Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11753/2016

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 8 November 2018	**On 27 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR [D N]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr John Nicholson, Counsel instructed by
Greater Manchester Immigration Aid Unit
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a Palestinian from Gaza, appeals from the decision of First-tier Tribunal Judge Brunnen promulgated on 23 February 2018 in which he gave his reasons for dismissing the appellant's appeal against the decision of the respondent ("the Department") made on 13 October 2016 to refuse his protection and human rights claims.

2. The First-tier Tribunal did not make an anonymity direction, and the appellant did not apply for anonymity in the Upper Tribunal. I also do not consider that an anonymity direction is warranted on the particular facts of this case.

The Reasons for the Grant of Permission to Appeal

3. On 4 September 2018, Upper Tribunal Judge Kebede granted permission to appeal for the following reasons:

> Notwithstanding the unhelpfully lengthy and repetitive nature of the grounds, there is some arguable merit in the assertion that the Judge arguably failed fully and properly to grapple with the appellant's ability to return to Gaza and the consequences of a possible inability to return. There is less arguable merit in the grounds seeking to challenge the Judge's adverse credibility findings but I do not exclude that ground.

Relevant Background

4. The appellant is recorded as having claimed asylum on arrival at Heathrow Airport on 17 April 2016. He said that he had left Gaza 15 months previously, on or around 17 January 2015. En route to the UK, he had stayed in Cairo, Egypt, for 10 months.

5. His account, which is set out more fully in paragraphs [11]-[18] of Judge Brunnen's decision, was that he had fled Gaza due to a fear of persecution by Hamas. He had been an ambulance driver in Gaza, and he had been interviewed about his work as an ambulance driver on a radio programme in or about 2011 or 2012. Two days after the interview, he said that agents of Hamas had come to his home and threatened to kill him if he spoke to the media again concerning anything that happened during his work. About a year later, he set up a Facebook page on which he posted comments or issues concerning ambulance crews. After he set up this page, he received a phone call from an unidentified person who asked him whether he wanted to dig his own grave.

6. In July 2014, the appellant was taken aside at the hospital where he worked by two agents of Hamas who questioned him and told him that if they should discover that Israel had found out that ambulances were being used by Hamas for transport purposes, they would conclude that the appellant was acting as an informant for the Israelis.

7. Following this threat, the appellant feared for his life. He was unable to leave Gaza at the time because all the border crossings were closed. But in January 2015 he was able to use the Rafah Crossing to go to Egypt on the pretext of taking his son for medical treatment. He then sent his son back to Gaza with someone else, while he stayed in Cairo.

8. In the refusal decision of 13 October 2016, the Department did not accept that the appellant faced a real risk of persecution or serious harm on return to Gaza because he had publicly disagreed with the use by Hamas

of ambulance services in Gaza. The Department did not accept that he had worked as an ambulance driver, or that he had received any threats from Hamas. His general credibility was also considered to be undermined by the fact that he claimed to have destroyed the passport which he had used to travel outside the Palestinian Authority.

9. On the topic of future fear, the Department made reference to Article 1D of the Refugee Convention and Article 12(1) of the Qualification Directive. Article 1D provides as follows:

> This Convention shall not apply to persons who were at present receiving organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
>
> When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

10. The appellant had submitted a UNRWA Family Registration Card, which confirmed that he had been in the receipt of, or would be eligible to receive, assistance and protection from the UNRWA. He had provided no reasons as to why he would not be able to continue to receive assistance from the UNRWA, and therefore he did not qualify for (i.e. he was excluded from) refugee protection. He was not entitled to refugee status simply by leaving the UNRWA areas of protection and claiming asylum elsewhere.

11. The Department said that consideration had been given to the feasibility and practicability of his return to the Gaza Strip. The Department relied on **HS (Palestinian - return to Gaza) Palestinian Territories CG [2011] UKUT 124 (IAC)** in support of the proposition that his re-entry to the Gaza Strip was feasible, and that it was not unreasonable to expect him to return to the Gaza Strip.

12. On the topic of humanitarian protection and Article 15(c) of the Qualification Directive, the Department asserted that the humanitarian situation in both the Gaza Strip and the West Bank was not such that it represented, in general, a risk of harm contrary to Article 3 ECHR. In addition, following the signing of the long-term cease fire agreement in August 2015, the level of indiscriminate violence in the Gaza Strip was not at such a level that, within the meaning of Article 15(c), a civilian faced a real risk of indiscriminate violence which threatened his life or person solely by being present in the Gaza Strip. Accordingly, the appellant did not qualify in the alternative for humanitarian protection.

13. The appellant's appeal against this decision first came before a First-tier Tribunal Judge sitting in Manchester on 20 April 2017. The Judge dismissed the appeal in a decision promulgated on 5 May 2017. However, the decision of the First-tier Tribunal was set aside by Upper Tribunal Judge Bruce following an error of law hearing in Liverpool on 16 August 2017. The Upper Tribunal Judge found that there had been procedural

unfairness in the approach taken by the First-tier Tribunal to the question of credibility, and also that the First-tier Tribunal had misunderstood or diminished certain aspects of the evidence, principally relating to the ability of Palestinians to travel, these being significant in the assessment of both credibility and risk. As there were material errors in the approach of the First-tier Tribunal, the Judge ruled that the most appropriate outcome was for the decision to be set aside and the matter remitted for a hearing *de novo i*n the First-tier Tribunal.

The Hearing Before, and the Decision of, First-tier Tribunal Judge Brunnen

14. The *de novo* hearing took place before Judge Brunnen at Manchester on 1 February 2018. Mr Nicholson appeared on behalf of the appellant as he had done previously, and the Department was represented by Mr Dillon, Home Office Presenting Officer. The Judge received oral evidence from the appellant, who was cross-examined by Mr Dillon.

15. In his subsequent decision, a Judge accepted at paragraph [20] that the appellant had worked as an ambulance driver. At paragraphs [21] to [27], the Judge gave his reasons for not accepting that the appellant left Gaza because he had been threatened by Hamas and was in fear of his life. He concluded that, by the time the appellant left, any threat that he may have received in 2011 or 2012 was no longer an operative factor. He found it was overwhelmingly more likely that the appellant had left Gaza because life there was so difficult and restrictive, as the result of the general conditions in which its population had to live.

16. The Judge then addressed the submission from Mr Nicholson that the Department was required to set out in the asylum decision letter the method and route by which the appellant would be returned to Gaza. Mr Nicholson submitted that the Department could not do this, as there was no possibility of returning the Appellant either via Egypt or via Israel.

17. At paragraph [30], the Judge said he was not referred to any evidence to demonstrate that the crossings into Gaza from Egypt and from Israel were "*entirely closed or closed to returning residents of Gaza.*" As to the legal proposition advanced by Mr Nicholson, he had mentioned **HS (Somalia)** and **AA (Iraq)** but he had not provided copies of either decision or demonstrated how those cases supported his argument.

18. The Judge went on to cite the Supreme Court decision in **MS (Palestinian territories) [2010] UKSC 25** in support of the proposition that, "*uncertainty as to the possibility of removal did not render the decision to refuse asylum unlawful.*"

19. The Judge concluded his discussion of this issue with the following finding at the end of paragraph [34]: "*I find that the fact (if it be the fact) that the borders of Gaza are closed against the Appellant does not entitle him to international protection.*"

20. At paragraph [35], the Judge turned to address what he characterised as Mr Nicholson's final argument, which was based on paragraph 276ADE(1) (vi) of the Rules. Mr Nicholson submitted that, as the result of the decision of the USA greatly to reduce its funding to the UNRWA, there would be very significant obstacles to the appellant's reintegration in Gaza. Mr Nicholson maintained this argument while accepting that humanitarian conditions in Gaza were not so poor as to engage Article 15(c) of the Qualification Directive. The Judge continued: "*Whilst some evidence has been adduced that the USA proposes to withhold part of its expected contribution to UNRWA, the evidence also shows that the spokesman for UNWRA said that the organisation had not been informed of any change of US policy. An article from the Middle East Eye says the proposed cut would cause a serious reduction in services, in particular education and health service, for Palestinian refugees. However, the Appellant does not say anywhere in his evidence that if he returned to Gaza he would be reliant on the services provided by UNRWA. I am not satisfied the proposed funding cut does constitute a very significant obstacles to his reintegration.*"

The Hearing in the Upper Tribunal

21. At the hearing before me to determine whether an error of law was made out, Mr Nicholson helpfully developed what he regarded as his strongest points first. Accordingly, he began with an error of law challenge to paragraph 35; he then moved on to an error of law challenge to the Judge's treatment of the feasibility of the appellant securing his readmission to the Gaza Strip, before finally developing his case that the Judge's adverse credibility findings were not properly reasoned.

22. On behalf of the Department, Mr Tan submitted that Judge Brunnen had directed himself appropriately on all the issues in dispute, and that no error of law was made out.

Discussion

23. It is convenient to deal with the three grounds of appeal advanced by Mr Nicholson in the order that he developed them.

Ground 1

24. Ground 1 is foreshadowed in paragraph 20 of the permission application dated 27 March 2018 (which runs to 6 closely typed pages). Ground 1 is that the Judge did not properly consider that the appellant would probably not be entitled to his previous UNRWA support, whether it was totally or mostly cut by President Trump.

