Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10719/2019 (V)**

THE IMMIGRATION ACTS

Heard by *Skype for Business*	**Decision & Reasons Promulgated**
On 13 January 2021	**On 29 January 2021**

Before

UT JUDGE MACLEMAN

Between

A H

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by RH & Co, Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Palestinian, from Gaza, aged 40. He has entered the UK several times since 2008.

2. The appellant was convicted at Birmingham and Solihull Magistrates Court on 14 August 2018 of 2 counts of assaulting a constable, 1 count of assault causing actual bodily harm, and 1 count of failing to surrender to custody. On 11 September 2018 he was sentenced to 10 months imprisonment in total.

3. On 18 October 2018 the respondent decided to deport the appellant.

4. On 17 October 2019 the respondent refused the appellant's protection and human rights claims and found that no exceptions to deportation were established.

5. Designated Judge Macdonald dismissed the appellant's appeal to the FtT by a decision promulgated on 4 February 2020.

6. The appellant appealed to the UT. By a decision promulgated on 27 July 2020, UT Judge Norton-Taylor set aside the decision of the FtT for (a) failure to address whether later evidence warranted departure from country guidance and (b) lack of consideration of individual vulnerability.

7. Current country guidance is set out in *HS* (Palestinian – return to Gaza) Palestinian Territories CG [2011] UKUT 124 (IAC):

> Headnote (6). The conditions in Gaza are not such as to amount to persecution or breach of the human rights of returnees or place them in need of international protection.
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> 222. Our assessment of the background evidence is that it clearly shows a harsh state of affairs in Gaza which reflects a deterioration beyond the situation prior to the Operation Cast Lead hostilities. The infrastructure of Gaza is significantly depleted, and there are problems of access to electricity and clean water and there are limits on the amount of products that are brought into the territory. We do not seek to undervalue the level of difficulty that the appellants in this case, and indeed other residents of Gaza, face in the territory. But we consider that the tests set out in the Refugee Convention as applied in the case law and under Article 3 are set at a level of risk which is higher than that which would be experienced by the appellant and her family in this case on return.

8. On 30 November 2020 a transfer order was made to enable the decision to be completed by another UT Judge. The case accordingly came before me on 13 January 2020 for remaking of the decision. The technology enabled an effective remote hearing.

9. I had the benefit of a skeleton argument from Mr Winter and of thorough and helpful submissions from him and from Mr Howells. Having heard those submissions, I reserved my decision. I now resolve the issues as raised by the parties, (i) – (vii).

(i) What is the test for humanitarian protection?

10. Mr Winter submitted that the test for humanitarian protection, article 15(b) of the Qualification Directive, and article 3 ECHR, should be taken from *Sufi & Elmi v UK* (2012) EHRR 9 as cited in *MI (Palestine) v SSHD* [2018] EWCA Civ 1782:

> 18. Laws LJ then reviewed the decisions of the Strasbourg Court in *MSS v Belgium and Greece* and *Sufi & Elmi v United Kingdom* … The latter is of particular relevance in the present context. The case concerned Somalian nationals who had committed criminal offences in this country. The Secretary of State was proposing to deport them to Somalia, which was resisted on the grounds that the dire humanitarian conditions in Somalia were such that their return would be a breach of Article 3. The Government contended that the appropriate test for assessing whether the dire humanitarian conditions reached the Article 3 threshold was that set out in *N v United Kingdom* so that humanitarian conditions would only reach the threshold in very exceptional cases where the grounds against removal were compelling.

19. The Strasbourg Court rejected that contention in the particular circumstances of that case because the humanitarian crisis in Somalia was predominantly due to the direct and indirect actions of the parties to the conflict there, so that the "very exceptional circumstances" test in *N* was not applicable. At [282]-[283], the Court said:

> 282. If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N v the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict. The reports indicate that all parties to the conflict have employed indiscriminate methods of warfare in densely populated urban areas with no regard to the safety of the civilian population… This fact alone has resulted in widespread displacement and the breakdown of social, political and economic infrastructures. Moreover, the situation has been greatly exacerbated by al-Shabaab's refusal to permit international aid agencies to operate in the areas under its control, despite the fact that between a third and a half of all Somalis are living in a situation of serious deprivation…
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> 283. Consequently, the Court does not consider the approach adopted in *N v the United Kingdom* to be appropriate in the circumstances of the present case. Rather, it prefers the approach adopted in *MSS v Belgium and Greece*, which requires it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame (see *MSS v Belgium and Greece*, cited above, paragraph 254).

11. To show that there is a humanitarian crisis predominantly caused by the conflict between Israel and the Palestinian Authority, the appellant cites passages from the respondent's Country Policy and Information Note ("CIPIN") (Gaza), March 2019, and from the Report of a Home Office Fact-Finding Mission ("FFM") Occupied Territories, March 2020.

12. Mr Howells submitted that *MI* found only that the point was arguable, and remitted to the UT, observing that country guidance was dated (there has been no subsequent country guidance). He adopted the position taken for the SSHD in *MI*:

> 27. [Counsel for the SSHD] submitted that the decision of this Court in *Said* demonstrated that it was only in very narrow circumstances that the Court would allow an Article 3 claim which departed from the paradigm. If there was to be such departure, it had to be on the basis of principle which here was that the approach adopted in *Sufi & Elmi* only applied where there was an element of intentionality on the part of the parties to the conflict. There al-Shabaab, an extremist organisation was corralling the population in certain areas and refusing them access to international aid. The situation in Palestine was not comparable not least because of the permanent presence of UNRWA to protect the refugee population. If the *Sufi & Elmi* approach were applied here, it would apply to other receiving states where there were dire humanitarian conditions.
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> 28. She relied upon the decision of the Strasbourg Court in *SHH v United Kingdom* (2013) 57 EHRR 18. That case concerned an Afghan national who was disabled in a rocket launch attack and came to the United Kingdom some four years later. The Court held that the *N* test applied to his Article 3 claim and distinguished *Sufi & Elmi* holding at [91] that although the situation in Afghanistan was very serious, it could not be attributed to the ongoing conflict. Ms Anderson submitted that the same conclusion would have been reached here even if the *Sufi & Elmi* point had been raised.

13. Mr Howells said that, unlike in Somalia, in Gaza indiscriminate methods of warfare in densely populated urban areas are not being used with no regard to the safety of the civilian population; not only UNRWA but many other NGO's support that population; there is no blocking of aid and no intentionality of parties; and while conditions are poor, they are not attributable to the actions of the parties to the conflict.

14. The passages cited for the appellant, from sources complied by the respondent, show that since 2011, waves of conflict, the worst of which was in 2014, have exacerbated the already poor humanitarian situation in Gaza, and there has been a decline in aid transfers. The sources also show that humanitarian food and medical supplies as well as oil and fuel continue to be delivered. The "executive summary" in the FRMM notes that while the humanitarian situation is worsening due to the ongoing Israeli blockade and the internal Hamas/PA conflict, there are multiple organisations working to alleviate the difficult conditions.

15. The Court of Appeal reached no conclusion on the submissions made to it. The respondent's submissions, and her policy, are of course only the position of one party.

16. The principal causes of the humanitarian situation are intensely controversial, but the appellant has not shown that the sources justify the conclusion that it is predominantly due to the actions of the parties to the conflict, as such. Problems arise from poverty and from lack of state resources (or perhaps misuse of resources, on some interpretations) rather than from intention.

17. Unlike in Somalia, there is no refusal of aid. Humanitarian assistance is provided on quite a large scale by UNWRA, the EU, USAid, and numerous other organisations.

18. Accordingly, the appellant has not shown that his case should be assessed by "ability to cater for his most basic needs", rather than by general article 3 principles.

(ii) Would the appellant be able to cater for his most basic needs on return?

19. In the alternative, if the test in *Sufi & Elmi* should be applied, is it satisfied?

20. On this issue, the appellant relies on matters specified above, and in particular on difficulty in obtaining accommodation and employment; deteriorating living conditions; undrinkability of piped water; fluctuating electricity supply; poverty and food insecurity; his length of absence; mental health issues; lack of mental health facilities; and risk of suicide.

21. Mr Howells countered with references to the recent relatively low level of hostilities; a certain amount of health care through the WHO and others, including mental health care; groups active on mental health issues; and so on, which he said showed that basic needs, at least, were catered for; and that the situation did not amount to general infringement of article 3.

22. Conditions for most residents in Gaza are poor, but the appellant has not shown that they are so dire that his most basic needs, such as food, hygiene, and shelter, would not be catered for. Assistance is available from UNWRA and other organisations to a level at which, even if he did not find employment and accommodation on his own initiative, he would be kept above the level of destitution.

23. The mental health aspects, specific to the appellant, are of a different nature. They do not bear on the general test to be applied to the receiving territory.

(iii) Should the UT depart from country guidance?

24. Based on the same evidence, and for the same reasons, the appellant has not shown that general conditions in Gaza have further deteriorated to such an extent as to qualify him, without more, for international protection.

(iv) Would the appellant's return breach article 3 of the ECHR?

25. The appellant points out, and it is undisputed, that the legal test is now to be taken from *AM (Zimbabwe) v SSHD* [2020] 2 WLR 1152, UKSC 17, at [32]. He submits that there are "substantial grounds for believing that this is a very exceptional case because of the real risk of being subjected to inhuman treatment and on the facts of this case" – skeleton argument, [4].

26. The test approved in *AM* was stated in *Paposhvili v Belgium* [2017] Imm AR 867 at [183]:

> The Court considers that the 'other very exceptional cases' within the meaning of the judgment in *N v The United Kingdom* (para 43) which may raise an issue under article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.

27. The medical aspect of the appellant's case comes into play at this stage, being the only point which might differentiate him from any other averagely resourceful Palestinian.

28. He founds upon a report dated 12 December 2019 by Mrs M K Ross, a consultant clinical psychologist. The report finds at [46] that the appellant "experiences borderline clinical anxiety and borderline clinical depression". At [49] his presentation is found to meet:

> … the diagnostic criteria for an Adjustment Disorder with Mixed Disturbance of Emotion and Conduct 309.4. That is to say there is anxiety, depression and past disturbance of conduct.

29. At [50] the criteria are set out:

> … excessive reaction to a stressful life event which causes negative behavioural changes and impacts emotional stability.

30. The report goes on at [52] to find that as certain of the appellant's stressors are chronic, including his lack of immigration status, the disorder is now in the persistent form.

31. At [54] the report notes that although the appellant is not and has not been suicidal, he states that he would have no option but to take his life if faced with return to Palestine, because he believes he would not be able to survive and would be killed.

32. The appellant has failed to establish, objectively, either of those fears. Perhaps advisedly, his case has been put on the generality of article 3 risk and not on suicide risk alone. However, the degree of that risk requires assessment.

33. The report at [54] goes on:

> Given that DSM-5 indicates … an increased risk of suicide attempt and completed suicide … I would consider that there is a serious and significant suicide risk … in the circumstances in which he were removed from the UK to Palestine.

34. Thus, a qualified expert assesses the risk at a level which might indicate a need for protection. However, her report takes a major leap from the "increased risk" associated generally with the diagnosis (which is at the lower end of the spectrum of mental disorders) to "serious and significant risk" in the instant case, where there is no suicidal history apart from the statement to the psychologist at interview. A risk may increase, without reaching a significant level.

35. While I hesitate to take the expert report other than at face value, it is hard to see any justification for the intensification from "increased" to "serious and significant" risk.

36. The key cases on suicide risk are *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, [2005] Imm AR 409, and *Y (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 362. The following summary is from *Macdonald's Immigration Law and Practice*, 9th ed. + supplements, 7.54:

> In principle psychological illness is capable of engaging Article 3 just as physical illness is, particularly where there is a significantly increased risk of suicide because of removal.[1] In the case of *J* the Court of Appeal confirmed that Article 3 may be breached if there is a real risk of committing suicide as a foreseeable consequence of the decision to remove whether on being informed of the removal decision, in the course of removal or after arrival in the destination country.[2] The court drew a distinction between 'domestic cases' and 'foreign cases'.[3] With regard to the risk of suicide on being informed of an adverse immigration decision and in the course of being removed from the UK (both of which are 'domestic cases'), the tribunal would be entitled to assume that the UK authorities would take all reasonable steps in accordance with its obligations under the Human Rights Act 1998 to protect the individual from self-harm, including by the practice of arranging escorts to accompany the person on removal.[4] Further, a real risk that the person would

> commit suicide after arrival in the receiving State might not be sufficient to establish an Article 3 breach: what happens to the person on and after arrival is treated as a 'foreign case' (ie one in which the alleged violation takes place outside of the jurisdiction of the sending State), making the Article 3 threshold particularly high.[5] What would have to be shown is 'exceptional circumstances comparable in impact to those of the terminal patient in D'[6] or that 'removal would be an "affront to fundamental humanitarian principles"'.[7] An issue of considerable relevance in this context is whether the removing and the receiving states have effective mechanisms for reducing the suicide risk and whether those mechanisms are accessible to the particular invidual.[8] Although suicide risk cases are rarely successful, in *Y* the Court of Appeal found that the removal of a brother and sister to Sri Lanka where they had both been tortured and the sister raped; where they subjectively feared similar treatment if returned, notwithstanding that their fear was not objectively well-founded; and where they would have no family or other social support created such a likelihood that they would commit suicide in order to escape isolation and fear that their removal would breach Article 3.[9] In *Balogun* the ECtHR approved of the approach taken in *J* and noted that in suicide cases, appropriate and adequate steps taken to mitigate the risk will weigh against a conclusion that the high threshold of Article 3 has been reached.[10]

37. On the effectiveness of mechanisms in the receiving territory, the appellant's most recent citations were from the FFM:

> 4.24.14. The WHO representative noted: 'WHO aim to work with partners to adequately support services to address the mental health burden and have been actively engaging with UNWRA, to integrate mental health care into primary healthcare to avoid stigmatisation. Some progress has been made but there are severe capacity gaps in services and specialists. There is a small number of psychiatrists and mental health professionals and primary healthcare is not specialised. However, with training it is possible to diagnose and treat some mental health conditions. There is some investment in trying to alleviate the problem. …
>
> 4.24.16 Source 2 also noted 'there is one mental health hospital in Gaza, but with limited capacity in comparison with the needs. There is a need to address some gaps in mental health in terms of building capacity of health professionals and improving capacity of centres (in terms of the setting, beds, structure, etc).

38. The evidence does not reach the high threshold - taking account of its modification in in *AM (Zimbabwe)* - or the affront to fundamental humanitarian principles, required to succeed on this issue.

(v) Is the appellant entitled to withdraw his concession on whether his offences caused serious harm?

39. The appellant cites *Wilson* [2020] UKUT 00350 and *Mahmood v SSHD* [2020] EWCA Civ 717, both reported after the decision of the FtT, and seeks to withdraw his previous concession.

40. The respondent says that the intention to withdraw the concession was notified only on 11 January 2021, long after those cases were reported, and that withdrawal at this unjustifiably late stage should not be permitted.

41. Notification of withdrawal might have come earlier, but it does not prejudice the respondent. This is an evaluative exercise based on information known to both parties throughout the proceedings, to be carried out following a hearing on

remaking the decision. There is no good reason to bind the appellant by his previous concession.

(vi) Did the appellant's offences cause serious harm?

42. The appellant does not specify any passages in *Wilson* or in *Mahmood* which suggest that his offending should not be considered to have caused serious harm. The evaluative exercise turns on the facts. The appellant refers in this respect to his "mental health issues", but those are not related to the seriousness of resulting harm. Beyond that, he says that although the police officer whose hand he bit had to undergo further tests, nothing arose from that, nor from spitting on another officer; and there is nothing to indicate that the bite or scratch to the second officer needed stitches, or left scarring.

43. The appellant has consistently denied his offending, or at least played his behaviour down, and has sought to blame his previous lawyers and the police for what happened. On the other hand, I note that the psychologist viewed a video recording of the incident and was impressed by the patience and restraint of the police. His failure to take responsibility, however, is irrelevant to the degree of harm caused.

44. The sentencing remarks convey the reality:

> You chose to bite one of the police officers … hard enough to break the skin so that the officer required both a tetanus jab and a blood test … You flailed your arms catching another officer … causing an unpleasant scratch to his face … and spat at another officer, the spittle catching him in the face. You have never come to terms with what you did …
>
> … I regard the assault occasioning actual bodily harm as a category 2 offence … of high culpability because of the bite you inflicted the injury with …
>
> The other two offences of assaulting a police officer in the execution of his duty are both serious.

45. The remarks make it clear that the actual harm was a factor in the overall sentence of 10 months.

46. The offences had an effect on, it appears, 3 police officers, especially the one who was bitten. I consider that effect crosses the threshold from actual, but trivial, into serious harm. The appellant's case accordingly falls within the deportation provisions.

(vii) Are there very significant obstacles to the appellant's integration into Palestine?

47. The factors on which the appellant relies in this respect are all as considered under previous headings. Paragraphs 399A9(c) and 276 ADE(1)(vi) of the rules apply to protect private life, not to provide an easier alternative to the refugee, humanitarian, and article 3 routes. Although the appellant has been away from Palestine for years, he grew up there, speaks the language, and is familiar with the culture and society. He would be at no greater disadvantage than the rest of the general population, among whom he would be an "insider" not an "outsider", which is the principal criterion for integration.

48. The appellant has shown no feature of his private life in the UK such that it should carry any more than "little weight" in terms of part 5A of the 2002 Act.

Conclusions.

49. It is readily understandable that the appellant resists return to Palestine, but he has not shown that his offences were other than serious, that there are any exceptions or very compelling circumstances such that he should not be deported, or that he is entitled to remain in the UK on grounds of refugee or humanitarian protection, article 3 ECHR, private life, or any other legal basis.

50. The decision of the FtT has been set aside. The decision substituted is that the appeal, as originally brought to the FtT, is dismissed on all available grounds.

51. The UT's decision promulgated on 27 July 2020 is headed with the appellant's name, followed by "anonymity order not made"; but that is followed by an anonymity order. There is no obvious reason to depart from the principle of open justice, and the matter was not mentioned at the hearing before me. However, taking a cautious approach, and although it may be of little import, this decision is anonymised.

Hugh Macleman

15 January 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.