



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/04018/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport

**Determination
Promulgated**

On 2 December 2013

On 17 January 2014

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**H E-H
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Hodgetts, instructed by South West Law

For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The appellant is a stateless person of Palestinian origins. He was born on 24 November 1982 in Egypt where he has lived his whole life. He left

Egypt on 16 June 2012 and came to the UK as a visitor with leave valid until 30 November 2012. He overstayed. On 15 March 2013, the appellant claimed asylum on the basis that he would face a real risk of persecution if returned to Egypt. On 8 April 2013, the Secretary of State refused the appellant's claim for asylum and on 11 April 2013 made a decision to remove the appellant to Egypt by way of directions under s.10 of the Immigration and Asylum Act 1999.

3. The appellant appealed to the First-tier Tribunal. In a determination dated 1 June 2013, Judge Cresswell dismissed the appellant's appeal on asylum and humanitarian protection grounds and under Art 3 of the ECHR.
4. On 26 June 2013, the First-tier Tribunal (Judge Bird) granted the appellant permission to appeal to the Upper Tribunal. The appeal first came before me on 7 October 2013. In a decision dated 11 October 2013, I concluded that the First-tier Tribunal had erred in law in dismissing the appellant's appeal. My reasons are set out in full in that decision which I do not repeat here. In particular, I concluded that the First-tier Tribunal had erred in law in finding that the appellant would not be at risk on return to Egypt based upon the (then) Presenting Officer's concession that the appellant would only be returned if he had a valid residence permit and therefore would not be at risk as an illegal Palestinian living in Egypt. Further the First-tier Tribunal had failed to take into account the expert evidence first, that the appellant could only obtain a residence permit whilst in Egypt and secondly, that as a returning stateless Palestinian with a visit visa (but without a residence permit) he was at risk of detention and ill-treatment amounting to persecution or serious ill-treatment contrary to Art 3 of the ECHR.
5. As a consequence, I set aside the First-tier Tribunal's decision and the appeal was relisted for a resumed hearing before me on 2 December 2013.

The Hearing

6. Mr Hodgetts, on behalf of the appellant, relied upon a number of documents contained within the First-tier Tribunal's bundle ("FtT bundle"), a principal bundle prepared for the Upper Tribunal hearing ("UT bundle"), two supplementary bundles prepared for the Upper Tribunal ("supplementary bundle 1" and "supplementary bundle 2") and a clarifying letter from one of the experts.
7. Mr Hodgetts also relied upon the appellant's statement dated 2 October 2013 (at pages 1-5 of supplementary bundle 1) which the appellant adopted in his oral evidence. He also relied upon expert reports prepared by Dr George at pages 1-28 of the FtT bundle; by Ms Oroub El-Abed at pages 29-35 of the FtT bundle, Dr George's letter dated 17 July 2013 at pages 2-3 of the UT bundle, and an addendum to Ms El-Abed's report at pages 5A-5G of supplementary bundle 1 and the report of Dr Harrell-Bond dated 28 November 2013 at pages 3-32 of supplementary bundle 2. In

addition Mr Hodgetts relied upon a number of emails from the appellant (or sent on his behalf) to the Egyptian Consulate/Embassy and vice versa. No objection was made on behalf of the respondent to the admission of the additional documents not previously before the First-tier Tribunal under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

8. As I have indicated, the appellant gave oral evidence in which he adopted his statement of 2 October 2013 and was not subject to any cross-examination by Mr Richards on behalf of the respondent.

The Appellant's Claim

9. The appellant's claim can be summarised as follows. He is a stateless Palestinian who was born in Egypt and lived there until coming to the UK in June 2012. As a stateless Palestinian, the appellant had various residence permits valid for three years and, so I was told, his most recent such permit had been valid until sometime in 2014.
10. On 6 June 2012, he came to the UK with a six months' visa to visit his two brothers who lived in the UK. His elder brother is a British citizen and his younger brother has an application for indefinite leave to remain pending. The appellant's visit visa expired in December 2012 and he overstayed.
11. The appellant's case is that, as he has been outside Egypt for more than six months, he can only return if he obtains a re-entry visa. In addition, his residence permit in Egypt has been cancelled as he failed to return within six months. The appellant's case is that he is unlikely to be able to obtain a re-entry visa to Egypt. However, if he does obtain such a re-entry visa, on arrival in Egypt he will be detained in conditions that amount to persecution or serious ill-treatment contrary to Art 3 of the ECHR. As I understood Mr Hodgetts, that is the appellant's principal claim. In addition, it is said on the appellant's behalf that if he does gain entry (and it is only then that he could seek a residence permit) the bureaucracy is such that he is unlikely to obtain a residence permit within the 60 day period for which his re-entry visa would be valid and he will as a result become an illegal Palestinian in Egypt and again be at risk of detention as a stateless illegal Palestinian in circumstances amounting to persecution or serious ill-treatment. It is also said that he would not be able to satisfy the criteria for the renewal of his residence permit, in particular he would lack permission to work or enrolment in an educational institution.

The Respondent's Case

12. On behalf of the respondent, Mr Richards submitted that the appellant's claim should fail. He submitted that the appellant had failed to show that he had been subject to any persecution or ill-treatment in the past. The appellant had surrendered his residence permit by being outside Egypt for more than six months. He had applied for a travel document and that application was pending. Mr Richards submitted that it might still be issued by the Egyptian authorities and if it were there was no reason to

believe that he would be subject to any mistreatment on return. There was insufficient evidence to show that a stateless Palestinian travelling to Egypt who had not been mistreated in the past was subject to a real risk of serious ill-treatment in the future.

The Impediment to Return issue

13. At the end of the representatives' submissions, I raised with them the recent decision of the Court of Appeal in HF and Others (Iraq) v SSHD [2013] EWCA Civ 12. There, the court considered the issue of whether an international protection claim can be established where there are impediments to an individual's return, for example because the individual will not co-operate in obtaining the necessary travel document.
14. I invited both representatives to make written submissions on the application of HF and Others and, as a consequence, both Mr Hodgetts and Mr Richards made written submissions. In brief, Mr Hodgetts submitted that HF and Others did not prevent the appellant establishing his international protection claim if he were returned to Egypt having obtained a travel document and re-entry visa. Mr Hodgetts submitted that HF and Others was distinguishable as there the individuals concerned declined to co-operate so as to make their return to Iraq feasible. Here, Mr Hodgetts submitted, the appellant was co-operating in applying for a travel document and, if he obtained a re-entry visa, the expert and background evidence established that he would be at risk on return either by being detained at the airport or, if allowed to enter Egypt, because he would not be able to obtain a residence permit which would again, as an illegal Palestinian living in Egypt, put him at risk of detention in conditions amounting to persecution or a breach of Art 3.
15. Mr Richards' written submission was that HF and Others applied because the Secretary of State had given an assurance that the appellant would not be removed to Egypt without a residence permit and there was insufficient evidence to show that stateless Palestinians in Egypt with residence permits were at risk of persecution or treatment contrary to Art 3 of the ECHR.

Discussion and Findings

16. The primary facts are no longer in dispute in this appeal. Mr Richards did not seek to challenge the appellant's evidence as set out in his statement dated 2 October 2013. I also did not understand Mr Richards to challenge the evidence both emanating from the Egyptian Consulate/Embassy and set out in the expert reports concerning the process (if any) by which the appellant could return to Egypt.
17. Consequently, I make the following findings of fact based upon the evidence:
 - (a) The appellant left Egypt and arrived in the UK on 6 June 2012;

- (b) The appellant remained more than six months outside Egypt and, as he had not first obtained a re-entry visa, his three year residence permit, in effect, was cancelled;
- (c) The appellant did not apply for a re-entry visa prior to travelling because he only intended to stay in the UK for less than six months but did, in fact, choose to stay longer as a result of the changed political situation in Egypt and his fear of return;
- (d) The appellant first contacted the Egyptian Consulate on 10 December 2012 and was told that unless he travelled back to Egypt before 16 December 2012 his residence permit would be automatically cancelled on that day. He was told that if he wished to return to Egypt after 16 December 2012, he would have to apply for a tourist visa and that before he made an application he would have to apply for "pre-approval" which could take up to three months;
- (e) Thereafter the appellant sought confirmation that his residence permit had been cancelled but was told by the Embassy that it could not be officially confirmed in writing unless confirmed by the Egyptian authorities in Cairo first;
- (f) In March 2013, the appellant was invited to the Egyptian Embassy and told to bring his travel document as confirmation had been received from the Egyptian authorities that his residence permit had been cancelled;
- (g) On 5 March 2013 the appellant attended the Egyptian Embassy and handed over his travel document which was stamped and he was given a letter confirming the cancellation of his residence permit;
- (h) Having sought legal advice, on 3 May 2013 the appellant emailed the Egyptian Embassy asking what procedure should be followed to renew his residence permit;
- (i) There then followed a number of exchanges by email between the appellant (or his legal representatives) and the Embassy, which culminated in an email dated 26 July 2013 which set out the process by which the appellant could first, acquire a new travel document (his own having expired on 23 May 2013); obtain a visa; and, on return to Egypt, apply for residency. The appellant can only apply for a residence permit from within Egypt (see also report of Dr George at para 75, FtT bundle)
- (j) That procedure requires for a travel document to be obtained, a prior approval process which involves sending documents and details to Egypt and can take between one to three months; if that prior approval is obtained then approval can be sought from the Consulate and a travel document obtained within one to two months; in order to obtain a tourist visa a further pre-approval process is set out

involving, again sending the documents to Egypt, a process which takes between two to six weeks and, then, if successful an application can be made to the Egyptian Consulate and a visa may be issued within two to three working days if the application is made in person or five to seven working days if made by post.

(k) The appellant's evidence which, as I have said, was not challenged, and I accept, is that he has made the "prior-approval" application for a travel document (and this is supported by the documentation) and, most recently, on 27 November 2013 he emailed again but has had no reply and he has not, therefore, obtained a travel document.

18. Further, I consider the submissions and evidence and make the following findings.
19. Mr Hodgetts submitted that the appellant would not be able to obtain a travel document because, even if he were to pass the pre-approval process, he did not have the required "certificate of work or study" as set out in the email from the Egyptian Embassy dated 26 July 2013. Mr Hodgetts did not elaborate upon what precisely was this missing documentation. The expert evidence does not provide any illumination. Dr Harrell-Bond deals only with the process from the point of seeking a visa to re-enter Egypt. Ms El-Abed in an addendum to her report (at page 5C of supplementary bundle 1) states that: "I am not acquainted with the details of the travel document pre-approval and these are pre-approval processes." Again, she deals with the process from the point of the appellant seeking a visa to re-enter Egypt. Dr George, likewise, does not deal with this part of the process in his report.
20. Consequently, it is not clear to me whether the requirement set out in the Embassy's email that the appellant should provide either a certificate of work or a certificate of study in order to obtain a travel document, assuming that the appellant passes the prior approval process, relates to a certificate of work or study in the UK or in Egypt. In truth, whichever it is, the appellant does not appear to have documents whether relating to the UK or Egypt.
21. Thus, I am not satisfied that the appellant would be able to obtain a travel document from the Egyptian authorities. As the recent history has made plain, the Egyptian authorities have not even completed the prior approval process within the claimed one to three months.
22. Further, even if the appellant did obtain a travel document, I am not satisfied that he would be able to obtain a visa to return to Egypt.
23. Dr Harrell-Bond in her report states in her conclusion that: "In my opinion the appellant will not obtain a tourist or other visa to Egypt." That view derives from a passage in her report at page 17 of the supplementary bundle 2 in the following terms:

"It has to be understood that a person will only obtain a visitor visa if the ambassador in the embassy concerned approves. This approval is not given without first obtaining a state security clearance - as is the case in all embassies worldwide. In the case of a Palestinian with an Egyptian residence, who has overstayed his exit permit, the ambassador will not be able to obtain security clearance on his behalf."

24. Ms El-Abed in the addendum to her report states at page 5C of the supplementary bundle 1:

"I can confirm the chances of [the appellant] being issued a re-entry visa are virtually nil. The procedures have remained the same after the revolution. The Egyptian Government continues to prevent any Palestinian who leaves the Egyptian territories from returning back to Egypt if remaining outside of Egypt for longer than the period allowed."

25. Ms El-Abed continues at page 5D of the supplementary bundle 1 as follows:

"To my knowledge, all of the Palestinians that I have interviewed apart from one who had tried to apply for a visiting visa to return to Egypt from abroad were refused. I have interviewed one only person who had been able to obtain a visitor's visa from abroad. His family in Egypt used some contacts to help him obtaining a visa."

26. Dr George, in his report dated 13 May 2013, states at para 77:

"To the best of my knowledge and belief, 'temporary admission' is simply the admission to Egypt that is enabled by possession of a visitor's visa. I have no way of knowing whether the Egyptian authorities would be likely to issue [the appellant] with a visitor's visa. On the basis that the Egyptian authorities are antagonistic towards Palestinian refugees, I consider it unlikely that he would be issued with a visitor's visa. I do not hold this view with great confidence, however. The authorities' decision on the application would be influenced by a variety of factors. One such could be a desire not to cause problems with the British authorities by leaving [the appellant] stranded in the UK. Such a consideration could prompt the authorities to issue him with a visitor's visa, although I stress that this is essentially speculation on my part."

27. Bearing in mind, Dr George's recognition that his view was "speculation", I am satisfied on the basis of the other expert evidence that the appellant is unlikely to be issued with a visit visa.

28. What would be the position if the appellant did obtain a visit visa? In my judgment, the expert evidence is all one way. There is a real risk that he would be detained at the airport. It is likely that he would be denied entry to Egypt and would be detained for an indeterminate period of time in conditions which would amount to serious ill-treatment or persecution on the basis of his Palestinian background.

29. Ms El-Abed at page 5B of supplementary bundle 1 states that:

"... even if he is granted a visa he will not be allowed to enter Egypt on arrival at the airport."

30. At page 5D she continues:

“If, **hypothetically**, [the appellant] were to be granted a visa to Egypt (after the renewal of his Travel Document) and allowed entry to Egypt, he most probably would be held in the airport jail. However, he might be let into Egypt only to be imprisoned. To note, there is a big number of young Palestinians in Egyptian prisons who have failed to provide a justifiable and acceptable reason for their stay in Egypt.”

31. At paras 9-12 of her original report, Ms El-Abed deals with the treatment of Palestinians on return as follows:

- “9. Detaining Palestinians at the border is a common occurrence, particularly for those who are stateless and have only the Egyptian travel document. One example is Abu Saqer, born in Cairo in 1976, who held an Egyptian travel document and had been living in Moscow. When his Russian residence permit expired, he went to Egypt to see his family and also to reapply for a permit at the Russian consulate in Egypt to return to Moscow. On arrival at Cairo airport in August 2001, he was denied entry and was eventually deported to Moscow. In turn, the authorities in Moscow prevented him from entering Russia due to the expiration of his residence permit. He was stranded between airports (at Moscow and Cairo airports as each country was sending him to the other) for at least fourteen months.
10. In March of 2004, at Cairo Airport, I met a Palestinian who held an Egyptian travel document who was given a re-entry visa in Germany but was denied entry to Egypt. His mother is Egyptian and he was raised in Egypt. He had left Egypt in order to look for work and found employment in Tanzania. He came back to Egypt hoping to see his family for the holidays. With a stamped re-entry visa (from the Egyptian embassy in Germany - the country of his wife), the Egyptian authorities still denied him entry and incarcerated him and told him to seek a visa for another country.
11. Palestinians who are stateless and only holding an Egyptian travel document face persecution especially because they may be detained for indeterminate periods of time. When arrested, Palestinians may be sentenced, regardless of the grounds of arrest.
12. Without a valid residency permit, Palestinians coming from outside Egypt will face incarceration for indefinite periods of time in deplorable conditions and face abuse and persecution at the hands of Egyptian authorities. These people will not be permitted to re-enter Egypt. The case of the hundred of thousands of Palestinians holders of the Egyptian travel documents who in 1990-1991 escaped from Kuwait as the Gulf war I erupted. Many of them, without a renewed residency permit, albeit the Egyptian travel document they held and the exceptional conditions of the war, were not permitted to enter Egypt. The same scenario was repeated when Qadhaffi of Libya pushed Palestinians living in his country to go to the Palestinian borders in order to pressurize Israel to accept them. From the estimated 30,000 Palestinians living in Libya, in majority holders of the Egyptian travel documents, almost 300-600 families ended up being stranded in Salloum camp for almost two years. A deal, between the two states had to be negotiated for half of these families to be permitted to re-enter Egypt while the others had to go back to Libya.”

32. At para 17 she set out the condition of detainees in Egypt as follows:

- “17. Detainees in Egypt are kept in conditions that amount to cruel, inhuman or degrading treatment, and some become ill as a result. Recent reports

of Amnesty International and Human Rights Watch all attest to the fact that persons are detained without charge and held indefinitely in extremely poor and unhealthy conditions. Such detainees are also more than likely to be ill-treated, denied access to the outside world, detained for indefinite periods of time, denied access to healthcare, and possibly tortured.”

33. In her report, Dr Harrell-Bond concludes as follows (at page 18 of supplementary bundle 2):

“If he were to obtain [a visa], he will be detained on arrival in Egypt (if allowed to disembark) and will not be allowed to resume his residency status in that country and will remain imprisoned. The evidence gathered and presented in the Dutch court strongly suggests that a person in the appellant’s position would be at risk of being detained indefinitely at arrival in Egypt, denied the possibility to apply for a residence permit (even if he were granted a visitor’s visa, which in itself is unlikely) and while in detention be subjected to severe mistreatment.

I believe that there is also a risk that he would subsequently be moved to a state prison if he cannot be deported to another country. If this were the case, then the appellant would face further mistreatment at the hands of the Egyptian prison system, in the currently severe anti-Palestinian atmosphere which permeates throughout Egyptian society.”

34. In her report (at pages 14-15 of supplementary bundle 2), Dr Harrell-Bond explores in more detail the situation of returning Palestinians:

“The treatment Palestinians on arrival at the Cairo airport is theoretically determined on the basis of the travel documents they are carrying and the country from which they arrived. Palestinians with a valid Palestinian Authority passport are deported from the airport to the Gaza. Palestinians with travel documents but who have residence in another country will be deported back to where they came from or coerced into travelling at their own expense to which ever country that will take them. Palestinians with travel documents but no residency or visa to Egypt will be detained at the airport until they find a place to go, if not they get sent to Egyptian prisons indefinitely.

.....

All Palestinians, regardless of the passport they hold, appear to be (mis)-treated equally. This is best exemplified in the case of two Canadians - one of whom was a Palestinian medical doctor - who were arbitrarily arrested, beaten, kept in horrific conditions and held without charge for six weeks, only to be released after six weeks of diplomatic work by the Canadian government.”

35. At page 17 of the supplementary bundle 2, Dr Harrell-Bond continues:

“If he is able to obtain a visitor visa despite the existing security measures in place, the person will still be detained at the airport. If the person holds a Palestinian Authority passport he will be escorted to Rafah, and deported to Gaza. If he does not he will be detained indefinitely. The only exception, as stated earlier, is if he is a man of 60 years of age.

The appellant being a Palestinian born in Egypt from a family who arrived in 1948, he cannot obtain a Palestinian Authority Passport and as the Egyptian

authorities will not be able to remove him to Gaza he will be detained on arrival at the airport. He will be detained for an indefinite period in an Egyptian prison. It will be difficult to ascertain his whereabouts after detention.”

36. Mr Hodgetts also referred me to the potential detention conditions if that was the fate of the appellant as set out in the respondent’s own *Operational Guidance Notes* as follows:

“3.14.3 Consideration: According to the 2012 U.S. State Department report, conditions in Egyptian prisons and detention centres are generally harsh, with overcrowding, lack of medical care and poor sanitation particular problems. Provisions for food, water, lighting and ventilation are generally inadequate. Abuse of prisoners, including torture, is common, especially in relation to juveniles, and tuberculosis is widespread. Freedom House similarly reported in January 2013 that prison inmates are subject to torture and other human rights abuses. There were approximately 60,000 prisoners in the penal system during 2012; prison conditions for women are said to be marginally better than for men, but there are credible reports of the sexual abuse of female prisoners.

...

3.14.5 Amnesty International reports that torture in police custody has been systematic and widespread in Egypt for decades and despite numerous official pledges following the January 2011 uprising that police would respect human rights, videos of torture and other ill-treatment continue to emerge.

...

3.14.11 Conclusion: Prison conditions in Egypt are harsh and can be life-threatening, with overcrowding, poor sanitation, a lack of healthcare and generally unhealthy conditions being particular problems. In addition to these adverse conditions there are numerous reports that officials and guards act with impunity and regularly abuse and torture prisoners, physically and sexually, including to death. Information suggests that such ill-treatment is generalised throughout the prison population, indicating that conditions are likely to reach the article 3 threshold in most cases.”

