Upper Tribunal
(Immigration and Asylum Chamber)

HS (Palestinian – return to Gaza) Palestinian Territories CG [2011] UKUT 124 (IAC)

THE IMMIGRATION ACTS

Heard at Procession House
On 15 and 16 December 2009,
And at Field House on 22 and 23 February 2010,
Closing submissions received on 10 June 2010

Determination Promulgated

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Before

SENIOR IMMIGRATION JUDGE ALLEN
SENIOR IMMIGRATION JUDGE NICHOLS
MRS A J F CROSS DE CHAVANNES

Between

HS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(1) The Tribunal has jurisdiction to consider practical issues concerning the return of a Palestinian family to Gaza. GH [2005] EWCA Civ 1182 and HH (Somalia) [2010] EWCA Civ 426 applied.

(2) 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.

(3) The conditions likely to be experienced by Palestinians in Egypt while awaiting crossing into Gaza are not such as to give rise to breach of their human rights.

(4) On the basis of the authorities: MA [2008] Imm AR 617; MT [2009] Imm AR 290 and SH [2009] Imm AR 306, it would not be persecutory or in breach of their human rights for Palestinians to be refused entry to Gaza.

(5) The Tribunal does not have jurisdiction to decide whether Israel has acted in breach of customary international law in respect of its treatment of Palestinians within the Occupied Palestinian Territories.

(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.

Representation:

For the Appellant: Mr P Draycott, instructed by Harrison Bundey & Co, Solicitors
For the Respondent: Mr R Wastell, instructed by the Treasury Solicitor

DETERMINATION AND REASONS

1. The appellant is a stateless Palestinian from the Gaza Strip. She appealed to an Immigration Judge against the Secretary of State's decision of 16 September 2008 varying her leave to enter the United Kingdom under s 3(3)(a) of the Immigration Act 1971 such that there would be no leave remaining.

2. The appellant had left Gaza via Egypt and came to the United Kingdom, in September 2003, together with her husband and children. Her husband had limited leave to remain until 31 January 2009 to undertake PhD studies and the appellant and their (then) five children were granted leave to remain on the basis that they were dependants. Due to a reduction in the funds available to the family to support themselves as the funding for her husband's studies had been stopped, she and the children returned to Egypt and tried to enter Gaza but were unable to do so, so she returned to the United Kingdom, and applied for asylum on 27 March 2008.

3. The Immigration Judge who heard her appeal in October 2008 did not accept that the appellant was "stateless". He found her to be a national of the Palestinian Authorities and considered that even if she were stateless, she had been habitually resident in the area controlled by the Palestinian Authorities. She had not left Gaza because of any difficulties experienced there or on account of political activity or adverse conditions, but in order to accompany her husband on account of the grant

to him of limited leave to remain in the United Kingdom as a student. The Immigration Judge considered it was not seriously likely that if the appellant genuinely feared persecution in Gaza she would, of her own free will, leave the United Kingdom with the children and attempt to re-enter Gaza. He did not accept that the situation in Gaza between the time of her leaving the United Kingdom and re-entering became so much more severe as to cause her to claim asylum. He considered that she had claimed asylum to obtain financial support for herself and her children as her husband was able to support himself from his part-time earnings but could not support her and the children. He noted that she had chosen to go to Ireland to give birth to her sixth child because she had been informed that in doing so the child would be entitled to Irish nationality, and she said that she did that because it might be of use to her in the future. He took into account the fact that the appellant and her husband had a large number of relatives in Gaza and that prior to their departure in 2003 they had lived with the appellant's husband's parents.

4. In respect of the appellant's husband's claim that he was not prepared to leave the United Kingdom, the Immigration Judge found this to be entirely lacking in credibility. He found that it was not credible that the husband, who had limited leave to remain until January 31 2009, would not accompany his wife and children on their removal from the United Kingdom, nor that his desire to complete his studies would override his desire to support his family. He had suggested that he would be faced with adverse treatment from the Palestinian Authorities if he returned to Gaza having failed to complete his studies in the United Kingdom, but the Immigration Judge considered that if that were in fact the case, he had not explained why he himself had not applied for international protection, even bearing in mind that he had leave to remain as a student. Nor did the Immigration Judge accept that there was any substance to the claim that the appellant's Article 8 rights would be breached in respect of her family members in Gaza on the basis that she was not able to enter Gaza. There was no evidence of any dependency upon those family members although it was accepted that they could support the appellant if she was returned to Gaza. He dismissed the appeal in respect of the Geneva Convention and Article 3 and Article 8 of the Human Rights Convention, noting medical evidence concerning one of the appellant's children who suffers from epilepsy but bearing in mind that the evidence showed that she no longer received medication for that condition and in any event objective evidence showed that medical treatment was available in Gaza albeit perhaps not of the same quality as in the United Kingdom, and hence there would be no breach of Article 3 rights in respect of her.

5. The appellant sought reconsideration of this decision, arguing that the Immigration Judge had erred in respect of his consideration of relevant case law which flawed his findings on the Refugee Convention and Article 3. It was also argued that the determination did not properly consider the appellant's Article 8 rights. Reconsideration was ordered on the basis that the Immigration Judge had arguably erred in concluding that the appellant did not face a real risk of persecution on return if she could be returned, to the Gaza Strip and that the humanitarian protection and Article 8 issues might also be argued.

6. On 7 April 2009 a Senior Immigration Judge concluded that there was a material error of law in the determination for reasons set out in detail at paragraph 3 of the determination in that respect, a copy of which is annexed to this determination. In effect, a re-hearing was ordered on the basis of the appellant's grounds.

7. The hearing before us took place on 15 and 16 December 2009 and on 22 and 23 February 2010. There were also subsequent written submissions, the last of which was received on 10 June 2010. Mr P Draycott, instructed by Harrison Bundey & Co, appeared on behalf of the appellant. Mr R Wastell, instructed by the Treasury Solicitor, appeared on behalf of the Secretary of State. Both representatives put in further documentation in addition to the three bundles that each had already provided.

8. At the hearing on 15 December 2009 Mr Draycott sought an adjournment in respect of two particular matters. The first concerned the ability of the appellant to obtain a transit visa from the Egyptian Consulate, and, if she were able to gain access to the border, the question whether she would be able to access the Gaza Strip through the crossing. There was then the question of how long she would have to wait there, bearing in mind that she would be accompanied by six children, the youngest of whom was only 1½. There was an issue as to the kind of conditions in which she would have to reside. The evidence showed that the border was opened only sporadically and unpredictably. On one interpretation of the evidence from the Egyptian Consulate, the amount of time for which a visa would be granted was the same as the time it would take for the application to be processed, which would make it meaningless.

9. A further issue concerned the question of whether the appellant needed to renew her status with the Israeli authorities and if she had not done so whether she would be removed from the database and not allowed to enter Gaza. There were relevant issues in this regard in connection with the forthcoming country guidance case of Azam, concerned with the West Bank. The matter might be clarified if the appeal was heard after Azam had been determined.

10. Mr Wastell opposed the application for an adjournment. He argued that the last point had not been made before, and there had been a good deal of time in which it could have been made. It would not be appropriate, bearing in mind the amount of time and money that had been invested in preparation for the case, to adjourn on that basis. The fact was that the evidence showed that the crossing was open at least three days a month and there was evidence on this in Dr George's report at page 256 of the appellant's evidence bundle. Further, if the appellant could get into Egypt, the evidence showed that the Egyptians would do what they could to get her across the border and the visas would be extended, and if she could not get into Egypt then the Tribunal would have no jurisdiction to consider the matter in that regard as no removal directions had been set.

11. By way of response, Mr Draycott argued that, as it was an intended country guidance case, there was a need for more latitude for the parties to ensure all the issues were properly dealt with rather than being done again later. A short adjournment to enable the matter to be dealt with after Azam would lead to both determinations being produced at around the same time. He did not agree with Mr Wastell's submission in respect of the Tribunal's lack of jurisdiction to consider the issues pertaining to method and route of return.

12. After consideration we concluded that it would not be appropriate to adjourn. We should say that we have not set out in full all the points made by the representatives in regard to the adjournment request in the interests of brevity, and also because some of those arguments are relevant to further issues which were subsequently argued in greater detail before us. We saw force to the point concerning the desirability of clarifying the arrangements with the Egyptian authorities and the database point. It seemed to us that we could nevertheless go ahead and take the evidence and hear submissions concerning the legal issues pertaining to statelessness and concerning conditions within Gaza and leave the issue of access to Gaza for a further day (in the event it became necessary to re-list the matter for two further days) with any further evidence in this regard to be provided by the end of January, shortly before the date of the hearing in Azam.

13. We then heard evidence from Dr Alan George. He had provided two reports, and stood by both of these. In addition, he had provided a small further bundle of documents, including an interview with Dr Al-Khatib, the Head of the Palestinian Red Crescent Society.

14. He was asked about the terrain, especially on the Egyptian side, of the Rafah border crossing. He said he had never been there but had seen photographs. The border went through the town of Rafah, so it was an urban environment. As it was near the coast, there was rain so it was not desert but as one went further south from Rafah into Egypt for 30 or 50kms that would be total desert and likewise inland from Rafah after 6 or 7 miles.

15. He was referred to what he said in his report about conditions in Gaza. In particular at page 255 he had referred to drinking water and sewage spillage and was asked whether he had any views about whether the water and the environment had been affected as a consequence of Operation Cast Lead. Dr George said he was not aware of a problem. There were scattered munitions but it was not a problem in terms of contamination, as, for example, after the Gulf War. He had heard nothing about this, but that did not mean there was not a problem. He was asked whether he had anything to add to what he had said about malnutrition, and he said it seemed to him that one had to be careful with definitions. He referred to the World Health Organisation report of July 2009, at pages 217 to 218 of the Home Office bundle B as being especially relevant to this. There was reference to a level of anaemia. It should be questioned whether anaemia meant malnutrition. Dr Al-Khatib had referred to malnutrition as a significant problem and Dr George thought it was necessary to use

the word with some care. He had gathered clearly from Dr Al-Khatib that the water supply and the sewerage in Gaza were in a very poor condition. That was partly a consequence of neglect over many years but significantly because of the military action in 2008 to 2009 and the effect of the blockade. The quality of water, for example, would depend partly on the area of the Gaza Strip that one was in. Generally, water supplies in the area were not good.

16. He was referred to the fact that, in respect of the blockade, funding for reconstruction had been earmarked, but there was a logjam in getting building materials in. He was asked how much had been possible prior to the provision of his most recent report. He said that it was very limited. Funding as such was not a problem, but being able to spend it effectively was a problem. They had been building Red Crescent hospitals as a consequence of French intervention to which he had referred at page 256 of his report, but that was exceptional. Dr Al-Khatib was happy to have his comments relayed to the court.

