Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01625/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24th August 2017	**On 13th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR AAD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Harding, Counsel
For the Respondent: Mr Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the Palestinian Authority born on [ ] 1988. The Appellant left Lebanon by plane using his Palestinian travel document and entered the UK via Libya, thereafter by ship and then concealed in a lorry on 30th April 2015 claiming asylum on the same day. The Appellant's

claim for asylum was refused by the Secretary of State by Notice of Refusal dated 25th September 2015. Thereafter the Appellant has been involved in a substantial number of appeals. He initially appealed to Immigration Judge Walker sitting at Hatton Cross on 25th December 2016. That appeal was dismissed in a promulgation dated 4th February 2016. Thereafter Grounds of Appeal to the Upper Tribunal were lodged on 12th February 2016. Permission was refused initially by Immigration Judge Parkes but was latterly granted by Upper Tribunal Judge Finch on 12th April 2016.

2. That appeal came before (then) Deputy Upper Tribunal Judge Kamara sitting at Field House on 27th May 2016. Judge Kamara found a material error of law and remitted the appeal to the First-tier Tribunal to be reheard. That hearing came before Immigration Judge O'Garro sitting at Hatton Cross on 22nd November 2016. In a Decision and Reasons promulgated on 12th January 2017 Judge O'Garro dismissed the Appellant's appeal again on asylum and human rights grounds and found that the Appellant was not entitled to humanitarian protection. On 30th January 2016 Grounds of Appeal were lodged to the Upper Tribunal. In an undated permission to appeal Judge of the First-tier Tribunal Osborne refused permission to appeal. Indeed, Judge Osborne considered that the First-tier Tribunal Judge's decision was careful, well-reasoned, nuanced and focused. Renewed Grounds of Appeal were lodged on 16th May 2017.

3. On 5th July 2017 Upper Tribunal Judge Macleman granted permission to appeal. Judge Macleman's grant of permission is worth considering. He noted that the Appellant is a Palestinian refugee born and brought up in Lebanon. The principal reasons for rejecting the Appellant's claims were sufficiency of protection within camps in Lebanon, the possibility of relocation to another camp or outside a camp, exclusion from refugee protection for having voluntarily left the camp under Article 1D, and no reasonable likelihood of serious harm on return. In dismissing the decision of the First-tier Tribunal Judge, Judge O'Garro found that there was sufficiency of protection available, that the Appellant was not forced to leave the camp but did so for other reasons and the conditions in the camp, albeit that they had worsened, did not infringe Article 3 or justify humanitarian protection.

4. Judge Macleman found the grounds of challenge less than clear and noted that they asserted that the judge did not deal adequately with sufficiency of protection and that the claim was bound to succeed on the background evidence on that issue. He considered that that appeared to overstate the Appellant's case and to overlook that there were other reasons for it to fail, and that the Appellant was in effect asking the First-tier Tribunal to go beyond the country guidance relied upon in the Respondent's decision without facing up to the need to demonstrate how the nature of the evidence had changed.

5. However, in the important paragraph in the grant of permission, Judge Macleman noted that the grounds did identify arguable shortcomings in

the First-tier Tribunal's expression of its reasons at paragraph 50, an arguable lack of consideration of the case for the Appellant by reference to background evidence as set out in his skeleton argument, and an erroneous reliance on country guidance which related to the occupied territories and not to Lebanon.

6. The Secretary of State responded to the Grounds of Appeal on 25th July 2017. It is on the basis of the above that the appeal comes before me to determine whether or not there is material error of law in the decision of the First-tier Tribunal. The Appellant appears by his instructed Counsel, Mr Harding. Mr Harding is familiar with this matter. He appeared before Judge O'Garro at Hatton Cross in November 2016, he is the author of the Grounds of Appeal and also the author of the renewed Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer Mr Clarke.

Submissions/Discussions

7. Mr Harding acknowledges that there has been a certain amount of "grudgingness" by the judges granting or considering applications for permission to enable this matter to proceed, but he submits that the grounds are valid grounds and that he stands by them. In particular he starts by referring to the test that should have been applied, pointing out that in fact in the Rule 24 response the Secretary of State's representative has made the same mistake as the judge as the question is not one of the risk on return, but that the question the judge had to answer, given that the Appellant was a refugee, was whether Article 1D of the Refugee Convention applied? That section states:-

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

8. Consequently, Mr Harding puts it to me that the first question was "whether ... such protection or assistance has ceased for any reason". It is the contention of Mr Harding that the test therefore to be applied should not be construed restrictively and that the phrase will include:-

(a) the termination of UNRWA as an agency;

(b) the discontinuance of UNRWA's activities; or

(c) any objective reason outside the control of the person concerned, such that the person is unable to (re) avail themselves of the

protection or assistance of UNRWA and that both protection related as well as practical legal or safety barriers to return are relevant to this assessment.

9. It is the submission of Mr Harding that at paragraph 49 of her decision Judge O'Garro has considered a sufficiency of protection type test – from the "security committee" of the camp. He submits that the wrong test has consequently been applied at paragraphs 48 and 49. He refers me to his initial skeleton argument and the bundle that was made available before the First-tier Tribunal Judge. He submits that I need to consider the UNHCR's interpretation of Article 1D of the 1951 Convention and that I also need to consider the Australian Government Refugee Review Tribunal document from 2011 with regard to protection within the Lebanon. He submits that these documents give views as to how the Appellant is likely to finish up being questioned if he is returned and the persecution that he may thereafter be subjected to. It is therefore his submission that the finding by the judge at paragraphs 48 and 49 that although the Appellant has a subjective fear of harm from terrorist groups that he had the option of getting protection from the security committee in the camp which he did not bother to access but which his family appeared to have sought and obtained was open to him. He submits that that is perverse and an error of law and refers me to paragraph 50 which finds therein that the judge was not satisfied that the Appellant's personal safety was at serious risk and that it was impossible for the UNRWA agency to guarantee his leaving conditions in the refugee camps would be commensurate with the mission entrusted to that agency's protection. He submits that that is contrary to the test that is set out above and refers me to both paragraphs 51 and 52 of the decision and to the finding that the Appellant left the refugee camp for his own reasons and not because he was forced to do so as he could not avail the protection of the UNRWA was perverse and flawed.

10. Further and briefly Mr Harding refers to the claim relating to the breach of the Appellant's Article 3 rights and that the reference to the case law therein is the wrong authority and further the reference at paragraph 56 that the groups fighting do not pose a threat to civilians is unclear, particularly bearing in mind that for the purpose of this appeal it would not be appropriate to consider the Appellant merely as a civilian. On that basis he submits that there are material errors of law and he asked me to set aside the decision and to remit the matter back to the First-tier Tribunal.

11. In response Mr Clarke says that there is no material error of law, albeit that he accepts that if there is no protection from UNRWA then the Appellant would be entitled to succeed. However, it is his contention that the judge has directed herself correctly with regard to Article 1D, both at paragraphs 42 and 44 of her decision. She has set out the law in considerable detail therein and the approach she has adopted in noting that the national authorities must verify not only that the applicant actually sought assistance from the UNRWA and that the assistance has ceased, and that the applicant is not caught by any other grounds of

exclusion laid down in Article 12 is exactly what the judge has done. He notes that Mr Harding on behalf of the Appellant states that the UNRWA is not offering protection in the first place and that this is generic to people who live in the camps. He states that the UNRWA were directly involved in the administration of the camps and to say not is perverse. Therefore, he submits they have a say on how matters are policed in the camps and so it is necessary to look at Article 1D and it is difficult to construe a policy that the camps are not agencies of the United Nations and therefore the general principles submitted by Mr Harding are wrong.

12. He submits that the judge's findings from paragraph 48 onwards are well-reasoned and that the Appellant could seek protection on return and that it has not been demonstrated that he cannot avail himself of protection. He further notes that the findings made at paragraph 52 have not been challenged and that it is not therefore open to argue that the Appellant sought assistance or why he could not go back and seek assistance, and therefore the ground is misconceived and does not disclose a material error of law.

13. So far as the claim pursuant to Article 3 is concerned, he notes the case law at paragraph 55 and he accepts that it is the wrong authority that has been referred to. However, he does take me back to the original Grounds of Appeal, pointing out that the authority referred to therein of *MM and FH (Stateless Palestinians – KK, IH, HE CG reaffirmed) Lebanon v Secretary of State for the Home Department* confirms that discrimination does not amount to a breach of Article 3. He submits that looking at the skeleton argument produced by Mr Harding it is difficult to see how it warrants a departure from country guidance and consequently there is no material error of law. He asked me to dismiss the appeal.

The Law

14. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

15. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been

rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

16. Mr Harding in his final submission to me conceded that there was some merit in the submissions made by Mr Clarke, but what Mr Clarke seeks to do (and I agree with the contentions made by Mr Harding), is to rewrite the decision and to rewrite it without the evidence being in front of him. Had the judge adopted that approach then she might have been entitled to come to the decision that she did. Looking at the interpretation and the approach to be adopted under Article 1D, it is lacking in that the judge has failed to grapple with the fact that security at the camps is run by Fattah and other agencies. It seems to me that the judge has applied the wrong test under Article 1D. The judge should have considered whether protection under 1D or assistance has ceased for any reason and has failed to consider the objective reasons why the Appellant is unable to return or avail himself of the protection or assistance of UNRWA.

17. What the judge does is, as Mr Harding suggests, consider a sufficiency of protection test from the security committee of the camp rather than the correct test under Article 1D of the Refugee Convention. Had the judge applied the test as to whether the Appellant could objectively avail himself of the protection of either the state or the UNRWA, rather than when he can avail himself of whichever militants control the refugee camp, it is quite possible that she would have reached a different decision. Mr Harding is correct in his argument that the Appellant is a refugee and the question of sufficiency of protection has already been answered negatively in the Appellant's favour as a matter of law. I do not go so far as to remake the decision. There is a material error of law for all the above reasons, including the failure to address the correct authority under Article 3. It is the contention of Mr Harding that it is hard to see how the claim can fail given the background material before the judge. That is a matter for further consideration. Mr Harding indicates that in the event that I find a material error of law (which I do), then there is new evidence, including documentation from the UNRWA regarding the ability to live outside the camp, as well as some background material, that it would be necessary for the Tribunal to consider. Consequently, in finding there is a material error of law, and whilst noting the lengthy history of this matter, I think in the interests of justice the correct approach is to set aside the decision and to remit the matter back to the First-tier Tribunal for rehearing with none of the findings of fact to stand.

Notice of Decision

The decision of the First-tier Tribunal Judge contains material errors of law. The decision is set aside and the following directions are to stand:-

1. The matter is remitted back to the First-tier Tribunal sitting at Hatton Cross to be heard de novo before any Tribunal Judge other than Immigration Judge O'Garro or Immigration Judge Walker.

2. That there be leave to either party to file and serve such subjective and/or objective evidence upon which they seek to rely within 28 days of receipt of these directions.

3. That so far as is practical within the administration the appeal herein be expedited, bearing in mind the number of times this matter has been back and forth between the First-tier and Upper Tribunal.

4. That in the event of the Appellant requiring an interpreter that his instructing solicitors do advise as to the language requirement of that interpreter within seven days of receipt of these directions.

5. That the estimated length of hearing is placed at three hours.

Anonymity

The anonymity direction currently in place is not challenged and the direction do remain in place pending the remitted rehearing of this matter before the First-tier Tribunal Judge.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris