Upper Tribunal
(Immigration and Asylum Chamber)

ST (Child asylum seekers) Sri Lanka [2013] UKUT 00292(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 April 2013	.....

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE PERKINS

Between

ST (Sri Lanka) (A minor)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr A Vaughan Counsel instructed by Luqmani Thompson

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

1. Appeals can be brought under section 83 of the Nationality, Immigration and Asylum Act 2002 (so called “upgrade” appeals”) only on the grounds that removing the appellant from the United Kingdom would breach the United Kingdom’s obligations under the Refugee Convention (see section 84(3)) or that the appellant is entitled to humanitarian protection (see FA (Iraq) v Secretary of State for the Home Department [2010] EWCA Civ 696).

2. Such appeals are decided on the basis of a hypothetical return at the date of the decision/ hearing.

3. The wider range of grounds permissible in appeals under section 82 of the Act is not available in section 83 appeals and the Tribunal has no power to entertain them.

4. The “best interests of the child” are relevant in section 83 appeals only to the extent that they illuminate a claim that the appellant is a refugee or entitled to humanitarian protection.

5. The Tribunal is unlikely to be assisted by hearing the evidence of a child who is 12. Whenever a judge is considering hearing evidence from a child the issues should be explored with the advocates and the responsible adult accompanying the child and the guidance in the Senior President’s Practice

Statement of 30 October 2008 ‘Circumstances Under Which a Child Vulnerable Adult or Sensitive Witness May Give Evidence ’ applied.

6. A judge should alert the advocates where minded to depart from a favourable assessment of credibility made by the UKBA (as noted by the AIT in WN (Surendran; credibility) DRC [2004] UKIAT 213.)

DETERMINATION AND REASONS

We direct that the appellant be identified only by the initial S in connection with these proceedings

Introduction

1.
S is a child who is a national of Sri Lanka of Tamil ethnicity. His date of birth is September 2001. He is thus aged 11 ½ at the date of the hearing before us.

2.
On 29 November 2011 he claimed asylum at the Home Office having entered the UK irregularly.

3.
The core elements of his account are as follows:-

a.
He came from a village in the north of Sri Lanka that was a Tamil area where the LTTE had once been active.

b.
He had seen his father in the uniform of the LTTE that he was able to describe. He had also been told by his mother than his father was in the LTTE.

c.
When he was very young the LTTE came to search for his mother and she surrendered herself in place of his sister.

d.
Thereafter his care and that of elder sisters was entrusted to his paternal grandmother although time was spent with his uncle when bombing made the area unsafe.

e.
S moved to the seaside as a result of the fighting between the LTTE and government forces. When a bomb landed nearby, he became separated from his grandmother and sisters. Someone called Viki assumed responsibility for him. He relocated to Sammy Army Camp where he lived for 10 months. Calculating backwards, on the information S provided to the Home Office it would seem that he entered the camp some time around May 2009.

f.
Through a friend of his family, S was able to speak to his paternal aunt’s husband who is in Switzerland with his family.

g.

He was helped to escape the base by a friend of his uncle and then stayed with a Muslim family in Colombo before going to Malaysia (March 2010) where he remained for 18 months before travelling through a number of countries to reach the UK by coach in November 2011.

4.
Once he became known to the Home Office, he was assigned to the care of the local authority and started attending primary school within the London Borough of Croydon in December 2011. In February 2012 he was allocated to a Tamil foster parent who we will call P. After that a maternal aunt living in Liverpool came to light and we understand that following the decision below S has moved to live with her.

5.
The history of this claim may be summarised as follows:-

a.
On 12 December 2011 there was a brief screening interview conducted through an interpreter in Tamil.

b.
On 10 January S completed a Self-Evaluation Form with an accompanying witness statement that set out his experiences and concludes:

‘I am terrified of being returned to Sri Lanka. I am a Tamil and I am very young and I am not in touch with any family. I do not think I would be safe.’

That witness statement was produced with the assistance of a Tamil interpreter.

c.
The claim for asylum was considered and rejected on 20 January 2012. His age, identity, family history and essential narrative were not disputed but it was not considered that he was at a sufficient risk of harm on return. Essentially two questions were considered:

i.
Paragraphs 29 to 58 of the decision letter deal with an assessment of risk as a Tamil child of parents connected with the LTTE. It was concluded that in light of his age such factors did not give rise to any well founded fear of persecution.

ii.
Paragraphs 59 to 66 considered current conditions in Sri Lanka for children without parental and/or family care. Amongst the background materials referred to was a UNICEF report noting that at the end of 2006 there were 19,000 living in institutions in Sri Lanka and this was the most common solution for children without parental care. The international community had expressed concerns that not enough was being done to move away from institutional care for children. The decision maker noted that there were alternatives to institutional care and particularly noted the work of organisations such as SOS Children’s Villages that had started operating in Sri Lanka in 1980 and now through various programmes looked after 5,000 children in Sri Lanka and 78,000 children world-wide. The conclusion was reached that there were no substantial grounds for believing that S would be at risk on return to Sri Lanka.

iii.

Paragraphs 67 to 69 briefly assessed humanitarian protection and concluded that there were no substantial grounds for believing that there is a real risk or inhuman or degrading treatment or punishment.

d.
On the 23 January 2012 a decision was made to grant S discretionary leave to remain as an unaccompanied child. The duration of such leave was until 18 March 2015, a period of three years, at the end of which he would still be only 14.

e.
S appealed against the refusal of asylum and there was an initial hearing before the First-tier Tribunal on 5 March 2012. By that time S had produced a second witness statement, also made with the assistance of an interpreter; a witness statement from P, and an expert report from Professor Good.

f.
A fresh refusal letter was issued on 19 March 2012. This revised letter primarily focused on the claimed risk as a Tamil child of LTTE parents and consideration of care facilities in Sri Lanka to accommodate unaccompanied children was omitted.

g.
However the letter did address a claim to be a refugee by membership of a particular social group and addressed the decision of LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 0055:

i.
There was no evidence to suggest JT's parents were both dead

ii.
There were a number of facilities available to trace family members in Sri Lanka, such as the Red Cross and the family tracing unit in Vavuniya. UNICEF also sustained family tracing work undertaken by the local government's probation service and in 2011 had announced that it was expanding its work to the whole of the north of Sri Lanka.

iii.
It was not accepted that the claimant was an orphan or would end up in an orphanage.

h.
On 18 June 2012 this adjourned appeal came on before Judge Clayton in the First-tier Tribunal. By that stage the appellant had added the following to the material: a second report from Professor Good dated 3 May 2012; a bundle of country information focusing on the risk of sexual abuse of children in Sri Lanka; a third report from Professor Good dated 14 June 2012; a statement from a maternal aunt, SV, who was resident in Liverpool with discretionary leave to remain, and a skeleton argument drafted by counsel with conduct of the case, Ms R Chapman.