17. Dr George was asked what parts of the Gaza Strip were hardest hit. He was referred to the map at page 152 of the Secretary of State's bundle B. Dr George considered that the map was not really helpful. The main concentrations of population were the hardest hit. This was particularly so in Gaza City. Rafah had been less badly hit. Rural areas were relatively small and less dependent on sewerage systems of an urban nature and were less affected by the devastation. As regards the point at page 161B concerning the proposed wall to be built, he was asked how he saw this impacting on conditions in Gaza. Dr George said that this was potentially very serious. The Gaza Strip survived largely because of the tunnels to Egypt which enabled transit of goods and also weapons. Such economic activity as there was in Gaza was largely related to that traffic. The wall would extend 18 metres below the surface to stop the tunnelling and was likely to have a drastic impact. In the interview with Dr Al-Khatib, at page 257 of the bundle, he had said that even those goods to which he referred would start to disappear from the market. He was asked whether he had any knowledge or view as to why this had happened. He said that he found Egypt's position in this mysterious. He had been told by Dr Al-Khatib and other Palestinians that when the Israelis withdrew from the Gaza Strip in 2005 they had planned to dump the problem on Egypt, and Egypt had resisted by putting up barriers between itself and the Gaza Strip and aligning itself to the PLA who were at odds with Hamas who controlled the Gaza Strip, so in effect Egyptian solidarity with the PLA and its link to the USA which was pro-Israel, affected this position. The Egyptians were silent as to why they did as they did on the border.

18. He was asked how much influence the Israeli authorities had on what the Egyptians did concerning the operation of the border crossing. Dr George said he would be astonished if they were not intimately involved with border openings and closures. They were involved de jure before the Hamas takeover and had an intimate interest in maintaining the closure of Egyptian and Israeli borders. The Israeli/Egyptian links and processes were not public but this was a matter of Dr George's opinion. In respect of page 257 of the bundle also concerning the interview with Dr Al-Khatib

with regard to the blockade and Israel, he was asked whether there was any evidence concerning the general Israeli perspective on Palestinians, especially those from Gaza. Dr George said, with reference to his direct experience in Israel and the West Bank, that Israelis stereotyped Palestinians. What Dr Al-Khatib said was an accurate view. Dr George gave an example of a visit he had paid to Hebron in 2007 when, during the course of a conversation with a person in a cafeteria, this person said they wished that all Palestinians were dead. This was the extreme end of Israeli opinion on the subject. He had returned in 2007 to a kibbutz he had spent time in 40 years earlier, and had observed the view of Palestinians expressed as them being a dehumanised mass. Any resistance on the part of Palestinians was characterised as terrorism. The enemies of Israel were habitually dubbed by Israel as being terrorists.

19. When cross-examined by Mr Wastell, Dr George was asked how many countries were within his expertise roughly, and he said six or seven, referring to Syria, Lebanon, Jordan, Israel, Egypt, Kuwait and Yemen. He had been to all of these countries. He had been to the Occupied Territories in 1967, 1972 and 2007: in 2007 for around ten days. He had never been to Gaza. He had been to the Erez crossing in 2007 but the Israelis had denied him entry. He had never been to the Rafah crossing. He had been to Israel once since 1975. He considered that visits were valuable, but they were not the sole source of information. It was put to him that that constrained his evidence about the Gaza conditions in that he had never been there and he said that that was true to a very minimal degree, but he had a lot of sources of information about Gaza. It was suggested to him that the main constraint was that he could not see what was going on and he said that from the edges of the Gaza Strip one could see in as far as 150 yards. Parts of it were a buffer zone. It was suggested to him that there was also a constraint in that the reports he got would not concern everyday life but were weighted to negativity, including reports from Amnesty International, the International Committee of the Red Cross and the Palestinian Red Crescent. He said he did not only rely on those but there were a number of ways in which he obtained information. He met Gaza and Foreign and Commonwealth Office officials and journalists and had internet sources and read specialist publications, including academic publications and he met people from Gaza and spoke to them on the telephone also.

20. Adverting to Dr George's evidence in MA (Palestinian Arabs – Occupied Territories – risk) [2007] UKAIT 00017 which he was not going to ask questions about, Mr Wastell asked whether it was Dr George's view that he could describe Israelis as colonising the West Bank and he said "yes". He was asked whether he sympathised with the Palestinian cause in respect of the Israel versus Palestinian conflict. He said that he took international humanitarian law as his landmark and reference point and the laws of war. He had upset the Syrians with a book he had written and was not allowed back there and he sympathised with the Palestinians and the Israelis in some respects. Mr Wastell said he was asking this partly because earlier Dr George had said he agreed with the inference that for Israelis all Palestinians were terrorists. Dr George said it was an often-repeated view of Israelis, yes, and he gave the example again of the girl to whom he had spoken in the cafeteria as being at the very extreme.

It was put to him that this was a very sweeping statement since he had been there once in 31 years and he denied this. Dr George said it was being inferred that that was the source of his evidence and there was a lot more than that and it was not the only basis for what he said. It was put to him that it was nevertheless a sweeping statement and he said there was nothing wrong with that as such as there had to be generalisations to an extent and the question was whether it was accurate. He did not accept that having made one visit in 35 years constrained that view.

21. He was referred to paragraph 22 of his first report, with reference to the Oslo Accords and it was suggested to him that it was much more complicated than that, i.e. the fallout from the Oslo Accords. Dr George said that in the context of the limited report, it was an attempt to summarise accurately. There were UN reports and Foreign and Commonwealth Office reports and meetings with diplomats. He was asked whether he accepted that it was a two-sided breakdown, and he said that there were two sides, but there was a fundamental imbalance of power. Israel had held all the cards and had exploited that. The essentials were as he had said. It was not only his view but such bodies as the United Nations endorsed it, albeit of course the Israelis did not. It was suggested to him that the Oslo Accords did not provide for the removal of settlements and that was to be negotiated in the future and he said no, but it had left open the possibility of a continued Israeli presence. A third of the land had been seized for the colonists.

22. He was referred to the fact that he had not mentioned the Camp David summit of July 2000. He was asked whether what was said at page 22(a) in the Secretary of State's bundle B was a fair summary of the breakdown of the talks and he said on a simplistic level, yes. Offers were made to the Palestinians which they could not have accepted, so they had rejected them. It was a matter of dispute as to what was offered, and there were different interpretations.

23. He was referred to his paragraph 23 and was asked whether he was saying that in 2002 to 2003 the Gaza economy was already severely damaged. He said that it was always in a terrible condition given where it was and having a largely refugee population. In Gaza in 2003, there was mass poverty and food insecurity. Israeli settlements were still there. A lot of the Palestinian population depended on UNRWA; 65% to 70% then as now. In 2002 to 2003 there were small industries which were no longer functioning, such as construction and food processing and cash crops and flowers. It was quite bad by European standards but was not as bad as today. At that time many Gazans worked in Israel doing construction and similar work.

24. It was put to him that at paragraph 24 at the end he had over-simplified and he said he stood by it. Ariel Sharon would state that. There had been violence in Gaza in 2001 to 2002 and that was always the case. It was much more violent than the West Bank after the Israeli occupation. It was put to him that the events he described at paragraph 24 were welcomed by the Palestinian National Authority at the time and he said it was a matter of yes and no. Yes, it was the case that Israel was departing with their colonies and colonists, but it was a unilateral Israeli move and was not

agreed or conducted with the Palestinian Authorities or in connection with Palestinian concerns, as Gaza was a nuisance to them and they would concentrate on the West Bank. That was the Palestinian view. He was asked whether what he said at the start of paragraph 25 was his view and he said that the Israelis made no secret of this as could be seen from the BBC reference, and it was their reason for leaving Gaza. It was put to him that the BBC report was an analytical report by a correspondent and had not purported to be the final word on the Israeli withdrawal. Dr George said that a lot of Israeli spokesmen at the time made it clear that that was the plan. It was put to him that it was not a universal view, i.e. the commentator's views of the Israeli reasons for the withdrawal, and he said that was true, not all commentators agreed, but the policy was stated by Israeli government officials. It was put to him that Hamas and the EU and the USA had backed it and he said that no-one had opposed it.

25. He was referred to paragraphs 31 and 33 concerning the blockade. He agreed that both sides had been accused of international war crimes in Operation Cast Lead. He also agreed that since the ceasefire and as of today there were relatively low levels of violence. As regards paragraph 9 at page 242, referring to continuing violence in the Gaza Strip that was since the July report. He had wanted to give a flavour. As regards whether the references on 19 and 26 November were to the same individuals he thought that they were different. It was a snapshot from July to today. With regard to paragraph 39, concerning conditions in Gaza after the military operation ended in January 2009, he was asked whether that was not the position today and he said it was as he described it and of course it was not the position today but it was as it was at the time. It was better since then. There was not a major war going on. He was asked whether he agreed that since the end of Operation Cast Lead the position was better, and he said it was, in the sense that Europe was better after World War II. It was put to him that there had been a huge influx of aid, and he said that it was necessary to define one's terms. He was referred to bundle B of the Secretary of State's evidence at pages 136 onwards, in particular at page 142 concerning the amount of money. It was put to him that that was a vast increase since 2007 and he said he did not know, that pledges of money did not necessarily translate to physical aid and also the problem was one of getting goods through. It was put to him that the pledge of money was in the billions, and he said that he did not have the figures before him and preferred to focus on what was on the ground. He accepted what Dr Al-Khatib said. With regard to what he said at paragraph 40 at A1 concerning the blockade being a punishment of Gaza, he was asked whether that was his view also and he said yes, there were no rational military reasons for such a blockade. Judge Goldstone and Human Rights Watch were also of this view. It was put to him that this was not a universal view, for example with reference to the United States of America, and Dr George said he was not too sure about that.

26. He agreed that the Goldstone report had been criticised by the UK and US governments. 40 countries had abstained on the UN vote, it was put to him, and he said a fair number had. He was asked about the criticism that Israel's views had not been satisfactorily represented. Dr George said that Judge Goldstone had asked

Israelis to participate and provide information and they had not done so. The report was a political hot potato. The US views reflected its realpolitik rather than the contents of the report. There was not much validity to the criticisms. It was put to him that it was also said to be too partisan in respect of Hamas' defence of the criticism of the war crimes in which they were said to have used civilians as human shields. Dr George said that was an example. The Israelis had alleged that the Palestinians had used ambulances to carry weapons and that had never been substantiated and was untrue as far as anyone could tell. He agreed that it was the case that Israel had made allegations. It was put to him that it was not just a matter of allegations by the Israelis but there were criticisms of the report that, for example, it was not a sufficiently strong critique of Hamas' role. Dr George said that it had become such a political issue that all sorts of allegations were flying round. Judge Goldstone could defend his report better than Dr George could. It was put to him that the Economist had also been critical, and he said he was aware of criticism, mainly of bias, the essence of the UN activity and its abstentions.

