Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09908/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 February 2018	**On 22 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR A N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Christie of Counsel
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. The appellant is from the Palestine Territories originating in the Gaza Strip. His date of birth is 11 November 1986. He left the Palestine Territories on 13 February 2008 via Egypt from where he flew direct to the UK. He was using an Italian passport, which his agent had obtained for him. He claimed asylum in the UK on 4 March 2008. The claim was refused by the respondent on 2 April 2008. The appellant appealed against that decision to the First-tier Tribunal. His appeal was dismissed by Judge Hanes and his appeal rights were exhausted on 20 June 2008. Between 2008 and the fresh claim being made on 17 March 2016 it would appear that submissions were made to the Secretary of State in 2009 and further submissions on 22 December 2011, but papers were mislaid. There was a final rejection of those further submissions on 23 June 2015. Following an application for judicial review, settled by the terms of a consent order, the Home Office agreed to reconsider the appellant's case. The fresh claim was made on 17 March 2016 on the basis of the Refugee Convention, international protection and Articles 3 and 8 of the European Convention on Human Rights. The appellant claimed he would face mistreatment as a former member of Al-Aqsa. He has a diagnosis of PTSD. The Secretary of State refused the appellant's claim on 31 August 2016.

The appeal to the First-tier Tribunal

3. The appellant appealed against the respondent's decision to the First-tier Tribunal. In a decision promulgated on 23 May 2017 First-tier Tribunal Judge Freer dismissed the appellant's appeal on Article 8, asylum, and humanitarian protection. He allowed the appeal under Article 3 on medical grounds.

4. The appellant applied for permission to appeal against the First-tier Tribunal's decision and permission to appeal was granted by First-tier Tribunal Judge Page.

The hearing before the Upper Tribunal

5. The appeal was listed before me for hearing on 7 December 2017. A preliminary issue was raised at that hearing by the Secretary of State's representative. It was asserted that the appeal ought to be treated as abandoned under Section 104(4A) of the Nationality, Immigration and Asylum Act 2002 because the appellant had, subsequent to the First-tier Tribunal's decision, been granted leave to remain for a period of 30 months. I adjourned the hearing and gave directions for both parties to make written submissions. Written submissions were provided by both parties. The respondent accepted that in the circumstances of this case the appeal was not treated as abandoned and therefore the matter was listed for a resumed hearing on 16 February 2018.

6. There is a further preliminary issue to be dealt with in this case. In the appellant's skeleton argument for this hearing it has been requested that the Tribunal record in its determination that the appellant is a Palestine national from Gaza so as to avoid any future dispute over the issue. This

issue was originally pleaded in ground 1 of the appellant's grounds of appeal. The respondent in the Rule 24 response stated that Judge Freer did make clear findings that the appellant was Palestinian and from Gaza, and on that basis the appellant withdraws the ground of appeal that requests that there is a formal record that this is a finding of the judge. The decision of First-tier Tribunal Judge Freer is rather confusing on this matter. If I were deciding whether or not ground 1 was made out I would have been inclined to agree with the position asserted in the grounds that no clear findings were made in this regard. At paragraph 129 of the decision the judge set out:-

> "The appeal is allowed but only on human rights under Article 3 ECHR. It is predicated on an educated guess, having heard all the evidence about his birth family, that he originates from Gaza, otherwise he does not succeed at all."

The Secretary of State in the Reasons for Refusal Letter did not take any issue with the appellant's assertion to be from the Gaza Strip. It does not appear that this issue was canvassed during the hearing before the First-tier Tribunal Judge. The appellant does not appear to have been given an opportunity to address this point, either at the hearing or by way of post-hearing submissions. In the decision of First-tier Tribunal Judge Hanes in 2008 he found that the appellant '*is a person who emanates from the Palestinian authorities. His last place of residence was in Gaza'.* I therefore record as requested by the appellant that the appellant is a Palestinian national from Gaza.

7. At the hearing before me on 7 December 2017 the respondent's representative indicated that the position of the appellant's wife and child would be investigated. Essentially ground 6 of the grounds of appeal assert that the appellant's wife and son should be treated as dependants on his claim and that the First-tier Tribunal erred by failing to make a finding on that issue. Ms Everett submitted that this Tribunal has no jurisdiction to treat the appellant and his child as dependants. She submitted that there was a letter from the Home Office in 2016 in which they declined to treat them as dependants and required them to send further evidence. She submitted that the appellant's wife and his son did not arrive with the appellant in the United Kingdom and therefore they do not meet the requirements to be added as dependants on the appellant's protection claim. She submitted that there were other avenues available to the appellant's wife and son in that they could make their own applications either for asylum or for leave to remain in the United Kingdom. No decision has been made in relation to the appellant's wife or son and therefore the Tribunal has no jurisdiction to consider that issue. She suggested that anybody could be added as a dependant in circumstances where clearly they cannot be dependent. Therefore it cannot be the case that a Tribunal is seized of matters where no decisions have been made.

8. Ms Christie handed up a copy of a letter that was in the bundle from the appellant's solicitors in March 2016 asking for them to be added as

dependants on the appellant's asylum claim. This establishes that the Home Office were asked in March 2016 to add them as dependants. The Home Office had the necessary evidence to make a decision regarding whether they qualified as dependants. She referred to the Reasons for Refusal Letter which confirms the documents that were submitted. There is nowhere that the Home Office refuses that application to be added as dependants. She referred to page 8 of the Reasons for Refusal Letter where the Home Office set out that they had not considered the wife and son because neither of them appear on the asylum claim. She referred to the Home Office's guidance and submitted that the Home Office had not followed their own guidance. She referred to tab A at A2 of the appellant's bundle which contains the skeleton argument before the First-tier Tribunal which clearly sets out as a preliminary issue the appellant's wife and son as dependants. The skeleton argument refers to the requirements of paragraph 349 of the Immigration Rules and reference is made to the respondent's policy of dependants and former dependants of May 2014 at paragraph 3.8. She submitted that it is not a requirement for the appellant's wife and son to be part of the pre-flight family. She submitted that the Tribunal has jurisdiction to consider all matters raised included in the Reasons for Refusal Letter. There may be issues that have not been fully determined in the Reasons for Refusal Letter, however if those issues are raised at a Tribunal, Tribunals often then go on to make a finding. The issue of the appellant's son forms part of his human rights claim. The wife and son do not need to have a separate decision to be considered by reference to the human rights claim. The reason the Tribunal has jurisdiction to consider all matters raised as part of a decision otherwise it would lead to appellants having to judicially review part of a decision. The First-tier Tribunal did not consider that it did not have jurisdiction, it just failed to make a finding.

9. In response Ms Everett submitted that being a spouse and a child does not automatically mean they satisfy the requirements to be dependent on a protection claim. If the appellant's wife and child feel they should have been given a decision and were not, the proper course of action would have been to initiate judicial review proceedings. There are a number of avenues available to the appellant's wife and child.

10. Ms Christie responded that the First-tier Tribunal did not make a decision. There is a lack of understanding at why the Tribunal did not reach a decision on this issue. The Tribunal should make a decision if the people qualify as dependants. Where issues clearly have not been determined by the Secretary of State the Tribunal decides those issues all the time.

11. Moving to the substantive issues in this case the grounds of appeal are lengthy. Only grounds 3, 5 and 6 are now pursued. Ground 3 asserts that the judge erred in his consideration of the risk to the appellant on the basis of the dire humanitarian situation in Gaza, the appellant's personal circumstances, and the consequent risk of him suffering inhumane and degrading treatment. The judge relied on the considerably outdated 2011 country guidance case of **HS (Palestinian – return to Gaza)**

Palestinian Territories CG [2011] UKUT 124 holding that there is no case for showing widespread risks of serious harm to the level expected in Article 3 ECHR. It is asserted that the judge failed to consider up-to-date evidence on the humanitarian situation in Gaza. The evidence submitted to the First-tier Tribunal details the severe poverty, internally displaced people, lack of humanitarian assistance and reconstruction since the 2014 hostilities, inability to access food and clean water, destruction of homes, schools, hospitals and other vital infrastructure and the increase in violence since October 2015. Whilst the judge acknowledges that the blockade forces the people of Gaza to live in a state of perpetual humanitarian crisis and Oxfam reports that Gaza will be unliveable by 2020, he did not consider whether someone with the appellant's particular vulnerabilities would face a real risk of inhumane and degrading treatment if returned to such conditions. The judge failed to consider whether the appellant's vulnerabilities expose him to a risk of harm. His mental health, lack of housing, lack of family or other support structures and inability to sustain himself were all relevant to the determination of whether he faced a risk of suffering inhumane and degrading treatment on return to Gaza. The judge made factual findings without an evidential basis. The judge found that the appellant knows people in Gaza and that he can rely on support. The judge accepted that in 2014 the appellant lost fourteen of his relatives in a missile attack (see paragraph 79). The judge did not specify who the people who the appellant could rely on might be. No consideration was given to the appellant's evidence that he has no contacts in Gaza and that he does not know if his remaining family are alive.

12. Ms Christie referred to the Home Office guidance on humanitarian protection at page 12 referring to the paragraph which sets out:

> "There may be exceptional situations where conditions in the country, for example, absence of water, food or basic shelter, are unacceptable to the point that return in itself would constitute inhuman and degrading treatment for the individual concerned. Factors to be taken into account include age, gender, ill-health, the effect on children, other family circumstances, and available support structures."

and at page 13:

> "Decision makers must consider a claimant's ability to cater for their most basic needs, such as food, hygiene and shelter, their vulnerability to ill-treatment and the prospect of their situation improving within a reasonable timeframe."

She submitted that the judge has not considered humanitarian protection under Article 15(b). She referred to paragraph 100 of the First-tier Tribunal's decision where the judge set out correctly the relevant case. The judge looked solely at the country guidance case of **HS** and said there is no case law showing widespread risks of serious harm to the level

expected in Article 3 ECHR. That is the only consideration the judge gave to humanitarian protection under 15(b). It is clear from the decision under the heading of "Humanitarian Protection" at paragraph 105 that the judge considers only Article 15(c) of Council Directive 2004/85/EC, the Qualification Directive. There are three main errors in the judge's approach as set out in the grounds. The judge failed to apply the findings regarding the appellant's mental health to a consideration of the humanitarian protection claim as to whether as a result of his mental health condition he would suffer inhumane and degrading treatment.

13. Ground 5 asserts that the judge failed to determine whether the appellant's return to Gaza would breach his or his family's Article 8 rights. The judge accepted that there is no possibility of a Gaza resident relocating to the West Bank or vice versa, but failed to consider the consequences of this and the family life of all members of the family in violation of **Beoku-Betts v SSHD [2008] UKHL 39**. Their son was born in the UK and is undocumented. The judge set out that he was "told not to weigh up" the appellant's wife's case. This is incorrect. Counsel for the appellant submitted that any potential asylum issue arising out of the risks to the appellant's wife need not be determined as she had not made an asylum claim in her own right. The judge was required to consider the appellant's wife and son's Article 8 rights when considering the effect of removal of the appellant. The judge failed to consider the Supreme Court's guidance on precariousness in **Agyarko v SSHD [2017] UKSC 11** where Lord Reed stated, at paragraph 52, that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish, or the weight to be given to precarious family life is liable to increase if there is a protracted delay in the enforcement of immigration control. It was submitted that in circumstances in which the appellant, his wife and son are unable to live together abroad as they originate from different parts of the Palestinian Territories, removal would result in family rupture so precariousness cannot affect the weight to be accorded to their family life. The judge erred in his consideration of the best interests of the appellant's son to be brought up with both his parents, again failing to consider the issue of family rupture. While finding it is not likely that the child would prosper in Gaza he simply finds that the child is not a trump card. This is not a lawful consideration of the best interests of the appellant's son under Section 55 of the 2009 Act. The judge erred in discounting the absence of medical treatment in Gaza on the basis that health resources are being used in the UK. The finding that the appellant was not removable counts against the respondent's seven-and-half year delay undermines the dicta in **EB (Kosovo) v SSHD [2008] UKHL 41**. The judge erred in considering the issue of whether the appellant's lack of identity document would prevent his return to Palestine. There was a flawed reasoning and lack of evidential basis for finding the appellant to be a danger to the public. Ms Christie submitted that the entire consideration of Article 8 is unclear. She submitted that there are unusual circumstances in this case because the appellants cannot live together in Palestine which would amount to a flagrant violation of their family life.

14. Ms Everett submitted that the judge did only consider Article 15(c) and did not consider Article 15(b) However, there is a massive overlap with regard to Article 3 so the findings on Article 3 having already been made led to the judge finding the humanitarian situation is not such that the appellant would be subject to indiscriminate violence, a finding open to the judge. She accepted that the grounds with relation to Article 8 gave rise to a more vexing argument. The appeal was allowed on human rights with regard to the Article 3 medical claim and therefore any findings on family life and any misdirection would not be material because the appellant is not being removed. It is difficult for the judge, having found that the appellant cannot be removed on the basis of human rights (in this case Article 3), he has to look at a hypothetical situation with regard to Article 8. She submitted that there was not enough evidence to make a finding that the appellant's wife could not return to Palestine. The judge is looking at the issue in the abstract. The evidence that was there before the judge is insufficient for the judge to reach the conclusion that the UK was the only place that the appellant, his wife and child could continue family life.

15. Ms Christie submitted that the judge was required to determine the appeal on the basis of Article 8, notwithstanding a finding that it would breach the appellant's human rights to be removed on the basis of Article 3. It is incumbent upon a judge to decide all matters raised in an appeal.

Discussion

16. There is no appeal against the decision with regard to the appellant's claim for asylum and the findings of the judge in relation to the appellant's account of events. The judge set out under the heading of "International Protection" the following:

> "95. There is no credible basis for finding a valid protection claim. The 2008 findings of IJ Haynes must be accepted as the starting point. My other points make it even more difficult for the Appellant. The Home Office was broadly right.
>
> 96. …"

17. With regard to risks facing the appellant on return to Gaza the appellant argues that the judge simply relied on **HS** and failed to consider up-to-date evidence on the humanitarian situation in Gaza and did not consider the appellant's particular vulnerabilities (mental health, lack of housing, lack of family or other support structures). They were all relevant to the determination of whether he faced a risk of suffering inhumane and degrading treatment on return to Gaza.

18. I accept that the judge has not specifically referred to Article 15(b) of Council Directive 2004/85/EC. Article 15(b) provides:

> '(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'

19. There is a high threshold to succeed in a claim under Article 15(b). In **HS** it was held:

> "224. As regards the general socio-economic and humanitarian situation in Gaza, there is on the whole common ground in the evidence provided by both sides, although some of the evidence on the part of the Secretary of State indicates some small level of improvement in various respects. There has to be shown to be a severe deprivation with denial of shelter, food and the most basic necessities of life for the appeal to succeed. It is relevant to note the conclusion of the AIT in AM & AM (Armed conflict – risk categories) Somalia CG [2008] UKAIT 00091 that to succeed in a claim for protection based on poor socio-economic or dire humanitarian living conditions under the Refugee Convention, Article 15 of the Qualification Directive or Article 3, the circumstances would have to be extremely unusual (see e.g. para 157)."

20. In **M'Bodj v Etat Belge (case C-542/13**) it was held that the risk of deterioration of health of a third country national suffering from a serious illness as a result of the absence of appropriate treatment in his country of origin was not sufficient to warrant the grant subsidiary protection unless the person was intentionally deprived of health care. It was not argued that there would be any intentional deprivation of health care.

21. The judge has considered the relevant factors and made a finding that the up to date evidence provided with regard to the humanitarian situation in Gaza is insufficient to show a widespread risk of serious harm to the level expected in Article 3 ECHR cases (paragraph 100). The appellant argues that this is the only consideration given by the judge to Article 15(b). However, there is a significant overlap between Article 15(b) and Article 3. The same factors are relevant and have been considered by the judge. The judge set out:

> "101 I rely on the country guidance case of HS. There is no case law showing widespread risks of serious harm to the level expected in Article 3 ECHR …
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> …
>
> 102 There may be some basis for believing that his family home was attacked by Hamas before he left. He has never been a Hamas supporter. They went to great lengths to cement their hold over Gaza. That would be a very traumatic event and is consistent with the psychological evidence I have read. One event like this would plausibly explain why he left Gaza using an agent, if he is from Gaza. Yet I am asked to square this with his statement that his parents remained there in Gaza. This is another puzzling aspect of his account."

22. The judge relied on the case of **HS** but also considered the up to date evidence submitted and has acknowledged that personal factors must be taken into account when he was considering Article 15(c) referring to

Elgafaji. The judge has taken into account that there will be support available. The judge set out:

> "105. The Appellant relied on Article 15(c) of the Council Directive 2004/85/EC (the Qualification Directive). This relates to his security and humanitarian situation if he returns to Gaza. The test is facing a real risk of suffering serious harm. Specifically, it requires a certain level of indiscriminate (i.e. non-targeted) violence. There are very few parts of the world where the Courts have found such a high level to exist. So it is often claimed but rarely succeed as a legal argument. As a Judge, I must take very great care over such decisions, which can potentially affect millions of individuals if taken forward in a higher Court.
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> 106. Gaza is under blockade from Egypt and Israel. I wish to emphasise that Egypt is involved. ... The evidence is that the blockade forces the people of Gaza to live in a state of perpetual humanitarian crisis. No destroyed homes in Gaza had been rebuilt, as of May 2015. In 2016, the blockade entered its 10th year. The Rafah border crossing was almost totally closed by the Egyptians. Oxfam ... reports that Gaza will be unliveable by 2020 ...
>
> 107. **Elgafaji (2009)** stated that the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required.
>
> 108. Given that the Appellant's parents still live there (or did up to 2014), despite the much earlier incident when he says Hamas burnt down the house, it is hard to see what indiscriminate violence might come his way. There is no current armed conflict with Israel. There was a ceasefire agreement signed in August 2014. Hamas is not reportedly misbehaving on a grand scale of violence; their control is tight and has arbitrary aspects. They are re-arming which foreshadows future conflict but counsel has not pointed me to material that shows as at today a current serious risk of indiscriminate i.e. non-personalised violence. The Appellant is vulnerable but does that of itself attract indiscriminate violence towards him? I am asked to suppose it does but no clear proof of it has been adduced. I do not find that shown to the low threshold. He may find it difficult to sustain himself but that is not an obvious cause for violence. He knows people there. I suggest that he can rely on support".

23. The judge did identify who he considered was able to support the appellant. The judge referred at paragraph 78 to the appellant's evidence given to Dr Stevens (as mentioned by Dr Egnal) that his parents were still living in Gaza. The judge said '*I would expect them to support him now but he says nothing about that'.* The judge also referred to the appellant's account that despite an attack on his family home his parents remained in Gaza. The judge also refers to the appellant's account given to Mrs Rose and the medical report from his GP which was that his parents helped him to escape to Egypt when the war situation became critical and there was pressure to take sides. At paragraph 102 the judge again refers to the

statement that the appellant's parents remained in Gaza. With regard to the rocket attack in 2014 there is no suggestion that his parents or immediate family were killed. The evidence was that it was nieces and uncles (see paragraph 30). It is clear that the judge considered that the appellant could obtain support from his parents. Although the judge does not refer to Article 15(b) I do not consider that there was a material error of law given the high threshold - *a severe deprivation with denial of shelter, food and the most basic necessities of life for the appeal to succeed.* The appellant's grounds focused on the up to date humanitarian situation in Gaza and the appellant's mental health and lack of support. The judge has taken into account the up to date objective evidence and found that the appellant would be able to obtain support from his parents. It was found in **HS** that there is a good deal of humanitarian aid and there is medical support available in Gaza. The judge has taken all the relevant factors into account when considering the risk to the appellant on return under Article 3 and 15(c). Given the high threshold to be met on the facts of this case the judge would have arrived at the same conclusion under Article 15(b) as he did on 15(c) *'I find no evidential basis to grant humanitarian protection to this appellant.'* Although the appellant is vulnerable there is support available through his parents such that substantial grounds have not been shown that the appellant, if returned to Gaza, would face a real risk of suffering inhuman and degrading treatment. There was no material error of law in the judge's findings and decision on humanitarian protection.

24. I will deal with ground 6, the 'dependants issue' next. The First-tier Tribunal judge having found that the appellant was not entitled to humanitarian protection and having dismissed his asylum claim was not required to make any findings on the dependants issue. Although a judge is required to make findings on material issues raised, if an issue falls away as a result of the judge's findings on other matters it is regularly the case that a judge will not go on to decide other issues that essentially are parasitic on a substantive claim. It might be preferable for a judge to set out why he was not considering the issue (it might have been that the judge did not consider he had jurisdiction as argued by the respondent, that they did not meet the test for 'dependants' or because he had rejected the protection claim) but it is not a material error of law for him to have failed to make a finding given the rejection of all aspects of the protection claim. There was no claim left for the appellant's wife and son to be dependent upon. Having found no error of law I also therefore do not need to decide this issue.

25. In relation to ground 5, I will deal with the 'best interests' of the appellant's son first.

26. The judge set out:

> "121. The best interests of the child are a primary consideration. It is not likely that the child would prosper in Gaza as described above. This is a weighty if not conclusive factor against the normal public interest in removal. The public interest is set out in

section 117B of the Nationality, Immigration and Asylum Act 2002. The wife is not a person with status at present and the marriage occurred with both parties knowing their unsettled status. The child is not a trump card. I have been told not to weigh up her own case so I will leave the point there."

27. Consideration of and determination of a child's best interests are part of the Article 8 assessment. The judge has correctly identified that the best interests of a child are a primary consideration. However, the judge has not identified what the child's best interests are. It would appear that the judge has misinterpreted the submission which was that he should not consider any potential asylum issue arising out of the risks to the appellant's wife as no asylum claim had been made. The judge was required to make a finding as to what the best interests of the child are. Failing to do so in this case is a material error of law.

