Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: PA/03385/2019 (V)
EA/07252/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House Remotely	**Decision & Reasons Promulgated**
On 15th October 2020	**On 8th December 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR I A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M J Azmi, instructed by Turpin & Miller LLP
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Palestinian national born on 18th July 1970 and he appealed against the decision of the Secretary of State dated 15th March 2019 which refused his international protection and humanitarian protection claim and simultaneously refused his application to remain under the EEA European Economic Area Regulations 2016. On 13th June 2018 the Secretary of State wrote to the appellant explaining that Section 32(5) of the UK Borders Act 2007 required that a deportation order should be made against him unless he could demonstrate that he fell within

any of the specified exceptions. That decision also noted that he had an outstanding asylum claim from 2014. The appellant appealed.

2. His appeal came before First-tier Tribunal Judge Birk, who dismissed the appeal on all grounds on 24th July 2019. The appellant challenged the First-tier Tribunal decision as containing a material error of law. It was submitted that a Medical Foundation Report of 2012 was not before the Upper Tribunal in 2014 but presented to Judge Birk in 2019 (by different solicitors) and the report set out fourteen marks attributable to maltreatment, however, no finding was made on torture. Had findings been made the account of the incidents asserted were likely to be credible, that is, the appellant was fingerprinted and forced to sign a blank form which he says was a confession and only released by the intervention of the Red Cross. That would of itself raise the issue of past persecution. The appellant's passport had now expired, and he would be with the strict regime unlikely to be allowed to enter the Gaza Strip and of interest to the Israeli authorities.

3. These grounds set out above were found to have force and constitute a material error of law. The determination of the First-tier Tribunal was set aside by a decision of the Upper Tribunal dated 24th December 2019. There were no preserved findings of fact.

History

4. The appellant arrived in the in the United Kingdom on 7th April 2010 on the basis of a dependent spousal visa valid until 28th February 2011. During the currency of that leave, on 22nd November 2010, he made an asylum claim which was refused and his appeal was dismissed by the First-tier Tribunal on 10th December 2010. The Upper Tribunal comprising a panel of Upper Tribunal Judge C Lane and Designated Judge McClure on 31st January 2014 set aside the decision of the First-tier Tribunal, but dismissed the appeal, and made various findings which I will revisit later in this decision. His appeal rights were exhausted on 18th July 2014. On 1st August 2014 the appellant made further submissions which were ultimately dealt with in 2019 by the Secretary of State.

5. In April 2015 the appellant commenced a relationship with Mrs EK, a national of Hungary, and on 30th January 2016 their son was born and who was granted British citizenship on 18th April 2018. The couple married on 7th July 2016 and on 29th November 2016 the appellant applied for an EEA residence card on the basis that he was a family member of an EEA national and qualified person, namely his sponsor wife.

6. However, on 18th May 2018 at Reading Crown Court the appellant was convicted of eight counts of dishonestly making false representations to make gain for himself or another or cause loss to another/expose others to risk and four counts of making/supplying articles for use in fraud and two counts of possessing/controlling articles for the use of fraud. The appellant had inter alia been selling secondhand cars and falsifying their service records. On 25th May 2018 he was sentenced to a total of three years' imprisonment but that was subsequently said to have been

reduced to two years. On 9th August 2018 he was issued with a letter including a Section 72 notice but Mr Jarvis confirmed that this had indeed been withdrawn.

7. On 4th September 2018 the appellant completed an asylum registration questionnaire and attended a substantive asylum interview on 21st September 2018 and provided copies of medical letters from the University of Reading Medical Practice dated 16th January 2018 and 10th May 2018 in support of his claim that he suffered from posttraumatic stress disorder.

8. On 19th October 2018 the Court of Appeal's Criminal Division confirmed that his appeal against his length of sentence in his case had been allowed and that his total sentence consisted of two sentences of twelve months' imprisonment concurrent and one sentence of six months' imprisonment consecutive. It was accepted in the refusal letter of the Home Office that: "The Section 72 notice became irrelevant in your case as you had not received a sentence of two years' imprisonment for a single offence". It was also noted that on 24th January 2016 he was convicted of battery for which he received a £54 fine, had to pay £250 costs and had to pay a £50 compensation with a £30 victim surcharge.

9. The basis of the appellant's asylum and humanitarian protection claim made on 4th August 2014 was that he feared the Israeli authorities because he had previously been detained and tortured in the Negev prison in Israel after being accused of throwing a petrol bomb at an Israeli military jeep. He maintained his family had informed him he had been sentenced to 750 years' imprisonment for this offence in his absence after he left Gaza in 1990. His family were bombed by the Israeli Army in 2009 and two of his brothers were killed and he feared it was not safe to return to Palestine and he refused to take his family back to a warzone.

10. He states that he was detained at the Negev Prison for two months during which time he was tortured. His claim was that he was summoned by the General Intelligence Unit of the Israel Army working with the local Palestinian police to report at their headquarters and on arrival he was blindfolded, taken into a bus and driven to the Negev Administrative Detention Camp where he was detained. He was tortured daily, kicked on the stomach, face and body when he started to bleed. A bag was placed over his head and his pants were taken off and he was subject to further genital torture. He then went on hunger strike and was released to the Red Cross. However, he was subsequently summoned and offered inducements should he work as an informant with the Israelis. He was threatened with rape and a publication on the fact that he was raped. As a result his father advised him to leave the Gaza Strip and his escape was arranged via Egypt and he was smuggled through the Rafah Crossing to Egypt where an agent helped him to travel to Manila on 6th June 1990 on a student visa. He subsequently learnt that as a result of a confession that he had signed whilst was in Gaza the court conviction had been made against him and he was considered a fugitive from justice. He had not claimed asylum in the Philippines because the place was corrupt but remained there until he travelled to the United Kingdom to join his wife. He feared returning to Gaza as they had a database and he feared he would be identified at the Rafah Crossing, which was

controlled by the Israelis. Asked about the Egyptian travel documents during his initial asylum proceedings, he stated that it was obtained for him by fixers who fixed his travel to the Philippines and he had not mentioned having signed a confession because he was not asked about it at interview. His wife then applied for a visa to travel to the United Kingdom as a student in 2008 and she subsequently came to the United Kingdom whereupon the appellant joined her in 2010. They subsequently separated and the appellant is now with his new wife.

11. As noted above, the Upper Tribunal on 31st January 2014, some three years after the decision of the First-tier Tribunal dismissed the appellant's appeal. Further submissions were then made by Lei Dat & Baig Solicitors who submitted that in the light of recent developments there were substantial grounds for believing if he was forced to return to Gaza he was at real risk of torture. It noted that the main dispute in the Upper Tribunal was over the credibility of the appellant but he maintained he had told the truth throughout and had been consistent. He maintained that he had new documentation relating to him being able to obtain identity documents relating to his Palestinian nationality and further that information from the Upper Tribunal was published online on the Tribunal's website and he feared the information regarding his claim for asylum having been made public and that placed him at real risk of apprehension on his return to Gaza. A simple search of the appellant's name on the internet brought up his personal details and specific information relating to his claim for asylum. Additionally, owing to the recent volatile country situation the appellant was unable to return and/or it would be unduly harsh and unreasonable to expect him to return.

12. The evidence before me included the Secretary of State's reasons for refusal letter and the respondent's bundle, an updated appellant's bundle which included witness statements from the appellant and his wife, an expert report by Dr Alan George dated 17th February 2020, a letter from the Berkshire Traumatic Stress Service dated 18th October 2020 and an invasive coronary report dated 24th February 2019 together with the appellant's medical records from prison and the letters from the University Medical Group dated January 2018, May 2018 and June 2019. There was also a report from the Medical Foundation dated 10th February 2012.

13. At the hearing Mr Azmi relied on his skeleton argument which was presented to the First-tier Tribunal and Mr Jarvis supplied helpfully a bundle of authorities.

14. In view of the medical report of Dr Nicholas Smith dated 10th February 2012 from the Medical Foundation I accept that the appellant suffered from posttraumatic stress disorder from at least that date. At paragraph 118 the report recorded:

> *"118. The psychological symptoms elicited and signs objectively observed here fulfil the criteria for a diagnosis of posttraumatic stress disorder (PTSD). There is a clear history of an index event that is 'exceptionally threatening' (ICD 10 F43.1). This is accompanied by persistent nightmares (and daytime flashbacks) in which Mr A relives moments when he was maltreated. The content of these includes seeing the face of the man that interrogated him in the Negev camp (paragraph 82). …*

> *119. It is important to note that such flashbacks and nightmares were present from the time in which he entered the Philippines (paragraph 72). They are also contemporary. It is notable that he does not seek to attribute all of his psychological symptoms to his ill-treatment, indeed he feels the greater weight of their present cause is the loss of his family … However the majority of his flashbacks and nightmares are attributable to his experience of ill-treatment. ..."*

15. At paragraph 122 the report continued: *"It should be borne in mind that a further symptom of PTSD can be an 'inability to recall either partially or completely some important aspects of the period of exposure in the stressor'."*

The report proceeds in its summary to record the details of the torture said to have occurred including sexual abuse, physical attacks including punching, slapping and kicking, waterboarding and having freshly boiled water thrown at him. On hunger strike he was released to the care of the Red Cross.

16. The doctor concluded at paragraph 155 the following:

> *"Mr A has clear symptoms diagnostic of PTSD in which the content of many of his dreams and flashbacks indicate that the aetiology is maltreatment rather than the sudden loss of his family. He has taken several deliberate overdoses of medications as attempts at suicide and is treated by his GP with antidepressants."*

17. As such, I find the appellant is a vulnerable witness and treat his evidence accordingly in line with the Presidential Guidance.

18. My starting point is the Upper Tribunal determination of 2014 which made adverse credibility findings against the appellant. The 2014 decision at paragraph 4 recorded the appellant's history and noted that his fear was that he could not return to Palestine Occupied Territories because he would be identified as an individual with a criminal record and would suffer ill-treatment in consequence. It was recorded the appellant claimed he obtained a passport in 2009 with the assistance of a cousin in Palestine but denied that it was a valid Palestinian passport. He claimed to have bribed his cousin who worked at the Palestinian Department of the Interior, which issued passports, in order to acquire it. He also maintained that the ID card which he brought with him to the United Kingdom was not valid. At paragraph 9 the decision recorded that it was

> *"the appellant's contention that 'in order to require a passport legally, the requirements are a valid ID card and no criminal record on file'. It is on this basis that the appellant asserts that the passport which he used to enter the United Kingdom was not validly issued to him".*

19. As recorded in the decision at paragraph 6:

> *"The hearing of the Upper Tribunal was primarily concerned with evidence surrounding the issue to the appellant of a passport and his subsequent dealings, both directly and through third parties, with the Palestinian authority as represented in the United Kingdom."*

20. Directions were given to the Secretary of State to contact the Palestinian authority regarding the validity of the appellant's passport and at paragraph 7 the decision referred to the appellant's production in evidence of two letters concerning the passport, the first from the Palestinian Diplomatic Mission dated 17th October 2013 stating there was no record of a passport issued in the name of I A and that the passport number 2424831 was not a valid passport number. The second letter was dated 23rd October 2013, also with the letter heading of the State of Palestine (Palestinian Mission to the UK). This letter stated:

> *"9. This is to confirm that according to Oslo Agreement between Israel and PLO, the Palestinian passport that you are holding does not entitle you to have free entry to the Palestinian territories, as you are not a resident neither in Gaza Strip nor in West Bank and do not possess the new Palestinian ID card (sic)"*,

and the Upper Tribunal decision recorded as follows at paragraph 10:

> *"We have seen copies of a series of emails dated December 2013 and January 2014 that passed between the Palestinian Mission in the UK and Ms Sarah Marsh, a Senior Home Office Presenting Officer in Manchester. The contents of the mails may be summarised as follows: (i) The Palestinian Mission confirmed unequivocally that the 17th October 2013 letter is not genuine and was not written by any officer of the Palestinian authorities in the United Kingdom. (ii) The 23rd October letter is genuine and was written by Mr Mansur of the Palestinian Mission. (iii) The 23rd October letter was issued on the basis of the details of the passport which the appellant had presented to the Palestinian authority. However, those details are not the same as the passport details subsequently sent to the authority by the respondent. (iv) When checks were made by the Palestinian authority regarding the passport details forwarded by the respondent it was revealed that the appellant's passport 'is an authentic Palestinian passport which was registered in the Palestinian authority database' [see email to Sarah Marsh, 10th January 2013]."*

21. The appellant maintained that he did not obtain the 17th October letter but this was obtained by other individuals because he was too afraid of making any contact with the Palestinian authorities himself and he produced copies of text messages. However, neither of the individuals attended the Upper Tribunal to be cross-examined because they no longer wish to be involved in any way with his appeal.

22. The Tribunal concluded as follows at paragraph 12:

> *"Following an anxious and careful examination of all the evidence, we do not find that the appellant is a witness of truth. We have reached that conclusion for the following reasons. First, we are not satisfied that the account which he had given concerning the acquisition of his passport and his subsequent dealings both directly and through third parties with the Palestinian authority is true or accurate. The appellant has sought to rely on the 17th October letter which both parties now agree is a forgery."*

23. It appeared there was an opaque email from one of the individuals implicated in providing the letters and no written evidence at all from the other and the Tribunal concluded at paragraph 13:

> *"All that we know is that the letter is a forgery and that the appellant sought to rely upon it. In the absence of any satisfactory explanation from the appellant himself or two witnesses who have not been submitted for cross-examination, we have no doubt that the appellant himself knew that the document which he has attempted to use in support of his appeal is a forged document. We find that to be an act which very severely diminishes the appellant's credibility as a witness. We find that his credibility is further damaged by the readiness with which he abandoned his apparent scruples as regards making direct contact with the Palestinian authorities in the United Kingdom; indeed, we find that he showed so little reluctance in agreeing for the respondent to make enquiries (including disclosing his home address) because he never had any genuine fear of those authorities."*

24. The Tribunal further concluded at paragraph 14 that in relation to the 23rd October letter:

> *"In the absence of any other credible explanation, we find that those details were provided to Mr Mansur [Palestinian Mission] by the appellant. It is clear to us that the appellant has been faced with the problem of attempting to show to the Tribunal that he possesses a false passport when, in fact, his passport is genuine. … When the appellant's actual passport details were provided to the Palestinian Mission it did not hesitate in confirming that the passport is genuine"*,

and at paragraph 15 the Tribunal stated:

> *"We find that the appellant's conduct in his dealings with the Palestinian authority in the United Kingdom are such that we are unable to consider any part of his account as reliable. We find that the appellant did not obtain his passport by way of bribery. We find in consequence that any record of the appellant's detention in 1990 was either not present on the databases consulted by the issuing authority or had never been or was no longer considered to be of such importance as to justify denying the appellant a passport. We reject the appellant's claim that, upon release from detention, he was forced to sign a blank confession or that any attempt was made to recruit him as an Israeli spy. In the light of the fact that a passport has been issued to the appellant relatively recently, we do not find it reasonably likely that the appellant's detention in 1990 would come to the attention of Israeli or Palestinian officials at the borders of the Occupied Territories, or, if the information is known to those officials, it would frustrate the appellant's entry into those territories; we emphasise that, if the fact of the detention had ever been a serious problem for the appellant, then we find that he would never have been issued with a genuine passport in the first instance.*
>
> *…*
>
> *We find that no attempt was made to force him to sign a blank confession or to compel him to work for the Israelis as a spy. He will present to the border authorities in Palestine as an individual holding a genuine and extant Palestinian*

passport and who has no criminal or other security record which would give rise to any suspicion that he is anything other than a law-abiding expatriate Palestinian returning to his homeland."

25. The Tribunal applied **HS (Palestinian - return to Gaza) Palestinian Territories CG [2011] UKUT 124 (IAC)** such that:

> *"Palestinians from Gaza with passports (expired passports can be renewed via a straightforward procedure) are unlikely to experience problems in obtaining and, if necessary getting extensions of, visas from the Egyptian authorities to enter Egypt and cross into Gaza via the Rafah Crossing."*

26. The Tribunal also noted the observations of the court in **El Kott and others [2012] EUECJ C-364/11** [77]:

> *"It should be added that Article 11(f) of Directive 2004/83, read in conjunction with Article 14(1) thereof, must be interpreted as meaning that the person concerned ceases to be a refugee if he is able to return to the UNRWA area of operations in which he was formerly habitually resident because the circumstances which led to that person qualifying as a refugee no longer exist."*

27. The Tribunal found that although the appellant had told them that he had made enquiries about obtaining a new ID card, given his limited credibility they did not accept that he had made any such enquiries and had failed to discharge the burden of proving that he would be unable to obtain an ID card or any other documentation he may require in order to pass into the Occupied Territories through Egypt.

28. In applying **HS**, the Upper Tribunal found the appellant would be able to return to the Occupied Territories without facing any risk of persecution or ill-treatment and therefore dismisses his asylum and Article 3 appeals. No evidence was given in relation to his private life in the UK and therefore his Article 8 ECHR appeal was dismissed.

29. **Devaseelan v SSHD [2002] UKIAT 00702** is my starting point for an assessment of the appellant's status at the time it was made. "In principle issues such as whether the appellant was properly represented or whether he gave evidence are irrelevant to this." That said, the facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator and furthermore:

> "*(4) Facts personal to the appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection.*
>
> *(5) Evidence of other facts - for example country evidence may not suffer from the same concerns as to credibility, but should be treated with caution.*
>
> *(6) If before the second Adjudicator the appellant relies on facts that are not materially different from those put to the first Adjudicator, the second Adjudicator should regard the issues as settled by the first Adjudicator's*

determination and make his findings in line with that determination rather than allowing the matter to be relitigated.

(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him. Such reasons will be rare.

(8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second Adjudicator to decide which of them is or are appropriate in any given case."

30. The medical report from the Medical Foundation dated 10th February 2012 was compiled after the First-tier Tribunal decision of Judge Kanagaratnam which was set aside by the Upper Tribunal but no mention of that report was made in the decision of the Upper Tribunal. The documentary evidence before the Tribunal is not recorded in the decision which is absent any finding on the report. **Devaseelan** is guidance rather than proscriptive, but there is no reason to doubt the authenticity of the report which was submitted by the appellant's legal representatives and I consider that the medical report should have been taken into account because of the reflection on the appellant's psychiatric state and credibility. I am aware that facts not before the first adjudicator should be treated with circumspection, but there was no challenge to its authenticity and it is plausible that the Upper Tribunal concentrated, if there had been no application, on the evidence that was before the First-tier Tribunal. I also that the appellant is now represented by different solicitors. In the circumstances I consider that thee medical report dated 2012 should be considered.

31. When considering credibility, the medical report was important in two ways, first, to shed light on the appellant's psychiatric state and secondly, as evidence of the maltreatment that he experienced in the Negev Prison at the hands of the Israeli authorities. He was apparently accused of throwing a Molotov cocktail at an Israeli jeep and burning two soldiers and he thinks he was mistaken for someone else because of a Diego Maradona T-shirt that he was wearing. There are references throughout that he was detained in Palestine although in fact he was detained in the Negev prison under the control of the Israeli authorities.

32. The medical report contained detail of the appellant's account of the sexual and physical maltreatment throughout his period of detention. He experienced interrogations whilst in detention in the Negev Prison and he experienced electric shock treatment whilst being asked to confess. The account of the torture is very detailed and paragraph 46 refers to his right arm being broken. Finally, the appellant stated he underwent a hunger strike and was released to the Red Cross. He was released and then resummonsed and forced to sign a confession document on pain of rape and asked to collect information at the local mosque.

33. The report refers at paragraph 68 to his then wife leaving the Philippines and moving to the United Kingdom and he was encouraged by her family to join her in the UK.

> *"Mr A applied for a Palestinian passport. He found out through a friend with a relative in the Palestinian authority that with a payment of US$3,000 the paperwork could be arranged. He borrowed the money and received his passport in August 2009 with a view to joining his wife. His visa application was refused because his passport contained no Philippines stamps"*

His appeal was subsequently allowed. By this time he had officially overstayed in the Philippines by thirteen years and was able to leave with the help of a friend who was the brother of a police officer.

34. The author of the medical report Dr Smith described the scars and also described on psychological examination the flashbacks and nightmares consisting of a replaying of the image of the man who interrogated him in the Negev Detention Camp. The appellant was described as having symptoms of hyperarousal and avoidance and reported he had sometimes had difficulty in dealing with individuals who cause annoyance to him, waking him with excessive noise. He felt depressed at the loss of his family both in Gaza (his brothers were killed) and his family in the Philippines. He took a deliberate overdose on hearing the death of his mother in 2011 and although there were two previous attempts at suicide he had no further account of that time intent on suicidal ideation.

35. The report is thorough and detained. Dr Smith evaluated the scars in accordance with the Istanbul Protocol, noting that the appellant did not seek to attribute all scarring or marks to ill-treatment.

36. The doctor considered that a number of scars were "highly consistent with the attribution given by the appellant such as being struck" and noted that there was no history of a road traffic accident and at paragraph 99: "Given the distribution of facial injuries seen and their characteristics, they are, together, typical of an assault or assaults by a third party rather than as the result of accidental injury." The doctor considered certain injuries said to be lacerations and rejected this, finding that it was "more likely that he has inadvertently misattributed these scars to torture-related injury".

37. The scalding by hot water was said to be in keeping with the position of the marks on the medial surface of the arm and:

> *"Individually these marks are highly consistent with the attribution as there are few other possible causes that are likely to produce this appearance and there is no history of other scalding or burning events taking place other than discussed below."*

38. In relation to his arm, the doctor noted that the scar was characteristic of a surgical wound that had been crudely sutured with little care. Further scars S13 and S14 were highly consistent with the attribution given. In relation to the scar found on the anterior aspect of the left forearm the doctor had stated:

> *"Considerable force is needed to achieve a laceration under these circumstances and this makes accidental injury (for which there is no significant history) unlikely as a possible cause. In my experience in emergency medicine the anterior forearm is an unusual site for such an injury",*

Further the doctor found:

> *"Self-harming behaviour usually involves incised rather than lacerated wounds. … and the wound is less centred than would normally be found were it self-inflicted."*

39. Dr Smith concluded on review of the various scars that many were highly consistent with the attribution given by the appellant and summarised at paragraph 154: "Given the very extensive torture history, the presence of other lesions [is] highly consistent [and above] with ill-treatment." He added that:

> *"Mr A has clear symptoms diagnostic of PTSD in which the content of many of his dreams and flashbacks indicate the aetiology is maltreatment rather than the sudden loss of his family."*

40. As held in **KV (Sri Lanka)** at 23, the function of the medical report is to provide expert opinion on the degree of correlation between the asylum seeker's presentation and his allegations of torture and underlined that the expert should recognise the Istanbul Protocol as authoritative in accordance with the Court of Appeal's decision in **SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1302**. The Court held in **KV** at paragraph 25

> *"25. …The conclusion about credibility always rests with the decision-maker following a critical survey of all the evidence, even when the expert has placed his conclusion within category (a) or (e). Indeed, in an asylum case in which the question is only whether there is a real possibility that the account given is true, not even the decision-maker is required to arrive at an overall belief in its truth; the inquiry is into credibility only of a partial character."*

41. Dr Nicholas Smith is an expert doctor appointed by the Medical Foundation. I give weight to the report and the opinion of the medical expert, noting the degree of consistency between the clinical findings and the account of torture. The expert has applied the Istanbul Protocol finding the injuries were highly consistent with the account of how the injuries were sustained. The expert also explored whether there other explanations for the injuries.

42. Mr Jarvis pointed out that in his interview the appellant stated that it was his other arm which had been affected but nonetheless, the examination of the doctor and the conclusions in relation to the repair of the injury lent credence to the assertion that it was a physical attack.

43. The report is powerful evidence together with the appellant's detailed account that the appellant was severely tortured whilst in detention. The Secretary of State accepted in the refusal letter that the appellant had indeed been detained by the Israeli authorities but concluded that this was just part of a rounding up. Owing to

the level and severity of the injury inflicted, I find the Israeli authorities had more interest in the appellant than a mere civilian being rounded up. It is conceivable that being accused of throwing a petrol bomb at a jeep would attract a serious sentence even in absentia although there is no evidence that the appellant accepts that he did this but that his arrest was a case of mistaken identity.

44. The appellant is a well-qualified optometrist who produced his credentials and he qualified in the Philippines. There is no indication that he has undertaken manual labour as a profession and owing to the level of scarring detailed in the report, I accept that the report is independent evidence of serious torture.

45. Owing to the degree of torture outlined in the report I accept the appellant may have signed a confession in order to secure his release and, indeed, it would appear from the outset, in his screening interview at question 4.2, that the appellant asserted that he had signed a confession.

46. The focus of the Upper Tribunal in 2014 was that of the validity of the appellant's passport. Indeed, it was the appellant's case that he bought the passport for US$1,000. The Upper Tribunal concentrated on the account given by the appellant that the passport was false (and thus he had no valid documentation). I note that a letter was produced which was not written by the Palestinian Mission, which in turn undermined the appellant's credibility. The findings of the Tribunal are set out in detail above. It is not the Upper Tribunal's conclusion that he had not been detained, rather that he had obtained a passport, lied about it and could return on that basis.

47. The Upper Tribunal considered the various documentation provided to the Palestinian Mission in the UK and drew conclusions on the passport which are not undermined by the medical report (such as the appellant providing information not relating to the passport in hand to the Mission). I do not find that is explained away by the medical report. Mental health difficulties do not explain dishonesty. I do not depart from the Upper Tribunal's findings that he holds a valid Palestinian passport. However, an appellant may be credible about some aspects of his appeal and not others.

48. It was specifically noted that the appellant was not served with a Section 72 notice and thus he would not be excluded from international refugee protection. I acknowledge that the appellant was said to have refugee protection in an UNRWA area of operation (in Gaza) (**El Kott and Others** [2012] EUECJ C-363/11 but the question is whether he would be able to access protection by getting there. I accept he cannot return to the Philippines where he had overstayed and this was not suggested.

49. The further question is whether there a real risk of persecution from the Israeli authorities should the appellant attempt to return to Gaza.

50. The only access point would be Rafah. The Upper Tribunal, applying **HS (Palestinian – return to Gaza) Palestinian territories** CG [2011] UKUT 124 (IAC), found that the passport having been issued by the Palestinian authorities, would

facilitate on the face of it, the appellant's return to Gaza via the Rafah crossing in Egypt. The headnote from **HS** relied on held

> *'Palestinians from Gaza with passports (expired passports can be renewed via a straightforward procedure) are unlikely to experience problems in obtaining and, if necessary getting extensions of, visas from the Egyptian authorities to enter Egypt and cross in Gaza via the Rafah crossing'.*

51. Pausing there, **MI (Palestine**) **[2018] EWCA Civ 1782,** to which I return below**,** considered **HS** to be out of date. I agree**.**

52. The Rafah crossing was said to be available to those returning to the Gaza Strip is in Egypt. Even in 2014, it appears it was the only crossing, available to the appellant. The report of Dr George identified the longstanding and ongoing security concerns of the Israeli government with regard the Palestinian Occupied Territories and the level of security applied to the entry points into Gaza from Israel. On the evidence before me I accept that the appellant would be at risk of the security checkpoints should he try to enter Gaza from Israel. I also accept there is a real risk the Israeli authorities would have kept records of the appellant's previous detention and would perceive him as a risk. I base this on the evidence given by the report of Dr George who is an expert on the middle east and has given expert evidence in numerous cases before the Tribunal. I found his report detailed and relevant.

53. Dr George recounted the history of closures and control of the Rafah Crossing. At paragraphs 100-103 Dr George cited the report "Forget About Him. He's Not Here": Israel's Control of Palestinian Residency in the West Bank and Gaza, a report issued by Human Rights Watch in February 2012 (and notably post **HS**) and which identified the control of the Israelis and the plethora of measures aimed at controlling the occupied Palestinians.

54. Dr George also referred to Israel's continuing influence over the Rafah crossing and although the opening of the crossing has, in later years, been more relaxed, there is a description of Egypt's longstanding co-operation with Israel's blockade of the Gaza Strip. Pre-2011 the Egyptian government wished to reduce the influence of the Muslim Brotherhood, of which Hamas is an offshoot, to prevent Hamas, which governs Gaza from gaining influence in Egypt. Further Cairo was closely allied with and in receipt of substantial financial support from the USA which is vehemently opposed to Hamas. Dr George wrote that only those whose names had been approved by the Egyptians in advance were permitted to cross the borders (it was already a requirement that only those with valid passports and ID cards were allowed to pass) and that the Egyptians submitted the names of those crossing to the Israelis implying that the Israelis had the possibility of vetoing individuals.

55. A further report cited by Dr George at paragraph 118 referred to the Rafah Crossing remaining the sole passage in and out of Gaza for all its residents. In 2011 its operation and usage remained under the control of Egypt and managed by Israeli guidelines. By 2014 the Daily News reported further periodic closures of the Rafah crossing and continuing strain on Egypt /Hamas ties and the situation worsening

because of Hamas/ Israeli conflict in the Gaza Strip. The crossing was effectively closed from 2014 to 2018 owing to a blockade by the Egyptians and Israelis of Hamas but reopened in 2018 ' to alleviate the burdens of the brothers in the Gaza Strip" as tweeted by Egypt's President and 'Israeli troops fatally shot 59 Palestinians and wounded more than 2,700 during protests and violence along the Israeli fence with Gaza'.

56. At paragraph 126 of his report, Dr George cited OCHA's 'Gaza Crossings Operations Status' such that the crossing was open five days a week but at paragraph 127 added that Palestinians hoping to enter Egypt en route to the Gaza strip require an Egyptian entry visa and those are not granted as a matter of course. Dr George advised that information given to him (albeit in 2010) was that entry was a two stage process and that first clearance must be obtained by supplying forms, passports and photographs and secondly an application for a tourist visa. Dr George reported that the consensus of the sources he consulted indicated that 'the Egyptian authorities submitted these names to the Israelis for vetting in advance of border openings implying that Israel had the possibility of vetoing individuals" although he received no response when trying to corroborate this from the Egyptian authorities (paragraph 128). The population registry was manned by Israel and

> '*According to official Egyptian sources the border openings have the agreement of Israel and the PA: Egypt informs both parties in advance and even sends Israel the lists of those expected to pass through'* [paragraph 129].

Dr George was not aware of changes to these arrangements of regulation despite regime change.

57. Dr George was told that the appellant had no Palestinian ID or travel documentation and Mr Jarvis observed that the report was founded on a misconception as the appellant had a passport valid from 2009 to 2014. That passport has expired but even if he managed to obtain a new passport with an ID card there is a risk that his passage would be alerted to the Israelis which would, on the lower standard of proof, place the appellant at risk. Dr George cited a report issued in 2019 by Denmark's Ministry of Immigration and Integration which stated that

> '*Returning after years abroad and residing is possible if the person concerned has a valid Palestinian ID and is not banned for security reasons.*

This suggests two limbs to be satisfied – that of a passport and not being banned for security reasons. That the appellant has an expired passport does not alleviate the risk to him of being identified at the border. Dr George at paragraph 167 of his report had this to say in relation to the appellant's detention in 1990

> '*This would likely be held on Israeli records, and Israeli decisions on matters relating to security are notoriously arbitrary. Mr A's 'offence' would likely have been minor; but it could still be sufficient for the Israelis to object to his return'*

and

> '*it is possible – but by no means certain- that his brief detention by the Israelis in 1990 might cause the Israeli authorities to block any attempted return by Mr A to the Gaza Strip*'.

The standard of proof is whether if he is returned to his country of origin there is "a reasonable degree of likelihood" or 'real risk' of persecution. In my view on the evidence there is a real risk that the appellant may be detained by the Israeli authorities not least through the co-operation with the Egyptian authorities albeit in possession of a passport and ID card which would in fact readily serve to alert relevant personnel to his identity.

58. I note that the refusal letter dated 15th March 2019 referred to an out of date Country Guidance that being Country Information and Guidance Occupied Palestinian Territories (OPTs) Security and Humanitarian Situation Version 1.0 June 2015. In fact, the relevant Country Policy and Information Note Occupied Palestinian Territory (Gaza): Security and Humanitarian Situation Version 2.0 March 2019 was valid from 5th March 2019 and predated the refusal letter. That records a deteriorating humanitarian situation than that described in the refusal letter but nonetheless I have relied on the report from Dr George in respect of the humanitarian conditions.

59. The appellant's passage to the Rafah crossing is also problematic. Rafah is in North Sinai. The crossing would appear to be subject to closures and there is a risk of being stranded in Sinai. Dr George described an escalating Islamist insurgency in the Sinai Peninsula which had prompted Egypt's military government to create a security buffer zone along the border with the Gaza Strip. I consider that the risks of travelling through this area and being stranded are high.

60. **MI (Palestine**) considered whether the predominant cause of the humanitarian crisis in Gaza was the conflict between Israel and Hamas so that the *N* test was not applicable: see *Sufi & Elmi v United Kingdom* (2012) 54 EHRR 9*;*

61. Lord Justice Flaux recorded in **MI (Palestine**) that when referring to Gaza the Secretary of State's own depiction of the living circumstances was of **'**dire humanitarian conditions in Gaza…'. The high threshold test of very exceptional circumstances in **N v SSHD [2005] UKHL 31** in relation to Article 3 was not to be followed for Gaza because

> **'***32. Having considered the country evidence to which Mr Gill QC referred the Court, I consider that it is sufficiently arguable that the conditions in Gaza are and were attributable to the direct and indirect actions of the parties to the conflict within the meaning of [282] of Sufi & Elmi and that there was an element of intentionality if that is a necessary ingredient before the approach in that case will be adopted. I also consider that the Deputy Upper Tribunal Judge failed to have proper regard to the country evidence, in particular the evidence as to the seriously worsened position after the Israeli military operation in 2014*'.

Further

> *34. Finally, our attention was drawn to the fact that the Country Guidance in HS not only pre-dates the decision in Sufi & Elmi but is also dealing with the position as it was up to 2010, some years before the 2014 military operation with its serious impact on the population and the infrastructure. Counsel suggested that perhaps a new Country Guidance case on Gaza should be considered. Ultimately that is a matter for the Upper Tribunal, not this Court, although I can see the sense of the suggestion given that, on any view the Country Guidance in HS is somewhat out of date.*

62. Even if the humanitarian situation in the Gaza Strip is not such that it represents, in general, a risk of harm contrary to Article 3 of the European Convention on Human Rights, which is questionable bearing in mind the humanitarian conditions as described by Dr George, I must consider on the facts of the case, whether the appellant, by reason of his individual vulnerability, might face a real risk of harm contrary to Article 3 of the ECHR and as a result of the dire humanitarian situation cumulatively. The decline in humanitarian conditions as a result of armed conflict is graphically described by Dr George and there was no challenge by the Secretary of State to his report.

63. Dr George at paragraph 151 observed that armed conflict between Israel and Hamas erupts relatively frequently in the Gaza Strip very often involving significant casualties amongst the civilian population.

64. At paragraph 51 he records that in a population of approximately 2 million, between 2008 and 2020 nearly 5,000 died in the Gaza Strip with over 2,500 being classified as civilians; nearly 60,000 were injured. In the same period 5,580 Israelis were wounded. At paragraph 160 Dr George refers to a report from the Independent on 12th February 2020 entitled 'How Israel is "bombing Gaza blind" with no real time check for civilians.

65. At paragraph 60, Dr George identified that 'humanitarian conditions in the Gaza Strip, always poor, deteriorated markedly as a result of the Israeli-Egyptian blockade imposed in 2007 and worsened dramatically as a result of the armed conflicts between Hamas and Israel. In 2007 the Strip was said to be at emergency level of medical supplies. Since 2013 Cairo authorities had been blocking the tunnels used as routes for entry and exit, by flooding them with sewage.

A World Bank report (and not an NGO report) dated May 2015 [cited at paragraph 65 of the expert report] recorded unemployment in Gaza at 43%, and the economic outlook as 'bleak' and that '*Gaza's economy has been reduced to a fraction of its estimate potential*'. The report noted that if compared to other economies the unemployment rate in Gaza would be '*the highest in the world*' and

> '*these numbers fail to portray the degree of suffering of Gaza's citizens due to poor electricity and water/sewerage availability, war related psychological traumas, limited movement, and other adverse effects of wars and the blockade*'.

The International Crisis Group report dated 2015 and entitled 'No Exit? Gaza and Israel between wars' [paragraph 68 of Dr George's report] noted serially with regard to Gaza

> *'…a functioning economy requires exports, which today are virtually non-existent'…*
>
> *'…the health sector is collapsing'*
>
> *'…95% per cent of the water from Gaza's aquifer, which will soon be unusable, is unfit for humans…'...'Water related illnesses account for over one fourth of illnesses…'*
>
> *'Gaza has long struggled with an energy shortage but recently the situation has got much worse. Mains electricity is switched off for 16 to 20 hours a day'.*

66. By 2017 a report issued by the UN country Team in the Gaza Strip [paragraph 70 of Dr George report] recorded not improvement but that

> '*Life for the average Palestinian in Gaza is getting more and more wretched…'*

The May 2018 issue of OCHA's monthly Humanitarian Bulletin wrote that poverty had increased from 38.8 % in 2011 to 53 % by the end of 2017.

67. The respected Israeli NGO Gisha issued a press release on 13th March 2019 [cited at paragraph 75] identifying that

> '*even the few who find employment in Gaza don't necessarily earn enough to make a living…72% of private sector employees in Gaza earn less than minimum wage'.*

68. The portrayal of the health sector is no less desperate. In June 2019 the UN OCHR report stated

> '*Years of blockade have led to a serious deterioration in the availability of qualify of health services in the Gaza Strip'*

69. In its report dated September 2019, the Office of the United Nations Special Co-Ordinator for the Middle East Peace process latest UNSCO report dated September 2019 recorded

> *'However, as we enter 2020 it is clear that without the significant humanitarian and development assistance provided on an annual basis, the Gaza Strip* ***may well already be unliveable****'*

70. The UN Security Council in December 2019 stated [paragraph 78 of the expert report]

> '*the humanitarian and socioeconomic situations in Gaza remain dire…overall 58 percent of patients who sought treatment outside Gaza during the reporting period were granted permits by Israel. Of patients who were injured during the demonstrations, 18 per cent of those seeking treatment outside Gaza were granted permits by Israel. …overall 1.7 million Palestinians are considered food insecure'.*

This underlines the plummeting socioeconomic and health conditions in the Gaza Strip but also illustrates the hold that Israel continues to have over existence in the Gaza Strip even to the point of denying access to medical care. At paragraph 98 of

his report Dr George cited from a report which confirmed that Israel retained control of the population registry and that only persons listed in the population registry or issued permits by the GOI can use the Rafah crossing.

Overall, I find, there would be serious limitations on the appellant seeking health services either within or without Gaza. It is self-evident that the lack of water and fuel and electricity outages will have a significant effect on the availability and standard of health care.

71. I take into account that the appellant is now 50 years old, has had a history of ongoing cardiac complications including a heart attack whilst in prison as documented by the medical evidence. The appellant has been absent from the Gaza Strip since 1990. and owing to his age I accept his mother will have died. He also maintained that his brothers were killed in a bombing attack and that his sister had died. This is plausible owing not only to the time elapsed, the ongoing conflict but also to the living conditions, as outlined above, in Gaza. Mr Jarvis was sceptical that the appellant had been unable to make recent contact with his friends in Gaza owing to power outages in Gaza, but the reports of severe electricity shortages are numerous.

72. I accept Dr George's evidence with regard the appellant's prospective unemployment. Dr George notes that 'the reality is that medical professionals including optometrists suffer very high levels of unemployment. He recorded that optometry degrees are worthless but possibly 'leased'. Degrees, however, particularly medical degrees such as optometry, are personally awarded for a reason – not least to ensure proper health assessments. There was no evidence that 'leasing' degrees, a practice apparently undertaken by those qualified to people who do not have the necessary qualifications, is legal. I consider this route to an income could not be seriously advocated by the Secretary of State without adequate evidence that it is a legitimate practice.

Dr George also emphasised the importance of family networks which I accept the appellant is unlikely to have indicating an absence of an important support structure. As a result of high unemployment his accommodation and housing opportunities will be restricted. Although there is a psychiatric hospital in Gaza and a network of local clinics offering a range of free mental health services this appellant has presented with severe psychiatric difficulties as well as suicide attempts and although I am not finding a possible breach of Article 3 on mental health grounds alone or on suicide risk, I do find that the appellant's heart condition and the services available in Gaza are a relevant ingredient in assessing the conditions for this individual. At paragraph 99 it was observed that it was difficult for foreign born spouses and children of Palestinians to obtain residency. It is likely, on the lower standard of proof, that his wife and son will not be able to join him and he will not be able to leave Gaza even if he managed to enter which I find unlikely.

73. I therefore find that the appellant would be at risk of persecution for a convention reason (and thus humanitarian protection does not apply) and even if I am wrong

about that, I conclude that return to Gaza for this appellant would be in breach of his Article 3 rights.

Immigration (European Economic Area) Regulations 201

74. I turn now to the assessment of the EEA appeal and his exclusion under Regulation 27 of the EEA Regulations 2016. The appellant is a family member of Ms X, a Hungarian national with permanent residence in the United Kingdom. It was accepted by Mr Azmi at the hearing that the appellant attracted the lowest band of protection. Further to Regulation 27(5):

> *"27.*
>
> *…*
>
> *(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles -*
>
> *(a) the decision must comply with the principle of proportionality;*
>
> *(b) the decision must be based exclusively on the personal conduct of the person concerned;*
>
> *(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;*
>
> *(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;*
>
> *(e) a person's previous criminal convictions do not in themselves justify the decision;*
>
> *(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.*
>
> *(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ('P') who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin."*

75. I have considered whether the appellant's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I have taken into account his past conduct and that the threat does not need to be imminent. I had specific regard to Schedule 1, particularly paragraph 7(e), (f), (g) and (j). These criteria set out the fundamental interests of society such as including prevention of social harm, tackling offences likely to cause harm to society

and protecting the public. The appellant has been convicted of the offences which I have detailed above. The conviction for which he received imprisonment were the counts relating to fraud when he was running a second-hand car business buying cars and "improving" or "altering" them in order to sell on at a profit. The sentencing remarks of the judge make clear that some of them were considered to be unsafe and the appellant used car-branded stamps in order to "doctor" the service history of the vehicles. It would appear that the appellant received two year-long sentences concurrently and one six month sentence. He was said to have been sentenced to two years' imprisonment but as noted above the Section 72 certificate was withdrawn.

76. During his evidence, the appellant accepted the decision of the court that he was found guilty and he accepted the sentence. Mr Jarvis challenged the appellant's response to the question "do you accept you are guilty?" as demonstrating a lack of remorse and indicative of a propensity to reoffend. The last offence of fraud occurred in 2018 when the appellant was no longer to work as an optometrist because of his immigration status. Prior to that offence he was convicted of battery for which he received a fine. There is no other indication or record of any conviction for violence either before or since this offence. It would appear that the first offence committed by this appellant was when he was in his mid-40s. There is no record of a history of offending save for these convictions outlined. That was acknowledged by the sentencing judge in 2018. That is not to demean the status of those convictions, but I am assessing whether he is a present threat.

77. The burden of proving that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society under the EEA Regulations rests on the Secretary of State and the standard of proof is the balance of probabilities, **Arranz (EEA Regulations – deportation – test)** [2017] UKUT 00294 (IAC)

78. In particular, I have considered the letters from the probation officers, one of which was undated and one which is dated 12th June 2019. The undated report (but evidently post release), written by Hayley Winter, Probation Service Officer, described the appellant as a "low risk offender". She described Mr A as always attending on time and "been well-presented, respectful and fully engaged. Mr A has not had any warnings issued due to his compliance and positive, proactive engagement". I find that his compliance and positive, proactive engagement suggest that he is willing to submit to the decision of the court and does not indicate a further propensity to offend. The probation officer, Miss Winter, added: "Mr A is very keen to seek employment but has not been able to due to the restrictions in relation to his immigration status, this has been problematic for Mr A's family. Despite this, there are no concerns with regards to him committing further offences." She added:

> *"As part of this report I have requested police intelligence checks which evidence that there are no concerns regarding Mr A and that he continues to remain compliant and of good behaviour."*

A second report dated 12th June 2019 referred to Mr A as being assessed as:

> *"Low risk of serious harm (RoSH) to public, known adults, children, staff and self. Mr A was convicted of a fraud-related offence which, whilst unpleasant for those who were deceived by him, it is likely they would make a full recovery from the incident and there would be no lasting impact or serious harm."*

In relation to the offence of battery, Ryan Jenkins, the Probation Service Officer, stated that he had a capacity to behave in an aggressive manner, which risks serious harm being caused to someone but "Mr A has previously described his action as an 'anger response' following an argument with the victim. However, his previous violent offence appears to have been an isolated incident and is not part of an entrenched pattern [of] offending." He was a cooperative prisoner albeit he was only in prison for a matter of months.

79. Since committing those offences the appellant has suffered a heart attack and his health is compromised. Whilst in prison the appellant suffered a heart attack. He was admitted to the coronary care cardiac unit of the Royal Berkshire Hospital in February 2019. He underwent heart surgery on 24th February 2019, and he was discharged, prescribed with a variety of medications including medication in relation to anxiety and depression. The notes record that the appellant had made suicide attempts prior to his incarceration. At the hearing before me the appellant showed evidence that he had been admitted to the Royal Berkshire Hospital in October 2020 and remained there overnight. I find that the appellant's health is such that this reduces the risk of any propensity to reoffend.

80. Nevertheless, I also consider whether the decision is proportionate as set out in Regulation 27(6). The appellant is aged 50 years old. His physical health is compromised, and he has mental health difficulties as witnessed by the report on his posttraumatic stress disorder. He has recurring heart problems. He is married with a child and is presently unemployed, albeit he is a qualified optometrist and did work for Specsavers but was released when his leave expired on separation from his previous wife. He entered the United Kingdom lawfully on a spousal visa although I accept that he has remained unlawfully in the United Kingdom since 2014 and is now subject to a deportation order.

81. I accept that owing to the time he has been absent from Gaza that his links with his family there are limited. He maintained that his mother had died in 2011 and I note the medical report which identified his distress at that point and that his sister had been killed in 2014. I take into account the report of Dr George and the number of civilian casualties in Gaza, so the fact that his sister was killed in 2014 is plausible. I accept that he has not visited Gaza for 30 years and although he may speak Arabic his links with that country are, at best, tenuous now. Mr Jarvis questioned the appellant about whether he was able to contact anyone on Facebook and displayed understandable scepticism as to the appellant's response that he was unable to get through to anyone in Gaza because of electricity outages. The report by Dr George does refer to frequent power cuts in Gaza, not least because of the economic difficulties, and I accept that it would not block all communication but the difficulties

of accessing relatives there would be accentuated by time differences and thus I accept that the links are no longer there.

82. The appellant has a wife and child who is a British citizen and has lived in the United Kingdom for ten years and has been employed as an optometrist in the UK. I accept that despite his conviction he is socially and culturally integrated here, not least because of his family but also his previous work as an optometrist. Although his rehabilitation is not as relevant as he only attracts the lowest form of protection under the EEA Regulations, he gave evidence that he offered assistance during the pandemic as a previous healthcare professional, which must be to his credit, and I take into account the probation officer reports which I have cited above.

83. I also take into account the best interests of the child, who is nearly 5 years old and is settled at primary school. On the evidence of his mother, which I accept as being entirely plausible, he is devoted to his father and would be devastated on his father's removal. There is documentary evidence that his mother took the child to see his father regularly when in prison. His mother teaches and thus provides an income although they do receive universal credit. I do accept, however, that the father contributes to the care of the child, not least because he is the person who is unemployed. I accept the child is very attached to the appellant not only because of the evidence from the mother. The documentary evidence from the child's nursery school (the child is now at school), confirmed that '*A is truly attached to his father and need[s] to continue to grow close to him for the sake of his wellbeing especially psychologically*'.

84. The best interests of the child are to remain in the United Kingdom with his mother and father. I consider that the child's removal to the Gaza Strip would be entirely inimicable to his best interests. The report of Dr George made clear the unedifying conditions in which many adults and children live in the Gaza Strip and the effect on children of the poverty there, the deteriorating medical facilities and the general living conditions.

85. The expert report cited at paragraph 176, 'A Decade of Distress' a report by Save the Children Fund in March 2019 which referred to *'a state of toxic stress' and that children 'are at high risk of developing serious and long-term mental health issues'*. The report continued

> '*many children and their family members have been killed and thousands more injured as a result of mass demonstrations at the Israel Gaza perimeter and their response of the Israeli security forces*'.

and

> *'children and families are living in a near- constant state of distress, with little hope for an end to their ordeal. They have been subjected to the horrors of war, dire economic conditions, and have little opportunity to escape the harsh realities of life'*.

86. Overall this leads me to conclude that it would be wholly unreasonable to expect this child, who is a British citizen, to relocate to the Gaza Strip, even if the child could

travel there and be documented, which I seriously doubt. His education and health outcomes would be severely affected.

87. The decision under the EEA Regulations affects a child, and, thus falls within the scope of Section 55 and should be included in my consideration of the proportionality of the decision to exclude the appellant.

88. Balancing the risk that the appellant poses which I do not accept is sufficiently serious to affect one of the fundamental interests of society, I consider that the decision to exclude appellant would not be proportionate under the EEA Regulations.

89. For completeness, I have considered the human rights claim under the Immigration Rules and taken into account Section 117C of the Nationality, Immigration and Asylum Act 2002 (and as set out in the Immigration Rules). The deportation of foreign criminals is in the public interest and further to Section 117C(3) he has not lived in the UK for most of his life as the appellant came to the UK in 2010. I accept, however, that he has a qualifying relationship with a qualifying partner (his wife has permanent residence) and that he has a qualifying relationship with a qualifying child who is a British citizen.

> *"**117C Article 8: additional considerations in cases involving foreign criminals***
>
> *(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.*
>
> *(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."*

90. Paragraph 399 of the Immigration Rules applies where paragraph 398 (b) or (c) applies if –

> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported;

91. I also bear in mind the principles enunciated in **KO (Nigeria) [2018] UKSC 53**, **HA (Iraq) [2020] EWCA 1176** **AA (Nigeria) [2020] EWCA 1296 Civ** and the guidance

included therein. I find that the impact on the child would be unduly harsh. With the restrictions on entry to the Gaza and the conditions which pertain there it is likely that the relationship between father and child will be severed permanently and it is unlikely he will see his father again. I have already found that the child should not be expected to remove to Gaza and, indeed is very unlikely to even be granted access with the mother. I will not rehearse those reasons again. The child is at a crucial stage in development and is said to be devoted to his father. The child is at the start of his educational career and relies on his father for much of his primary care, which I derive from the mother's evidence. I also accept her evidence that he will be devastated to be parted from his father, with whom he has always had a close bond and for whom his emotional attachment has deepened. It is no substitute to have communication via "modern means" and in view of the continual power outages in Gaza even remote access by for example, skype, is unlikely to be a feasible form of communication.

92. I accept that psychological harm would be inflicted on the child owing to the father's deportation which would be unduly harsh further to paragraph 399 of the Immigration Rules. The mother is also deeply attached to her husband as shown by her very regular visits to him in prison, sometimes twice a week but on a very regular basis, whereupon she took her child. She has expressed the harm it would do to their family life (and I note that his status was precarious when they entered the relationship and then married) but it is the effect on the child which I consider to be most pressing.

93. I have factored in the Section 117B factors. The appellant can speak English and would if not working as an optometrist not be a burden on society although I realise that the family are in receipt of universal credit at present. I accept that Section 117B(4) that little weight should be given to a relationship formed with a qualifying partner established at a time when the person's immigration status was precarious but, as set out in **Rhuppiah [2018] UKSC 58**, Section 117B is not a straitjacket.

94. I enlist all of my reasoning above to find very compelling circumstances which outweigh the decision to deport the appellant. I find the deportation would be disproportionate. I take into account the separation from the child which would cause undue harshness, the medical condition of the appellant, and the dire humanitarian conditions which would meet the appellant in the Gaza strip even if the he could access it via Sinai.

Notice of Decision

I allow the appeal under the Refugee Convention and on human rights grounds (Articles 3 and 8). I also allow the appeal under the Immigration (European Economic Area) Regulations 2016.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Helen Rimington* Date 21st November 2020
Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award owing to the complexity of the matter.

Signed *Helen Rimington* Date 21st November 2020
Upper Tribunal Judge Rimington