27. He was referred to paragraphs 42 and 46 of his report where he contrasted the West Bank and Gaza. He agreed that there were no settlements in Gaza and there were no checkpoints restricting movement inside Gaza. It was put to him that more aid had been pledged to Gaza in monetary terms and he said he did not know whether that was so or not. He was referred to the figures at bundle B at pages 142 and 143 and he said he did not know what those figures meant in practice. Flows took place over a period of time. It was a question of how much was spent in each. It was put to him that it concerned six months of aid since Operation Cast Lead and he said it was unsurprising after such events that there would be a hike in aid pledges but he did not know how much of it had been received. He was referred to the fact that he said the West Bank conditions were less severe and therefore it was relevant to know how much aid Gaza received. Dr George said that 70% of people in Gaza depended on UNRWA. He stood by what he said at paragraph 46 concerning food and water in the West Bank. He was referred to the reference to high levels of food insecurity in the decision in MA by the Tribunal and there being up to 40% food insecurity. It was put to him that therefore he was not right and he said it was a question of definition. MA had been decided in November 2006 and he was writing about now. He was asked whether that was his evidence in MA and he was asked whether he thought that what was said in MA was wrong and he said it depended on the definitions, and what was meant by "food insecurity" in comparison to starvation. He was asked whether he did not accept that there were food supply issues in the West Bank in 2006, and he said he would have to do the necessary research. It was not the position today, and he referred to paragraph 46 of the report. Food was available and people were not starving. In 2007 there was no evidence of foodstuffs being in short supply. He agreed that he had not done the same research in Gaza, but he said there were good reports about this in the public domain. It was put to him that he did not have a definition of "food insecurity" and he had said there were no food shortages in the West Bank but one reason was that he had seen for himself and he agreed that that was the case.

28. He was referred then to his second report. He was asked to what extent negotiations about the captured soldier had impacted and he said that it was not much. He was asked whether an offer to release the soldier would have any bearing on the blockade and he said it might. It would more likely lead to a release of Palestinian prisoners. It was put to him that there had been some movement in respect of the blockade and reference was made to the recent export of flowers as mentioned in an article which had been handed up and was now at page 4 of the Secretary of State's bundle D. He was asked whether this was not a positive step by the Israelis. Dr George said it was referred to as "a rare easing". It was the first time since 2007 and he said it was a one off. He was asked whether he knew that to be the case and it was put to him that it could be every season thereafter and he said it could be but "pigs might fly". He would believe it if he saw it. You had to be cautious. Both sides were entrenched. He tended to be a pessimist on these matters, given the general deterioration over a 40 year period. There were credible accounts of Hamas developing a rocket with a range to reach Tel Aviv and if it got such a weapon it would use it. There was no prospect of the necessary general political solution and no speedy resolution was likely.

29. He was asked whether he had seen an improvement in the types of goods allowed into Gaza, for example some loads of construction. He said he did not see a clear pattern. Some were let in and then not and then others were let in. He was asked whether he accepted that Israel now let construction material in, and he said it was very limited. The Palestinian Red Crescent hospitals had been repaired, as referred to in his report. He agreed that the Israeli view was that they were letting in humanitarian aid and goods since Operation Cast Lead. He was referred to page 8 of bundle D concerning this and it was put to him that that conformed to what the aid agency said. He said yes, the Israelis were letting some goods in, but there was a gap between demand and supply and there was far too little for what was needed. He was asked whether it was the view of the foreign aid agencies concerning the reconstruction of Gaza rather than basic food and shelter and he said not quite. The Red Crescent referred to shortages of, for example, medical equipment and it was not just a question of reconstruction of Gaza. Dr Al-Khatib had said that they let in enough to keep people alive. It was put to him that this was exaggerated, for example if it was true you would see wide-ranging famine and malnutrition. He said that you would see people eating enough to stay alive. Dr Al-Khatib's was a slightly colourful way of speaking, but it was very much a subsistence existence and there were problems all the way and no slack and it was minimal. He was asked whether what was said at page 160 of bundle B, paragraph 3.3.6 was fair and he said yes, but it was necessary to exercise caution. There had been a change in Palestinian diets with the siege. There was a shift from vegetables and meat to much cheaper carbohydrate based foods and this caused ill health and obesity. He was asked whether there was any reason to doubt what Dr Al-Khatib said about access to Gaza via Rafah. He said there was no reason to doubt this but Dr Al-Khatib did not know the procedures in detail and nor did Dr George. It was put to him that the Egyptians did not confirm that they were constructing a tunnel barrier and he said they denied it. The balance of the reports and the nature of the information in them suggested

that this had a ring of truth but time would tell. He was asked whether he was surprised at the tunnellers' reaction that they would be able to get round the problem and he said no, but it would be necessary to see.

30. There was no re-examination.

31. The next witness was the appellant. She identified her signature on her three statements and was happy to accept the contents of each of them as her evidence today. She was asked where she had been living when she left Gaza in 2003 and she said it was with her husband's family in Shanti Jabalia. She did not know where that was in relation to Gaza City. It was a camp. She was referred to her reference to her siblings in Gaza in the most recent statement and she was asked where they were living. She said they used to live in Sheikh Radwan, but now they lived close to her mother-in-law's address in Shanti Jabalia. It was therefore the case that almost all of the family lived there. She was asked if she could identify on the map at page 152 of bundle B where she lived and she said that in Palestine she was a housewife and did not go out a lot. Her residence was in the Gaza area but she could not say what district.

32. She was asked what the family in Jabalia had told her about their experience of the war when she had been in touch with them and she said that they had suffered a lot. Their windows were broken and they did not sleep at night to the extent that the children were bedwetting. When they had gone out they had found that her husband's family's neighbours' house had been bombarded and demolished by a plane. The glass from the broken windows in her family's house was a result of the bombarding and attacks. Since the war the situation there was deteriorating and the food was very expensive and there was very little of it and there was no importing.

33. If she did not have six children, she said, she would go back today. She was asked whether if the Israeli blockade stopped tomorrow and people could come and go and supplies could come in what would she and the six children do then, and she said that if the situation became normal and natural she would go back, but of course after Israel withdrew. She was asked what her position with the children would be about returning in the future with the continuing blockade and she said that it would be so difficult and so much fear for them and for their education and health and schooling and their mental state. She was asked whether she knew what would happen in the future in terms of returning and she said that the Arabs were threatened by the Jews and that at any time they could invade and cause war as before, and the Palestinians were threatened with dying as the Israelis were not aiming at Hamas and Fatah but were attacking women and children. She was asked whether she would be able to earn a living in Jabalia with her children and said of course not as she had not finished her education and was their mother and there was no-one else to take care of them. She had no idea of how she would be able to pay for accommodation, given that she could not stay with her relatives in Jabalia. She did not know where she might be able to live in Gaza, nor in what kind of

accommodation. She would have to go back to do so but the situation was very difficult.

34. She was asked about her daughter Saja and whether it was the case that she had had no problems with epilepsy since she had been in the United Kingdom. She said yes as she had had treatment for a period of time and also she felt settled as she was safe. The people in the schools with whom the appellant communicated were very good. She was referred to what she had said at paragraph 10 of the statement about Saja having a fit in 2003 and she said yes that was because she had been exhausted on the route as they had left at 5 in the morning and the car had taken them at 6 p.m. and the car which would normally accommodate seven people was in fact accommodating fourteen. There was a delay because one of them had forgotten their passport and they had to wait for him to go back to get it. As regards Saja's epilepsy, she said that she used to get attacks when she experienced a long walk or upset or exhaustion, and she was mostly in fear for her and the baby.

35. It was the case that when she left Gaza for the United Kingdom she had been given a stamp in her passport. She was asked whether this was by the Palestinians or in conjunction with the Israeli authorities, and she said, possibly. Since she had been in the United Kingdom she had not taken any steps to ensure she had retained her status on the Israeli database in respect of Palestinian individuals, for example by speaking to the Israeli Consulate. She did not know because no-one had told her that she must.

36. When cross-examined, the appellant said that she kept in contact with the situation in Gaza by telephone and that was every two to four weeks. She had spoken to her relatives in Gaza in the last month. This had approximately always been the case since she had come to the United Kingdom. She asked them about conditions in Gaza and they told her. She was asked whether it was the case then that in March 2008 she had known what the situation in Gaza was like and she said that was during the war. It was put to her that the war was between the end of 2008 and the beginning of 2009, and she said that she tried to go back during that period, March 2008, but the border was closed. She was asked whether she had known what the conditions in Gaza were like in March 2008 when she tried to leave the United Kingdom and said yes, but at that time there was no war. She agreed that she had tried to go to Gaza with the children in March 2008 so her husband could complete his studies but that she had wanted to go like those who went in and out. She agreed that she had claimed asylum as she could not get into Rafah and said that afterwards, however, the war had begun and the obstacles had increased. It was put to her that the war had not begun for some further nine months and she said yes, but the border was closed for almost two years and was only opened if somebody was very upset or very important. She agreed that it was the case that she had claimed asylum as the border was shut and said that afterwards, when the people tried to cross the border, it happened that families with their children tended to stay at the border area for about three days and were not allowed to cross the border. She was asked when this was and said that it was always happening and it was since the border crossing

began to shut and open. She was asked whether she understood that to get into Gaza today it was the case that she would have to wait for three or so days at the border and she said yes, probably, it depended, and there were people who went through who were on medication and people who were not allowed to cross. She was asked whether today her relatives had told her that the Rafah crossing was open every month to let people in and she said perhaps it did open on various dates, but the situation in Gaza was deteriorating. It was put to her that she had not been afraid of going back in March 2008 when she was eight months' pregnant, and she said she had been fearful for herself and her children, but the fear had increased. She was asked whether she had planned to have the baby in Gaza and said maybe, if they allowed her to cross then possibly. She was asked whether, before she understood the border was closed, she and her husband had intended that she would go to Gaza to have the baby, and she said, yes. She was asked whether since March 2008 she had not applied to go back and she said they had applied and the Egyptian Embassy had refused the application and they had stayed and applied for asylum. It was put to her that that was not quite right. In fact they had asked a question of the Egyptian Embassy and she said she did not know but she knew her husband had sent to the Egyptian Embassy for permission to travel and they had not given it. She was asked whether they had not applied to the Egyptian Embassy since then and she said, no. She heard from people that they did not let them enter and made them suffer and it was not easy to go in and out. Her husband's father had died and he had not seen his father as he was frightened to go and should have the right to be able to return and complete his studies.

37. It was put to her that in 2008 she had said that if the killing stopped in Gaza she would be happy to go back and she said that that was the case even now she said so. If the situation changed completely and there was no war and there was food and education and medication and water, electricity and sewage available and if the Israelis withdrew she would go back to Gaza. It was put to her that earlier she had said she did not fear to return but feared for her children. She said yes, but if there was security and safety she would go back with them and if not she would not. She was asked whether her relatives had told her that it was relatively calm in Gaza now and she said to an extent, but the Israelis were still there and could invade at any time. It was put to her that the Israelis were not in Gaza but they could invade and she said they were on the borders. She still had a large family in Gaza. They used to live with her father-in-law. Her brother-in-law lived with the father-in-law. His children were aged between 2 and 6. She was asked whether one had been born since 2003 and she said that was possible and she was not sure. She was asked whether when she tried to go back she had intended to live with her father-in-law and said no, there was no space, and when asked where, she said she would have had to be accommodated by various friends until she found accommodation and until her husband returned. At the present, it was very difficult to find accommodation to rent as the buildings had been demolished. She was asked whether her relatives had not told her the building situation today was better than at the time of the war: she said, no. She was asked when her husband would finish his studies and said that it was perhaps in July next year. She agreed that ideally she

would return with her husband and the children if the security situation allowed. She agreed that Saja no longer suffered from epileptic fits and that was because she was settled and had no fear. Mohammed had been born in Ireland in November 2003. She agreed that the reason for this was she had wanted to secure nationality for him. She agreed that two months after she arrived in the United Kingdom she had intended to obtain nationality for him and this was because their nationality and passports were not useful, and various friends had advised them that he would be able to benefit from education in the future. She had not always intended to claim protection in the United Kingdom.

38. There was no re-examination.

39. The hearing resumed on 22 February 2010. We heard further evidence from Dr George, who had provided a third report dated 17 February 2010. Dr George had been to Rafah earlier this month, not having been there before. He said that he had not learned much, if anything, new about the situation there but that visits could have a value, although not invariably. He had met various people in Cairo who were knowledgeable about the procedures for people returning to Gaza. He emphasised that there was great uncertainty about the precise procedures involved. There was a lot of "ad hockery".

40. He was asked about information that had been obtained about the two youngest children of the appellant. He had not been asked to deal with this issue prior to this third report but had now done so. He said that he could not see how someone like Muhammad who was a citizen of Ireland could gain entry to Gaza. For a child to be born outside Gaza they had to be registered there. If they were under 5 they could enter with their mother, having produced a birth certificate, but children aged 5 to 16 had to have a visitor's permit in order to enter Gaza and they had to be present in Gaza in order to be registered on the population register. The Regulation as stated by him was correct as of yesterday evening when he had last checked it. Muhammad would therefore need a visitor's permit and none were being issued, so Dr George did not see how he could enter Gaza, let alone get into Egypt.

41. He was referred to documents put in on behalf of the Secretary of State where there was reference to temporary passports and children of Palestinian ethnicity in the United Kingdom and coming and travelling back. Dr George said he had never come across this and had looked into it in respect of this case. He said it could depend on what you meant and it could be that that was what a child under 5 with their mother would be given. The only passports the Palestinian Authority could issue under the Oslo Accords were in respect of people on the population register and they were issued by Israel, so he did not see how the Palestinian Authority would have the authority to allow in such a child who was not on the register.

42. The measure was part of a very much wider Israeli policy to limit the number of Palestinians in the Territories. It was one of a number of such measures to prevent the Palestinians returning to live in the Territories.

43. With regard to the youngest child, he was asked whether it was the case that if he and his mother could get to the Gaza crossing with a birth certificate, he would be able to enter Egypt where he had no passport and no Palestinian ID number. Dr George said he had no categorical view of this. It could be that the Egyptians would issue some sort of travel document to him. It would be extremely difficult. The Egyptians were not particularly well disposed to Palestinians and the initial reaction of the Egyptians would be not to get involved.

44. Palestinians had to apply for a visa but for that they had to get Egyptian approval and he had been told this recently by the Egyptian Consulate. Even if they got a visa, they could be turned back at Cairo Airport and he gave an example of this happening at paragraph 34 of the latest report. Even if such a person entered Egypt then they would have to get on a list of approved names sent by the Palestinian authorities to the Egyptians who would submit the list to the Israelis.

45. He was asked how a person would get on the list and he said, from what he had been told by the Palestinian Embassy in Cairo, this had to be done via that Embassy, so the appellant could get to Cairo and go to the Palestinian Embassy there and through them try to get her name on the list and he gathered that the list was the responsibility of the Egyptian Interior Ministry. People did not learn if they were on the list until the last moment.

46. He was asked how he would describe Rafah and he said it was a very small town which had been made worse recently by very bad flooding. It was essentially a settlement dissected by the Gaza-Egyptian border with the Egyptian side smaller than the Palestinian side. There were checkpoints every 200 metres. He had been in Egypt with Egyptian friends and again found it a very ad hoc arrangement.

47. He was asked about the wall, which he said had previously been denied by the Egyptian government. He had not seen it under construction but saw this on CNN over Christmas. The Egyptians now confirmed the existence of the wall. It remained to be seen how effective it would be. There were between 600 and 1200 tunnels and the tunnellers were reasonably confident they would still be able to get under the wall.

48. He was asked whether he wanted to add anything to what he had said last time. With regard to the number of trucks entering Gaza, he said that usually 2,500 a month went in, in comparison to 10,400 before. This came from an Israeli report. There were compelling examples of Israel explaining why they withdrew from Gaza, to ensure the Israeli grip on the colonisation of the West Bank.

49. With regard to colonisation, Dr George referred to a report in the Independent of 1 February of this year and a reference by Lord Phillips of Sudbury to the offer to Gaza of $4.5 billion dollars for rebuilding where it was said that not one dollar had in fact been sent.

50. He was referred to his responses to two cases in which comments had been made on his evidence and he was happy to accept these as part of his evidence in these proceedings. He said that the line of questions last time addressed a lot of issues in relation to those cases and that was why he had said what he said, for example in relation to remarks about sweeping generalisations.

51. Dr George was then cross-examined by Mr Wastell who said he did not want to debate matters that had been raised last time as they were a matter of record.

52. Dr George confirmed that he had not been able to speak to the Egyptian authorities about Gaza as they had not responded to his requests. He was asked whether he would defer to information obtained directly from them concerning points of procedure in this case and he said it would be necessary to be cautious about whether they were practised as they said. It was the case that the Egyptians had been known not to follow their procedures.

53. As regards the first issue he said that only those on the register got Palestinian passports.

54. The next issue concerned the two youngest children and what he said in his report about them. He agreed that it was the case that you would only get a Palestinian passport if you were on the register, so if Muhammad, the fifth child, had a passport he must be on the register. He also agreed that if a person was on the register with a Palestinian passport, they should be able to enter, subject to the Egyptian authorities. He said that the Israelis issued a number as a starting point and a person would be a given a number on registering, and they could get an ID card from the Palestinians in respect of that and also a passport.

55. As regards the youngest child, he agreed that he should be able to get into Gaza because of his age, if he got through Egypt and if he was on the Egyptian approved list and with his mother. He agreed that he was saying that a person had to be there in person and it said so in the regulations. He was asked whether the Palestinian regulations related to how a person got into Gaza, given the child's age, and he said as far as the website went. There was detailed regulation and the person needed to be present as part of the Oslo process. Paragraphs 17 and 18 contained the reference.

56. He was asked how it was that the child, Muhammad, had a Palestinian passport, which he had obtained in April 2006 and it had on it a number given at a time when he was not present in Palestine. Dr George said it was very curious and he would want to know how he had done that. He was asked whether, given that Muhammad had the passport, his concerns did not apply and he said he could make no comment without seeing a detailed account of how he got the passport, and he emphasised that procedures in Palestine, as well as in Egypt, were very ad hoc. Contacts could help. He agreed that he had said earlier that if a person was Palestinian and on the

register, they could enter Gaza. It was put to him that therefore Muhammad could enter Gaza and he said if he had a valid passport and was on the register then yes.

57. Mr Wastell suggested that the reason why Dr George was wrong was that the weblink he referred to did not refer to any regulations. Reference was made to page 273 of the bundle, and it was said that his assumption was mistaken and it was seemingly based on a report. He did not know when the report was written precisely but it was not the only relevant report. It was put to him that the references he referred to seemed to be at least three and a half to four years out of date, as the latest reference was in 2005, and there was no reference to any regulations. Dr George said the reference to the regulations was in the 2009 report. He had cited elsewhere in his report from paragraph 209, at his own paragraphs 19 and 20, and he had checked its accuracy. He did not agree that he was in error in saying that it was necessary for the child to be physically present.

58. Mr Wastell said this referred back to the Betselem report at page 206 and the regulations were set out at page 207 and there was no reference to physical presence. There was at pages 208 to 209 but not in the regulations. Dr George was asked whether there was any more recent information than that, and he said this corroborated his report and that it was necessary to be physically present. He said he could find the actual announcement so it could be decided whether it was a regulation. The question was what the actual practice was. He had checked the matter with the Gisha NGO in Israel. It was put to him that he did not know whether they took their information from the Betselem article or some other source and he said that was right. He said that what mattered was what happened. He would be very interested if Mr Wastell had evidence showing that it could be done without physical presence. The child, Muhammad, could be a special case and he emphasised again the ad hoc nature of the system.

59. Dr George was then asked again about the need for children between the ages of 5 to 16 to be present in order to enter Gaza. It was put to Dr George that the Israelis had made an exception to their freeze on visiting permits for children aged 5 to 16. Dr George questioned whether there was any evidence of that and he said he had not seen any other than for VIPs such as Judge Goldstone. He agreed that it was the case that there was a freeze after the Second Intifada in 2000. It was put to him that that had not applied to humanitarian cases and he was asked about the criteria for the exceptions. He said that in broad terms it was VIPs. Palestinians themselves did not know and he was not sure that Israel had ever even stated to whom it would apply, any more than what products were banned. He was asked whether he did not know what the criteria were, and he said he did not think that anyone knew. As to who got a visitor's permit, it was the people in need of medical treatment or humanitarian cases and it was not a flood, whether people were aged 5 to 16 or otherwise, and it was very limited numbers of people who were getting in or out and the vast majority were residents on the population register.

60. He was referred to footnote 14 at page 217 of the new bundle which was from the Betselem report and it was put to him that it seemed that the Israelis were thinking to let children or Occupied Territories' residents in. Dr George said one had to be very careful with this sort of report. It was an Israeli official making a statement and it was said not to be the reality. The general picture was what mattered and it was very clear. Visitor's permits were not available as a matter of course for entry into Gaza. He did not rely on the Betselem report because it was a nice report, but because it corroborated the situation on the ground. He was asked whether he had asked about the position of children between 5 and 16 when he was there, and he said not specifically: he was asked about visitor's permits.

61. He was then referred to the third issue in his report, at page 7, paragraph 44. He agreed that it was the case that the Israelis were not physically present at the Rafah crossing. He agreed that the Egyptians controlled them in theory, but had their own reasons for keeping the crossing closed, for example to keep Hamas out of Egypt. At paragraph 26 he had said that openings were sporadic and it seemed that on Thursdays and Fridays there were openings. He said that he had heard this but it was too early to say if it was a pattern. He was asked whether there were any criteria in the Egyptians deciding who could cross and he said no and it was ad hoc.

62. It was suggested to him that he had no reason to doubt what was said by Dr Al-Khatib that the Egyptians would do what they could to get Palestinians across. Dr George said, certainly, they did not want a pool of Palestinians. It was in their interests to allow them across. He referred to the fact that he had not found out from the Egyptian authorities if they showed their list to the Israelis and if it were the case it would be likely to be a matter of security concerns as to why the Israelis would like to see the list and he said the Israelis invoked security broadly. He agreed that it would be likely to be under the guise of security. In respect of the 2009 report at paragraph 27, it was unclear if there were cases of refusal by the Israelis.

63. In general, in relation to Rafah, he was referred to the AMA (The Agreement on Movement and Access) and when that was discontinued. The Israelis had offered a solution, which Hamas had rejected, to the issue of the exit of Palestinians from Gaza. Dr George said that there had been a series of ad hoc arrangements and agreements and he referred to the Gisha report which had a good history of that period after the Hamas takeover with regard to movement in and out of Gaza. He agreed with what was said in the Gisha report in the new bundle at paragraph 15 from page 135 in the bundle. The shuttle arrangement concerned Palestinians exiting Gaza via crossing points and then being bussed by the Israelis into Egypt. This enabled the Israelis to control who was coming out. It was put to him that the Israeli influence operated to the extent that the Egyptians did not just open up Rafah, but responded by opening it up periodically to relieve the pressure of the Arab world on them. Dr George agreed and said that the Egyptians were in a very difficult position as they were trying to play things both ways. There were risks of Islamism and it was open to them for good reasons, including mollifying the Israelis. He was referred to suggestions that the Egyptians ignored Israeli requests to keep Rafah shut

and he said he had seen reports that the Israelis were comfortable with the current situation and they understood Egypt's situation.

64. With regard to Dr George's fourth point at page 8, he accepted it was probable that the appellant and her children and husband would get tourist visas for Egypt, if they obtained passports. He was asked whether he had any idea of the Egyptian criteria in respect of tourist visas. He said that he had gone on his recent visit on such a visa. The Palestinians were in a different category as they would need to get approval from the Egyptian authorities before they could apply for a visa and the situation was, as already emphasised, very ad hoc. He did not know what the position would be and it was very hard to know. It was random and unpredictable.

65. Dr George was not aware of anything preventing multiple applications. He agreed that when a Palestinian got to Rafah the Egyptians would be content for them to get across. With regard to the example that he had given at paragraph 34, he had no idea what information the Egyptians had on this person. It was put to him that journalists were of particular concern to the Egyptians and he said yes at the moment because of the recent events. It was put to him that a journalist was likely to be of more concern than a Gaza housewife. Dr George said it depended on the context at the time. He did not know how many applications they got. He was unaware of the information the Egyptian authorities had. The belief of the Palestinian officials in Cairo was that the ad hoc nature of the system was random.

66. With regard to Dr George's fifth point concerning conditions at Rafah, he was asked whether he had seen a lot of Palestinian refugees there. He said he had not and it was rather a ghost town and there were more police and residents, as a friend had commented to him. It was not an area where there were camps of people ready to cross. As to whether was the case that the Red Crescent were helping Palestinians in Rafah in providing food and shelter and mattresses he said it had happened.

67. In respect of the sixth point in his report, it was put to him that the fifth child, Muhammad, had a Palestinian passport and Dr George said he would be fascinated to look into the circumstances about that. In respect of temporary passports, he had never come across this notion and had seen no references to it. He was asked whether he concluded therefore that they were not issued and he said he could not say that they were never issued and again the point about the ad hoc nature of the system was made, and it could be that they were provided for internally displaced persons (IDPs) etc.

68. When re-examined by Mr Draycott, Dr George was referred to the report at page 199 of the new bundle, and pages 208 to 209 to which he had been taken by Mr Wastell, and the reference to the basis of the Betselem report which was said to be inaccurate. He was referred to page 207 at paragraph 2.3, and a reference to the bibliography at page 216 in the fourth entry. He was asked whether he had seen that report and said, no. The regulations affecting Palestinians changed very frequently, twenty times in the 1980s, and there was a reference to this somewhere. He said that he tried

to deal with the situation as it was, rather than the historical regulations and references. He was asked what he had gleaned from the Palestinian Authority website in this regard, and he said he sought confirmation to ensure the regulations described in the 2009 report about the re-entry of children, the Khalil report, were still the same. As he had said, he had checked the website yesterday. His understanding was that it was as described by Khalil. A child up to the age of 5 would have to show a birth certificate and between 5 and 16 a visitor's permit if they were not on the register. Again there was the problem of the ad hoc nature of the system.

69. He was asked whether he had any views on the position if the child Muhammad had a passport. He said that he had been told to proceed on a certain basis in writing his third report. This had been in respect of the general situation concerning Palestinian children born overseas. Dr George referred to the process known as wasta which was a process of exchanging favours and the use of informal channels to obtain objectives, including relevant documentation. It was a Middle Eastern matter, and he gave examples of this process. It was a question of who you knew. It was therefore not a surprise, in respect of the passport. The regulatory picture, as published, was a general picture for country guidance purposes and you could not routinely sidestep these procedures.

70. He was referred to page 209 of the report and the third sentence beginning "According". He said that it could mean in this case, in respect of the child of 5, that family contacts had enabled the passport to be obtained, but there could be problems at the border if the Israelis did not recognise the number on his passport, if that was correct. There was a history of such things occurring. There were cases of Palestinians living for years in Cairo unable to get back to Gaza. They were people who had been referred to as "present absentees" since 1948. He was asked about the Hebrew announcement he had referred to and he said that if there was going to be a concentrated focus on the Israeli regulations then it would be necessary to go back to the original Hebrew to do a proper analysis. He had exchanged emails with the Gisha organisation on this. He had sought to clarify certain issues in their reports and they had referred in a report in 2007 to Israel and issued ID cards and he had asked about that and they had said it was a matter of semantics and the Palestinian Authority issued the card after the Israelis had approved it after entry on a population register.

71. He was asked about his reference to meetings in Egypt in connection with visitors' permits and whether he had asked specifically about children between the ages of 5 to 16. He said he had not asked about specific age groups as that would be redundant as it was clear from those in charge in Egypt that there was no flood of visit permits being issued so it would be absurd to ask about a particular group. It was a blockade and hardly anyone got through. Palestinian passports had to be on the approved list.

72. He was asked about temporary passports and whether it could not be said that they were never provided. He said it was an ad hoc system, but on a balance of probabilities they could be used. Dr George said he did not think it was an issue. Someone would have mentioned it. It could not be ruled out categorically.

73. He was referred to his evidence in respect of Rafah, where he had said he saw no camps or queues, and he was asked where Palestinians waiting to cross would stay. He said that if they were aware that the border would be open in the next two or three days they would be in Rafah or in Elarish, which was 40 kms to the south. People who were waiting on a longer term basis would be in Elarish or in Rafah, renting rooms in people's houses. The border had been open for two or three days before his visit, he thought on 3 to 5 February but was closed when he went on 6 February.

74. That concluded the proceedings on 22 February.

75. On 23 February, Mr Draycott produced a four page addendum report from Dr George addressing issues that had arisen the previous day concerning the passport and its status and the issue of temporary Palestinian passports. He raised three further issues. Firstly the appellant was not here today, which was unfortunate, due to a misunderstanding via NASS about the amount of accommodation to be arranged and she and the family had gone home.

76. A further concern in respect of their absence was, with reference to, in particular, the note at page 215 of the Secretary of State's bundle E the situation of the appellant's husband's funding and ability to survive if returned to Gaza. Mr Draycott's difficulty was that he had only seen this last weekend and had tried to get the husband to come to the hearing yesterday or today for the point to be put to him as to how it was funded. It was clearly quite an important point and the appellant was disadvantaged by a lack of ability to deal with it as it raised a number of issues. The Presenting Officer's notes referred to were not available. The third point concerned the judgment of the Court of Justice in Teixeira which had now been produced and Mr Draycott understood from Mr Wastell that the issue of the right to reside permanently was not dealt with by the Court so the matter remained open and it was a question of the views of the Court of Appeal in McCarthy in contrast to what had been said by the Advocate General in Teixeira.

77. Mr Wastell expressed concerns that he had only received the report from Dr George at twenty past ten last night. In respect of the appellant's husband, Mr Wastell had indicated from the start that his credibility was in issue, it having been rejected from the outset, and his application had been made previously to the Home Office about still receiving funding and that was in the original determination. It had been open to the appellant's advisors to call evidence to disturb that finding and they had chosen not to do so. He was due to complete his studies in July 2009, so with regard to the question of return to Gaza it was a non-issue. There was a note in connection with the January 2009 application for leave in respect of a relative providing funding.

The case would not turn on whether he could get funding or loans from a relative. Mr Draycott had taken instructions and Mr Wastell was told that the appellant's husband said he could get loans from his family and there would be no point in calling him to say that.

78. A copy of Teixeira was put in and also other case law on the EU point. The argument on behalf of the Secretary of State was that the permanent right to reside deriving from residence, which did not have to be in accordance with the Regulations, was not in accordance with what was said in McCarthy and that was the law and it was on a reference at the moment.

79. In respect of Dr George's report, if this were traditional two party civil litigation, he would strongly argue it was entirely inappropriate after cross-examination to produce such a report. It was accepted that it was a country guidance case, however. Mr Wastell suggested that the fourth report did not answer the two critical questions that needed to be answered and should be treated with caution. An expert had a duty to give opinions on matters within his knowledge or say when it was not within his knowledge and such a last minute report, without the Secretary of State having the chance to consider it, was entirely outside the ordinary rules of litigation. He did not have the opportunity to go behind the points in it but it conflicted with the Secretary of State's evidence that the Tribunal would hear. The appellant needed to apply for permission to rely on it and the Tribunal was asked to note Mr Wastell's objections and to treat the report with caution.

80. By way of reply, Mr Draycott said that the nub of the report and the catalyst for it was a telephone call by Dr George to the Palestinian Delegation in London and it mainly related to the child, Muhammad. Dr George had been told that there were two types of document: a travel document which was authentic and looked like a passport and could be travelled on, but did not include the ID number allowing a person to travel around the Occupied Territories. Dr George had been given precise information about what to look at on the passport. These were difficult issues and the evidence was not readily in the public domain. The concerns on behalf of the Secretary of State were understood, but it was a complicated issue, and all the Secretary of State had said was that Muhammad had a passport. The Karim report of 2009 might settle it.

81. By way of response, Mr Wastell said that it was a country guidance case and the point had been made very early on concerning temporary passports. Dr George was not a passport expert. The passport had been obtained when Muhammad was less than 5. Dr George did not deal with the point concerning visitor's permits and allowances being made by the Israeli authorities to Gaza residents' children being allowed in. Mr Wastell referred to paragraphs 5 and 6 of the report and the reference to a "travel document" which was like a passport and that the representative had never heard of a temporary passport. It could be that the culprit had now been found. The Tribunal should look at the passport. If it was not a point then it should not be dealt with in this case.

82. In response, Mr Draycott said that in his view the Secretary of State was in difficulties over the ID issue. The Secretary of State's own evidence said that there would be no entry without an ID number and reference was made to the correspondence involving Mr Kemble and in Azam and Rabat at pages 243 and 244. With no ID number, a person would not be allowed into the Occupied Territories. As regards the temporary passport point, it could be a matter of semantics whether it was a travel document or temporary passport, but the report said passports had not been provided for eighteen months. So if the youngest two children could not be allowed in, then this would be persecution for discriminatory reasons and a strong Article 8 case.

83. After consideration, we concluded that it would not be necessary for us to adjourn to take evidence from the appellant's husband. It seemed to us that we had sufficient evidence concerning his circumstances so as not to necessitate hearing further evidence from him. We granted permission for Dr George's fourth report to be put in and for him to give further evidence in respect of that.

84. The passport having been examined by both sides, Mr Draycott noted that the passport had an ID number on it but a different date of birth from that recorded in Muhammad's Eire passport and, in comparison with other Palestinian passports that the appellant's side had seen, it appeared to be a different format and the numbers in other cases began with a 9. It was not contended that the passport would not have come from a civil delegation office run by Palestinians in Gaza or the West Bank, but the question was whether the ID number on the passport correlated with the Israeli registry number and the next question was what the Israeli requirements were for the provision of an ID number. On behalf of the appellant it was said that the objective evidence answered that and that it must be a matter of residence, but that contrasted with the Secretary of State's view.

85. Dr George gave further evidence, adopting his fourth report. With regard to the ID number on the passport, he said that he would raise a question about the format of the number. On other Palestinian passports he had seen, though he was not an expert, in some cases they began with an I and then a space and then a long number and then a space and then a final number. In his opinion, given the weight of the evidence concerning the rules and the passports and the gaining of ID numbers, he could not see how the passport could be fully genuine and it was back to issues of contacts and wasta. It might be that strings had been pulled. Israel was the key party. He would want to know the details of the circumstances in which the passport was issued.

86. He made the further point that the report was not a consequence of deficiencies in the previous day's evidence concerning the rules of issuing passports. The third report dealt with the situation as it now was and not the historical situation. The fourth report dealt with an essentially historical phenomenon. The Palestinian Delegation officials said they did issue such documents, but these ceased some

eighteen months ago. He referred to evidence involving the Palestinian and Lebanese governments in respect of Palestinian-Lebanese refugees and the issue of Palestinian passports where they would not have residence rights, but he was not aware of such passports being presently issued. Only fully valid passports were presently issued, but not in Gaza because of the Hamas dispute.

87. This was a country guidance case and he was as satisfied as he could be that his evidence concerning the circumstances and rules and regulations about the issue of Palestinian passports and ID numbers as they generally applied was accurate. As he said, there were exceptions on the basis of favours and bribes, etc. That was a matter on the country guidance side and was the general picture. It was hard to see how one could establish the validity of the ID number on this passport, as only the Israelis could say. The Palestinian Population Registry was run by the Israeli Interior Ministry and it was inaccessible and it was unclear even if the Palestinian Authority had access to it and, if so, whether it could be accessed by Ramallah or an NGO on the West Bank.

88. In cross-examination Mr Wastell asked Dr George whether it was the case that he did not know whether an ID number was real or not and he said only the Israelis could say. The question was asked again and he said it was only Israelis who could say and neither he nor anyone else here could. He was asked whether he accepted the possibility that it was wrong to say that a person needed to be present in Gaza to be registered on the Palestinian register was wrong. He said it was not his premise but it was the published background evidence.

89. He was asked about his expertise in passports and the fact that he had said he did not have comprehensive expertise on the minutiae of Palestinian passports and he agreed that that was the case. However, Dr George said that he assessed the likely authenticity of documents from the Middle East as part of his work as an expert and had never differed from the conclusions of the National Document Fraud Unit. There were some characteristics such as a lack of a number or the appearance of a document which did not demand a particular expertise, though it was the case that neither of those applied to this passport, which appeared to be authentic and to have been issued by a genuine authority, except for the format of the ID number. He had not done any infrared tests. That he was not an expert did not mean that he had a zero claim to fame in respect of documents.

90. It was put to him that he found a regulation saying that children under 5 needed to be physically present in Gaza to be registered on the Palestinian register. Dr George questioned what was meant by this and repeated what he had said yesterday, that it was a matter of scrutiny in Hebrew issued by the Israelis and the sources stated in his report were derived from the Israeli regulations. He was referred to the fact that there was a UK residence stamp in the passport and it was put to him on that basis it could be inferred that the UK authorities had accepted that it was genuine. Dr George said yes, but referred to the recent case of the Dubai authorities accepting UK passports. It was put to him that the documents were genuine and that was the case

with this also but there was nothing obvious about this passport. It was put to him that there was no reason to suspect the Egyptian authorities would not allow the document to be used to obtain a visit visa to Egypt. Dr George said yes, but noted the fact that it was necessary to have Egyptian approval to apply for a visa and he did not know what checks they would make. They could think that this was a Palestinian from Gaza who probably wished to return there and that they might decide to run it by the Israelis and see if the ID number was accepted. It could not be put any higher than that. It could be the case and no-one could say.

91. He was referred to his fourth report at paragraph 12 and the third paragraph on page 3 and was asked whether that was still the case. Dr George said he did not know. The Palestinian Delegation said that to get an ID number in order to get a passport the child would have to go to Ramallah. He was referred to paragraph 10 and it was put to him that that assumed that the person was not on the register and that the Secretary of State disagreed about that. Dr George said one could not know and there was no way to establish it. He did not see how Muhammad could be on the register and, if not, he would have had to go to Ramallah to get a passport. It was put to him that that only applied to children through the ages of 5 to 16 and there was nothing about children under 5 and he said no. He agreed that Muhammad had applied for the passport in April 2006 when he was under 5. It was common ground that he would not have been able to be present in the Occupied Territories then as he had been in the United Kingdom. He was referred to paragraph 13 and it was suggested that it indicated that now limited numbers of passports were received in Gaza and people could apply to the West Bank. Dr George said that people with ID numbers would not have to be present, for example they could be issued by the government in London.

92. There was no re-examination.

93. The next witness was Ms Holmes. She identified both her statements and her signature on them and said that they were both true to the best of her knowledge and belief. She was asked about the source for what was said at paragraph 5 of the first statement and she said it was an email of 27 November 2009 from a colleague who had obtained the information from the Palestinian Delegation in the United Kingdom. She had it with her but was somewhat reluctant to produce it as it was restricted.

94. In cross-examination, Mr Draycott asked Ms Holmes whether she would agree that Palestinian ID numbers were of critical importance for returnees to the Palestinian Territory, and she said this was a matter for the Tribunal and she was not an expert. She had looked briefly at the material produced by Geoffrey Campbell. She was referred to the letter at pages 243 and 244 at Secretary of State's bundle E and said she was not in a position to disagree with that and had no reason to disbelieve any of it. She was referred to Dr George's evidence that the authorities in Gaza were not in a position to provide passports and everything had to come from Ramallah and she said that her recollection of Muhammad's passport was that it named Gaza as the

place of issue. It was put to her that the passport went back to 2006, and Dr George had spoken about more recent occurrences of 2008 to 2009. Ms Holmes said that the general understanding the Home Office had was that there would be no problem for the appellant to get into Gaza with her children. It was put to her that Dr George said that they would have to go to Ramallah to get Palestinian passports if they were able to get into Gaza. Ms Holmes said again that she was not an expert and did not feel that she could answer the question with any degree of authority. She was asked whether she could agree that the Israeli authorities had responsibility for control of the population registry concerning Palestinians. Ms Holmes queried what the word control in this context meant and it was suggested to her that they were the keepers of it and logged the information concerning ID numbers or verified the truth of information given by the Palestinian Authority. Ms Holmes said yes, that was as she understood it, but she was not an expert. It was put to her that she was putting forward contentions concerning access to Gaza and that was an issue to be addressed. Ms Holmes said that what she said was on the basis of the information that they had received and the appellant and the children had had passports in the past and that added weight to that belief. She agreed that none of them had been in the Palestinian Occupied Territories since 2003. She agreed that evidence had been given that each child and the appellant would need a visa in advance before entering Egypt and also given that five of the children had passports then if they got them renewed they could get travel documents except for the youngest child. She was asked how she envisaged the youngest child getting a travel document to enter Egypt and get to Rafah. She said that given that his family had travel documents, she did not see why it would be difficult for him to get one. She was asked whether this was an assumption on the part of the Secretary of State, and said that was not entirely the case but there was no evidence about children being prevented from entering, especially as the whole family were documented and it seemed unlikely that there had been no problem previously with the children. Again, she reiterated that she was not an expert. She was referred to what the statement said about this and she said it was a matter of what was in the statement and she referred to paragraphs 2 and 3.

95. Ms Holmes was referred to the point made by Dr George about temporary passports and there being two levels of Palestinian travel documents, the fully fledged passport and the travel document, and she was asked whether the temporary passport to which she referred was one of those. Ms Holmes said that the statement at paragraph 5 was the information the Home Office had been given. The email which was the basis of this information was restricted. It said that the Palestinian Delegation in the United Kingdom confirmed that a new passport via the use of a power of attorney could be obtained and be done on an application for a passport in the United Kingdom and a nominated person could apply in the Palestinian Territory. The child in the United Kingdom would get a temporary passport using the same procedure, and they could present that and a birth certificate and get an ID number.

96. It was put to her that Dr George had said that if the youngest child got to Rafah with a birth certificate he would be allowed in, but Mr Draycott was rather concerned about the earlier stage as to how the child would get access to Egypt to get a visa as he needed a recognisable travel document. Ms Holmes suggested that his ID document could suffice.

97. With regard to paragraph 8 of her first statement, she said that her role was as a country guidance coordinator and others did the specific job of obtaining information and evidence and she had no particular expertise in respect of the Occupied Territories. She was asked whether there could be difficulties in obtaining the relevant visas and she said yes, as was set out in paragraph 8. She could not shed any further light on that. It would be odd if only a small child who was not documented would cause trouble as he would hardly be seen as a security threat.

98. She was referred to paragraph 12 of her first statement and the reference to there being no prospect of a forced return and she was asked whether it was the case that the situation was seen as very precarious in respect of people's abilities to cross the border and the appellant had six children. Ms Holmes said that the appellant's appeal rights were not exhausted and she could go back voluntarily and it was up to her. The appeal would not be concluded today and it was unclear what the situation would be when her appeal rights were exhausted. She was not aware of any cases of forced returns, but that did not mean there had not been any. She understood that there was a Home Office policy in connection with unaccompanied children that they would only be returned if suitable reception conditions were available. It was not the situation of the appellant who was not a single parent and it was not the same at all as the case of a child who was on their own. Ms Holmes said she could only however give a personal opinion on this. She was asked whether she was unaware of the case being considered on this basis and Ms Holmes made the point that the appellant was married. As to whether there was no guarantee that her husband would leave with her, given that he still had leave, she said that it was not up to her and the question was unhelpful. It was put to her that the test was what would happen on the notional return of the appellant and her children, and Ms Holmes said that was a matter for the Tribunal and she could not say anything helpful and these matters were obviously considered seriously by the Secretary of State. With reference to paragraph 12, it said "currently" and that the appellant could return. The matter had been considered and analysed. Mr Draycott said that he was not saying that the Secretary of State accepted there had been an Article 3 violation but he argued that it was relevant and Ms Holmes said it was a matter for the Tribunal.

99. That concluded the evidence. We asked Ms Holmes to take instructions over the luncheon adjournment in respect of whether the email which was the basis of paragraph 5 of her first statement could be disclosed since it was evidence that could clearly be helpful.

100. After lunch, we were addressed by both representatives who indicated that it would assist them, given the time difficulties they were likely to experience today, if they

were allowed to put in written submissions, a request to which we acceded, making the point that in the immediate future the representatives should be able to identify the points of agreement and disagreement, given the complexities of the case. Mr Wastell also indicated that Ms Holmes would obtain instructions as to whether the email could be released, and after discussion we agreed that it would not be necessary to reconvene if the email were released as the parties could make their submissions on it without there needing to be further evidence. We received the final written submissions from Mr Draycott on 10 June.

Whether the Appellant and Her Family Can Enter Egypt and Cross the Rafah Border Crossing

101. It is, we think, common ground, that the appellant would have to re-enter Gaza, if it were possible to do so, by means of entry into Egypt and then access to the Rafah crossing into Gaza. Alternative possibilities of entry from the northern border at Erez in Israel or entry via Ben Gurion International Airport in Tel Aviv appear not to be feasible. Dr Alan George, who has provided five reports on behalf of the appellant, says in his first report, dated 20 July 2009, at paragraph 53 that until November 2005 entry to and exit from the Gaza Strip from Egypt were strictly controlled by the Israelis. Crossings were manned by officials of the Palestinian National Authority (PNA) but Israeli officers were also present at the checkpoint and had full powers to veto the entry of Palestinian individuals who were required to present their documents at the Rafah checkpoint. It is said that Israel has maintained an influence over the Rafah crossing even after Israel's unilateral withdrawal from the Gaza Strip which was completed in September 2005. In the report Dr George says that since Hamas's takeover of the Gaza Strip in June 2007 its borders have been all but totally closed. He quotes from an Amnesty International briefing paper of July 2008 entitled "Gaza Blockade – Collective Punishment" stating that Israel also continues to exercise a degree of control over Gaza's border with Egypt, and Israeli officials have repeatedly made it clear that the border can only be reopened within the framework of a joint agreement. Dr George says that Palestinians hoping to enter the Gaza Strip from Egypt must obtain visas to enter Egypt and these are not granted as a matter of course.

102. In his second report of 30 November 2009 Dr George says that Israel continues to permit only very small numbers of people to cross to and from the Strip and the Egyptian border is opened only sporadically by Egypt and then only for brief periods to allow the passage of "humanitarian cases" (mainly people in need of medical treatment not available in the Gaza Strip) and students. He refers to periods since his previous report when the border had been opened, comprising 3 to 7 August, 15 August (to allow Muslim pilgrims to cross), 26 to 27 August, 15 and 17 September, 1 to 3 November and 6 to 8 November (to allow Muslim pilgrims to cross).

103. In his third report, dated 17 February 2010, and submitted following a visit to Egypt between 2 and 10 February 2010, including travelling to Rafah, Dr George addresses, among other issues, the position of the appellant's fifth and sixth children. They are

respectively Mohammad, who was born in Antrim on 28 November 2003 and is a citizen of Eire, and Abdurrahman who was born in Liverpool on 25 April 2008. In particular he addresses the question of their ability to obtain a Palestinian identity card and passport and obtain entry upon return. Dr George quotes from a report by Gisha, an Israeli human rights organisation, entitled: "Rafah Crossing: Who Holds the Keys?" which was published in March 2009 (the Gisha report). Dr George says that for the registration of children born abroad of parents who are on the population registry, the physical presence of those children within the Occupied Territories at the time of the application for registration is a requirement. He notes however that the Rules stipulate that young children of Palestinians with residence status do not require a visitor's permit and this appears to apply to children younger than 5 years of age and would therefore apply to Abdurrahman, who Dr George considers would be able to enter the Gaza Strip on the strength of his UK birth certificate. He notes that Muhammad is a citizen of Eire and to the best of his knowledge considers that this would not hinder his ability to be registered on the Palestinian Population Registry and obtain a Palestinian ID and passport. He notes however that since 2000 Israel has imposed a general freeze on the issue of visitors' permits and though Israel formally has had no direct control over who enters the Gaza Strip from Egypt since the Hamas takeover of the Strip in June 2007, he says that in practice Israel exercises a veto because the Egyptian authorities submit to the Israelis lists of persons who wish to enter the territory from Egypt via the Rafah crossing. He considers that in view of Israel's general position on visitor's permits for Palestinians not resident in the Occupied Territories it is highly unlikely that the appellant would be able to obtain permission from the Israeli authorities to enable Mohammad to enter Gaza.

104. Dr George goes on to say that the Egyptians have largely acquiesced in Israel's requirement that the Rafah border be closed. He notes the reasons for this, and says that Israel permits only sporadic openings of the crossing, generally lasting only two or three days and says that they are announced only a few days in advance, severely limiting the ability of potential travellers to the territory to reach the border in time. He says that only individuals whose names have been approved by the Egyptians in advance are permitted to cross the border into Gaza. The consensus of the sources he has consulted, including sources at the Palestinian Embassy in Cairo, through which the lists of names are submitted to the Egyptians, is, he says, that the Egyptian authorities submit these names to the Israelis for vetting in advance of border openings, thereby implying that Israel has the possibility to veto individuals. He says however that he has been unable to corroborate this with the Egyptian authorities as they did not respond to his request for a briefing from them. He quotes the Gisha report in support of this view. He quotes a report to the US Congress by the Congressional Research Service dated February 2008 as showing the efforts made by Israel to make US aid to Egypt conditional on Egypt's performance in maintaining the blockade.

105. Dr George then goes on to consider whether the Egyptians will grant the appellant a transit visa allowing her and her children to enter Gaza. He telephoned the Egyptian Consulate in London on 16 February 2010 and was told that the Consulate did not

issue transit visas and that Palestinians holding Palestinian passports who wished to enter Egypt required tourist visas. This required them first to apply for clearance from the Egyptian authorities via the Consulate and approval would take between two to six weeks. If approval was granted they could then embark on the second stage of the process which was the application for the tourist visa itself. If they applied in person this took two days and if by post between five and ten days. Once in Egypt, a Palestinian wishing to travel on to the Gaza Strip had to apply to the Egyptian authorities. The Egyptian Consulate was unable to say to which official agency a Palestinian would have to apply. From discussions during his recent visit to Cairo and from published sources it seemed to Dr George highly likely that this would be the Interior Ministry and its main Security Agency. On the assumption that the appellant and all the children possessed valid Palestinian passports it was probable that the Egyptian Consulate would issue them with visas to enter Egypt. Assuming they were able to do so he considered it probable that they might, after very considerable bureaucratic wrangling and delay, be able to obtain Egyptian permission to enter the Gaza Strip. He considers however that there are significant problems in respect of the two youngest children for the reasons set out earlier in his report. He goes on also to note that the procedures affecting Palestinian travel to and through Egypt are not always rigorously applied and that Egyptian officials often act arbitrarily. He refers to the example of a Palestinian journalist who experienced problems in this regard.

106. As we have set out above, in his oral evidence Dr George said that he would be very surprised if the Israelis were not intimately involved with border openings and closures. He agreed with what had been said by Dr Al-Khatib in his report. He reiterated the difficulties he saw as to how someone like Mohammad, who was a citizen of Eire, could gain entry to Gaza. He would need a visitor's permit and none were being issued. With regard to documents put in on behalf of the Secretary of State containing reference to temporary passports and children of Palestinian ethnicity in the United Kingdom and coming and travelling back, he had never come across this and thought it might be a reference to what a child under 5 with their mother could be given. He said that the only passports the Palestinian Authority could issue under the Oslo Accords were in respect of people on the population register and they were issued by Israel, so he did not see how the Palestinian Authority would have the authority to let in such a child who was not on the register.

107. He also said in cross-examination that Palestinians had to apply for visas and get Egyptian approval in advance and even if they got a visa they could be turned back at the airport in Cairo. He had given an example of this in his third report. Even if they were able to enter Egypt they would have to be on a list of approved names sent by the Palestinian Authorities to the Egyptians who would submit the list to the Israelis. He thought that, from what he was told by the Palestinian Embassy in Cairo, a person would get on the list via the Palestinian Embassy so they could get to Cairo and go to the Embassy and in that way try to get their name on the list. They would not however learn that they were on the list until the last moment.