25. In oral submissions, Mr Nicholson drew my attention to the acknowledgement in the refusal decision that the appellant had submitted his UNRWA Family Registration Card, and accordingly, he submitted, the

Judge had made a clear mistake of fact in the penultimate sentence of paragraph [35].

26. This is not the way the case is put in the permission application, and in any event I am not persuaded that the Judge made a factually incorrect statement. Mr Nicholson did not refer me to any evidence given by the appellant that, if returned to Gaza, he would be reliant on services provided by the UNRWA. He is not at a stage in his life when he requires access to education services, and he is fit and well, and so he does not have a pressing need to access health services in the Gaza Strip. Moreover, his evidence was that as well as working as an ambulance driver in Gaza he had a side line business as a painter, decorator and tiler. Accordingly, the fact that the appellant was in possession of an UNRWA Family Registration Card does not entail that he was reliant on UNRWA assistance for his survival in Gaza prior to his departure, or that the proposed cut in funding from the USA, and hence the consequential serious reduction in services - in particular education and health services - would impact so adversely on the appellant as to constitute a very significant obstacle to his reintegration in Gaza.

27. In short, it was open to the Judge to find that the proposed funding cut did not constitute a very significant obstacle to the appellant's reintegration, for the reasons which he gave.

28. In order to reinforce his argument that the Judge's finding on Rule 276ADE(1)(vi) was inadequately reasoned, Mr Nicholason cited **MI (Palestine) -v- SSHD [2018] EWCA Civ 782**, a decision which was published on 21 July 2018.

29. There are three reasons why this authority does not advance Mr Nicholson's argument under Ground 1. The first is that it was published long after the decision was promulgated, and therefore it cannot be an error of law for the Judge not to take it into account. The second is that it is not a Country Guidance decision, and the third is that it is not relevant.

30. In **MI**, Deputy Upper-Tribunal Judge Alis had applied the Country Guidance of **HS [2011] UKUT 124 (IAC)**, and found that Palestinians returning to Gaza would not face a real risk of Article 3 harm. Counsel for MI invited the Judge to depart from the Country Guidance on the basis that the appellant's wife was then 36 weeks' pregnant, and there were serious concerns that her mental condition would deteriorate if the claim was refused. Counsel also submitted that the situation on the ground was bleak, referring to an expert report from Dr George. The majority of the population were refugees and only a small proportion of funds had been delivered by donating nations.

31. In his decision promulgated on 22 October 2015, Deputy Upper Tribunal Judge Alis dismissed the appeal. His reasoning is that little had changed since 2011 save for further conflict and destruction following a period of re-building and development. Counsel for the appellant conceded that,

without any additional factors, the appeal on Article 3 grounds would fail. Counsel relied on the spouse's medical condition as tipping the scales in the appellant's favour. The Judge held that the decision was not tipped in the appellant's favour, because the House of Lords in **N -v- SSHD [2005] UKHL 31** had set the bar very high for an Article 3 claim in medical cases, and the appellant's wife did not meet this threshold.

32. The Court of Appeal set aside the decision of Deputy Upper Tribunal Judge Alis, and remitted the appeal to the Upper Tribunal. The reasoning of the Court of Appeal was that Deputy Upper Tribunal Judge had misdirected himself in law in applying the test in **N -v- SSHD** whereas he should have applied the less onerous test in **Sufi & Elmi -v- UK [2012] 54 EHRR 9** since the predominant cause of the humanitarian crisis in Gaza was the conflict between Israel and Hamas.

33. The Court of Appeal also considered that the Deputy Upper Tribunal Judge had failed to have proper regard to the Country Evidence, particularly the evidence as to the seriously worsening position after the Israeli military operation in 2014.

34. The decision in the Court of Appeal in **MI (Palestine)** does not support the argument that the Judge's reasoning in paragraph [35] is inadequate. Mr Nicholson did not submit that conditions in Gaza had deteriorated to a level where Article 3 ECHR was engaged, or that humanitarian conditions in Gaza were so poor as to engage Article 15(c) of the Qualification Directive. Mr Nicholson simply relied on a proposed cut in UNRWA funding, and I consider that the Judge gave adequate reasons for finding that the appellant did not qualify for leave to remain under Rule 276ADE(1)(vi) on this basis.

Ground 2

35. Ground 2 relates to the feasibility of the appellant being returned to Gaza, and it is developed discursively by Mr Nicholson at paragraphs 10 to 19 of the permission application dated 27 March 2018. In essence, Mr Nicholson's submission is that the Judge ought to have held that it would be impossible for the appellant to gain readmission to Gaza, and that he would face real risk of Article 3 harm in Egypt in the form of destitution while waiting indefinitely for the border crossing to be re-opened.

36. Mr Nicholson further submits that the Judge erred in law in following the Supreme Court decision in **MS** that the method and route of return to the Palestinian territories is a technical obstacle which does not require to be considered as part of the evaluation of the merits of the appellant's protection and human rights claims.

37. I will deal with the evidential issue first. In the course of oral argument, Mr Nicholson backtracked from his initial submission that the evidence before the Judge showed that crossings into Gaza from Egypt were "*impossible.*" He agreed that he had overstated the case. The word 'impossible' did not

appear in the background evidence that he had relied upon. Sometimes the Rafah Crossing was open, but usually it was not open. So it was very hard to re-enter Gaza by the Rafah Crossing.

38. In light of this acknowledgement by Mr Nicholson, I do not consider that Judge Brunnen misrepresented the position when he said he was not referred to any evidence to demonstrate that the crossings into Gaza from Egypt and from Israel were "*entirely closed*" or closed to returning residents of Gaza.

39. On the question whether the Judge was wrong to treat the issue of the method and route of the appellant's return to Gaza as a technical obstacle which lay in the future, I do not consider that the Judge was wrong to follow a Supreme Court authority directly on the point, while at the same time declining Mr Nicholson's invitation to apply by analogy lower Court decisions to contrary effect, especially when these decisions relate to countries or territories other than the Palestinian territories.

40. The Judge acknowledged that **MS** had been decided under a different statutory regime in respect of appeals by asylum claimants, but he explained why he considered that the authority remained relevant under the new statutory regime: the prospective nature of the ground of appeal under the old section 84(1)(g) was preserved in the new ground of appeal under section 84(1)(a). The issue was whether the removal of the appellant from the United Kingdom *would* breach the UK's obligations under the Refugee Convention.

41. I note that, notwithstanding the Supreme Court decision in **MS**, the Tribunal in the Country Guidance case of **HS [2011] UKUT 124** held that the Tribunal had jurisdiction to consider practical issues concerning the return of a Palestinian family to Gaza. However, the guidance in **HS** was that return to Gaza is feasible. Conversely, Mr Nicholson's submission that the appellant would face Article 3 harm in Egypt while waiting to cross into Gaza runs directly contrary to the guidance in **HS**, which held that conditions likely to be experienced by Palestinians in Egypt while waiting to cross into Gaza were not such as to give rise to a breach of their human rights.

42. Mr Nicholson was very critical of the Judge for dismissing his argument by analogy because he had not provided copies of the authorities on which he relied. I consider it was incumbent on Mr Nicholson to provide copies of the authorities on which he relied so that the Judge could see the context of the particular passages cited by him, so as to be able to evaluate whether they illuminated a point of general principle that was applicable to prospective returns to the Gaza Strip as well as to prospective returns to Iraq or Somalia.

43. It is not clear whether Mr Nicholson relied on an asserted absence of relevant documents to enable the appellant's re-entry. But if he did, the Judge did not err in not specifically addressing this issue for two reasons.

Firstly, it was open to him to rely on the Supreme Court decision of **MS** for the reasons which he gave; and, secondly, the appellant had not shown that he was unable to obtain a new passport via the Palestinian Commission in the UK, or that his wife would be unable to sponsor his return to the Gaza Strip or that he would be denied re-entry into the Gaza Strip as her returning husband; see paragraph 50 of the refusal decision.

Ground 3

44. Ground 3 is that the Judge's adverse credibility findings are not adequately reasoned. I consider that this ground is no more than an expression of disagreement with findings that were reasonably open to the Judge for the reasons which he gave.

45. This is exemplified by the Judge's reasons for rejecting the appellant's account of the incident which he says led to him fleeing Gaza in 2014. The Judge gave four reasons for disbelieving the appellant's account of being threatened for a third time in 2014. These were:

    (a) His interview did not record any intelligible context for the third threat;

    (b) He had no explanation for the third threat in cross-examination;

    (c) Neither in his interview nor in his oral evidence did he rely on the conflict situation in 2014 as a reason for the third threat;

    (d) In his statement of 7 March 2017 the appellant made another elaboration, which was significantly different from the account of the incident given by him in interview.

46. In the permission application, Mr Nicholson submits that a prolonged assault by Israel in 2014 provides a credible context for a third threat in 2014, and that it should not be held against the appellant that he did not mention the conflict situation in 2014 in interview as the background to the third threat, as he was not asked the question. But Mr Nicholson does not in terms challenge the sustainability of the other reasons given by the Judge, and neither in his written or his oral submissions does he make out an error of law under Ground 3.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 10 November 2018

Deputy Upper Tribunal Judge Monson