28. I set out below the judge's consideration of Article 8 of which the above paragraph (121) formed part:

"118. I turn now to Article 8: private and family life. Medical aspects can fall under Article 8 too; I do not need to repeat everything.

119. The case of **Agyarko v SSHD [2017]** UKSC 11 confirms that, in order to succeed under Article 8 outside the Rules, the Appellant will need to show that the consequences of the decision will cause very substantial difficulties or exceptional circumstances or unjustifiable harshness for the Appellant. Gaza as described above tends to fit that description, all the more so while the Appellant is mentally unwell. That is however a temporary situation. We do not know what his mental state will be in 2020 and we really do not know what state Gaza will be in at that date. What Oxfam has predicted is an extrapolation from the past that does not allow for the possibility of changes.

120. In **MM Zimbabwe [2012]** EWCA Civ 279, Moses LJ held that the absence of medical treatment is an additional factor to be weighed in the balance with other factors which engage Article 8. However, the fact that health resources are being used in the UK is likely to be a factor in favour of removal, so I am not sure where that takes us.

121. ...

122. A factor in his favour is the delay by the Home Office but against that he was not removable anyway in 2008 (as it was noted), so the point may be a Pyrrhic victory. **EB Kosovo [2008]** UKHL 41 remains a good authority. The Appellant has been able to start a family in the UK, which would not have happened if a speedy outcome had taken place. There is of course no sign that he has put down roots in the wider community; his friends and family are Palestinian and he has not changed his identity in any way.

123. The Home Office is criticised for failing to consider the Al-Aqsa document and arrest warrant. However, I have been able to

> make up my own mind about them. They did not help the Appellant. ...
>
> ...
>
> 125. Under the statutory weighting factors, it lies against him that he is not fluent in English and is not supporting himself economically. He has had a precarious status at best for the last decade. The statutory factors all favour the respondent's refusal decision.
>
> 126. Considering these matters as a whole, it is strongly arguable that he meets the Article 3 threshold and it may also be the case that the Article 8 weighing exercise makes it disproportionate to remove at the present time. I take note that he just possibly is within the scope of **Paposhvili** for medical reasons but that may not be so forever and perhaps a reversible state of depression should not be counted as such a factor."

29. The judge has not undertaken an appropriate balancing exercise and has failed to reach a conclusion on whether or not it would be a disproportionate interference in the family life of the appellant, his wife and their child if he were removed to Gaza. The judge had already concluded that it would breach his Article 3 rights to remove him. It is often difficult when a decision has already been reached on one aspect of an appeal that has the result that the appellant cannot be removed (for a period of time) to consider separately what, in the judge's mind, seems to have become a hypothetical situation. However, that is what the judge was required to do. The Article 8 claim is a separate claim to the Article 3 claim and the appellant could potentially succeed under both.

30. These failings amount to material errors of law. I set the First-tier Tribunal's decision aside in respect of the Article 8 issue only pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA'). The appeal against the First-tier Tribunal's decision on humanitarian protection is dismissed.

31. I considered whether or not I could re-make a decision on the Article 8 appeal myself. The appellant, his wife and his child have no status in the UK. For an Article 8 claim to succeed the threshold test requires that they risk suffering a flagrant denial of the right under Article 8 such as would completely deny and nullify the right in the destination country – see **EM (Lebanon) v SSHD UKHL 2008**:

> "38. The question to be determined in this appeal is accordingly this: whether, on the particular facts of this case, the removal of the appellant and AF to Lebanon will so flagrantly violate her, his and their article 8 rights as to completely deny or nullify those rights there. This is, as Ms Carss-Frisk QC for the Secretary of State emphasised, a very hard test to satisfy, never found to be satisfied in respect of any of the qualified Convention rights in any reported Strasbourg decision."

32. I have not had any submissions on this issue. Further there has not been sufficient fact finding by the First-tier Tribunal for me to re-make the Article 8 decision.

33. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

34. I remit the case to the First-tier Tribunal for the case to be heard at the First-tier Tribunal at Taylor House before any judge other than Judge Freer pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed at the next available date.

Notice of Decision

The appellant's appeal against the First-tier Tribunal's decision is allowed on the Article 8 issue only. The appeal against the First-tier Tribunal's decision on humanitarian protection is dismissed. There was no appeal against the First-tier Tribunal's decision on asylum. Therefore the respondent's decision on the asylum and humanitarian protection claims stand.

Signed P M Ramshaw Date 20 March 2018

Deputy Upper Tribunal Judge Ramshaw