



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11447/2019

THE IMMIGRATION ACTS

Heard at Birmingham
On 17th November 2020

Decision & Reasons Promulgated
On 07 December 2020

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MA

Respondent

Representation:

For the Appellant: Mrs H Aboni, Home Office Presenting Officer

For the Respondent: Mr I Hussain, Lei Dat and Baig Solicitors

DECISION AND REASONS

Introduction

1. The appellant in the appeal before me is the Secretary of State for the Home Department (“SSHD”) and the respondent to this appeal is MA. However, for ease of reference, in the course of this decision I adopt the parties’ status as it was before the FtT. I refer to MA as the appellant, and the Secretary of State as the respondent.

2. The hearing before me on 17th November 2020 took the form of a remote hearing using skype for business. Neither party objected. The appellant joined the hearing by Skype and throughout, he was able to see and hear me and the representatives. I sat at the Birmingham Civil Justice Centre. I was addressed by the representatives in the same way as I would have been if the parties had attended the hearing together. I was satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

Background

3. The appellant is a national of the Palestinian Authority, from Burage in Gaza. He claims to have left the Occupied Palestinian Territories at the end of March 2019 and to have travelled to Egypt. He then travelled to Turkey and Bangladesh, before arriving in the United Kingdom on 8th June 2019 and claiming asylum. His claim was refused by the respondent for reasons set out in a decision dated 5th November 2019. The claim made by the applicant was summarised in paragraph [11] of the respondent's decision.
4. The respondent accepted the appellant comes from the occupied Palestinian Territories, and accepted the appellant had encountered the difficulties claimed, due to the general situation in Palestine. The respondent noted the appellant claims that he would be at risk upon return because he will be killed by either Hamas or the Israeli authorities due to the general situation in Palestine. The respondent

concluded that the reason given by the appellant for claiming a well-founded fear of persecution under the Refugee Convention is not one that engages the United Kingdom's obligations under the Convention. The respondent concluded that the appellant's removal from the UK to the Occupied Palestinian Territories would not be in breach of the ECHR or the Qualification Directive. The respondent concluded the appellant is not entitled to a grant of humanitarian protection in accordance with paragraph 339C of the immigration rules and that the appellant has not demonstrated that there are substantial grounds for believing that there is a real risk that he would face treatment contrary to Article 3.

5. The appellant's appeal against that decision was heard by First-tier Tribunal Judge Turner ("Judge Turner") on 31st January 2020. For reasons set out in a decision promulgated on 10th February 2020, Judge Turner dismissed the appeal on asylum, humanitarian protection, and Article 8 grounds, but allowed the appeal on Article 3 grounds.
6. The matters relied upon by the appellant in support of his claim are summarised at paragraphs [4] to [16] of the decision of Judge Turner. At paragraphs [9] to [13] of her decision, Judge Turner sets out an additional claim made by the appellant that he has also been personally targeted by Hamas.
7. Judge Turner heard oral evidence from the appellant with the assistance of an Arabic interpreter. At paragraphs [35] to [45] of her decision, Judge Turner addresses the additional claim made by the appellant that he has been personally targeted by Hamas. Judge Turner did not accept that the appellant would not have appreciated the importance of disclosing the issues with Hamas, regardless of his cultural background and mistrust of systems. She found the failure of the appellant to make any mention of the problems with Hamas significantly undermines his credibility. Judge Turner considered documents relied upon by the appellant that he claimed were from Hamas and were handed to his family. At paragraph [45], she said:

"I have stood back from the detail and considered the evidence in the round, weighing those matters that tell both for and against the appellant's credibility as a truthful witness. Having done so, I have overall concluded that there is not at

least a reasonable degree of likelihood that he has given truthful account of the events that led him to leaving the Palestinian territories.”

8. Judge Turner was not satisfied that the appellant faces a real risk of persecution on return to the Palestinian territories by reason of his imputed political opinion. At paragraph [47] she said:

“I need to then go on to consider the issue of Article 15(c). The country guidance case of HS (Palestine) remains good law in relation to this point. I am also referred to the case of MI (Palestine) which again suggests that Article 15(c) is not engaged. I have been provided with little evidence to suggest that I should depart from this country guidance, albeit I acknowledge that paragraph 34 of MI does suggest that HS is somewhat out of date. I note the appellant’s personal characteristics, namely that he is educated, healthy and has family support back in Gaza. He is not a vulnerable person. The appellant claims that he was shot at whilst near the border with his cousin. I have to question why he was near the border in the first place, knowing that the majority of violent exchanges take place in that area of Gaza. This, in my view, only supports the fact that the appellant is able to protect himself and manage any risks of indiscriminate violence that may occur in Gaza. I do not find at this time that Article 15(c) is engaged. I also note in the case of MI that the Article 15(c) challenged by the appellant at that time but rather the appropriate test to apply in relation to Article 3 ECHR.”

9. The Article 3 claim is addressed at paragraphs [48] to [52] of the decision. Judge Turner refers to the background material relied upon by the appellant and at paragraph [51], she said that the background material that she was able to place some weight upon, paints a picture of an area where the humanitarian situation is dire. At paragraph [52] she said:

“I do find that the appellant has worked and saved and has always planned to leave Gaza due to the general situation there. As stated above, I find that the appellant has manufactured the claim that he was targeted by Hamas to bolster his claim to remain in the UK. That being said, if he were to return in these circumstances, I find that this would currently be a breach of his rights under Article 3 ECHR.”

The appeal before me

10. The respondent claims that in allowing the appeal on Article 3 grounds, Judge Turner failed to apply the country guidance set out in HS (Palestinian – return to Gaza) Palestinian Territories CG [2011] UKUT 124 (IAC) and the decision of the Court of Appeal in MI (Palestine) v SSHD [2018] EWCA Civ 1782. The respondent

claims that having recognised at paragraph [47] of her decision, that the country guidance set out in HS remains good law, and, that she had been provided with little evidence to suggest that she should depart from the country guidance, Judge Turner erred in failing to apply the conclusions set out in the extent country guidance and materially erred in allowing the appeal on Article 3 grounds.

11. Permission to appeal was granted by First-tier Tribunal Judge Nightingale on 24th August 2020.
12. Mrs Aboni adopted the written submissions settled by Mr Tufan and dated 8th October 2020. The respondent submits Judge Turner failed to give sufficient reasons for concluding that the appellant's Article 3 rights would be breached. In HS, the Upper Tribunal had considered whether the general situation in Gaza amounted to a breach of Article 3 but following a wide-ranging consideration of the evidence, concluded that the harsh state of affairs in Gaza did not breach the threshold required to cross Article 3. The respondent submits that having concluded that the appellant has not established that he would be at risk contrary to Article 15(c), Judge Turner erred in allowing the appeal on Article 3 grounds. Mrs Aboni submits Judge Turner failed to follow the guidance set out in HS and has failed to give adequate reasons for departing from the country guidance. Mrs Aboni submits that although HS does not address Article 3 specifically, the Tribunal concluded, as set out in 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. She submits the judge has departed from the findings in HS and failed to give adequate reasons for doing so.
13. Mr Hussain relied upon the rule 24 reply filed on behalf of the appellant. The appellant submits that it is evident from the decision of Judge Turner that she was fully aware of the relevant country guidance and referred to it in reaching her decision. It is submitted that it was open to Judge Turner to allow the appeal based on the dire country conditions in Gaza following an adequate consideration of the background material relied upon by the appellant. The appellant submits that in

reaching her decision Judge Turner had regard to the personal circumstances of the appellant and the situation he would find himself in, if returned to Gaza. In reaching her decision the judge properly referred to the background material regarding cuts to various health and employment programs in Gaza and the impact of cuts to financial support. It is submitted Judge Turner was entitled to note that the country guidance set out in HS is somewhat dated, and in fact predates the war that took place in 2014 following which there was substantial devastation in Gaza. The appellant submits that in dismissing the appeal on humanitarian protection grounds, Judge Turner was considering the claim in the context of indiscriminate violence in the Palestinian territories and she properly applied the country guidance set out in HS. The appellant submits that the conclusions reached regarding the Article 3 claim were based upon the broader prevailing conditions in Gaza and is entirely consistent with the respondent's published guidance on 'Humanitarian Protection - Version 5' published in March 2017, that explains the circumstances in which it would be appropriate to grant humanitarian protection.

14. Mr Hussain submits Judge Turner looked at matters holistically and separately considered the claims for asylum, humanitarian protection, and the Article 3 claim. At paragraph [47], the judge was considering the indiscriminate violence and the Judge followed the relevant country guidance. The Judge was correct to follow the country guidance when considering the Article 15(c) risk but was entitled to allow the appeal on Article 3 grounds, for the reasons set out in the decision and the dire humanitarian conditions.
15. I accept the starting point is the position set out in the Country Guidance case of HS, in which the Tribunal said at [221] and [222]:

"221. We do not see any material difference in this case between the level of risk and the nature of the risk to which the appellants are exposed in respect of asylum and Article claims. We note that it is not argued that Article 15(c) of the Qualification Directive is applicable in this case.

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."

16. In R (SG (Iraq)) v SSHD [2012] EWCA Civ 940 the Court of Appeal considered the status of Country Guidance. At paragraph [27] Stanley Burton LJ cited Irwin J (as he then was) in HM (Iraq) v SSHD [2011] EWCA Civ 1536 who said, when considering what the impact of a country guidance case should be: -

"... one would look for clear and coherent evidence coming after the country guidance decision was reached, before the starting point and guidance given in such a case should be departed from.... It seems to me adventurous to seek to draw quite general conclusions as to the reliability of any case or of any decision - and particularly a decision which is denominated as a country guidance case - merely from the fact that permission to appeal has been granted".

17. Stanley Burton LJ went on at paragraphs [46] and [47]:

"46. The system of country guidance determinations enables appropriate resources, in terms of the representations of the parties to the country guidance appeal, expert and factual evidence and the personnel and time of the tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the country guidance appeal to, the country in question. The procedure is aimed at arriving at reliable (in the sense of accurate) determination.

47. It is for these reasons, as well as the desirability of consistency, that decision-makers and tribunal judges are required to take country guidance determinations into account and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so".

18. I reject the claim that it was not open to Judge Turner to allow the appeal on Article 3 grounds, or that she has failed to give sufficient and adequate reasons for doing so having dismissed the appeal on humanitarian protection grounds. In MI (Palestine), Lord Justice Flaux, with whom Lady Justice King agreed, summarised the law on Article 3 in this context and referred in particular to the decisions of the Strasbourg Court in MSS v Belgium and Greece and Sufi & Elmi v UK (2012) 54 EHRR 9. There, the Strasbourg Court rejected the claim by the UK that the appropriate test for assessing whether the dire humanitarian conditions (*in Somalia*) 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. Judge Turner referred, at paragraph [48] of her decision to the relevant paragraphs ([282] and [283]) of the decision of the Strasbourg Court. In her final analysis, at paragraphs [49] to [52], Judge Turner refers to the background material before her and gives her reasons for concluding that the return of the appellant to Gaza would be in breach of his Article 3 rights. The decision in HS is now somewhat dated and Judge Turner reached her decision based upon more recent background material that as she was entitled to do. She found that the conditions the appellant would himself in in Gaza were attributable to the direct and indirect actions of the parties to the conflict and the background material that the appellant had adduced paints a picture of an area where the humanitarian situation is dire, with a risk of a water borne disease epidemic with reduced access to medical services , whether the individual is rich or poor. If the Tribunal judge applied the correct test, and that resulted in an arguably generous conclusion, it does not mean that it was erroneous in law.
20. In my judgement the decision of First-tier Tribunal Judge Turner was one that was open to her on the evidence. As Mr Hussain submits, Judge Turner had the relevant country guidance in mind when reaching her decision. She departed from the country guidance based upon more recent background material. The findings and conclusions reached by the FtT judge were neither irrational nor unreasonable in the *Wednesbury* sense. It follows that in my judgement there is no error of law and the appeal is dismissed.

DECISION

21. I dismiss the appeal by the SSHD and the decision of First-tier Tribunal Judge Turner stands.

V. Mandalia

Date 30th November 2020

Upper Tribunal Judge Mandalia