IAC-AH-LEF-V1

First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21631/2011

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 26th and 27th September and 3rd October 2011	**On 25th October 2011**
	……

Before

UPPER TRIBUNAL JUDGE RENTON
IMMIGRATION JUDGE C LLOYD

Between

RAED MAHAJNA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr R Hussain QC and Mr D Seddon instructed by Irvine Thanvi Natas Solicitors
For the Respondent:	Mr N Sheldon and Mr H Ripley instructed by the Treasury Solicitors Department

DETERMINATION AND REASONS

Introduction

1. The Appellant is a Palestinian and a citizen of Israel born on 10th November 1958. Aware of his intention to travel to the UK, on 23rd June 2011 the Respondent made an

Exclusion Order against the Appellant on the basis that his presence in the UK would not be conducive to the public good. This was stated to be in accordance with the Government's policy of excluding those who express views which foster hatred which might lead to inter-community violence in the UK. However the Order was never served upon the Appellant, nor made known to the authorities at Heathrow Airport, and when the Appellant arrived there from Tel Aviv on 25th June 2011 he was given leave to enter as a visitor for a period of six months. The purpose of the visit was to attend a number of meetings and speaking engagements, and the Appellant arrived in possession of a return air ticket for 5th July 2011. On 27th June 2011 the Appellant attended a meeting of parliamentarians and researchers at the House of Lords chaired by Baroness Tonge, but the following day the Appellant was arrested and detained until released on bail on 18th July 2011. In the meantime, and on 29th June 2011, the Respondent decided to make a deportation order against the Appellant under the provisions of Section 3(5)(a) of the Immigration Act 1971 for the reasons given in the Notice of that date. The Respondent deemed that the Appellant's deportation would be conducive to the public good. The Appellant appealed.

2. In deciding the appeal, we have read and taken account of the documents contained in the Appellant's Bundle as indexed and also a statement by Tabajah Hassan dated 22nd September 2011 and communications from Anna Allen and Rod McLean both dated 27th June 2011. At the hearing there was oral evidence from Jonathan Rosenorn-Lanng, a senior executive officer of the United Kingdom Border Agency (UKBA), the Appellant, and three of the expert witnesses being Dr Stefan Sperl, Dr Robert Lambert MBE, and Professor David Miller. What they said is noted in the Record of Proceedings and will not be set out in detail in this Determination. The Tribunal also watched extracts from three DVDs. We have also taken account of the Skeleton Arguments submitted on behalf of both parties. At the hearing there were oral submissions made on behalf of both parties which are noted in the Record of Proceedings and which again will not be set out in detail in this Determination.

The Law

3. The decision to deport the Appellant was made under the provisions of Section 3(5)(a) of the Immigration Act 1971, in which event this appeal will be decided in accordance with the provisions of paragraph 364 of the Statement of Changes in Immigration Rules HC 395 as amended. It was decided in **EO (deportation appeals: scope and process) Turkey [2007] UKAIT 00062** that:

> "In determining an appeal against a deportation decision made on conducive grounds on or after 20 July 2006 the Tribunal should first confirm that the Appellant is liable to deportation (either because the sentencing judge recommended deportation or because the Secretary of State has deemed deportation to be conducive to the public good); if so, secondly consider whether deportation would breach the Appellant's rights under the Refugee Convention or the ECHR; if not, thirdly consider paragraph 364. Paragraph 364 is only in issue if the Appellant fails to establish a claim under either

Convention; and if an appeal is to be allowed under paragraph 364 the Tribunal must identify the reasons, state why they amount to 'exceptional circumstances', and state why they are so strong that the Appellant is able to establish that his own circumstances displace the public interest."

4. It is not in dispute that the Appellant is a person liable to deportation. For example, he is not a British citizen. It is no part of the Appellant's case that deportation would amount to a breach of the Appellant's rights under the Refugee Convention. However, it is argued that it would be in breach of the Appellant's rights under Articles 8, 9, 10 and 11 of the ECHR, and therefore we must deal with those issues next. We will begin with the rights which the Appellant relied upon in the main, being his Article 10 rights.

