Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13489/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Wednesday 20 June 2018	**On Monday 22 October 2018**

Before

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

Between

S M R

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Although an anonymity order was not made by the First-tier Tribunal, as this is a protection claim, it is appropriate to make that order. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction

applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

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

BACKGROUND

2. The Appellant appeals against a decision of First-Tier Tribunal Judge A K Hussain promulgated on 1 February 2018 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 5 December 2017 refusing his protection claim.

3. The Appellant is a national of Iran born on 12 September 1999. He claims to have arrived in the UK clandestinely in January 2017. He claimed asylum on 7 January 2017. At that time, he was a minor but at the time of the Respondent's decision and the hearing before the First-tier Tribunal he was aged eighteen.

4. The Appellant's claim of the Iranian authorities stems from association with his father who he says is a high-ranking member of the Kurdish Democratic Party ("KDP"). He says that his father's name was disclosed to the authorities by a girl who worked within the KDP and knew his father. She disclosed his father's identity, the Appellant says, when she was detained and tortured by the authorities.

5. In addition to his father's role in the KDP, the Appellant says that his father was a smuggler of goods banned in Iran. He does not claim that his father came to the adverse attention of the authorities on that account. The Appellant says that he accompanied his father on at least ten smuggling trips but did not himself come to the adverse attention of the authorities.

6. The Judge did not accept that the Appellant's father is or ever was a member of the KDP, that he was a high-ranking official in that party or that he was of adverse interest from the authorities on that account ([24] of the Decision). The Judge rejected a claim of any wider risk arising from the Appellant's illegal exit from Iran or his failed asylum claim.

7. The Appellant seeks permission to appeal on three grounds. In summary form, those are that the Judge applied the wrong burden and standard of proof, that the Judge ignored the Appellant's vulnerability as a child with regard to a material

part of the evidence and that the Judge failed to identify the background material on which reliance was placed in support of the Judge's finding that the claim was inconsistent with the way in which the Iranian authorities conduct themselves.

8. Permission to appeal was granted by First-tier Tribunal Judge Birrell on 4 March 2018 in the following terms (so far as relevant):

> "…[3] The grounds challenge that the Judge failed to take into account the Appellants age in assessing the significance of the discrepancies between the various accounts he gave. The Judge identified in paragraph 1 the fact that the Appellant was a minor at the time of the events outlined, the Screening interview and the SEF but was an adult at the time of his witness statement and the hearing and that he 'made appropriate allowances' but it is arguable that he failed to make any reference to the Appellant's age thereafter when assessing the evidence and therefore what 'allowances' he made. There is no reference to specific background material in relation to the assessment of the activities of the Etalaat. There is less force in ground one but all grounds may be argued.
> [4] The grounds disclose arguable errors of law."

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

DECISION AND REASONS

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

10. 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.

11. 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".

12. 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.

13. 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.

14. 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 …"

15. 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.

16. 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.

17. 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."

18. 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".

19. 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

20. 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)

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

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

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

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

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

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

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

The UNHCR Note on the Burden and Standard of Proof

22. 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

23. 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".

24. 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."

25. 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."

26. 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".

27. 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).

28. 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.

29. 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.

30. 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.

31. 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".

32. 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".

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

34. 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".

35. 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)."

36. 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.

37. 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).

38. 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).

39. 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."

40. 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).

41. 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)

42. 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".

43. 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.

44. 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."

45. 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

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

47. 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.

48. 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.

49. 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.

50. 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.

51. 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.

52. 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).

53. 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.

54. 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.

55. 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.

56. 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.

57. 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.

58. 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.

59. 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.

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

61. 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.

62. 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.

63. 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.

64. 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.

65. 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.

66. 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".

67. 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.

68. For the above reasons, we are satisfied that there is no indication that the Judge applied the wrong burden and standard of proof. The appropriate burden and standard of proof are as we have set out at [10] above.

Ground Two: Consideration of the Appellant's Vulnerability

69. The Appellant's ground two focusses on the Judge's reliance on the inconsistencies said to arise between the versions of the Appellant's claim. The Appellant's case is that the Judge failed to direct himself in accordance with the Joint Presidential Guidance Note No 2 of 2010 ("the Presidential Guidance") and the Court of Appeal's guidance in AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 ("AM (Afghanistan)"). The Court of Appeal held at [30] in AM (Afghanistan) that a failure to follow the Presidential Guidance in a case to which it applies is likely to be a material error.

70. Separately but in the same vein, the Appellant relies on the Court of Appeal's decision in JA (Afghanistan) v Secretary of State for the Home Department [2014] EWCA Civ 450 ("JA (Afghanistan)") as authority for the proposition that it is unfair to rely on the screening interview as read particularly where there is no independent check of the accuracy of the record.

71. On the facts of the claim, the Appellant says that the Judge has not made allowances for his age when holding against him that he was unable to remember the name of the woman who disclosed his father's name to the authorities and who he recognised from seeing her on television. Similarly, it is submitted that the Judge failed to take into account the Appellant's immaturity as reason for his failure to mention when first asked that his mother had been beaten when their home was raided, or when considering the Appellant's explanation for learning only later that his father's position was the source of the family's problems.

72. The Judge sets out his reasons for disbelieving the Appellant at [11] to [23] of the Decision.

73. In relation to the JA (Afghanistan) point, the Appellant points to what is said by the Judge about a discrepancy between the Appellant's description of his father's political allegiance during his screening interview and his substantive interview at [18] to [19] of the Decision. It is said that the Judge did not take into account the Appellant's evidence that there was an error in the screening interview. In any event, it is said that there is no obvious discrepancy between the Appellant's father being a senior KDP member and at the same time being involved in leafletting.

74. In the course of his screening interview, the Appellant said that his father was in the "Kurdish Democratic Party". However, in his statement of evidence form the Appellant said only that he was "not sure about his exact role but he was working for an opposition party who were Kurds" ([C.1.1]). At [C.1.3] the Appellant said that his father was working for "the opposition party" when asked why he believed he was being targeted.

75. The Appellant's substantive interview records the following exchange:

> "[Q82] Do you know if your father was in a party at all?
> A: I don't know which party it was but if you find out about the girl who was killed in Sardasht, my father was in the same party as she.
> [Q83] At your Screening Interview, you said that he was in the Kurdish Democratic Party. Why are you now saying you don't know which party it was?
> A: I didn't say Kurdish Democratic Party – I just said it was a Kurdish party."

76. Contrary to the Appellant's case on this point now, the Appellant's witness statement says this:

> "[10] With regards to my father's involvement in politics, I have always maintained that he was a high-ranking official in the Kurdish Democratic Party in Iran however I am not sure what he did exactly for the party."

The Appellant does not say that there is any error in the screening interview record, that he was misunderstood or offer any explanation for the discrepancy. The error, according to the Appellant's account in his statement, is in the SEF form which was self-completed at a time when he was legally represented and what he said at the substantive interview, which interview he attended with a responsible adult. This part of the second ground is therefore not made out on the evidence.

77. As to the implausibility of a senior ranking party official carrying out leafletting, it is not necessarily inconsistent but was a finding which it was open to the Judge to make ([21] and [22] of the Decision).

78. The Appellant accepts in his Counsel's skeleton argument for the hearing that there is a discrepancy between the Appellant's account as to the timing of the execution of the girl who gave up his father's name, the identity of the person who alerted the Appellant's father to the raid at the family home and how that

came about. The Appellant offered an explanation for the discrepancies but that was rejected. In this regard, the Appellant relies on his ground one and what is said in JK. He says that, even if the account is implausible in some of its detail, that does not necessarily detract from the Appellant's overall credibility (which is an unremarkable proposition). Relying on his first ground, though, the Appellant says that having established a claim which is "capable of belief" overall, it was for the Respondent to dispel doubts about the real risk on return and that he has failed to do so. We have already dealt with that submission above and have rejected it.

79. However, we are persuaded that the Judge has erred in his treatment of the Appellant's evidence in relation to other of the inconsistencies upon which reliance was placed.

80. The Appellant was no longer a minor at the date of the First-tier Tribunal hearing. As such, the Presidential Guidance was no longer directly relevant to his evidence on that occasion. However, as the Court of Appeal observed at [18(a)] of its judgment in AM (Afghanistan) a Judge can also fall into error by failing properly to take into account an appellant's age when making adverse credibility findings reliant on inconsistencies in his various accounts.

81. As we find above, the Judge was entitled to rely on certain inconsistencies, particularly in relation to the party for whom the Appellant's father worked. In that regard, if the Appellant had first claimed not to know for whom his father worked but then said it was the KDP, that is an inconsistency which might be explained by his age. Put another way, it is plausible that a child might not remember the detail of a claim when first asked, particularly if the child found the interview process daunting. However, the converse is not easily explained in the same way.

82. The inconsistencies regarding the delay in the authorities finding his family (14]), and the violence towards him and his mother when the authorities came ([16]) might possibly be embellishments undermining the Appellant's credibility. However, they might be explained equally by the Appellant not remembering details of events when first asked due to his age at the time of interview. Similarly, it is plausible that the Appellant would not know details of what his father did for the organisation if he was a child as his parents would not necessarily have told him ([20]).

83. Although the Judge notes at [1] of the Decision that the Appellant was a minor when he provided his evidence in the various interviews and in his SEF and that he has "made the appropriate allowances for this in the evidence he gave then" there is no indication thereafter that such allowances have been made or how the Appellant's age at that time has been factored into the credibility findings.

Ground Three: Consideration of the Background Material

84. We are also persuaded that there is merit in the Appellant's ground three. At [11] of the Decision, the Judge finds as implausible that the Appellant would not be able to name the girl he saw on the television whose execution was there reported. He found it implausible that a television broadcast would not identify the girl in both sound and script. It is not clear on what he bases that finding.

85. The Judge also relied heavily there and at [13] of the Decision on the fact that the authorities when they came for the Appellant's father brought with them court papers. It is said that this is contrary to the "modus operandi" of the Iranian authorities. No source is cited for that proposition. Similarly, at [15] of the Decision, the Judge did not accept as plausible that the authorities would visit precisely at the time that the Appellant's father was absent from the home because they would use surveillance to ensure he was there. Again, no material supportive of that finding is cited. Even the most competent of authorities can make mistakes and simply because the authorities said to be targeting the Appellant's father may operate outside the law does not mean that they do not use the judicial process to prosecute opponents.

86. For the above reasons, we are satisfied that the Decision contains material errors of law. We therefore set aside the Decision.

87. In relation to the appropriate forum for the re-making of the decision, we have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

88. Our reasons for setting aside the Decision concern the Judge's adverse credibility findings and, in particular, whether the Judge has made due allowance for the Appellant's age when considering his answers at interview. For that reason, we have formed the view that the appeal should be remitted for credibility to be considered afresh.

DECISION

We are satisfied that the Decision contains material errors of law. We set aside the decision of First-tier Tribunal Judge A K Hussain promulgated on 1 February 2018.

We remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Hussain.

Signed Dated: 18 October 2018
Upper Tribunal Judge Smith