37. On the basis of this evidence, I accept that if the appellant obtains a visa to re-enter Egypt, there is a real risk that he will be detained at the airport on return. I further accept that there is real risk that he will, thereafter, be detained in an Egyptian prison and that conditions will be such as to breach Art 3 of the ECHR as the respondent’s own *OGN* states. His detention will be on account of his Palestinian origin and his ill-treatment will, therefore, be for a Convention reason.
38. Further, remembering that a residence permit may only be obtained from within Egypt (see above para 17(i)), I accept that if the appellant were allowed to enter Egypt (which I consider to be unlikely) the evidence to which I was referred demonstrates that the bureaucratic process for him obtaining a residence permit is likely to be protracted (see Dr Harrell-

Bond's report at page 8 of supplementary bundle 2). Dr Harrell-Bond states that:

"Without a residency permit, the appellant would be subject to imprisonment Palestinians report that the process for them applying for any document is always prolonged. Before applying for any document, a Palestinian needs a security check which takes a minimum of eight weeks. To renew one's residency, it is necessary to begin the process at least four months before it expires, and this has to be done in person if one is over the age of 18."

39. The appellant's visit visa would only be valid for 60 days. Dr Harrell-Bond states that:

"... where the Palestinian loses the residence for any reason, they cannot be permitted re-entry to Egypt unless the security authorities look into their cases and issue a new residence. Mostly however, security authorities never allow re-entry and no new residencies are issued."

40. In my judgment, it is likely that the process for obtaining a residency permit could not be completed within the time of the appellant's visit visa and he would, as a result, become an illegal Palestinian in Egypt and would then be at risk of detention on that basis and, in the light of the evidence I have already set out, to the conditions of imprisonment amounting to a breach of Art 3 of the ECHR.

41. I was not specifically addressed on the issue of 'internal relocation' by Mr Richards. It is unclear the extent to which he now relied upon that. Given, however that the real risk to the appellant of detention and ill-treatment on return arises at the airport, there is no possibility of internal relocation open to him to avoid that risk. It would be impossible, in my judgment, given the background evidence to make good an argument that, when within Egypt, a stateless Palestinian could avoid the Egyptian authorities, particularly given that the appellant would, entirely reasonably, be seeking a residence permit from the very authorities who might persecute or cause him serious harm by detention.

42. Consequently, if the appellant returns to Egypt, I am satisfied that there is a real risk that he will be detained and the conditions of his detention would breach Art 3 of the ECHR and also, as they would result from his detention because of his Palestinian origins, would amount to persecution for a Convention reason.

43. However, my findings are that it has not been established that the appellant can (or will) be able to return voluntarily to Egypt because either he will not be able to obtain a travel document from the Egyptian authorities or, alternatively, even if he does he will not obtain a visit visa.

44. Does that affect the validity of his claim to international protection? That is an issue not dissimilar to the argument put forward by the Secretary of State that the appellant will not be returned without a residency permit. As I have already indicated, I invited and received written submissions

from both representatives in relation to that latter issue and the effect of HF and Others (Iraq).

45. In HF and Others, it was argued that an individual could not succeed in establishing that he was a refugee or that his return would breach Art 3 of the ECHR where the Secretary of State undertook not to return that individual without the appropriate documentation and, in the absence of that documentation, there was a real risk of the individual being detained in a prison near Baghdad International Airport in conditions involving a breach of Art 3.
46. The Court of Appeal rejected the argument that the fact that the individuals would only be returned with documentation had to be ignored. The Court of Appeal accepted the submissions made on behalf of the Secretary of State set out at paras [98]-[99] as follows:

“98. ... [Counsel for the Secretary of State’s] contention is that, properly analysed, the practice of not returning those without the appropriate travel documents is not a voluntary policy of the Secretary of State at all. The lack of documentation creates an impediment to return which the Secretary of State cannot circumvent. Iraq will not receive anyone from the UK without the relevant travel document. If an unsuccessful applicant for asylum refuses to co-operate to obtain the *laissez passer* document, he is in precisely the same situation as any other failed asylum seeker whom the Secretary of State is unable to return for one reason or another. The assurance of the Secretary of State that she would not return someone to Iraq without the relevant document is of no special significance; it simply reflects realities. The general position of someone who cannot be returned, whether because he cannot obtain the requisite documents or for some other reason, is that he may be detained or granted temporary admission pursuant to section 67 of the Nationality, Immigration and Asylum Act 2002, provided at least there remains a possibility of his being returned at some stage in the future: see *R (on the application of AR and FW) v Secretary of State for the Home Department* [2009] EWCA Civ 1310. As Lord Justice Sedley pointed out in that case, the condition of someone with that status is harsh, although being granted temporary admission does at least allow the unsuccessful asylum-seeker to be free of actual detention.

99. Mr Eadie submits that these appellants are precisely in the situation of any other failed asylum seekers who would not be at risk in their own state but cannot for technical reasons be returned home. The existence of such technical difficulties does not entitle them to humanitarian protection. Article 8(3) of the Qualification Directive makes that plain where, as here, relocation is an option and it is *a fortiori* the case where they are not at risk in their home area. Moreover, they can hardly be in any better position than any other asylum seeker who cannot be returned technical reasons given that the technical difficulty stems from a deliberate refusal to co-operate.”

47. At [101] the court stated that the analysis was “correct”. Elias LJ (with whom Maurice Kay LJ and Fulford LJ agreed) stated that:

“I accept that it would be necessary for the court to consider whether the appellants would be at risk on return if their return were feasible, but I do not accept that the Tribunal has to ask itself the hypothetical question of what

would happen on return if that is simply not possible for one reason or another.”

48. Elias LJ continued:

“I agree with the Secretary of State that the *sur place* cases are distinguishable because there the applicant could be returned and would be at risk if he were returned. They are not impediment to return cases.”

49. In my judgment, HF and Others does not prevent the appellant succeeding in this appeal.

50. First, the Court of Appeal was seeking to distinguish the situation where the non-returnability of an individual stemmed from the Secretary of State’s policy not to return a person unless it was safe to do so (which could not defeat a claim to international protection) and where that individual’s return could not be effected because of a lack of documentation.

51. Secondly, however, in HF and others that latter situation, namely return without the documentation, gave rise to the very circumstances which created the risk of serious ill-treatment to the individual on return. The risk of being imprisoned in conditions breaching Art 3 in Iraq only arose for those who were returned without appropriate documentation. In this appeal, the absence of documentation (at least in respect of a travel document and entry visa) is not the source of the risk to the appellant on return to Egypt. The source of risk is, rather, that he is a returning Palestinian without a residence permit in Egypt. I do not understand the Court of Appeal to exclude from a claim to international protection a person who, if he were in his own country, would be at risk but (independently of the source of that risk) cannot in fact be returned to his own country. In accepting the submission of the Secretary of State’s Counsel in HF and Others, the Court of Appeal accepted that the individuals in HF and Others should not be treated differently from any “other failed asylum seeker who would not be at risk in their own state” but “cannot for technical reasons be returned home”. Whilst that was true of the individuals in HF and Others, it is not true of the appellant. If returned to his own country, on the evidence as I have found above, he would be at risk of persecution for a Convention reason or serious ill-treatment contrary to Art 3. The appellant is a refugee as he is outside his country because of a well-founded fear of persecution for a Convention reason. He is not a failed asylum-seeker or someone analogous who cannot demonstrate a risk within his own country or could only do so by relying on the particular circumstances or route of return. For him, the risk exists independently of how he is returned, once he arrives in Egypt.

52. Finally, this may not even be a case where the appellant cannot be returned by the Secretary of State to Egypt. The evidence is only that he cannot himself voluntarily return because he would not obtain a travel document or visa to do so. Nothing in Mr Richards’ submissions in relation to HF and others, either made orally or subsequently in writing, deals with

the appellant's inability to return to Egypt voluntarily. Rather, Mr Richards' written submissions focus exclusively upon the Secretary of State's intention not to return the appellant unless and until he obtains a residency document. That, of course, on the evidence as I have found, he cannot do from outside Egypt. The fact that the Secretary of State has decided not to return the appellant to a situation where, if he did, through no fault of the appellant's, he would be at risk on arrival (and thereafter) of being detained and seriously ill-treated, does not defeat his claim to international protection.

53. For these reasons, therefore, the fact that the appellant cannot, in fact, voluntarily return to Egypt and the Secretary of State has no intention of returning him unless he has a residency permit in Egypt, does not abrogate his entitlement to international protection on the basis that, if returned, he would be at risk of persecution for a Convention reason and treatment contrary to Art 3 of the ECHR.

Decision

54. For the reasons set out in my earlier decision, the First-tier Tribunal erred in law in dismissing the appeal. The decision is set aside.
55. For the above reasons, I remake the decision allowing on asylum grounds and under Art 3 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal