5. The appellant appealed against that decision on 16 February 2016 and produced a bundle of documents for the appeal shortly before the hearing, on 18 November 2016. The bundle included a witness statement (unsigned and undated) in which he admitted to having fabricated his entire claim, having followed advice given to him when he arrived in the UK, and claimed that he had never worked as an informant or been involved in any political activity, and that he had left Egypt on 6 February 2010 with a genuine visa to go to Italy on a work assignment for the company where he was employed but had not attended the assignment and had as a result been dismissed from his job and then left Italy to come to the UK. The bundle also included evidence of his exit from Egypt on 6 February 2010. The appellant withdrew his appeal on 21 November 2016 at the hearing.

6. On 21 December 2016 the appellant made a human rights claim in an application for leave to remain in the UK on the basis of his family life with his wife Hafswa Fara, a British citizen of Kenyan nationality whom he married in a Muslim marriage in June 2012 and in a civil marriage in 24 June 2014.

7. The appellant's application was refused on 11 July 2022. The respondent, in refusing the application, considered that the appellant's application fell for refusal under the suitability provisions in S-LTR.1.6 ("*The presence of the applicant in the UK is not conducive to the public good because their conduct..., character, associations, or other reasons, make it undesirable to allow them to remain in the UK*") and S-LTR.1.8 ("*The presence of the applicant in the UK is not conducive to the public good because the Secretary of State: (a) has made a decision under Article 1F of the Refugee Convention to exclude the person from the Refugee Convention or under paragraph 339D of these Rules to exclude them from humanitarian protection...*"). It was noted that the appellant had withdrawn his appeal against the previous Article 1F exclusion decision and the respondent therefore considered that the reasons for excluding him from the protection of the Refugee Convention remained valid and unchallenged. The respondent considered that there were no exceptional circumstances in the appellant's case which would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for him and his partner, and considered that he could not meet the requirements of Appendix FM or succeed on Article 8 grounds outside the immigration rules.

8. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Nightingale on 27 February 2023. For that appeal hearing, the appellant relied on an appeal bundle which included updated witness statements from himself and his wife and statements from two friends, a Schengen visa issued in Italy together with a letter from his Italian employer, medical documents for his wife, correspondence between himself and his representatives and the Home Office, his appeal withdrawal form and previous appeal bundle and Home Office GCID case record sheets from a subject access request.

9. In his witness statement, the appellant referred to the delay by the respondent in making a decision on his asylum claim and the further delay in deciding his human rights claim. He referred to the Home Office having constantly told him that his case was being considered yet it was subsequently discovered that they had lost his file which had been in storage. He repeated his account of having fabricated his asylum claim and his reasons for making up the claim. He referred to the lack of any evidence to show that he was a war criminal and to the evidence showing that he was not in Egypt at the time of events previously claimed to have occurred in 2011, but had left on 6 February 2010 and travelled to Italy for work. He therefore had evidence proving that he had lied in his initial claim. The appellant also referred to the family and private life he had established in the UK and stated that his wife could not go to Egypt with him as she was originally from Kenya and had never been to Egypt. He stated that she suffered from anxiety and depression and that she could not be separated from her family in the UK.

10. The appellant did not attend the appeal hearing as it was said that he was unwell and had been in hospital overnight with palpitations and a diagnosed panic attack. There was no application to adjourn and the appeal proceeded, with the appellant's wife giving evidence before the judge. The respondent argued before the judge that the appellant could not use this appeal as a route to challenge the exclusion decision under Article 1F and that the allegations should be treated as unassailable as the appellant had withdrawn his appeal against that decision. The suitability grounds were therefore made out and, in any event, the requirements of paragraph EX.1. could not be met as there were no insurmountable obstacles to family life continuing in Egypt. The appellant could not meet the requirements of the immigration rules and could not succeed outside the rules on Article 8 grounds. For the appellant, reliance was placed on the considerable delay in deciding his application, during which time he was

chasing the Home Office and was forced to involve his MP and, whilst consistently being told that by the Home Office that the case was being considered but was complex and would therefore take longer than usual to consider, it later transpired that the file had been put into storage and then lost. It was argued that the only evidence in support of the respondent's exclusion decision under Article 1F was the appellant's own account in his interview, yet he had come clean and had admitted that the claim was a fabrication and the respondent had been on notice of that for three and a half years.

11. The judge noted that there was no challenge to the genuine relationship between the appellant and his wife. She rejected the respondent's view that the requirements of S-LTR.1.8 were by way of strict liability, considering that the first part of S-LTR.1.8 required the respondent to show that the presence of the appellant was not conducive to the public good, which was wider than strict liability. The judge noted, with regard to the exclusion decision, that that had been based solely on the appellant's interview record and relied on no other source, that there was no other evidence linking the appellant to conduct relevant to Article 1F and that the appellant had been admitting for several years that his claim had been false. She found that the respondent had not established that the appellant's asylum claim was a truthful one and she relied upon evidence produced by the appellant showing that he was not even in Egypt at the time of the events described in his interview. The judge accordingly found that the conduct described by the appellant in his interview did not occur and that the respondent had not, therefore, discharged the burden of showing that the appellant fell for exclusion on suitability grounds under S-LTR.1.6 or S-LTR.1.8. The judge considered other requirements of the immigration rules and found there to be no insurmountable obstacles to family life continuing in Egypt for the appellant and his wife for the purposes of paragraph EX.1 and EX.2. She then went on to consider Article 8 outside the immigration rules, accepting that there was family life between the appellant and his wife and that the respondent's decision interfered with that family life, and finding that there were exceptional circumstances in this case such that it would be disproportionate for the appellant to be removed from the UK owing to the respondent's inexplicable and egregious delay in dealing with his application. She accordingly allowed the appeal on Article 8 grounds.

12. The respondent sought permission to appeal to the Upper Tribunal on three grounds. Firstly, that the judge had acted outside her jurisdiction by determining the appellant's asylum claim and setting aside the section 55 certificate, when the respondent had not given consent for the 'new matter' to be considered pursuant to section 85 of the Nationality, Immigration and Asylum Act 2002. Secondly, that the judge had irrationally interpreted S-LTR.1.8, which was mandatory in nature and which clearly applied as the respondent had, as a matter of fact, made an un-appealed exclusion decision under Article 1F of the Refugee Convention. Thirdly, that the judge's proportionality assessment was fatally flawed as a result of the first two errors, since she had failed to take into account the relevant immigration rules on the SSHD's side of the balance.

13. Following a grant of permission to the respondent to appeal to the Upper Tribunal, the matter came before myself and Deputy Upper Tribunal Judge Hanbury on 7 July 2023. In a decision issued on 19 July 2023 we set aside Judge Nightingale's decision on the following basis:

"16. The first ground concerned the jurisdiction of the First-tier Tribunal in considering the appellant's asylum claim when this was an appeal arising out of a human rights claim and where no consent had been sought, or given, by the respondent, under section 85(5) of

the 2002 Act, to rely upon asylum related issues. In our view this ground is wholly misconceived. This is not a matter of jurisdiction, nor is it a situation where section 85(5) is relevant and applicable. This was not a matter of the appellant raising a new asylum claim or a new ground of appeal under section 84. The question of the appellant having denied the conduct leading to the exclusion decision under Article 1F was something that had been raised by him and relied upon as part of his human rights claim and was clearly a matter which was relevant to the substance of the decision refusing his human rights claim, in accordance with section 85(4). The fact that it involved asylum issues and issues arising out of his previous claim did not mean that it constituted a new ground of appeal of a kind listed in section 84 and the appellant was clearly not precluded by section 85(5) from raising it.

17. However, having said that, we agree with the respondent that it was not open to the judge to reach a different decision in the appellant's asylum claim. That is not because of any erroneous application of the principle of "*res judicata*", as Mr Miah suggested, but because of the circumstances in which the judge did that, namely on the basis of the untested evidence of the appellant and in the absence of any opportunity for the respondent to test that evidence by way of cross-examination which, as Mr Wain submitted, gave rise to unfairness, and the lack of proper reasoning by the judge. The appellant had had an opportunity to argue his case in his appeal against the exclusion decision in November 2016 but had decided not to do so. The judge did not give any proper consideration to that matter, nor to the fact that the appellant was not intending to give any oral evidence before her. Further, her conclusion in departing from the previous exclusion decision was reached without any proper reasons being given as to why the appellant's evidence in denial of his previous asylum claim was considered to be any more reliable than the evidence given in support of that claim at the time it was made. The judge simply failed to conduct a proper assessment of the evidence and the context in which it was provided. Contrary to the assertion made by Mr Miah that the appellant had "come clean" immediately after his interview in May 2011, the evidence was that he had only sought to retract his asylum claim in his witness statement for the appeal which he subsequently withdrew, in November 2016, some five years after having made the claim and following the respondent's exclusion decision. That was also not considered by the judge. In addition, the judge accepted, at face value, the documentation produced by the appellant in support of his claim that he was outside Egypt at the time of the events previously relied upon, without undertaking any assessment of the reliability of that evidence, and without considering the extent to which it undermined the appellant's underlying account of the role he played in the Egyptian security services. In the circumstances we consider that the judge materially erred in law by going behind the exclusion decision on the basis that she did and that her decision simply cannot stand as a result.

18. In any event, we agree with the respondent that the judge misapplied and misinterpreted S-LTR.1.8, and that she failed to recognise that it was a mandatory provision. The interpretation she applied, at [24] of her decision, was that the rule included a discretionary element as to whether the presence of the applicant in the UK was not conducive to the public good, which was independent of the SSHD having made a decision under Article 1F of the Refugee Convention. However a proper reading of the rule is as set out in the respondent's grounds, namely that the rule confirmed that the applicant's presence would not be conducive to the public good **because** the SSHD had made a decision under Article 1F, which does not provide for any discretion in a case where the SSHD has made an exclusion decision. As such, the judge was not entitled, even if she disagreed with the basis of the exclusion decision, to conclude that the requirements of S-LTR.1.8 were not met. In our view, the proper place for the judge to have considered the implications of the suitability provisions arising out of the Article 1F exclusion decision ought to have been when assessing the weight to be given to the suitability exclusions in S-LTR in the Article 8 proportionality balancing exercise.

19. It was Mr Wain's submission, with regard to the proportionality assessment made by the judge, that she had erred in so far as the 'historical injustice' point upon which the appellant relied in relation to the delay was a matter of his own conduct and not that of

the respondent. Mr Miah submitted, on the contrary, that the judge was entitled to give the weight that she did to the delay and that the history of this case was relevant as there had been an abuse of process by the respondent. However, whatever the weight to be given to the delay, that was only one factor to be considered in the proportionality balancing exercise. The overall balancing exercise was clearly undermined by the judge's erroneous finding that the suitability exclusion had not been made out by the respondent. The respondent's third ground, that the proportionality assessment was fatally flawed, is therefore also made out.

20. Accordingly the judge's decision has to be set aside and the proportionality assessment re-made. That assessment is to be made on the basis of the unchallenged findings of the judge in regard to paragraph EX.1 and EX.2, which are preserved, and on the basis that the suitability provision under S-LTR.1.8 was properly applied by the respondent, albeit that the weight to be given to that matter is still to be assessed.

21. There was some discussion as to whether the re-making of the decision could be done without a further hearing. Mr Miah requested that there be a further hearing although later indicated that there was nothing further to add. Given that the Article 8 proportionality assessment has to be re-made on the basis of the circumstances existing at the date of the hearing we agree that a resumed hearing would be appropriate. If, as Mr Miah submitted, the appellant has nothing further to add, it is assumed that that will proceed by way of submissions only. However if it is intended that there will be oral evidence from the appellant, he will be expected to explain why an adjournment request was not made previously to enable him to do so."

14.Directions were made for the filing and service of any further evidence prior to the resumed hearing.

15.The matter then came before me to re-make the decision in relation to Article 8 and proportionality.

16.Mr Wilcox advised me that the appellant was not in attendance and that there was to be no oral evidence. He also advised me that there was no further documentary evidence for the re-making of the decision in the appeal. The appeal then proceeded on the basis of submissions only.

17.Mr Wilcox relied upon the evidence previously produced by the appellant which showed that he was outside Egypt at the time of the events occurring in his fabricated claim, namely a Schengen visa valid from 3 February 2010 to 11 March 2010 showing his arrival in Italy on 7 February 2010, a letter from the managing director of the company where he had been working dismissing him from his job as a result of his failure to fulfil his international assignment to Italy from 6 February 2010, and a letter from the Consulate General of Egypt confirming that he left Egypt on 6 June 2010 and did not return there again. He submitted that that evidence was not challenged and it was difficult to see how those documents could not be taken at face value and that they corroborated the appellant's claim that his previous account was not true and that he ought not, therefore, to have been excluded from the Refugee Convention. The result of that was that, whilst technically he fell within S-LTR.1.8, in substance he should be treated as not having been excluded and that it was wrong in substance to find that his presence in the UK was not conducive to the public good. Mr Wilcox submitted that, in the circumstances, and given the substantial delay by the respondent in deciding the appellant's application and the fact that he was married to a British citizen, it would be disproportionate to remove him to Egypt and the appeal should be allowed.

18. Ms McKenzie submitted in response that it was wrong to say that the documents were not challenged by the respondent. She submitted that, on the contrary, they were challenged given that the originals were not available for verification. The appellant had failed to show that he did not fall for exclusion. As for the delay in deciding his claim, the appellant had not been able to point to any policy to show that he had been prejudiced by the delay and it was relevant to consider that his claim had to be considered by a particular department at the Home Office because of the exclusion issue. As for the suitability provisions, the appellant could have fallen under the other provisions owing to his conduct and his dishonesty in any event. There was no breach of Article 8 and the appeal should be dismissed.

19. In response Mr Wilcox submitted that it was unfair to consider any other part of S-LTR, as the reliance upon the suitability provisions was solely informed by the precedent fact leading to the exclusion decision.

## **Discussion**

20. Whilst the focus of the submissions made before me today have been on the correctness of the exclusion decision it seems to me that this is not a case which could succeed on Article 8 grounds in any event, regardless of the exclusion issue.

21. The findings of Judge Nightingale in regard to EX.1 and EX.2 were not previously challenged and have been preserved. Accordingly, following Judge Nightingale's properly made findings at [28] to [31] of her decision, whilst the appellant and his wife have been accepted as being in a genuine and subsisting relationship, it has not been demonstrated that there are any insurmountable obstacles to their family life continuing in Egypt. Mr Wilcox asked me to consider the appellant's wife's private and family life in the UK, but as he acknowledged there is no recent evidence in that regard and neither the appellant nor his wife appeared at the hearing before me to provide any such evidence. The appeal bundle before Judge Nightingale contained limited evidence of an established private life in the UK. There was some medical evidence referring to the appellant's wife suffering from depression and anxiety but that pre-dated the hearing by some years and there is nothing before me to suggest that there is any reason for concern in that regard when considering her ability to relocate to Egypt with the appellant. There was no evidence to suggest that there would be very significant obstacles to the appellant reintegrating in Egypt, as Judge Nightingale found at [28] and neither was there any evidence to suggest that his removal would lead to any unduly harsh consequences for himself and his wife. The appellant could not, therefore meet the requirements of the immigration rules, either under Appendix FM or paragraph 276ADE(1), even aside from the suitability provisions, as Judge Nightingale found at [29].

22. It is relevant to a proportionality assessment under Article 8 that, as Judge Nightingale properly found at [27] of her decision, the appellant had clearly lied to the Home Office, whether in his initial claim or in his subsequent denial of the truthfulness of that claim. As Judge Nightingale found at [31], the appellant's relationship with his wife, and the private life he had established in the UK, had formed at a time when he had no leave to remain in the UK. As for the delay in considering the appellant's application, upon which Judge Nightingale had put so much weight, much of that was due to the appellant having presented a complex claim necessitating consideration by a specialised department of the Home Office in relation to exclusion and to his retraction of that claim some five years later. The correspondence from the Home Office, in the appellant's bundle, shows that there was regular contact with the

appellant in relation to his human rights claim and that the respondent was engaged in enquiries which made his case complex as a result of the previous exclusion issues, as explained in the respondent's response to the appellant's pre-action protocol letter in April 2022 (page 48). There clearly was some delay attributable to the respondent, particularly as it appears that the appellant's file had erroneously been put into storage, but as Ms McKenzie submitted, there is no evidence to show how he was disadvantaged or prejudiced by that delay in considering his Article 8 claim, other than by experiencing frustration at having to wait so long for a decision. He never had any entitlement to remain in the UK and the delay benefitted him by enabling him to prolong his stay here and develop his private life. In the circumstances I do not accept that the delay was in any way sufficient reason to tip the balance in the appellant's favour, given the number of relevant public interest considerations favouring his removal from the UK. Accordingly, even disregarding the suitability provisions the respondent's decision was a proportionate one.

23. In any event, the respondent was perfectly entitled to apply the suitability provisions as she did, not only because of the mandatory nature of the provisions in S-LTR.1.8(a) as discussed at [18] of the error of law decision of 19 July 2023, but also because she was entitled to rely upon the exclusion decision under Article 1F(a). It has never been part of the appellant's claim that the respondent was not entitled to apply the exclusion in Article 1F(a) on the facts he had presented. His claim was that the facts presented were not in fact true and that he had fabricated his entire claim. However he did not appeal against the respondent's decision of 15 January 2016 which applied the exclusion in Article 1F(a) - in fact he withdrew his appeal. Accordingly the respondent's decision stood unchallenged. It was only some five years later that he sought to retract his account but he failed to appear at the appeal hearing before Judge Nightingale to give evidence in that regard or to make himself available for cross-examination and he did not appear at the hearing before me today, and in any event it was not open to him to re-argue the exclusion decision at that late stage.

24. Not only that, but it seems to me that in so far as the substance of the exclusion decision is relevant to the Article 8 proportionality assessment the appellant has failed to show that the decision ought not to be relied upon. His case, that the facts he had initially presented for his asylum claim were not true, rests upon his own statement and some limited documentary evidence, but nothing more. Mr Wilcox submits that the documentary evidence alone is sufficient to support the appellant's case that his previous claim was untrue, and that the documents, if taken at face value, powerfully corroborated his statement since they proved that he was not in Egypt at the time the relevant events had occurred. Indeed that was what Judge Nightingale concluded herself. However I do not accept that to be the case.

25. It seems to me that the only document which could perhaps be taken at face value is the Schengen visa at page 14 of the appellant's bundle before the First-tier Tribunal, but that goes no further than showing that the appellant entered Italy on 7 February 2010. It does not show how long he stayed there or that he did not return to Egypt. The other two documents relied upon by the appellant, namely the letter from the managing director of the company SEKEM dismissing him from his job and the letter from the Consulate General of Egypt confirming that he left Egypt and did not return there are not unchallenged documents, contrary to Mr Wilcox's assertion. The respondent has not had an opportunity to cross-examine the appellant about the documents and Ms McKenzie confirmed that they had not been verified as genuine and were indeed challenged. Whilst Ms McKenzie did not point to any particular inconsistencies in the documents, I have made my own observations. I note with



regard to the first document that the appellant's employment with SEKEM featured in his initial claim, whereby he claimed to have been made the purchasing manager of the company in October 2007 as a reward for his loyalty to the NDP, a claim that he has since retracted. As for the letter purporting to come from the Consulate General of Egypt, the appellant relied on that document in his previous statements as demonstrating that he left Egypt on 6 February 2010 and did not return there, whereas the version of the document at A6 of the Home Office bundle states that he left Egypt on 6 February 2010 but the version at page 78 of the appellant's bundle states that he left Egypt on 6 June 2010 for Italy. There are therefore clearly questions to be asked about the documents. I disagree with Mr Wilcox that they should be taken at face value as corroborating the appellant's current claim and, on the contrary, consider them to be of questionable reliability.

26. In any event, even if the documents were a genuine representation of events, they go no further than suggesting that the appellant left Egypt in 2010 and that the events in 2011 and his departure in March 2011 did not occur as originally claimed. They do not in themselves contradict or undermine the appellant's original claim to have worked for the Egyptian intelligence services and to have been involved in activities, which in turn led the respondent to conclude that there were serious reasons for believing that he had participated in crimes against humanity and to apply the exclusion in Article 1F(a). In the circumstances it seems to me that the respondent properly applied the suitability provisions in S-LTR.1.6 and S-LTR.1.8, and was entitled to do so, both in substance and in form, so that there was a significant public interest in removing the appellant from the UK when considered together with the factors mentioned above.

27. For all these reasons the appellant is unable to demonstrate that the respondent's decision is disproportionate and is unable to show that his removal from the UK would be in breach of Article 8 of the ECHR. The appeal is therefore dismissed on Article 8 grounds.

### **Notice of Decision**

28. The Secretary of State's appeal having been allowed and the decision of the First-tier Tribunal having been set aside, the decision is re-made by dismissing the appellant's appeal.

Signed: S Kebede  
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

12 October 2023