Judge Clayton's decision

6.
Judge Clayton briefly heard from S and P. Both gave their evidence without an interpreter. It seems that S was called at the Judge's request, as we understand that Ms Chapman considered that as credibility was not in issue and S was still only 10 ½, it was not appropriate to call him to give evidence.

7.

In a decision promulgated a few days later the judge dismissed the appeal. She concluded:-

a.
The appeal was under s. 82(1) of the Nationality Immigration and Asylum Act 2002 (NIAA).

b.
Having considered the evidence as a whole, the appellant's asylum claim was found not to be credible.

c.
It was implausible that his family members in Liverpool and Switzerland would have no knowledge of the appellant's paternal grandmother.

d.
Although his claim was argued on the basis that he was a member of a particular social group there was no question of his being required to leave the UK at the present time.

e.
His maternal grandmother's whereabouts in Sri Lanka were known and although she was 68 and had high blood pressure and associated problems this would not prevent a teenage boy living with her.

f.
Although institutional care facilities in Sri Lanka were poor and returning S now to face them would be unreasonable, he would not be returning immediately and when he was returned in the future, he would not be in a different position from any other teenage boy in that country.

g.
There was no well-founded fear of persecution for a Convention reason.

h.
There were no substantial grounds for believing that S would face serious harm if returned to Sri Lanka.

i.
Any interference with Article 8 ECHR was justified and proportionate in the circumstances.

<u>The appeal to the Upper Tribunal</u>

8.
The appellant lodged grounds of appeal to the Upper Tribunal that alleged material errors of law in that:-

a.
The fact that the judge refused to permit S and P to use the services of a Tamil interpreter was irrational and flawed.

b.
The judge was wrong to reject the credibility of S's evidence when this had not been put in issue by the Home Office and no intimation had been given that such a course might be taken.

c.
The judge applied the wrong test in not evaluating the asylum claim at the date of the hearing before her on the basis of a hypothetical return of S to Sri Lanka.

d.
The judge was wrong to fail to consider the best interests of S in her decision making.

9.
Permission to appeal to the Upper Tribunal was granted on 20 July 2012, when Judge Brunnen pointed out that contrary to what Judge Clayton had determined, this was in fact an appeal under s.83 NIAA 2002 and the issues for determination were, therefore, confined to the question of asylum only.

10.
In due course, we had the benefit of a typed version of the Judge's notes and a short note summarising events at the hearing from her and we also had a witness statement from Ms Chapman who stood down as advocate in the appeal before us.

Error of Law

11.
It is clear to us and acknowledged by Mr. Bramble that the judge's decision reveals a number of legal errors. We did not trouble Mr Vaughan on this issue. We have had sight of his skeleton argument and an earlier one by Ms Chapman but we conclude that the judge's errors were in some respects even more fundamental than these submissions indicate.

1. Scope of the Appeal

12.
In our judgement, the first error was that noted by Judge Brunnen. The judge was concerned and only concerned with an appeal under s.83 NIAA, that is to say with an 'appeal against the rejection of his asylum claim'. As a result of the decision of the CA in FA (Iraq) [2010] EWCA Civ 696, [2010] 1 WLR 2545 the meaning of the word asylum is to be taken to include subsidiary protection status under The EU Qualification Directive 2004/83.

13.
However, the appeal is not otherwise against an immigration decision set out in s.82 (1) of NIAA. The present right of appeal was confined to whether the appellant was entitled to asylum or humanitarian status or not. The judge was not concerned with independent legal issues, including whether any hypothetical removal would be would be contrary to Article 8 ECHR or the discharge of the statutory duty under s.55 of the Borders, Citizenship and Immigration Act 2009.

14.
The point is emphasised by regard to s.84 of NIAA. It provides that:

'An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds-

(a)
that the decision is not in accordance with the rules

....

(c) that the decision is unlawful under section 6 of the Human rights act 1998 .....as being incompatible with the appellant's Convention rights;

.....

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules.'

The point to note here is that none of these grounds of challenge is available in an appeal under s.83, which is solely concerned with the status of someone who has already been granted leave to remain here.

15.
The point was accurately made by the Asylum and Immigration Tribunal in the case of LQ (Age: immutable characteristic) Afghanistan (above). The Tribunal noted at [2]:

'The Immigration Judge took the view that "the 1951 Convention is not engaged", because the appellant is adequately protected by his leave to remain in the United Kingdom. It was, we think, common ground before us, and it is certainly the case, that that was an error in law. The 1951 Convention goes to status. Section 83 of the 2002 Act entitles an appellant to assert his status as a refugee independently of any risk of removal. It was the Immigration Judge's task to assess whether, at the date of the hearing before him, the appellant had the status of a refugee. His failure to do so amounts to a material error of law.'

16.
As the appellant's skeleton argument points out, there is some link between consideration of whether a claimant is entitled to asylum and the duties owed to him as a child. In our judgement, the impact of a child's best interests in a s.83 appeal is limited to the question whether a child is entitled to asylum or subsidiary protection status. This includes the issue of how the claim should be assessed having regard to the fact that it is made by a child, and whether steps have been taken to trace the child's parents pursuant to the duty on the state under Article 19 (3) of the EU Reception Directive (Directive 2003/9/EC) to 'endeavour to trace the members of his or her family as soon as possible': see AA (unattended children) Afghanistan CG [2012] UKUT 16 (IAC) (01 February 2012) at paragraphs 23-25, 30-34.