Article 10 ECHR

5. Article 10 states as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

It is not disputed by the Respondent that the Appellant has the right to freedom of expression, and that that right will be interfered with, albeit only to a limited extent, by the Appellant's deportation. The Appellant had intended to attend other meetings and speaking engagements in the UK, and we accept the submission of Mr Hussain that it has been decided in cases such as **Regina (ProLife Alliance) v British Broadcasting Corporation [2003] UKHL 23** that the right protected is as much one of form as of content. We therefore find that the interference will be of such gravity as to engage the Appellant's Article 10 rights. It was decided in **AG (Eritrea) v SSHD [2007] EWCA Civ 801**, albeit an Article 8 case, that the threshold which has to be crossed to make such a finding is not exceptionally high, and indeed it was decided in **VW (Uganda) v SSHD [2009] EWCA Civ 5**, albeit again an Article 8 case, that no more than a technical or inconsequential interference is necessary.

6. We are satisfied that the Respondent has shown that the interference will be in accordance with the law, and necessary in a democratic society in the interest of public safety for the prevention of disorder or crime.

7. We are left to decide if the interference is proportionate to the legitimate public end sought to be achieved by the Appellant's deportation.

8. The public interest is represented by the Secretary of State's policy in such matters. This is given in the Prevent Strategy, and is a published policy for which the Respondent is accountable. The Strategy relates to the Secretary of State's powers to exclude individuals from the UK on the grounds that their presence is not conducive to the public interest. It states that the Secretary of State will consider using the power to exclude when an individual has engaged in any of the activities appearing on an indicative rather than an exhaustive list of unacceptable behaviours. The Strategy also states that the Secretary of State will consider deportation under her statutory powers of individuals who have leave to enter or remain in the UK who have engaged in similar behaviour. The list of unacceptable behaviours has also been published, and includes any person who uses any means or medium including writing, producing, publishing or distributing material; public speaking including preaching; and using a position of responsibility such as teacher, community or youth leader to express views which foster hatred which might lead to inter-community violence in the UK.

9. To show that the Respondent has acted in accordance with her policy and proportionately, Mr Sheldon relied upon five items of evidence which we will now deal with individually.

(i) <u>The Poem</u>

The Appellant published a series of poems entitled "Anthems of the Children of Al-Aqsa" in a publication named Sawt Al-Haq W'Al-Huryya. On 4th January 2002 one such poem was published. According to the translation provided by the Appellant, that poem is entitled "A Message to the Oppressors". Taken out of context, the words under consideration read as follows:

> "They corrupted our land and dared to offend our honour
>
> They became arrogant in our garden. Alas, how traitorous they are
>
> They bombed the mosques, killing the repentant, the worshippers"
>
> "They slaughtered the pregnant and the infants and the children are fallen dead
>
> "You are the germs of all times
>
> The Creator had deemed you to be monkeys and losers

> Do not rejoice, the dawn came, from the Egyptian Nile to the Euphrates
>
> The victory is the crown of all good tidings to all faithful Muslims"

In the submission of Mr Sheldon, these words are anti-Semitic. The poem was referred to in an issue of the Jerusalem Post dated 6th July 2011 where it was described as being addressed to "You Jews". According to the submission of Mr Sheldon, the significance of the poem is in its impact. It was written from the point of view of a victim, and therefore must be about Jewish oppression of Palestinians.

To summarise the evidence of the Appellant, the poem is not anti-Semitic. Instead, it is not critical of the Jews as a race, but was about all oppression. That is why it contains references to oppressive Arab tribes and the Pharaohs . It relies upon references from the Koran, and states that those who violate the law of God will eventually be punished by God. This evidence is supported by the expert evidence of Dr Sperl who said that anyone familiar with the Koran would recognise that the poem was not anti-Semitic but was critical of the perpetrators of injustice, including Arabs. Those who acted righteously, be they Jews, Muslims, or Christians, would equally find favour with God. The word "apes" was a reference to anyone who broke religious law. The historical context of the poem meant that it was critical only of the authorities of the Israeli State and Israeli expansionists who supported the occupation of Palestinian land. Dr Sperl added that the true meaning of the poem would not be lost on those with a knowledge of the Koran. The Koran was more widely known in the Middle East than, for example, the Bible in Christian countries.

(ii) <u>The Blood Libel</u>

This is an accusation of many years standing that the blood of Gentile children is used in Jewish religious customs. It is anti-Semitic and particularly offensive to Jews. It is the Respondent's case that there is an example of the Appellant referring to the blood libel on 16th February 2007 when the Appellant addressed a large gathering in Jerusalem which is referred to in an Indictment issued by the Jerusalem Magistrates' Court on 23rd June 2011. On that occasion, the Appellant said:

> "We have never allowed ourselves, and listen well, we have never allowed ourselves to knead the bread for the breaking of the fast during the blessed month of Ramadan with the blood of the children. And if someone wants a wider explanation, you should ask what used to happen to some of the children of Europe, whose blood would be mixed in the dough of the holy bread. God Almighty, is this religion? Is this what God wants? God will confront you for what you are doing."

The context of the address was racist and an incitement to violence.

The Appellant says that he has never invoked the blood libel and would not do so. He is aware that the libel is a fabrication used to persecute Jews. The reference to holy bread was a metaphor used to convey an example of those who had falsely used religion to justify their crimes. It refers to the actions of Israelis who use religion to subject the Palestinians to oppression. The Appellant drew a parallel with the crimes of the Spanish Inquisition. The Appellant's evidence is supported by that of Professor Ilan Pappe who although describing the Appellant's address as at times incoherent and emotive, said the Appellant did not invoke the blood libel in this or any other speech, and made a clear distinction between Jews as a race and the actions of Israeli officials. The words used by the Appellant on this occasion did not amount to the blood libel because he did not refer to Jewish bread; the message of the address was not anti-Semitic nor even anti-Zionist, but directed to the violation of Muslim rights in Jerusalem.

(iii) Destruction of the Al-Aqsa Mosque

For some time the Appellant has alleged that it is the intention of the Israeli authorities to demolish the Al-Aqsa Mosque and build a Jewish temple in its place. At the gathering in February 2007, according to the Appellant's own evidence, during the sermon he said:

> "After the crime of Rafah Camp it was told that the Israeli establishment wants to build a temple for the purpose of worship, how insolent and what a liar he is, who issued this statement. He wants to build a house of God; it is irrational to build a house of God while our blood still stain their clothes, doors, food and drink, and our blood passes from a terrorist general to another."

Later in 2009 the Appellant is quoted as saying:

> "Netanyahu's plan is to dig tunnels under Al-Aqsa and replace it with a Jewish temple. We will not compromise on our principles or holy sites. We prefer to die as Shahids and will welcome death joyfully".

According to the Respondent, this is a call to violence to protect the Al-Aqsa Mosque, and to accept martyrdom in its defence. It was a justification for, and glorified, terrorism. The incitement to violence was successful in that following the address in February 2007, which took place near to the Al-Aqsa Mosque, a crowd started rioting and throwing stones at the police which resulted in three police officers being injured. As the Al-Aqsa Mosque was a holy shrine particularly important to Muslims, the allegations of its destruction led to great tension. The allegations were inflammatory and dangerous, and designed to justify violence and to radicalise those who heard them.

The Appellant's case is that he was subject to a ban excluding him from the Al-Aqsa Mosque, and therefore gave his usual Friday prayer sermon at a site nearby. His theme in the sermon was only that worshippers in the mosque

should be protected from harm so that they could worship in peace. Violating the sanctity of the mosque by its destruction would be akin to violating the sanctity of God. After the sermon, there were prayers, and then the audience dispersed peacefully. There was no rioting. He contests the allegation that his actions that day led to disorder. We were shown a DVD of the occasion which did not include any signs of violence or disorder, although it was not clear if the DVD showed the event in its entirety including its aftermath, nor the whole of the area in which the event took place.

(iv) The 2011 Indictments

On 23rd June 2011 two separate indictments were issued against the Appellant to be eventually heard at the Jerusalem Magistrates' Court. The allegations contained in the indictments are disputed by the Appellant and are yet to be decided. The first indictment relates to the events of 16th February 2007 which we have dealt with above. It alleges that what the Appellant said during his sermon on that occasion did lead to a riot, but as we have already said, that is an allegation which has yet to be decided. The second indictment relate to an incident on 17th April 2011 at the Allenby Border Terminal when the Appellant is alleged to have obstructed a police officer by objecting to his wife being searched. We have seen a DVD of this incident. We are of the view that this particular indictment has no relevance to the issues in this appeal. It is a minor incident which has no bearing on the central issues in this appeal. It is worth mentioning at this point that we were shown another DVD of an incident in 2008 which is described by the Appellant as the "Al-Halawany dinner". The contents of this DVD can only be interpreted as showing the Appellant being the victim of serious police harassment, but that again is not a matter which is relevant to the central issues in this appeal.

(v) Links to Hamas

The military wing of Hamas is a proscribed organisation in the UK under the provisions of the Terrorism Act 2000. It is the Respondent's case that the Appellant is closely linked to this organisation as established by a prosecution of the Appellant in which it was alleged that the Appellant used charitable organisations as a front to provide Hamas with large sums of money. After a lengthy trial, the Appellant pleaded guilty to an amended indictment as part of a plea bargain as a consequence of which he was sentenced to six and a half years' imprisonment of which only three and a half years was to be served. Eventually the Appellant served something less than that term. What the Appellant says about this is that it was a political prosecution and he denies any links with Hamas. His only activity was to provide funds for genuinely charitable and humanitarian purposes. There is a statement from the Appellant's Israeli advocate, Tabajah Hassan stating that the plea bargain was made on the basis that it was accepted that the Appellant did not intend to harm the security of the State of Israel, and that the Appellant entered into the bargain in order to avoid a biased and harsh ruling.

10. We conclude from all this evidence, viewed in the round, that the Secretary of State was right to conclude that the words and actions of the Appellant relied upon by the Respondent do come within the Prevent Strategy and therefore in accordance with the Secretary of State's policy do justify a conclusion that the Appellant's removal would be conducive to the public good. Therefore in the balancing exercise necessary for any consideration of proportionality, great weight must be attached to the public interest of preventing disorder or crime. We are satisfied that the Appellant has engaged in the unacceptable behaviour of fostering hatred which might lead to inter-community violence in the UK. We are satisfied that the Appellant's words and actions tend to be inflammatory, divisive, insulting, and likely to foment tension and radicalism. They deal with issues which are highly sensitive in the context of the Israeli/Palestinian dispute. To make his point, the Appellant has often used historical references, such as the Spanish Inquisition, which have a particular resonance to those on either side of the dispute. He also spoke in vivid terms alleging that it was the intention to destroy the Al-Aqsa Mosque, again a particularly sensitive issue, and notwithstanding the plea bargain, has admitted in criminal proceedings being involved with organisations used to fund Hamas, a group part of which is proscribed as being a terrorist organisation.

11. It is the Appellant's argument that he is not anti-Semitic and that he is not a racist. He says that he only has a political point of view, and that he has only been critical of the authorities of the State of Israel and those who he considers have broken the law of God and can be viewed as expansionist settlers. It is true that the Appellant is supported by anti-Zionist Jewish organisations such as the Jews for Justice for Palestine. However, we do not accept that the Appellant can successfully claim that what he has said can only be interpreted as expressing his opposition to oppression and injustice in general. We accept that the poem is not expressly addressed to Jews, and we must accept the opinion of such an eminent expert as Dr Sperl that the poem is not directed at the Jewish people as a whole but only at those among them who aim at Israeli territorial expansion and control at the expense of the Palestinians. However, our concern is with the impact of the poem and other sayings of the Appellant. The opinion of Dr Sperl is a heavily nuanced one derived from his considerable and sophisticated expertise and experience. It may be the case, as he said, that in the Middle East there is widespread Koranic knowledge, but we do not think that comment can apply generally to, for example, Jews resident in the UK.

12. In any event, it is not necessary to satisfy the criteria of unacceptable behaviour for words and actions to be racist as such. That is not the test given in the policy. For the purposes of the Secretary of State's decision, they need only foster hatred which might lead to inter-community violence in the UK. This might be achieved by words and actions which are not necessarily racist. It might be achieved by words and actions critical of a section of the Jewish people if done in the way preferred by the Appellant as described above. Israel is a democracy, and therefore it must be the case that the actions and stance of its Government has a large measure of support of Jews living in Israel, and also within the wider Jewish Diaspora.

13. We also come to our conclusion in the context that although it is not our task to rubber stamp a decision of the Secretary of State, nevertheless it is the Secretary of State who is responsible for the avoidance of disorder and crime, and therefore has a wide margin of discretion in deciding what is conducive to the public good. We are satisfied that this decision was made in accordance with the criteria set out in the factors listed in paragraphs 71 to 74 inclusive of the decision in **R (Farrakhan) v SSHD [2002] EWCA Civ 606**. We agree with Mr Hussain's submission that it is for the Tribunal to consider afresh the proportionality of any breach of the Appellant's Article 10 rights, but it was decided in **SSHD v Rehman [2001] UKHL 47** that the Tribunal should not in most cases interfere with the Secretary of State's assessment as to what is conducive to the public good. It is not our responsibility to find that the Secretary of State has proved each item of evidence upon which she relies as if they were counts on an indictment. We need only be satisfied that there is "material on which proportionately and reasonably the Secretary of State can conclude that there is a real possibility of activities harmful to national security". This is partly because, as remarked upon in **Rehman**, the Secretary of State "has the advantage of a wide range of advice from people with day-to-day involvement in security matters". In this particular case according to the evidence of Mr Rosenorn-Lanng, the Secretary of State acted upon information provided by the Department for Communities and Local Government (DCLG) which in turn took advice from the Community Security Trust (CST) and the Jewish Board of Deputies. It is of concern that apparently the Secretary of State did not consult with any Muslim or Palestinian organisations, and we note the evidence of both Professor Miller and Mr Lambert that whereas the CST has done invaluable work in identifying threats to the Jewish community in the UK from the far right such as the British National Party (BNP), it failed to distinguish between anti-Semitism and criticism of the actions of the Israeli State and therefore gives an unbalanced perspective, but they did not say that it was improper for the Secretary of State to seek the views of the CST in this matter, and it was the evidence of Mr Rosenorn-Lanng that the Secretary of State gave this issue serious consideration and looked upon all of the evidence with a discerning eye.

The Appellant's Circumstances

14. On the other side of the balance, the Appellant is a prominent public figure in Israel and internationally. In 1989 he was elected mayor of his home town, Umm Al-Fahm, the largest Arab town in Israel. He was re-elected in 1993 and 1997, and then decided to stand down. He is one of the founders of the Islamic Movement, and now leader of the northern branch of that organisation following a split. He has visited the UK on four previous occasions in 1990, 1997, 1998/1999, and March 2000. On the last three of those occasions the Appellant addressed conferences and other meetings. On this occasion, the Appellant was invited by the Middle East Monitor (MEMO) primarily to attend and give the main address at a meeting held at the House of Lords and chaired by Baroness Tonge. In addition, the Appellant has travelled widely to other countries such as Denmark, Germany, Italy, and Switzerland for similar purposes. None of these visits have resulted in civil disorder. There are letters of support from various people such as Baroness Tonge, Lord Ahmed of Rotherham, John Cryer MP, Noam Chomsky, and Bruce Kent, the

contents of which we have read, but it is not clear from those letters how well the authors know the Appellant.

Balancing Exercise

15. Mr Rosenorn-Lanng told us that in his opinion and in the opinion of his Department, this is a finely balanced case. However, that is a matter for us to judge. Our conclusion is that the public interest outweighs the interests of the Appellant. We accept that it is a serious matter to restrict in any way the freedom of speech, particularly that of political speech, and that it is the form of speech as much as the content which is protected by Article 10. However, we have already explained why we find that considerable weight must be attached to the public interest. We also take into account the fact that the Appellant's exclusion from the UK will not amount to a significant infringement of his freedom of speech. He can continue to preach and put forward his message from abroad, and it can be received by residents of the UK using modern methods of electronic communication. In this connection it is to be noted that the Appellant has not challenged in any way the original Exclusion Order which after he has left the UK, will prevent him from re-entering for a period of at least three years. We accept that the Appellant has behaved lawfully throughout this matter, and that he has been the victim of unfairness and procedural irregularity in that he was not notified of the Exclusion Order, and following his arrival in the UK was detained unlawfully for a period of time, but given the potential impact of the Appellant's presence in the UK, we find that the interference with the freedom of expression by the deportation order is proportionate to the legitimate aim of preventing disorder or crime as represented in the criteria of the Prevent Strategy.

Articles 8, 9, and 11

16. Articles 8, 9, and 11 were also invoked on the Appellant's behalf. Article 8 protects the right to respect for private life which includes reputation. Article 9 protects the right to freedom of thought, conscience and religion, which includes the manifestation of religion. Article 11 protects the right to freedom of peaceful assembly and to freedom of association with others. There was no evidence before us as to how the Appellant's removal would significantly damage his reputation, nor how his removal would interfere with his freedom of thought and conscience, and to manifest his religion. The Appellant following his removal would not be able to assemble peacefully and associate with others in the UK, but of course he will still be able to do so elsewhere. All this being the case, we are not satisfied that the interference with these rights is of such gravity to engage the Appellant's rights under Articles 8, 9, and 11 of the ECHR.

Our decision therefore is that the Appellant's deportation would not amount to a breach of his rights under the Refugee Convention or the ECHR. We therefore need now to consider the provisions of paragraph 364 of HC 395. Returning to the decision in **EO**, for an appeal to be allowed under paragraph 364 there must be reasons which amount to exceptional circumstances to rebut the presumption in

favour of deportation. Those reasons must be so strong that the Appellant is able to establish that his own circumstances displace the public interest. Apart from those argued on behalf of the Appellant in connection with Articles 8 to 11 of the ECHR, no other circumstances were put to us. We have already found that those circumstances do not displace the public interest, and therefore our decision is that the appeal is dismissed under the Immigration Rules.

Legitimate Expectation

17. It was argued on behalf of the Appellant that the decision to deport him was not in accordance with the law because it amounts to a breach of his legitimate expectation to visit the UK unhindered in accordance with his leave to enter. That expectation is based upon the four previous grants of leave to enter, and the grant of leave to enter when the Appellant arrived in the UK in June of this year. The Secretary of State's reasons for intending to deport the Appellant all relate to matters which took place prior to June of this year.

18. We do not agree with this argument. It was dealt with in **Naik v SSHD [2010] EWHC 2825 (Admin)**. In that case an Exclusion Order as opposed to a deportation order was being considered, but in this case the decision to deport comes as a consequence of the earlier decision to exclude, and, as decided in **Naik**, "as a matter of law nothing in the legislation or the Immigration Rules requires the Secretary of State to consider whether to exclude a person from the UK before entry clearance is decided."

Decision

The appeal is dismissed.

Signed Date

Upper Tribunal Judge Renton
(Judge of the First-tier Tribunal)

Approval for Promulgation

Name of Immigration Judge issuing approval:	Mr N W Renton
Appellant's Name:	Raed Mahajna
Case Number:	IA/21631/2011

Oral determination (please indicate) ☐

I approve the attached Determination for promulgation

Name:

Date:

Amendments that require further action by Promulgation section:

Change of address:

Rep: ☐ Appellant: ☐

Other Information:
