Neutral Citation Number: [2023] EWCA Civ 216

Case No: CA-2021-003407

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
PA/00162/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2023

Before :

LADY JUSTICE KING
LORD JUSTICE SINGH
and
LORD JUSTICE WARBY

- -

Between :

MAH (EGYPT)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

David Jones and **David Sellwood** (instructed by **Brighton Housing Trust**) for the **Appellant**
Kathryn Howarth (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 8 February 2023

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 28 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. The main issue in this appeal is whether the Upper Tribunal (Immigration and Asylum Chamber) ("UT") was entitled to reach the conclusion that the Appellant's claim for international protection failed because of his lack of credibility. At first sight such appeals are unlikely to succeed before this Court; indeed it is unlikely that permission to appeal would be granted. On closer analysis, it will become apparent that this was not a typical case about credibility. This was not a case which turned, for example, on the UT's observation of the Appellant's demeanour when giving live evidence before it, although there can be dangers with over-reliance on such observation anyway; or on the inherent implausibility of the Appellant's evidence; or on the fact that he had told lies or given inconsistent accounts at different times. The reason why the Appellant was not believed by the UT was that it considered that there were further steps he could, and should, have taken to adduce evidence which would corroborate his account.

2. The Appellant appeals against the decision of the UT, comprising UT Judge Norton-Taylor and Deputy UT Judge Jarvis, promulgated on 17 September 2021. In her order granting permission to appeal dated 28 July 2022, Nicola Davies LJ noted that the UT accepted significant aspects of the Appellant's case before finding against him on the issue of credibility on three core matters. She considered that the reasoning of the UT, which led to those adverse findings, required the scrutiny of this Court. There was therefore a compelling reason to permit the appeal to proceed.

3. At the hearing before this Court we heard submissions from Mr David Jones, who appeared with Mr David Sellwood for the Appellant, and from Ms Kathryn Howarth, who appeared for the Respondent. I express the Court's gratitude to them all for their written and oral submissions.

4. For the reasons set out in this judgment I have come to the conclusion that the UT erred in its approach to this case, in particular by applying what in substance was too high a standard of proof, when the law requires no more than a "reasonable degree of likelihood"; that in substance it required the Appellant to produce corroborative evidence to support various aspects of his account, when there is no requirement in law that there must be corroboration; and that, accordingly, the only conclusion that was reasonably open on the evidence before the UT, and this Court, is that the Appellant's claim to qualify as a refugee must succeed.

Factual Background

5. The Appellant is an Egyptian national, born on 1 January 2001, from the village of Al Gazira Al Khadra in the Khafre Al Sheikh Province. The Appellant lived with his father, who was a mechanic, and his mother and three sisters.

6. The Appellant's father, whom the Appellant describes as a pious man, was arrested and imprisoned in 2014, in a town called Wadi Al Natroun. The Appellant believes that his father was arrested because he was thought by the authorities to be a member

of the Muslim Brotherhood, although he does not know if this was in fact true. The Appellant visited him with his mother on approximately six occasions, in the early stages of his detention. The Appellant stopped visiting, concerned that the authorities might also detain him.

7. The Appellant's father was tried and convicted in Khafre Al Sheikh in 2014, and sentenced to six years' imprisonment. The Appellant did not attend the trial, although his uncles and other family members did. The Appellant's father was incarcerated in Liman 440, part of the Wadi Al Natroun prison complex, which is described in expert evidence as being notorious for torturing political prisoners, and specifically members of the Muslim Brotherhood.

8. The Appellant fled Egypt on 1 August 2015, when he was 14 years old, fearing he would also be arrested and detained. From Egypt, the Appellant travelled to Italy, where he remained for a number of months; then France and Belgium, arriving in the United Kingdom ("UK") on 25 October 2016. He claimed asylum on arrival.

9. The Appellant was placed in the care of West Sussex Social Services and registered with his current legal representatives on 19 January 2017, who in turn informed the Home Office that the Appellant wished to claim asylum on 20 January 2017.

10. On 12 April 2017 the Appellant's father became ill in prison, was hospitalised and died on 26 April 2018.

11. On 10 December 2018, the Appellant's international protection claim was refused by the Home Office. The Appellant exercised his right of appeal against that decision under section 82 of the Nationality, Immigration and Asylum Act 2002.

12. The appeal had a complicated history, going back and forth between the First-tier Tribunal ("FTT") and the UT, but it is unnecessary to rehearse that history in detail for present purposes. Suffice to say that eventually the appeal was considered afresh by the UT itself but with certain findings of fact being "preserved" in the Appellant's favour: those findings had been made by the FTT (Judge Pears) in a decision dated 26 November 2019, which was otherwise set aside by the UT on 17 August 2020.

13. The appeal was then re-determined and dismissed by the UT on 17 September 2021. That is the decision now under appeal to this Court. This appeal is relatively unusual in that, for present purposes, the UT was acting as the tribunal of fact rather than as an appellate tribunal. Further, we must bear in mind that at the hearing, which was conducted in person, the Appellant gave evidence and was cross-examined.

The judgment of the UT

14. In brief, the UT accepted that:

    (1) The Appellant had provided documentary evidence, which was taken to be reliable, which supported the Appellant's account that his father had been arrested, imprisoned and subsequently died in prison.

(2) The Appellant's father's arrest in 2014 was not inconsistent with the specifics of the crackdown going on against the Muslim Brotherhood at that time.

(3) It was not implausible that the Appellant's father could have been a member of the Muslim Brotherhood without necessarily attending demonstrations.

(4) The Liman 400 prison does house political prisoners, although not exclusively so, and this was the prison in which the Appellant's father was held.

(5) The Appellant was only 14 years old when his father was sent to prison, and 15 when he left Egypt.

(6) It was not implausible that the authorities might have searched the family properties in January 2016.

15. However, the UT went on to conclude that the Appellant was not a credible witness because:

(1) He never asked his mother or his father's lawyer what was on the indictment at his father's trial, although he knew that the accusation was that his father was involved in the Muslim Brotherhood: paras. 69-70. It was not unreasonable to expect the Appellant, now that he is an adult, to have enquired as to the identity of his father's lawyer with his mother/extended family, and sought to obtain evidence confirming whether his father's imprisonment was in fact predicated on an accusation that he was a member of the Muslim Brotherhood: para. 72.

(2) The Appellant had not given a reasonable explanation as to why he had not sought to make contact with the human rights organisation to which one of the raids on the family was reported: paras. 77-78.

(3) The Appellant had not given a reasonable explanation for failing to provide supporting evidence from family members about his father's, or other family members', political involvement: paras. 80-81.

16. Accordingly, the UT found that the Appellant was not "truthful" and his claims, made on both international protection and human rights grounds, failed: paras. 87-88.

17. I will now consider the structure of the judgment in more detail, commenting where appropriate. It is important to go through the judgment in detail because this Court is asked to say that the UT's conclusion was one that was not reasonably open to it. It would be inappropriate to take one or more phrases out of context: the judgment must be read as a whole.

18. The UT summarised 'The legal framework' at paras. 7-12 of its judgment. At para. 10 of its judgment, the UT directed itself that:

> "The burden is on the Appellant to show in an asylum appeal that their return will expose them to a real risk of an act of persecution for a Refugee Convention reason."

19. At para. 11 the UT directed itself that, in a claim for humanitarian protection:

> "An Appellant must show substantial grounds for believing that if returned to their country of return, they would face a real risk of suffering serious harm …"

20. At para. 12, the UT reminded itself that, in such appeals, "we are obliged to look at the case in the round …"

21. At paras. 19-28 of its judgment, the UT set out what it called 'The Appellant's core claim'. The key features of the facts were as follows:-

(1) The Appellant claimed that his father was put in prison in January 2013 (later corrected to 2014), having been accused of being one of the Muslim Brotherhood. The Appellant was not present during his father's arrest but he did claim that he had been present when the Government had come to one of the family's homes in respect of the "Muslim Brotherhood issue".

(2) The Appellant claimed that his father had been tried in Khafre al Sheikh. Again he was not present but his uncles and other family members had attended the trial.

(3) The Appellant clarified that he did not know whether his father was in fact involved with the Muslim Brotherhood but it was his belief that the Government's interest in his father was because of alleged involvement with the Muslim Brotherhood.

(4) Since being in the UK, the Appellant claimed that he had been informed by his mother and maternal cousin (SA) that his paternal cousin, GH, and his brother-in-law, MA, had also been arrested by the authorities at the beginning of February 2017. They had been released a few weeks to a month later, with no charges being brought against either of them.

(5) The Appellant alleged that the Egyptian authorities had been to the Appellant's family home looking for him. He asserted that the authorities had stopped searching for him when they found out that he had left the country. They had ransacked the property and as a result his family reported this incident to a Government human rights organisation in Khafre al Sheikh. This organisation came and looked at the house but took no further action.

(6) The Appellant had produced a document (at the time of his full asylum interview) showing that his father was in Wadi Al Natroun prison (dated 20 January 2016). He clarified that the document was a photograph of a certified copy of the original document and had been sent to the Appellant by his maternal cousin (Saad) via Facebook and this copy had been obtained by his father's lawyer. He also clarified that the documents relating to his father's death were also sent by Saad via Facebook.

(7) The Appellant mentioned that his paternal cousin (GH) was now in the United Arab Emirates because of his problems in Egypt; and that his brother-in-law (MA) was now in Libya, working as a fisherman.

(8) The Appellant stated that he had contacted his mother and asked her to give him the details of his father's lawyer. He went on to say that she said that she had tried to contact the lawyer but this was not possible as she had lost contact with him when his father died. The Appellant said:

> "My mum is not a very educated woman, she left school when she was young and doing these kinds of things is difficult for her."

22. At paras. 29-36 of its judgment, the UT set out its summary of the law relating to the assessment of credibility.

23. It reminded itself that, in assessing the Appellant's credibility, it had to take into account that the standard of proof is "the lower standard". It also reminded itself that it "must take into account all of the material issues in the round."

24. The UT directed itself that the burden was upon the Appellant to establish the core elements of his protection claim. It was guided in that assessment by the terms of Article 4 of the Qualification Directive and the transposition of that provision in the Immigration Rules at para. 339L: I will refer to both of those provisions in detail later.

25. The UT also bore in mind that genuine protection claimants might exaggerate or fabricate evidence in order to reduce the risk of the appeal being wrongly dismissed, citing *SB (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 160, at para. 43. It then set out in full what was said by Green LJ in *SB (Sri Lanka)* at para. 46, which I will quote below.

26. The UT then directed itself as to the applicability of the '*Lucas* Direction', that being a reference to the decision of the Court of Appeal (Criminal Division) in *R v Lucas* [1981] QB 720, which was referred to by the Court of Appeal in the context of asylum claims in *Uddin v Secretary of State for the Home Department* [2020] EWCA Civ 338, at para. 11. As those judgments make clear, there can be many reasons why a person may lie, for example to bolster their case or to avoid embarrassment, and that these are not necessarily inconsistent with their telling the truth about the issue of fact which has to be determined. It is not immediately apparent why the UT referred to *Lucas*, given that this was not a case in which it found that the Appellant had told lies, save in so far as its ultimate conclusion was that the Appellant had not been "truthful". When it did express that conclusion, at para. 87, it did not then remind itself of *Lucas*.

27. The UT then set out its findings and reasons in relation to this Appellant's credibility, from para. 37. At para. 37 it set out the preserved findings of FTT Judge Pears, at paras. 44-45 as follows:

> "44. I make the following observations. The crackdown on the Muslim Brotherhood seems to be in the period of 2013 and onwards. The Appellant says his father was arrested in either

> 2013 or 2014 and whichever date is correct that is consistent with such a crackdown.
>
> 45. I accept that on the lower standard of proof and based on the background evidence, the board claimed by the Appellant that his father was arrested and the documentary evidence that suggested he had been arrested fact that had indeed happened and I accept that he has since died." (*sic*)

The meaning of that passage is clear despite the typographical errors.

28. At para. 38, the UT said that a further effect of those preserved findings was that the documentary evidence provided by the Appellant "is taken to be reliable." It had considered this "important aspect" when assessing his credibility overall.

29. At para. 39, the UT said that, throughout its assessment of the Appellant's credibility, it had kept at the forefront of their minds that the Appellant was only 14 years old at the time his father was sent to prison and that he left Egypt when he was 15. It fully accepted the submission that it should approach the Appellant's evidence with proper caution bearing in mind his minority at the relevant times.

30. The Tribunal also weighed in its overall assessment the reports of two expert witnesses, Alison Pargeter and Walter Armbrust. They found the report by Ms Pargeter to be "useful" in respect of the background to political events in Egypt at the time of the Appellant's father's arrest and imprisonment in 2014: para. 49. Although it considered that Mr Armbrust effectively played advocate on at least one occasion, it was prepared to place weight on his conclusions: para. 54.

31. At para. 59, the UT directed itself as to what this Court had said in *Y v Secretary of State for the Home Department* [2006] EWCA Civ 1223, at paras. 25-27; and said it had been careful to make such findings as there are "through the prism of the Appellant's own claim and the conditions in the proposed country of return."

32. At para. 60, the UT set out the following findings, which were all supportive of the Appellant's case:

> "Bringing all of this together so far, we are prepared to accept in the round that:
>
> a. It is not implausible that the Appellant's father could have been a member of the Muslim Brotherhood without necessarily attending demonstrations.
>
> b. It is not implausible that the authorities might have searched the family properties in January 2016.
>
> c. The Liman 400 prison does house political prisoners, although not exclusively and that this is the prison in which the Appellant's father was held.

> d. The Appellant's father's arrest in 2014 is not inconsistent with the specifics of the crackdown going on against the Muslim Brotherhood at that time."

33. At paras. 61-62, the UT rejected the Secretary of State's reliance upon section 8(4) of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. It concluded that the Secretary of State had wholly failed to properly factor in the Appellant's minority at the time he was travelling through Italy to the UK. It concluded that his failure to claim asylum earlier did not materially impact the core of the Appellant's credibility: see para. 63.

34. Critically, however, it said the following, at para. 64:

> "We have however, despite the expert evidence providing some support for the plausibility of the Appellant's claim and despite our rejection of some of the points made against the Appellant's core credibility by the Secretary of State, ultimately come to the conclusion that the Appellant is not a credible witness, applying the lower standard, for the reasons that we now give."

35. The UT then turned separately to three aspects of the facts on which it considered that the Appellant had not done enough to support his core claims.

36. Under the first heading, 'The Appellant's knowledge of his father's involvement with the Muslim Brotherhood', the UT said the following, at paras. 67-68:

> "67. In our judgment, whilst the background evidence certainly does not contradict the Appellant's belief as to why his father was arrested it also does not, for instance, suggest that people were only being arrested at that time if they were associated with the Muslim Brotherhood. We have explained below why, despite this general consistency with the background/expert evidence, we have rejected the reliability of the Appellant's claim as to the reasons for his father's arrest.
>
> 68. Mr Sellwood also made the submission that it was difficult to see what other reasons there could be for the Appellant's father being detained, but in our view there is, with respect, no merit in that point. Neither expert suggested that Liman 440 prison only houses political prisoners and so that clearly means that the Appellant's father could have been imprisoned for other, non-political, reasons." (Emphasis in original)

37. In my view, the UT unduly focused in that passage on the fact that it had not been proved by evidence that the *only* prisoners who were kept at Liman 440 were political prisoners. It ought reasonably to have sufficed that that prison was notorious for holding political prisoners and that this was consistent with the Appellant's account as to what had happened to his father. This is especially so when one recalls that the lower standard of proof applies in this context: I will set out the relevant legal principles on the standard of proof later. I accept Mr Jones's submission that this passage provides one indicator that the UT was in substance imposing a high threshold of proof when something far less than the balance of probabilities standard is required in this context.

38. The UT then turned to the fact that the Appellant had never asked his mother what the indictment at the trial was specifically about. The UT considered this to be an adverse point which went against the Appellant's core claim. It said, at para. 72, that it was not unreasonable to expect that the Appellant, now an adult, and with legal representation, would have made enquiry as to the identity of his father's lawyer with his mother and/or his extended family and sought to obtain evidence from that lawyer to confirm whether his father had been imprisoned, "corroborated by the reliable documentation sent from Egypt", was in fact predicated upon an accusation by the Egyptian authorities that his father was a member of the Muslim Brotherhood.

39. At para. 73 the UT said that it saw no merit in the suggestion that, even if relevant information had been obtained, it was likely that charges against his father would not have stated the true nature of the prosecution. It said:

> "There is no sound reason why the Egyptian authorities would have wished to disguise this: after all, from their perspective, they were simply seeking to bring those allegedly connected to a terrorist organisation to justice."

40. At para. 74 the UT concluded that this was "a significant point against the Appellant's core credibility."

41. Under the second heading, 'The raid on the family home – authorities' interest in the Appellant', the UT reached the conclusion that there was "an adverse credibility point" in that they had not been given a reasonable explanation as to why the Appellant had not sought at least to attempt to make contact with the human rights organisation in Khafre Al Sheikh. The UT acknowledged that it was possible that the organisation could have responded by saying that they had no record of attending the property on that day but it was clearly also possible that they could hold a record of the complaint and would be able to confirm this even if the outcome had been to take no further action. The UT concluded, at para. 78, that this evidence could plainly have been important "in corroborating the Appellant's underlying claim and the failure to even seek to obtain it is a matter which damages his credibility at the lower standard."

42. Under the third heading, 'Other family involvement in the Muslim Brotherhood', the UT said that the Appellant's claim that two family members were also arrested and held for some time by the authorities in respect of allegations of involvement with the

Muslim Brotherhood "has not been credibly made out at the lower standard of proof …": para. 79.

43. At para. 80, the UT said that they reached that conclusion by the additional failure of the Appellant to seek to provide evidence from his two family members. They considered that there was ultimately no reasonable explanation for the absence of evidence from the family in Egypt or elsewhere "to corroborate the two arrests (and indeed the reasons for apparently leaving Egypt)."

44. At para. 81, the UT said that it considered it reasonable to conclude that the Appellant's mother could have been assisted in providing a witness statement or letter by the family in Egypt by the Appellant's legal representatives.

45. The UT set out its overall conclusions on these three matters at paras. 83-85 as follows:

> "83. … The Tribunal's role, as established in authority, is to assess if there is a reasonable explanation for the absence of evidence which could logically have been adduced (see *SB* at [46], as quoted above) and in our view, for the reasons given, we consider that the Appellant has not reasonably explained his failure to attempt to obtain potentially highly important corroboratory evidence from his father's lawyer, the human rights organisation in Khafre Al Sheikh, or his family members, especially where his family have already assisted in providing him with some documents.
>
> 84. As we have sought to emphasise throughout these findings, we recognise that there is no legal duty upon the Appellant to corroborate his claim, but we have also sought to explain why, in our view, even applying the lower standard of proof, the absence of evidence which could have substantiated his case has not been reasonably explained and leaves significant gaps in the overall evidential picture.
>
> 85. On that basis we have not been able to accept the Appellant's core claim that his father was imprisoned on the basis of actual or perceived involvement with the Muslim Brotherhood or that there was or is adverse interest in the Appellant."

46. Under the heading 'Risk of persecution/risk of serious harm on return to Egypt', the UT set out its conclusions as follows, at paras. 86-87:

> "86. We have therefore reached the overall conclusion that although the Appellant has established that his father was imprisoned in Egypt for six years and that his father died of a brain haemorrhage in 2018, he has not credibly made out his claim that the reasons for his father's imprisonment was

> because the Egyptian authorities considered him to have association with the Muslim Brotherhood.
>
> 87. As a consequence we have also reached the conclusion that *the Appellant has not been truthful* in respect of his claim of ongoing adverse interest from the Egyptian authorities against him either on the basis of the father's real or imputed political beliefs and connections or on the basis of the Appellant's imputed political beliefs or connections." (Emphasis added)

47. Accordingly, the UT concluded that the Appellant would not be at real risk of persecution and/or serious harm on return to Egypt. For the same reasons it was also satisfied that there would be no breach of Articles 2 and 3 of the European Convention on Human Rights ("ECHR") by his removal to Egypt; nor a real risk of serious harm for the purposes of Article 15(b) of the Qualification Directive; or para. 339C(iii) of the Immigration Rules (humanitarian protection). Finally, at paras. 90-93, the UT dismissed the appeal under Article 8 of the ECHR.

Relevant legal principles

48. Before I address the grounds of appeal in this case, I hope it will be helpful if I set out the relevant legal principles on a number of issues that arise in this context.

Standard of proof in asylum cases

49. The so called "lower standard of proof" is well known but still deserves to be set out here. One of the striking features of the present case is that nowhere in its judgment did the UT set out what the "lower standard of proof" is, although it used that phrase many times, for example at para. 29. Setting it out expressly can be a helpful discipline because it operates as a constant reminder of precisely what question the tribunal of fact has to determine. The requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated "a reasonable degree of likelihood" that he will be persecuted for a Convention reason if returned to his own country: see *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958, at 994 (Lord Keith of Kinkel).

50. Various formulations of this standard can be found in the decisions of courts both in this jurisdiction and elsewhere such as the USA, e.g. "reasonable possibility": *Immigration and Naturalisation Service v Cardozo-Fonseca* 480 US 421 (1987), at 440 (Stevens J, giving the Opinion of the US Supreme Court), cited by Lord Keith in *Sivakumaran*, at 994; "real chance": *ibid.*; or "real risk": *Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97, at 109 (Simon Brown LJ). Another formulation which has been used is that there must be "a real as opposed to a

fanciful risk" that future events will happen: *MH (Iraq) v Secretary of State for the Home Department* [2007] EWCA Civ 852, at para. 22 (Laws LJ).

51. Strictly speaking it could be said that it is not entirely accurate to refer to this as a standard of "proof", because the applicant does not in fact have to prove anything. It could more accurately be described as being an "assessment of risk".

52. It is also well established that the standard required is less than a 50% chance of persecution occurring. Even a 10% chance that an applicant will face persecution for a Convention reason may satisfy the relevant test: see *Cardozo-Fonseca*, at 440, cited by Lord Keith in *Sivakumaran*, at 994; and *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, a decision of the High Court of Australia given by Mason CJ, cited with approval by Brooke LJ in *Karanakaran v Secretary of State for the Home Department* [2000] 2 All ER 449, at 464.

53. That the exercise required is not the familiar one which is used in ordinary civil litigation (when facts are taken to be true if they are proved on a balance of probabilities) is also made clear at page 459 by Brooke LJ, where he said:

> "… When assessing future risk decision-makers may have to take into account the whole bundle of disparate pieces of evidence: (1) evidence they are certain about; (2) evidence they think is probably true; (3) evidence to which they are willing to attach some credence, even if they could not go so far as to say it is probably true; (4) evidence to which they are not willing to attach any credence at all."

54. Brooke LJ continued that the decision-maker is not bound to exclude category (3) evidence as they would be if deciding issues that arise in civil litigation.

55. Nevertheless, as Brooke LJ made clear at page 469, this approach does not entail the decision-maker purporting to find "proved" facts, whether past or present, about which it is not satisfied on the balance of probabilities.

> "What it does mean, on the other hand, is that it must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present). Similarly, if an applicant contends that relevant matters did not happen, the decision-maker should not exclude the possibility that they did not happen (although believing that they probably did) unless it has not real doubt that they did in fact happen."

56. Brooke LJ continued that:

> "… when considering whether there is a serious possibility of persecution for a Convention reason if an asylum-seeker is returned, it

> would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur." (pages 459-470).

Credibility

57. Sometimes, as in the present case, the issue of the applicant's credibility may arise. But it is important to recall that this issue must be considered in the context of the relatively low standard of proof. As it was put by Lord Wilson JSC in *KV (Sri Lanka) v Secretary of State for the Home Department* [2019] UKSC 10; [2019] 1 WLR 1849, at para. 25:

> "The conclusion about credibility always rests with the decision-maker following a critical survey of all the evidence… Indeed, in an asylum case in which the question is only whether there is a real possibility that the account given is true, not even the decision-maker is required to arrive at an overall belief in its truth; the inquiry is into credibility only of a partial character."

58. In *SB (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 160, at para. 44, Green LJ said that appellate courts will accord due deference to the fact-finder who has assessed an applicant's credibility. But the appellate court needs to be able to satisfy itself that the fact finder has at least identified the most relevant pieces of evidence and given sufficient reasons (which might be quite concise) for accepting or rejecting it.

59. At para. 46, Green LJ said:

> "In cases (such as the present) where the credibility of the appellant is in issue courts adopt a variety of different evaluative techniques to assess the evidence. The court will for instance consider: (i) the consistency (or otherwise) of accounts given to investigators at different points in time; (ii) the consistency (or otherwise) of an appellant's narrative case for asylum with his actual conduct at earlier stages and periods in time; (iii) whether, on the facts found or agreed which are incontrovertible, the appellant is a person who can be categorised as a risk if returned, and, if so, as to the nature and extent of that risk (taking account of applicable Country Guidance); (iv) *the adequacy (or by contrast paucity) of evidence on relevant issues that, logically, the appellant should be able to adduce in order to support his or her case*; and (v), the overall plausibility of an appellant's account." (Emphasis added)

60. At para. 47, Green LJ made it clear that this list was not intended to be exhaustive. Nor, I would add, is it a "checklist", every part of which has to be satisfied in every case. Everything depends on all the circumstances of each individual case. In the present appeal particular emphasis was placed by the UT, at paras. 33 and 83, on what was said by Green LJ at para. 46(iv) but what he said was not intended to be, nor should it be, read as if it were set out in a statute.

61. At para. 59 of its judgment, the UT referred to the decision of this Court in *Y v Secretary of State for the Home Department* [2006] EWCA Civ 1223, at paras. 25-27. As Keene LJ said at para. 25, the tribunal of fact should be cautious before finding an account to be inherently incredible, because there is a considerable risk that it will be over influenced by its own views of what is or is not plausible, and those views will have inevitably been influenced by its own background in this country and by the customs and ways of our own society. It is therefore important that it should seek to view an appellant's account of events in the context of conditions in the country from which the appellant comes.

62. However, as Keene LJ continued at para. 26, none of this means that the tribunal is required to take at face value an account of facts proffered by an appellant no matter how contrary to common sense and experience of human behaviour that account may be. The decision-maker is not expected to suspend its own judgment. In appropriate cases, it is entitled to find that an account of events is so far-fetched and contrary to reason as to be incapable of belief. Keene LJ supported that proposition by reference to the decision of Lord Brodie, sitting in the Outer House of the Court of Session, in *Awala* [2005] CSOH 73, at para. 24.

63. In that passage, Lord Brodie said that a tribunal of fact making an adverse finding on credibility must only do so on reasonably drawn inferences and not simply on conjecture or speculation. Inferences concerning the plausibility of evidence must have a basis in that evidence. An applicant's testimony should not be lightly or readily dismissed and when it is reasons must be given. Nevertheless, the tribunal of fact need not necessarily accept an applicant's account simply because it is not contradicted at the relevant hearing. The tribunal is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent "with the probabilities affecting the case as a whole." Because the reference to the word "probabilities" may be misunderstood in the present context, where the lower standard of proof applies, it is important to read that passage in context.

64. Lord Brodie went on to cite a passage from a decision of the British Columbia Court of Appeal in *Faryna v Chorny* [1952] 2 DLR 354, at 357, where it was said by O'Halloran JA:

> "In short, the real test of the truth of the story of a witness [where there is conflict of evidence] must be its harmony with the preponderance of the probabilities which the practical and informed person would readily recognise as reasonable in that place and in those conditions."

65. It is important to appreciate that *Faryna* itself was not an asylum case. It was a defamation case. The passage cited by Lord Brodie appeared in the context of consideration of the question of how the credibility of a witness should be gauged. The Court said, in terms which are also familiar in this jurisdiction, that credibility cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. It was in that context that the Court said that the story of the witness must be reasonably subjected to an examination of its consistency "with the probabilities". As I have said earlier, in the present context it is important to keep in mind that the tribunal of fact is not concerned with establishing whether the facts have been proved on a balance of probabilities, as it would be in ordinary civil litigation, but is concerned with an assessment of risk.

66. Furthermore, that assessment has to take place in the particularly sensitive context of a claim for asylum, in which there is the need for the "most anxious scrutiny": *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, at 531 (Lord Bridge of Harwich).

67. Finally in this context, I would observe that the present case was distinguishable from *Y* because the UT did not find that any part of the Appellant's account was *inherently* implausible.

Role of an appellate court

68. Although this is a second appeal, it should be borne in mind that the UT was acting as the tribunal of fact in this case rather than as an appellate tribunal considering only matters of law from a decision of the FTT.

69. It is well established that this Court will not, on an appeal, readily interfere with findings of fact by the tribunal of fact. This is for familiar reasons, including the fact that the tribunal has considered all of the evidence, including hearing oral evidence; and is an expert tribunal in its field. But the present case was not one in which anything turned on the Appellant's oral evidence or the UT's assessment of it: the UT did not say, for example, that something he said in oral evidence was inconsistent with an earlier statement he had made to the Home Office.

70. In any event, as Green LJ explained in *SB (Sri Lanka)*, at para. 48, if a judge makes material errors in the evaluation of evidence, for instance because the inference drawn from a fact found is logically not one that properly can be drawn, then an appellate court will interfere. This is because:

> "A material error in logic is an error of law."

Equally, as he said at para. 49, the evaluation of the evidence must bear in mind that the relevant question that the court is dealing with is risk, not actuality. If the test were that of the balance of probability, a finding that a fact has been proved is a binary question, which can only be answered "yes" or "no". But where the question

is whether there is a real risk, Green LJ said that does not squarely confront the relevant question.

The Refugee Convention and other materials

71. The foundation of modern asylum law is to be found in the 1951 Geneva Convention relating to the status of refugees and the 1967 Protocol to it ("the Refugee Convention"). Although the Convention has not been directly incorporated, it is given effect in domestic law through a combination of legislation (both primary and secondary), the Immigration Rules and, where still relevant, retained European Union ("EU") law. The legal framework was recently set out by Lord Stephens JSC in *G v G* [2021] UKSC 9; [2022] AC 544, at paras. 45-47.

72. One of the principal measures is Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection ("the Qualification Directive").

73. At para. 84 of *G v G* Lord Stephens recorded that the Secretary of State accepted, for the purposes of that appeal, that the relevant provisions of that Directive are directly effective and remain extant in domestic law as "retained EU law" after the UK's withdrawal from the EU.

74. Article 4(5) of the Qualification Directive provides as follows:

> "5. Where Member States apply the principles 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 reasons for not having don so; and

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

75. This is given effect in domestic law through the Immigration Rules. So far as they were applicable in the relevant period (1 July to 30 September 2021), para. 339L of the Immigration Rules provided:

> "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 his asylum claim or establish that they are a person eligible humanitarian protection or substantiate their 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."

76. The Home Office has published guidance on 'Assessing credibility and refugee status in asylum claims lodged before 28 June 2022' (version 10.0). Under the heading 'Benefit of the doubt' this states as follows:

> "The principle of the benefit of the doubt reflects recognition of the difficulties some claimants face gathering evidence to support their claim, and the grave and potentially irreversible consequences if international protection is wrongly refused.
>
> You must consider whether to apply the benefit of the doubt to any material facts which remain in doubt, after you have reviewed all the evidence in the round. The concept of the

> benefit of the doubt in the context of the Immigration Rules is designed to provide a framework for deciding whether to accept or reject a material fact, or the facts as a whole, where the evidence in one or more areas is not sufficient to enable a clear finding to be made.
>
> Paragraph 339L of the Immigration Rules sets out that where a claimant's account is not supported by documentary or other objective evidence, there will be no need for further confirmation when the following conditions are met:
>
> - the claimant has made a genuine effort to substantiate their claim
> - all material factors at their disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given
> - their statements are coherent and plausible and do not run counter to available specific and general information relevant to their case
> - they have lodged an asylum or human rights claim at the earliest opportunity, unless they can demonstrate good reason for failing to do so
> - their general credibility has been established
>
> If a claimant's account satisfies all five criteria, you must give them the benefit of the doubt – as there would be no reason not to do so. *If the claimant only meets one or more criteria, you must still consider whether, on the facts of the case, it is appropriate to give them the benefit of the doubt, bearing in mind the relatively low threshold of 'reasonable degree of likelihood' applicable*. All of the credibility indicators must be considered in the round." (Italics added)

77. It is important to appreciate the legal effect of these provisions. What both Article 4(5) of the Qualification Directive and para. 339L of the Immigration Rules provide is that, where certain criteria are met, corroborative evidence is *not* required. It does not follow from this that, where one or more of those criteria are not met, corroborative evidence *is* required. The correct legal position is accurately summarised in the Home Office guidance, which I have quoted above. In those circumstances the decision-maker (here the tribunal of fact) must still consider whether, on the facts of the case, it is appropriate to give the appellant the benefit of the doubt, bearing in mind the relatively low threshold of "reasonable degree of likelihood".

78. Against the above background of principle I can now turn to the grounds of appeal in this case relatively briefly.

Grounds of Appeal

79. There are seven grounds of appeal, although Mr Jones submitted that they are closely related. His fundamental complaint is that, in substance if not in form, the UT applied the wrong standard of proof (Ground 1); that it required the Appellant to adduce corroborative evidence (Ground 3); and that its conclusion was not reasonably open to it on the totality of the evidence before it (Ground 7). Mr Jones relies on the other grounds as supportive of his fundamental complaint.

Ground 1: Misdirection in law: standard of proof

80. The Appellant submits that despite citing the lower standard of proof, the UT failed to apply it in concluding that the Appellant's account of events in Egypt were incredible. The UT instead essentially sought certainty (or something very near to it) when no more than a "reasonable degree of likelihood" was required.

81. I accept this ground in substance. It is not necessary to say that the UT sought certainty, or something close to it. It suffices to observe that, although the UT used the phrase "lower standard of proof" many times in its judgment, it never defined what that standard was. If that were the only criticism that could be made, that would be unlikely to be sufficient to allow the appeal. More fundamentally, in my view, as a matter of substance, the UT applied a much higher standard of proof than the one which is appropriate in this context.

Ground 2: Misdirection in law: approach to assessing risk of return

82. The Appellant submits, following on from Ground 1, that the UT misdirected itself in law in failing to consider all of the evidence *in the round* when concluding that the Appellant's account of events in Egypt was incredible. As Simon Brown LJ made clear in *Ravichandran*, at 109, the question whether a person has a well-founded fear of persecution raises a single composite question. The question should be looked at "in the round and all the relevant circumstances brought into account."

83. I do not accept that Ground 2 has been made out. The UT expressly directed itself that it had to assess the evidence "in the round" and cited *Karanakaran* and *Ravichandran* for that proposition, at paras. 12 and 29 of its judgment.

Ground 3: Misdirection in law: corroborating evidence

84. The Appellant submits that the UT found the Appellant's account of events in Egypt incredible because every aspect was not corroborated by specific evidence. Mr Jones submits that there is no legal duty to provide corroborating evidence in a protection claim, which the UT acknowledged but did not apply.

85. In response Ms Howarth submits that the UT's finding that the Appellant was not a credible witness focused primarily on the lack of any attempt by the Appellant to

obtain corroborative evidence in relation to his key claims, or any reasonable explanation about why he did not try to obtain such evidence, in all the circumstances of his case. Ms Howarth submits that the UT was entitled to draw adverse inferences about the absence of specific evidence produced in relation to key aspects of the claim, and assess the Appellant's overall credibility negatively when he had failed to provide reasonable explanations for not attempting to provide that evidence.

86. It was common ground before this Court that there is no requirement that the applicant must adduce corroborative evidence: see *Kasolo v Secretary of State for the Home Department* (13190, a decision of the then Immigration Appeal Tribunal, 1 April 1996). On the other hand, the absence of corroborative evidence can, depending on the circumstances, be of some evidential value: if, for example, it could reasonably have been obtained and there is no good reason for not obtaining it, that may be a matter to which the tribunal can give appropriate weight. This is what was meant by Green LJ in *SB (Sri Lanka)* at para. 46(iv).

87. I accept Mr Jones's submissions on Ground 3. Although the UT directed itself, at para. 84, that there is no legal duty on the Appellant to corroborate his claim, that was in substance the basis on which it proceeded. Each of the three perceived deficiencies in the evidence adduced on his behalf was to the effect that he could have but had not obtained corroborative evidence to support his claim. In the circumstances of this case, bearing in mind both the relatively low standard of proof and the fact that the Appellant had adduced positive evidence which supported his claim (as the UT recognised), evidence both of what he had himself witnessed and evidence of experts which was consistent with his claim, I have reached the conclusion that the UT required more of him than was necessary. It then fell into error by concluding that the failure to adduce corroborative evidence undermined his credibility with the result that his evidence was found not to be "truthful", at para. 87.

88. The Appellant had not said anything that was in fact untruthful. He still does not know whether his father was in fact a member of the Muslim Brotherhood or whether that was the reason why the Egyptian authorities arrested and detained him. Nor does he know whether they will take a similar interest in him if he is returned to Egypt. His evidence was to the effect that that is his fear and that fear is well-founded. When the UT concluded that he had not been truthful, what it meant in substance was that it did not accept that his fear was indeed well-founded. But that has nothing to do with the Appellant's credibility; it is simply an expression of the conclusion that his claim for asylum is not made out. In this context it is of interest to note that, at para. 67 of its judgment (which I have quoted at para. 36 above), the UT said that it rejected "the *reliability* of the Appellant's claim as to the reasons for his father's arrest." (Emphasis added) I would observe that "reliability" is not the same thing as "credibility".

Ground 4: Misdirection in law: approach to the Appellant's age

89. The Appellant submits that the UT failed to properly take into account the Appellant's age when assessing his credibility, despite noting that it was mindful of this.

90. I do not accept Mr Jones's submissions on Ground 4. It is clear, from paras. 39 and 62-63, that the UT had the fact that the Appellant was a child at all material times well in mind.

Ground 5: Failure to take into account material facts

91. The Appellant submits that the UT failed to take into account and make findings as to whether the Egyptian authorities visited the Appellant's family home on a number of occasions before his father's arrest, looking for his father "to do with the Muslim Brotherhood issue".

92. The Respondent submits that, although the UT did not make a specific finding about whether the Egyptian authorities visited the family home before the Appellant's father's arrest, the UT did make a finding in relation to the Appellant's father's involvement, or suspected involvement, with the Muslim Brotherhood. The UT was not satisfied to the lower standard that the Appellant's father had been involved with the Muslim Brotherhood. It would therefore have been immaterial whether or not it accepted the Appellant's account.

93. I accept Mr Jones's submissions on Ground 5. It was important, in my view, in a case where the Appellant's evidence was ultimately found not to be truthful, to set out, at least in summary, what his own evidence was. An important part of the positive evidence, which supported the appeal, was not mentioned in the UT's judgment. This was a material omission, in particular at para. 19, where it said that the Appellant had not been present during his father's arrest. Although that was true so far as it went, what the UT did not mention was that the Appellant's evidence was that he had been present "sometimes" when the authorities had come to the family's house some five or six times, every one or two weeks in the period *before* his father was arrested: see para. 17 of his first witness statement, dated 21 September 2017. He said that his father was not there on those occasions. The authorities would search the house and destroy things. There were normally about six or seven men, sometimes eight. They did not usually come in uniform but in civilian clothing, although there might have been one wearing a uniform. They had told the Appellant's mother to persuade his father to hand himself in.

94. I also accept Mr Jones's submission that the evidence in relation to human rights organisations and lawyers in Egypt (in particular whether it was unreasonable not to approach them to provide corroborative evidence) had to be considered in the context of the conditions in Egypt at the material time, in 2017 and 2018 in particular. That evidence included the evidence of Mr Armbrust, that there was a crackdown at that time, in particular the mass arrests of human rights lawyers and activists, which had been reported by the international NGO Human Rights Watch. There was similar evidence before the UT from Ms Pargeter, to the effect that, from April 2017, the President of Egypt had maintained a nationwide state of emergency that gave security forces unchecked powers: see para. 2.22 of her report dated 14 September 2020.

Ground 6: Taking into account an irrelevant consideration

95. The Appellant submits that the UT speculated, at para. 73 of its judgment, as to how the Egyptian authorities would draft an indictment/how charges would be framed for someone perceived to be hostile to the regime, but had no evidential foundation for such speculation.

96. The Respondent submits that, given that the UT had already made its adverse credibility finding for the reasons set out at para. 72, it does not seem that the issue in para. 73 was in fact relied on by the UT in making that finding. Rather, the Respondent submits, para. 72 constitutes the UT's explanation about why it did not accept one of the submissions made by counsel for the Appellant at the hearing before the UT.

97. Taken by itself, I would not have been inclined to accept Ground 6 but, in the end, this is not material, because I have reached the conclusion that the UT fell into more fundamental errors, in particular in relation to the standard of proof and the failure to adduce corroborative evidence (Grounds 1 and 3).

Ground 7: Irrationality

98. The Appellant submits that the UT's conclusion was not reasonably open to it, on the basis of the evidence before it if the correct legal principles had been applied. In response Ms Howarth submits that the UT was entitled to reach the conclusion which it did, especially as it had the advantage of considering all of the evidence, including the Appellant's oral testimony.

99. In my view, Ground 7 is made out. When one applies the correct standard of proof, the positive evidence which supported the Appellant's claim, including his own evidence of what he had observed before his father was arrested; the circumstances of that arrest and his father's imprisonment; and the expert evidence, which was consistent with – although not directly probative of – his case, could reasonably lead only to one conclusion: that the Appellant does have a well-founded fear of persecution if he is returned to Egypt. I stress again that the Appellant does not have to show that this will happen or even that it is likely to happen on a balance of probabilities. It suffices that there is a reasonable degree of likelihood. He therefore qualifies as a refugee.

<u>The powers of this Court on an appeal from the UT</u>

100. Section 14(2) of the Tribunals, Courts and Enforcement Act 2007 provides that:

> "(2) The relevant appellate court–
>
> (a) may (but need not) set aside the decision of the Upper Tribunal, and
>
> (b) if it does, must either–

> (i) *remit* the case to the Upper Tribunal or, where the decision of the Upper Tribunal was on an appeal or reference from another tribunal or some other person, to the Upper Tribunal or that other tribunal or person, with directions for its reconsideration, or
>
> (ii) *re-make* the decision. […]
>
> (4) In acting under subsection (2)(b)(ii), the relevant appellate court–
>
> (a) may make any decision which the Upper Tribunal could make if the Upper Tribunal were re-making the decision or (as the case may be) which the other tribunal or person could make if that other tribunal or person were re-making the decision, and
>
> (b) may make such findings of fact as it considers appropriate." (Emphasis added)

101. Mr Jones invited this Court to exercise its power to re-make the decision because, he submits, there was and is only one outcome which is reasonably open on the evidence which was before the UT and which is now before this Court. In the alternative, he invited us to remit the underlying appeal to be decided again by the FTT. For the Respondent Ms Howarth invited us, should the appeal be allowed, to remit the case to the FTT.

102. In the circumstances I have reached the conclusion that justice would be better served by this Court re-making the decision. This is because I agree with Mr Jones that, on the evidence before both the UT and this Court, there is only one outcome which is reasonably available, bearing in mind that all that the Appellant has to show is that there is a reasonable degree of likelihood of persecution if he is returned to Egypt. In my view, he clearly qualifies as a refugee according to that standard.

103. Further, I think it would be highly unsatisfactory to remit this case to be considered yet again by the FTT, bearing in mind the procedural history of this case. This is particularly so in a case which involved an applicant who was a child when he arrived in this country and immediately claimed asylum, and whose case has still not been determined over six years after his arrival here.

Conclusion

104. For the reasons I have given I would allow this appeal. I would set aside the order made by the UT and make an order allowing the Appellant's underlying appeal on the ground that he qualifies as a refugee.

Lord Justice Warby:

105. I agree.

Lady Justice King:

106. I also agree.