17.
There is a need to treat with some caution what the Tribunal in that case said at paragraphs 26-29 of its decision about the application of ZH (Tanzania) [2011] UKSC 4 to asylum adjudication as ZH was not an asylum case. Lady Hale, with whom the other members of the Supreme Court agreed, asked "in what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?"

18.
Neither this appellant nor his carers were being refused leave to enter or remain or being removed. We recognise the Tribunal based this part of its reasoning on some of the observations of the Court of Appeal in DS (Afghanistan) [2011] EWCA Civ 211.

19.
The narrow focus of the Tribunal's jurisdiction under s. 83 does not appear to have been discussed in either AA (Unattended children) or indeed in the decision of the Court of Appeal in DS (Afghanistan) . The subsequent decision of the Court of Appeal in HK (Afghanistan) [2012] EWCA Civ 315 indicates that what was being considered is the nexus between the tracing duty and the claim to asylum. The government's contentions that there was no such link were rejected at [39] to [40] per Elias LJ.

20.
We accept that a failure to take reasonable steps to endeavour to trace a child's parents or carers could have an adverse impact on the issue whether the child was at risk of harm in the country of origin as an unaccompanied child. However, where this arises as an issue it would be helpful for the claimant and his legal team to identify precisely what it is that is said should have been done. We observe:-

a.
The endeavour to trace depends on the information provided by the claimant and co-operation between claimant and respondent.

b.
International organisations like the Red Cross, the International Organisation for Migration (IOM), and UNICEF do not act at the instigation of governments but at the request of individuals. If a claimant wants the Home Office to approach an international body for assistance, s/he will probably need to sign a letter of authority to ask them to do so.

c.
Diplomats may be unable to enter a war zone and would need to be cautious about contacting the authorities of the state in question where there is a risk to the life of the child or the relatives if such inquiries are made (as Article 19(3) itself makes clear).

d.
The Court of Appeal in EU (Afghanistan) [2013] EWCA Civ 32 observed at [10] that a perception of self interest might provide a claimant with an incentive not to cooperate with the authorities or provide accurate information.

21.
For completeness we indicate that we accept that the UN Convention on the Rights of the Child and other child-based instruments, have relevance for the assessment of whether the harm that a child might face in the country of origin is serious enough to engage international protection or whether any well founded fear of persecution is for a Refugee Convention reason.

22.
We have no doubt that if a real risk of harm to S on return is made out in this case, either because of risk arising from the conduct of his parents or because S, or any child without family or friends to turn to, was highly vulnerable to sexual abuse in one form or another, an asylum claim or a claim to humanitarian protection could be made out. We accept that children can be a social group and face a real risk of persecution as such: children under one year old in King Herod's Bethlehem being an obvious case in point. That does not mean that any risk of serious harm that might happen to a child in his or her country of origin necessarily makes that child a refugee.

23.
Further, we recognise that the welfare of the child is an important issue for the Secretary of State in a s.82 (1) appeal against an immigration decision, particularly if the decision in question is to remove a child out of the jurisdiction. In this case, if the judge had indeed been properly considering that question, her decision would have been flawed for the reasons given in the grounds of appeal, namely that she has completely failed to consider S's best interests and welfare.

24.

In a s.82 appeal, these factors would be weighty ones in a case concerning a 10 year old child. The duty to consider them arises directly under s.55 of the Borders, Citizenship and Immigration Act 2009 and indirectly under Article 8 in considering the justification for interference with the private life of S. The law has been clarified at the highest level in the UK (notably ZH (Tanzania) itself) and at Strasbourg (Maslov v Austria 2008 ECHR 1638/03) and it is plain that an interference would not be justified if the criteria identified in other instruments of international law, notably Article 3 UN Convention on the Rights of the Child, are not met. We do not know what future decision will be taken in the case of S if it is concluded that he is not entitled to asylum, but we would be very surprised on the present information, if in 2015 it were to be concluded that removal to Sri Lanka was compatible with Article 8 and his best interests.

25.
However we cannot consider a contention that in addition to considering whether the appellant is entitled to the status of refugee or humanitarian protection, there is an independent duty to consider whether the reception arrangements on return are sufficiently well established to be in accordance with the child's best interests is compatible with the statutory regime applicable in a s.83 appeal. This is because there has been no decision to remove and no appeal against such a decision. The grounds of appeal in a section 83 appeal are limited to refugee or equivalent status and do not encompass the failure to comply with other duties including whether the decision is in accordance with human rights reasoning or otherwise in accordance with the law.

26.
Although we understand, in the light of the difficult previous case law why the judge embarked on the Article 8 assessment, on our analysis she was not entitled to do so in this class of appeal. We, therefore, set aside her decision in this respect.

2. Material date

27.
The judge's second error was in respect of the material date to assess risk on return. It is clear that the grant of the status of refugee cannot be evaded by the respondent in effect saying that although there is a risk of ill-treatment today, the Secretary of State proposes to grant discretionary leave to remain until the risk has diminished. Where an asylum claim is determined substantive and the criteria for the status are met, there is a right to the status, albeit one that can be made subject to the cessation clauses: see LQ (above).

28.
The Court of Appeal in Saad, Diriye and Osorio [2001] EWCA Civ 2008 [2002] Imm AR 471 said very much the same thing at [65]. Further that decision dealt in detail with the relevant date for fact-finding in asylum cases. Although it was concerned with the provisions of an earlier statute, its conclusions still hold good. Following a discussion we reproduce in Annex A to this determination it concluded:

1.
What emerges from this analysis is that, where an appeal is brought under section 8(1), the appeal tribunal will necessarily have to determine the refugee status as at the date of the hearing of the appeal. It follows that such an appeal provides a satisfactory vehicle for mounting a challenge to the Secretary of State's rejection of an asylum claim.

2.

The same is true of an appeal under sub sections 8(3) and 8(4). In each case the decision facing the tribunal is the hypothetical one of whether removal would be contrary to the Convention at the time of the hearing - i.e. on the basis of the refugee status of the appellant at that time.'

29.
The judge was therefore wrong to respond to the submission that the appellant was entitled to refugee status because of present risk by concluding that any risk of harm to the child would be diminished at the unspecified time in the future when the child (or former child) might actually return. What is required is an assessment of risk on the hypothesis that the child is being returned at the time of the decision on appeal. Her decision on the substantive asylum claim is therefore flawed and must be set aside.

3. Credibility

30.
The third error made by the judge was to revisit the credibility of the account of the appellant when that had not been raised by the Home Office in the decision letter. We accept that if there was an evidential basis to do so, the judge would not be bound by the approach of the decision maker. However, a long-established body of Tribunal case law has made clear that before a positive Home Office assessment of credibility is departed from by the judge, the claimant or his/her legal team must be alerted and given the appropriate opportunity to address any concerns that the judge may have had. Guidelines were first given by Mr Justice Collins in the case of Surendran in 2000 annexed to the decision in MNM v SSHD [2000] INLR 576. In the case of WN (Surendran; credibility) DRC [2004] UKIAT 213 the Tribunal reaffirmed these guidelines with some modifications to enable immigration judges to avoid the opposite error of being too intrusive in the primary investigation of the facts of the case. Ouseley J President said:

33. Where guideline five applies because no matters of credibility have been raised in the refusal letter, and there is no new material before the Adjudicator, the Adjudicator should raise any issues which concern him, as guideline five says. But as with guideline four, it is proper for the issue to be raised by the Adjudicator himself directly in questions of a witness, subject to the same caveats as to timing, content, manner and length. The Adjudicator must here be especially careful not to invent his own theory of the case and must deal with what are significant problems, not minor points of detail. In this situation, it is much less likely that an Appellant would be aware that his credibility was under consideration if it were not raised with him, and it is unlikely to be fair for the issue to be raised in the determination for the first time.

31.
It is plain from the record of proceedings that this was not done. We recognise that in the case of a child of this age, any concerns would have to be expressed to the advocate and we consider below whether the child should have been called as a witness at all. Nor can we see any rational basis of concern arising from the evidence submitted by the appellant since the Home Office decision. If the Judge would have welcomed the chance to hear the paternal aunt in Liverpool in person she could have said so, but nothing said or done by this appellant could support a conclusion that his account fundamentally lacked credibility, that is to say was incapable of belief. Again we set aside the finding of the judge as to credibility.

4. Lack of interpreter

32.

The fourth error made by the judge was the manner in which the appellant came to give evidence. From the materials before us it seems that the decision was taken to dispense with the interpreter before the appellant was asked to give evidence. If so, we find this to be very surprising decision.

33.
There were four documents indicating that the appellant wished to speak through an interpreter: his SEF form where he said he only spoke Tamil, his two witness statements, and the response to directions. It was particularly important for care to be exercised as to the manner in which a child gives evidence. It was not open to the judge to ignore this material at the outset. If in the course of giving evidence it was apparent that a witness's English was so well developed that an interpreter was unnecessary the position might be different, but as we understand Ms Chapman's evidence the interpreter had been dispensed with before the case was assessed.

34.
We find no such error in the judge's approach to P's evidence. He was settled in this country, worked in a garage here and was an accredited foster carer. His witness statement was made without any reference to translation or interpretation and there was no suggestion that he required an interpreter before the hearing on 18 June. He told the judge he was nervous but that did not mean he had insufficient understanding of English to speak in the language of his place of residence and nationality. On investigation the judge was satisfied that his comprehension was perfectly good and nothing has been placed before us to doubt that conclusion.

5. Evidence of a child

35.
For completeness we indicate that there was a further error of law in the judge's decision-making. We cannot understand how the appellant came to be in the witness box at all. He was 10 ½. He had not been interviewed on his claim by the Home Office. His experienced legal team were not proposing to tender him. There was no ambiguity in his evidence that required clarification or amendment. The judge did not explain that despite the approach of the Home Office she proposed to doubt the claimant's credibility.

36.
Although there can be no hard and fast rule, we would be very concerned if children below the age of 12 were expected to give contentious evidence in an asylum or other immigration appeal, without the express consent and support of their parent or guardian or appropriate adult. We acknowledge the fact that children younger that this age have given evidence before the criminal courts, but in these cases there have been extensive arrangements to support the child before, during and after the testimony in question. Such arrangements are outside the resources and the procedures adopted by the First-tier or Upper Tribunal and very careful consideration would need to be given to the child's best interests and welfare before a Tribunal judge of his or her own motion asked such for an appellant to go into the witness box.

37.
The criteria are in fact set out in the Senior President's Practice Statement of 30 October 2008 'Circumstances Under Which a Child Vulnerable Adult or Sensitive Witness May Give Evidence'. The Practice Statement is found at http://www.justice.gov.uk/tribunals/practice/practice-directions and is also annexed to Presidential Guidance Note No 2 of 2010 on the issue as Annex B.

38.

Paragraph 2 of the Senior President's Practice Statement puts the matter succinctly:

'A child… will only be required to attend as a witness and give evidence at a hearing where the tribunal determines that the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so.'

39.
Paragraphs 3 and 4 of the Direction state that a judge considering such a course must consider representations from the parties and interested persons. The record suggests that the judge did not raise, either with Ms Chapman as advocate or P as responsible adult, whether it was necessary for S to give evidence at all. Nor did she invite representations on the welfare arrangements to enable her to do so. The questions asked of S were negligible and overall we can see no reason why it was necessary for him to give evidence.

40.
This does not mean that whenever a child of tender years makes a witness statement, the Home Office or the judge must accept its accuracy. However careful thought needs to be given to the question why a child of such age should be called. If it was because of concerns about credibility that had not been taken in the decision letter, this should prompt the judge to ask whether it was appropriate to ventilate those concerns at all, and whether if so there were other means of doing so.

41.
For all these reasons we find each of the errors of law, set aside the decision in its totality and start again.

Re-making the decision

42.
When we indicated that the judge's factual findings were to be set aside, Mr Vaughan submitted that we should remit the case to start again before the First-tier Tribunal. He pointed out the terms of the Senior President's Practice Statement of 25 September 2012 broadening the class of case where the Tribunal might remit an appeal for a fresh hearing.

43.
It states:

'7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Re-making rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.'

44.
We have that statement well in mind, but do not consider that the present case should be remitted to the First-tier. We consider the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and reach our conclusion for the following reasons:-

a.
We propose to adopt the same course as the Home Office and presume that the appellant's statements are or may be true. We do not intend to invite S to give evidence or doubt his credibility. There is no need for a fresh fact-finding assessment on that issue, by contrast with the normal class of case mentioned in the SPT's Practice Statement.

b.
The real issues in the case are an evaluation of the documentary evidence placed before the First-tier Tribunal as to the prospects of risk to the appellant on the hypothesis that he were to be returned to Sri Lanka at the time of the hearing.

c.
There are some challenging legal questions arising out of the way the appellant has put his case, in the witness statements and skeleton arguments. It is appropriate for the Upper Tribunal to deal with these matters.

d.
We consider that expedition in decision-making is particularly important where the future of a young child is concerned. Ten months have passed since the decision was taken in the First-tier and an authoritative decision is needed to be reached.

e.
Remitting the matter to the First-tier with the risk that it may return to the Upper Tribunal in the future is neither necessary nor proportionate and would contribute to delay rather than avoiding it.

45.
We therefore will re-make the decision for ourselves.

Adjournment for further evidence

46.
Mr Vaughan then submitted that having decided that there was an error of law we should adjourn the case for further evidence to be adduced. In opening his appeal and in a response to a request from us, he identified four heads of further evidence:

a.
Evidence about fresh information received from the appellant's relatives that his parents had been located alive and well in India.

b.
Further information that may be available from his paternal aunt in Liverpool as to the state of health of his maternal aunt in Sri Lanka.

c.

A report from an expert in child trafficking as to the mechanisms by which children without adequate social protection can fall into the clutches of traffickers or other abusers of children.

d.
A fourth report from Professor Good dealing with any change of circumstances that may have taken place in Sri Lanka.

47.
By the end of the hearing, having taken us with care through all the documentary material relied on in support of the appeal, and having taken instructions from his very experienced solicitor he did not pursue the first three applications, but limited himself to the fourth.

48.
He reminded us of the Ravichandran principle (see Annex A Saad at [50]) that the appellate authority acts on the up to date information about country conditions pertaining at the time of the appeal. We accept that, but nobody has suggested that there has been any material change in circumstances as to the risks faced by young children in Sri Lanka between June 2012 and today.

49.
Mr Vaughan did not suggest there had been any such change but wanted to instruct an expert to make sure whether there had been. Thus additional cost and delay would result but on the speculative basis of a possibility. Although Mr Bramble did not oppose the application we do not consider that such a course was necessary or in the interests of justice.

50.
We noted that the directions for hearing this appeal included the standard directions that any evidence that was intended to be adduced in the event of re-making should be produced in advance of the appeal. Mr Vaughan submitted that the Legal Aid authority does not authorise further expenditure on experts' reports until it is known that a decision is to be remade. We cannot comment on the funding practices of the present authority, but consider it would be unfortunate if they were to frustrate the way in which the Tribunal delivers justice in accordance with the overriding objective once permission to appeal has been granted. There is a risk that if cases cannot be re-made summarily by adding to the data already available they will result in greater costs and delay in the form of fresh claims and subsequent litigation. We doubt that production of an expert's report is necessary to discover whether there is a reasonable likelihood of changed circumstances.

51.
The real issue in the case was identified and explored at hearing before us. In our judgment this was not whether sufficiently suitable child care arrangements had been identified by the Secretary of State on the hypothetical basis that the appellant was to be returned at the date of the hearing, but whether the appellant was at real risk of serious harm if (hypothetically) he were to be returned at the date of the hearing because he was an unaccompanied child. Much of what Professor Good had previously reported on seemed to be directed to the former rather than the latter issue.

52.
We also explored at the hearing the proposition that the appellant was at risk because he was a Tamil child of parents who had joined the LTTE, but it was apparent that this had understandably not formed the main part of the appellant's case below. There was no evidence to suggest that he had been ill-treated in Sri Lanka for this reason even though he had spent 10 months in a military camp for protection reasons at the height of the final battle. He was not of an age when anybody could

reasonably suspect he had been recruited by the LTTE as a child soldier. There was no evidence that children as young as this appellant is had been ill-treated inside or on return to Sri Lanka for this reason. No further evidence or argument was needed to address that contention.

53.
We, therefore, did not consider that further factual material was necessary to properly determine this appeal. It had been very thoroughly and professionally prepared for the previous hearing before the First-tier. There was no reason to believe that the risks to unaccompanied young children had increased or the assistance that could be offered by the state agencies or others to assist young children had changed.

54.
In announcing our decision on this question, we did indicate that the re-made decision would not be promulgated for 21 days following the hearing and if any written information were supplied on behalf of the appellant that might change the picture as presented to us we would consider it before reaching our decision.

55.
On 17 May we received by fax a fourth report from Professor Good and a short skeleton argument expanding the appellant's submissions. We comment on these below.

Re-making the appeal

Ill treatment as a Tamil

56.
For the reasons set out at [52] above we consider that there is no reasonable degree of likelihood that the appellant would be at risk of harm because of his Tamil ethnicity and the actions of his parents. The Home Office decision carefully examined the risk factors addressed in previous Country Guidance decisions and we agree with those assessments. Professor Good's point was that no regard had been had to the fact that young children do not have identification documentation issued to them. We are satisfied this is not a source of risk. The decision maker indicates that were the appellant to be returned some form of documentation would be obtained to satisfy the Sri Lanka authorities. In any event, if, in Sri Lanka, no child of 10 years of age is eligible for a national identification card, its absence cannot be the basis of suspicion or ill treatment.

Ill treatment as an unaccompanied child

57.
The appellant's core claim was his vulnerability to sexual abuse if he were hypothetically returned to Sri Lanka at present. Mr Vaughan submitted first:-

a.
He has lost touch with his parents, siblings and the paternal aunt who looked after him when his mother handed herself in to the LTTE.

b.
There is a maternal grandmother who lives in the north of the island but the information from SV is that she is elderly, in poor health and not fit enough to care for S. This is not the grandmother who looked after S before he went in to the military camp. Her village was devastated during the war and living conditions are harsh there.

c.
It would not be practicable or reasonable to expect the aunt to make a journey to Colombo to collect S.

58.
Mr Vaughan then referred us to the documentary information showing a serious problem of the sexual abuse of children in Sri Lanka. Young boys it seems have been the targets of the unwelcome attention of foreign paedophiles and/or trafficking gangs. Unaccompanied children who are street children and live off their own resources are likely to be the victims of such predators whether unwittingly or not.

59.
Although there were state orphanages and institutional care for Sri Lankan orphans and children who had become lost or abandoned during the conflict, Mr Vaughan submitted that the documentary evidence demonstrated that the international community and others considered these homes were unsuitable. There was some evidence that young girls had been sexually abused whilst resident in them.

60.
Mr Vaughan drew attention to Professor Good's critical comments on SOS Children's Villages and the fact that the villages already built were in the Sinhalese rather than Tamil areas and to assign S to an institution in the wrong linguistic condition would deprive him of his rights to cultural heritage. Professor Good quoted from the organisation's web site to note that it had run an emergency care centre in the north of Sri Lanka and had moved children into rented houses in Jaffna pending completion of a new village there.

61.
We acknowledge the references in the documentary material to the risks of sexual abuse faced by young boys in Sri Lanka. A press report in the 'Peace and Conflict Monitor' dated 20 February 2012 gives a general flavour of this material (Bundle B1):

"According to UNICEF's estimate, over half of the 30,000 child sex workers in Sri Lanka are boys. Hope for the Nations, a non profit organisation working in Asia, goes further to say that as many as 30,000 boys are involved in Sri Lanka's sex trade. Many are known as 'beach boys' because they are often forced to work by those who own property along the coastline. Child sex tourism in Sri Lanka involves young boys who are offered to European, American and Asian tourists, sometimes as part of vacation packages. It has been reported that the number of child abuse cases has increased every year over the past decade. Children's rights activists are quick to warn that thousands of cases go unreported. With approximately 40,000 child prostitutes - more than half of them boys - Sri Lanka has been described as 'a paedophile's pleasure centre'. Extreme poverty and years of civil war have left many children homeless and easy prey for sexual predators and traffickers. Sometimes boys and girls as young as three years old are captured. Others are sold to pimps for a few dollars by their desperately poor guardians or family members".

62.
We also note the view of the National Child Protection Agency (NCPA) recorded in a BBC report of 9 September 2011 (Bundle B 6) that all children's homes should be shut down. There are 20,000 children in 470 institutions throughout the country, most of which are privately run and 22 are government run. The commentator noted a case where a guardian of a care home was charged with sexual abuse of under age girls in his care. The NCPA had raided a number of children's homes

suspected of child abuse. It wanted to move towards a system of foster care and it is reported that 130 children in Mannar and Killinochi who had been placed in homes had been moved to foster care.

63.
We note without repetition or further description the other passages to which Mr Vaughan took us in the bundle, in particular paragraphs 21.01 to 22.05 of the UK Country of Origin Report of March 2012 on Sri Lanka, concerned with children and trafficking.

64.
We have had regard to the 4 th Report of Professor Good dated 9 May 2013. Despite its 85 paragraphs and the addition of further pieces of information we do not consider it substantially changes the evidential picture before us at the time of the hearing:-

a.
Paragraphs 7 to 19 deal with the adequacy of state orphanages and give some examples of children who were engaged in prostitution and placed on remand or in certified schools for rehabilitation running away.

b.
Some mutual hostility between the NCPA and the probation service was noted.

c.
The author noted that it was difficult to comment on the quality of the care offered by NGOs in Sri Lanka.

d.
Paragraphs 20 to 39 deal with the general situation in Killinochi and the surrounding area.

e.
Whilst there were improvements to restoration of infrastructure, there was a significant military presence and some evidence of commercial activities to the detriment of Tamil farmers and traders.

f.
Paragraphs 40 to 63 deal with the position of single women in the north and the risk of sexual violence to women and children.

g.
Paragraphs 64 to 85 deal with absence of prosecution against child traffickers and sexual exploiters of children.

Refugee status

65.
We accept that where a child or young person has a well-founded fear of being trafficked or exposed to sexual abuse, this is a form of serious harm sufficient to engage international protection and can be evidence of a fear of persecution for a Convention reason: usually membership of a particular social group, vulnerable to such form of harm.

66.
In LQ (above) in a brief decision based on the findings of fact of the First- tier judge the Tribunal was satisfied that an Afghan orphan who was under 18 but over the age of 12 who had nobody to turn to for protection was at a real risk of sexual abuse in Kabul, and that risk was in respect of his

membership of a particular social group, orphaned children, age at the time of vulnerability to persecution is the kind of distinguishing characteristic that makes a social group for the purpose of the Refugee Convention: see Shah and Islam [1999] UKHL 20; [1999] 2 AC 269 and K and Fornah [2006] UKHL 46; [2007] AC 412.

67.
However, LQ was not a country guidance case in Kabul stating that all children in Afghanistan are a social group (see the observations of the Court of Appeal in HK (Afghanistan) at [8] to [9] and [36] to [38]). It is even less permissible to move from a finding in a particular case to a general proposition that any child anywhere in the world is a member of a social group and at risk of child-based forms of persecution.

68.
In assessing social group persecution, we remind ourselves of Lord Hoffman's observations in Shah and Islam that questions of particular social group and persecution for a convention reason need to be assessed against the particular social context and the question of discriminatory denial of protection:

' To what social group, if any, did the appellants belong? To identify a social group, one must first identify the society of which it forms a part. In this case, the society is plainly that of Pakistan. Within that society, it seems to me that women form a social group of the kind contemplated by the Convention. Discrimination against women in matters of fundamental human rights on the ground that they are women is plainly in pari materiae with discrimination on grounds of race. It offends against their rights as human beings to equal treatment and respect'

. and

'What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention. As the Gender Guidelines for the Determination of Asylum Claims in the UK (published by the Refugee Women's Legal Group in July 1988) succinctly puts it (at p. 5): "Persecution = Serious Harm + The Failure of State Protection.'

69.
It is also well established that state protection does not have to be so effective as to eliminate the risk of harm on which the claim for refugee protection is founded: see Horvath [2000] UKHL 37; [2001] 2 AC 489 per Lord Hope:

' I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consist of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, do

not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy.'

70.
It is also clear that a similar approach to sufficiency of protection applies to a risk of harm under article 3 of the ECHR : see Bagdanavicius [2005] UKHL 38; [2005] 2 AC 668 per Lord Brown at [24]:

'The plain fact is that the argument throughout has been bedevilled by a failure to grasp the distinction in non-state agent cases between on the one hand the risk of serious harm and on the other hand the risk of treatment contrary to article 3. In cases where the risk "emanates from intentionally inflicted acts of the public authorities in the receiving country" (the language of para 49 of D v United Kingdom 24 EHRR 423 , 447) one can use those terms interchangeably: the intentionally inflicted acts would without more constitute the proscribed treatment. Where, however, the risk emanates from non-state bodies, that is not so: any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection. If someone is beaten up and seriously injured by a criminal gang, the member state will not be in breach of article 3 unless it has failed in its positive duty to provide reasonable protection against such criminal acts.'

71.
From the information before us, the situation of children in Sri Lanka is materially different from that of children in Kabul. On the evidence noted in LQ, HK and AA, about Afghanistan there was no programme of orphanages for children over 12, and a cultural tradition of sexual abuse of adolescent boys. The governmental authorities appeared at best either indifferent to the need for or powerless to take any effective measures to counteract the risk of abuse.

72.
In Sri Lanka there is a significant community of children caught up or vulnerable to being ensnared in sexual acts with adults whether on a commercial basis or by abuse of trust. This is not a problem unique to Sri Lanka, and concerned commentators could well point to significant examples of exploitation and abuse of children in care and in care homes in parts of the United Kingdom.

73.
In our judgement, there are four answers to the appellant's submissions in support of his claim to refugee status:-

a.
He is not an orphan or an abandoned child. He has a maternal grandmother aged 68 in the north of Sri Lanka with whom contact has been made. Her health and the social conditions is which she lives may well be poor, but in our judgement not sufficiently extreme to make transfer of this appellant to her care amount to a source of serious harm that entitles the claimant to international protection. In any event the grandmother in Sri Lanka is not alone. On the hypothesis of his return to Sri Lanka he has another aunt in Liverpool and an uncle in aunt in Switzerland whom he has contact with who are in a position to contribute to his material support and care.

b.
The authorities in Sri Lanka do not appear to be indifferent or unwilling to take action against those who abuse children whether as foreign tourists or disreputable care home guardians. The problem may be a significant one but raids, arrests and prosecutions may follow. There seem to be a number of institutions to receive unprotected children in the event that family or foster care was not feasible,

some may be of a poor standard but not all are, and the homes and centres run by international organisations seem alert to the challenges facing children and committed to make some difference. Moreover, the concern of the international community about over-reliance on institutional care is being reflected by some of the initiatives of the NCPA to move to foster care. This does not appear to be a discriminatory denial of protection, although we recognise that present means of prevention and protection may be less than sufficient to eradicate the risk of abuse, and there may be examples of corruption where the authorities have not acted against child prostitution in brothels.

c.
The appellant does not appear to fit any of the profiles of the most vulnerable children who may be at risk in Sri Lanka. He has family here and abroad who appear to care for and be concerned about his welfare. He was assisted and protected rather than abused and ill-treated during the time that he lost the protection of his paternal aunt with the bombing in the north. We have taken no account of the information given to us at the hearing that recently it has been established that his parents are alive and in south India, but if this is indeed the case, this is another source of assistance and support from S.

d.
If the Home Office were, hypothetically, to return him to Colombo Airport at the present time, it would be doing so under a legal regime of UK law that imposed a duty to safeguard him and protect him whilst he was under their jurisdiction. At the least this would require the provision of a suitable escort for the appellant on his journey to Colombo. It would also require suitable liaison with the High Commission, any willing family members, international organisations or local social services on his arrival. He would not just be dumped at the airport or the nearest beach.

74.
Mr. Vaughan sketched out a scenario where the appellant may end up in an unsuitable care home in Sri Lanka from which he ran away and then fell unwittingly into the clutches of traffickers. The further written submissions of the appellant seek to develop this argument by cross reference to the fourth report of Professor Good.

75.
We consider this was a speculation on a somewhat remote possibility. It is inconsistent with the factors we have noted at [73] above. Although S has been through some dramatic experiences for one so young, we note that on his account he was out of the protection of family or formal carers from May 2009 to November 2011 but there is no suggestion that he was either ill treated or sexually exploited in this period or that he ran away from institutional care. He has not committed any offence and we see no reason why he would be committed to a reform school or some institutional equivalent if returned to Colombo. By contrast with Afghanistan there was no local practice of sexual exploitation of young boys by local residents; in Sri Lanka the risk of sexual exploitation of boys comes predominately from foreigners. To qualify for international protection a risk of harm must have a reasonable degree of likelihood.

76.
We therefore conclude that on the hypothesis we are required to make that any fear of persecution or serious harm is not well-founded or based on substantial grounds. Any risk of harm is adventitious, speculative and remote from the circumstances of the appellant as they are known to us and the circumstances that would govern any return.

77.

We have not engaged in an exercise of evaluating whether S's best interests and welfare are better served as between the care he receives in the UK and Sri Lanka. That is not the task we are required to perform on a section 83 appeal, although it would be one if there was an actual decision to remove that gave rise to a section 82 appeal. We consider much of the data in Professor Good's four reports is directed at this issue rather than persecution per se . We do not consider that the further data about living conditions in the north of Sri Lanka establishes a new basis of risk and note that the appellant's supplementary submission do not suggest as much.

78.
Nor are we engaged in the task of requiring the respondent to prove precisely the circumstances for his removal and reception in Sri Lanka. This would be unnecessary in a case where the issue is not general welfare assessment on removal but whether the appellant on the known facts is entitled to refugee status. As a matter of practicality, it would be absurd to require detailed evidence of a removal plan: which home will the claimant be admitted to, how will he get there, who will meet him and the like when it is not proposed to remove him at all. We conclude that it is sufficient for present purposes to note the general legal obligations on the Secretary of State (that is to say s.55 of the 2009 Act and Article 3 UNCRC) in the event that the fictional hypothesis on which the appeal is predicated were to be implemented.

Humanitarian protection:

79.
Humanitarian protection under Council Directive 2004/83/EC should be granted where there are substantial grounds for fearing a real risk of serious harm, even if such harm is unrelated to a Refugee Convention reason. In the alternative to his submissions under the Refugee Convention, Mr Vaughan submits that the appellant falls within Article 15 (b) 'degrading treatment' in the country of origin. The duty to grant this status arises where a claimant faces a risk equivalent to those set out in Article 3 ECHR and the exclusion clauses do not apply.

80.
The material distinction between Article 3 ECHR and Article 15 (b) of the Qualification Directive is that Article 3 does not necessarily require the grant of a residence status merely the prohibition of expulsion whereas a Article 15 (b) does require such status to be granted (Article 18).

81.
However for the same reasons as have been set out in the previous section of this decision, we conclude that there are no substantial grounds to fear a real risk of such harm if S were to be removed to Sri Lanka.

Conclusions

82.
The judge's decision contained errors of law. We set it aside and re-make it for ourselves in the light of the materials received and submissions made.

83.
We dismiss the appeal under s.83 NIAA against the refusal of asylum and humanitarian status.

Signed

Date 23 May 2013

Chamber President of the Upper Tribunal

ANNEX A

EXTRACT FROM SAAD, DIRIYE AND OSORIO [2001] EWCA CIV 2008

3.
‘In the case of an appeal under section 8(1) against a refusal of entry, the effect of those provisions appears at first blush to be as follows. It is the duty of the special adjudicator to consider whether the decision to refuse entry was not in accordance with the law on the ground that the applicant was a refugee and, if he considers that the applicant was a refugee, to hold that the Secretary of State's decision was not in accordance with the law and to allow the appeal. The special adjudicator must then give such directions to the Secretary of State as he thinks requisite. By that mechanism, on the face of the provisions, the applicant who is wrongly refused entry on the ground that he was not a refugee, when in fact and law he was, can obtain appropriate redress and have his refugee status (with its attendant Convention rights) recognised.

4.
However the decision of this court in Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97 demonstrates that the position is not quite so simple. In Ravichandran the court was considering appeals under section 8(1). One of the grounds upon which it was sought to challenge decisions of the special adjudicator and the IAT was that their jurisdiction was confined to considering the facts at the time of the Secretary of State's decision and that it was not open to them to rely upon improvements in the situation in Sri Lanka between 1993 when the appellants were refused asylum and 1995 when their appeals were finally dismissed. This court rejected that submission.

5.
Simon Brown LJ, with whom Staughton and Nourse LJJ agreed, recognised (at p 112) that the language of section 19 of the 1971 Act, and indeed the reasoning in earlier non-asylum cases relying upon it, supported the conclusion that the appellate process was simply one of review of the original decision, but expressed his conclusion thus (at pp 112-3):

"I have reached the conclusion that in asylum cases the appellate structure as applied by the 1993 Act is to be regarded as an extension of the decision-making process. I am, I think, entitled to reach that conclusion as a matter of construction on the basis that the prospective nature of the question posed by section 8 of the 1993 Act overrides the retrospective approach ordinarily required (implicitly) on a section 19 appeal. Section 8, after all, could, but does not, identify the ground of appeal as being that the appellant's removal "would have been" (rather than "would be") contrary to the United Kingdom's Convention obligations. Moreover, section 8(1) refers to a particular class of appeals and section 19 to appeals in general. It would be a strong thing to say that the general was to over-ride the particular."

6.
Simon Brown LJ then referred to policy considerations which make asylum appeals different from other appeals and observed that the position might have changed for the better or for the worse since the refusal of entry and concluded that in either event the appellate authorities were not bound to ignore such changes but should take them into account.

7.

Both Simon Brown and Staughton LJJ stressed that the express words of section 8(1) look to the future. Thus the sub-section provides that the appellant may appeal "on the ground that his removal in consequence of the refusal would be contrary to the United Kingdom's obligations under the Convention". (Our emphasis). It was thus held in Ravichandran that it is the duty of the appellate authorities to consider the position as at the time of the hearing of the appeal.

8.
The Secretary of State's "Detailed Statement of Grounds" in support of the application for judicial review in the Afghan hijacking case made the following submission in respect of the wording in the 1999 Act which, so far as here relevant, echoes that of section 8 of the 1993 Act:

"All asylum appeals are hypothetical. They are all concerned with the removal that has not in fact taken place. This is recognised by the wording of s 69(1)-(4) which in each case refer to a removal that the Appellant claims " would be " contrary to the Convention. It is to be noted that the statute does not say " will be ". Although that is not this case, " would be " includes the situation where no removal is in fact contemplated."

9.
In Arif v Secretary of State for the Home Department [1999] INLR 327, where the appellant was not granted refugee status in circumstances in which he should have been and the question was whether by the time of the appeal to the special adjudicator and indeed to the IAT the situation in Azad Kashmir had changed so that the Convention no longer applied to him in accordance with Article 1C(5), which is quoted. This court held that the evidential burden of proving that the appellant ceased to be a refugee was on the Secretary of State. Simon Brown LJ put the point thus at page 331, after quoting a passage from paragraph 12.58 of the 4 th edition of Macdonald's Immigration Law and Practice :

"The sentence I would particularly emphasise there is 'Proof that the circumstances of the persecution have ceased to exist would fall upon the receiving state'. It is true that because of the notoriously long delays which attend our system of asylum hearings the appellant here was never granted refugee status, even though until the change of government in Azad Kashmir in 1996 it is now assumed on all sides that he was strictly entitled to it. It nevertheless seems to me that by analogy, on the particular facts of this case, there is now an evidential burden on the Secretary of State to establish that this appellant could safely be returned home."

10.
That passage draws attention to the course that appellate proceedings are likely to follow. The appellant is likely to focus on the circumstances prevailing at the time that the Secretary of State refused his application for asylum. If he demonstrates that at that time he was a refugee, the evidential burden will shift to the Secretary of State to demonstrate that circumstances have changed so that he has ceased to be a refugee.