108. In cross-examination he agreed that if it was the case that a person would only get a Palestinian passport if they were on the register then if Mohammad had a passport he must be on the register. Such a person should be able to enter, subject to the Egyptian authorities. He did not understand how Mohammad had obtained a Palestinian passport in April 2006. He agreed that he had earlier said that if a person was Palestinian and on the register they could enter Gaza and that Mohammad could enter Gaza if he had a valid passport and was on the register. He thought that this could be a special case and he emphasised the ad hoc nature of the system.

109. He agreed that the Israelis were not physically present at the Rafah crossing and that the Egyptians controlled the crossing in theory but had their own reasons for keeping the crossing closed, for example to keep Hamas out of Egypt. He did not think there were any criteria involved in the Egyptians deciding who could cross. He agreed that it was in the interests of the Egyptians to allow the Palestinians across. He had not found out from the Egyptian authorities whether they showed their list to the Israelis, though if it were the case it would be likely to be in connection with matters of security. The Egyptians were in a very difficult position as they were trying to play things both ways. He thought the Israelis understood Egypt's situation.

110. He accepted it was probable that the appellant and her children and husband would get tourist visas for Egypt if they obtained passports. As to whether the appellant and her family would get tourist visas, the situation was random and unpredictable. As regards the example he had given of a journalist who had experienced difficulties, he had no idea what information the Egyptians had on her. As regards Mohammad's passport, he had never come across the notion of temporary passports and had seen no references to it. He could not say that they were not issued and again he referred to the ad hoc nature of the system. It might be they were provided for IDPs. He referred to the process known as "wasta" which was a process of exchanging favours, and surmised that this might be the basis upon which Mohammad's passport had been obtained. He said that the regulatory picture, as published, was a general picture for country guidance purposes and these procedures could not be routinely sidestepped.

111. Dr George produced a fourth report overnight after the hearing on 22 February. After the hearing he had had a telephone interview with the Political Counsellor, Ms Shorafa, at the Palestinian General Delegation Office (PGDO) in London. In his report he says that the Palestinian Authority issues passports only to Palestinians in the Occupied Territories who are registered on the Palestinian population registry and who therefore hold Israeli approved ID cards. The Political Counsellor had told him that until approximately eighteen months ago the Palestinian Authority (PA) also issued some travel documents to Palestinians who were not on the population registry. These documents had the same appearance as a full passport but conferred no right of entry to or right of residency in the Occupied Territories. She told him that these passports and travel documents both carried serial numbers but the full passports, as they were described, included the number of the Israeli approved ID

card held by individuals registered on the Palestinian population registry, whereas the travel documents did not carry these numbers. Dr George considered that this information chimed with information he had received from the First Counsellor at the Palestinian Embassy in Cairo whom he had met earlier in February 2010.

112. Dr George then went on to refer to the notion of a temporary passport referred to at paragraph 5 of Ms Holmes' witness statement of 10 December 2009. He had found no evidence on an internet search to support this contention and the Political Counsellor had told him that she had never encountered or heard of such a thing as a temporary Palestinian passport. The Political Counsellor had told him that new Palestinian passports were not presently being issued from the Gaza Strip and that existing passports could be renewed via the PGDO office. New passports were being issued only in Ramallah (the location of the PA's headquarters in the West Bank). She said that a child born outside the Gaza Strip and aged between 5 and 16 who had not been registered on the Palestinian population registry and who wanted a Palestinian passport would have to apply in person in Ramallah.

113. Dr George also gave some oral evidence in adopting his fourth report. He thought that the ID number on Mohammad's passport gave rise to questions. He did not think it could be genuine, bearing in mind the evidence as a whole concerning the rules on Palestinian passports and how ID numbers were obtained. He said that the Israelis could say whether the ID number on the passport was real or not.

114. Yet further evidence was provided on behalf of the appellant concerning the issue of Mohammad's passport, after the end of the hearing. Reference is made to the Middle East Cancer Consortium (MECC) Manual of Coding and Staging Version 5.1 of July 2009. At page 13 of the Manual there is information concerning patients' national identity numbers for the Palestinian Authority (Gaza and West Bank). There is reference to nine numerical characters and it is said that sometimes only eight digits are recorded. It is said that in the West Bank of the Palestinian Authority a national identity number was initiated in 1967. All ID numbers issued between 1967 and 1989 are said to begin with the number 9. All ID numbers issued between 1990 and 1994 were given the number 8. All ID numbers issued from 1995 until the present start with the number 4. It is said on behalf of the appellants that all of the Palestinian IDs referred to were in the documentation before the Tribunal, with the obvious exception of Mohammad's, tallying with the above information. It is argued that as a consequence since Mohammad's passport does not commence with the number 4, which is the starting digit for the period 1995 to 2009, it will not be recognised by either the Israeli or the Egyptian authorities. Beyond that, the issue is addressed on behalf of the appellants of whether Mohammad would be granted a visitor's permit by the Israeli authorities to enter Gaza.

115. In his submissions on the issues from the first day, Mr Wastell asked that the appeal be dismissed. There were two main grounds, firstly that the appellant would not be allowed to enter Gaza because of an intentionally discriminatory policy and hence

she would be stateless and therefore sought asylum and also for the appeal to be allowed under Articles 3 and 8.

116. With regard to the first issue, the appellant was seeking to open up the law in this regard so it would be necessary to go through that. There was then the question of socio-economic conditions in Gaza, and it would be argued that there was a high threshold for cases where a person asserted that general country conditions led to a breach of Article 3. There were cases from the European Court on Human Rights and UK cases on that.

117. It was also thought to be the case, and Mr Draycott confirmed that it was, that Article 15(c) of the Qualification Directive was not relevant. It was not being argued that Gaza was subject to internal armed conflict. Any claims for asylum and humanitarian protection really amounted to a contention that Article 3 would be breached, since persecution involved a severe violation of a basic human right, a non-derogable right, which Article 3 was, and the same terminology essentially was used in Article 15(b) of the Qualification Directive as in the terms of Article 3. The Qualification Directive, that said, was not irrelevant, and it was significant to note how it was mapped out. Mr Wastell referred to recital 26. If the appellant was correct, as she did not seek to differentiate herself from others, there was a need for a finding in respect of all Palestinian Arabs from Gaza and potentially all Palestinian Arabs. There was simply no basis to justify such an extraordinary finding. Mr Wastell referred to pages 9 and 10 of his speaking note and argued that the matter would have to be considered in the round.

118. Mr Wastell then went on to address the evidence from Dr George which was also set out at paragraph 34 of his speaking note onwards. There was evidence from him as to the situation in March 2008 when the conditions were those which the appellant would have faced at that time when she returned, intending to have her child. He argued that Dr George's report in this regard was an irrelevance as it was all based on third party evidence and was of little value and contained no comment or analysis. Secondly it was argued that the evidence that Dr George gave concerning what was said by Dr Al-Khatib was hearsay and should be given less weight accordingly. There had been no opportunity to cross-examine Dr Al-Khatib. In oral evidence Dr George had not known the detail of the third party reports, for example concerning the definition of "malnutrition" or the amounts of aid provided to Gaza and the West Bank. Next, it was argued that Dr George did not add anything to the third party reports. Fourthly, he had never been to Gaza and had not seen the general conditions. He had made an absurd point about how it was possible to look into Gaza. He was obdurate and would not concede ground when he needed to. With regard to the West Bank, he offered the opinion that there were no food or water supply problems there, and he had been there and seen that there was no starvation. This reinforced Mr Wastell's point that there was little value to his views on Gaza. He had only been to Israel and the West Bank in the last 30 years for a period of ten days and had never been to Rafah. He could not give detailed evidence about the situation and the circumstances there in comparison to what he was able to

say about Israel. He had given startling evidence about Israel's attitude to all Palestinians, regarding them as terrorists, not least given how little time he had spent in Israel. The Tribunal would note what had been said about his evidence by the Tribunal in MA and the point about colonisation. He had accepted that the term colonisation referred to both settlement and domination of Palestinians. Bundle D, pages 8 to 20, contained the other side of the story, with the issues set out there, such as the arrest warrant in respect of the Israeli Defence Minister, Ms Livni, which had been revoked on Monday, and the Israeli response. Dr George had not had the excuse that Judge Goldstone in his report had. There was evidence of permission to export flowers and an improvement and he had been unduly unwilling to accept that these were positive signs. Reference was made to page 161 at bundle B concerning the West Bank. The figures were not much lower than those for Gaza. There were echoes of the evidence respecting Gaza. In regard to page 162 and pages 167 to 169, the evidence was set out. Therefore one could not rely on Dr George concerning the humanitarian conditions. He had said there was not a problem of starvation on the West Bank, but the figures were not very different from Gaza.

119. Mr Wastell went on to address the issue of statelessness in greater detail. That was separate from the issues of fact that would be dealt with when the matter was returned to in February 2010. He referred to his speaking note at paragraphs 5 and 6. It was not accepted that "arbitrary denial of entry by a sovereign state to one of its nationals or a previously habitual resident stateless individual did or could amount to persecution under the Refugee Convention". The decision of the Tribunal in MA at paragraphs 57 and 58 was of relevance and was the starting point. The Court of Appeal authorities in MA [2008] IAR 617, MT [2009] IAR 290 and SH [2009] IAR 306 bound the Tribunal. The appellant relied on establishing persecution or Article 3 on re-entering Gaza and it was not by way of refusal as it was the Egyptians who controlled the entry to Rafah and therefore they controlled her destiny in that regard. Dr George had not been to Rafah, but accepted that there was no public control by the Israelis. The Tribunal was referred to pages 20 to 21 in bundle D. The appellant would no doubt argue that the Court of Appeal authorities were not binding as there was "something more" in this case, i.e. the blockade, but that failed as the appellant had to attribute motives to Egypt in respect of that. The refusal of admission itself was not persecution or conduct giving rise to a breach of Article 3, but there was nothing else in the case and no motive. Also the appellant had no fear of refusal but referred to a practical difficulty, and critically, no evidence had been provided from her husband today. The Immigration Judge had found him to lack credibility and that he would return with her and would support her. There was no basis for disturbing that finding and it had not been pursued by the appellant and in any event the husband finished his studies next June. That was all by way of scene-setting but Mr Wastell suggested it was hard to believe that the appellant would not have known that the Rafah crossing was closed in March 2008 before she returned.

120. With regard to the authorities, there was first the decision in MA in the Court of Appeal. The "of itself" question had been answered in the negative. Reference was made to paragraphs 19 to 29 and 44 to 50 in particular. These were West Bank cases.

There was the question of whether they were citizens or had been when they were rejected by the Jordanians. It was unclear whether it would be argued that issue could be opened up, but it was argued that the Tribunal was bound and there were the ICCPR views on this case and the next two cases in the bundle. Mr Wastell was not relying on the definition of citizenship as heavily and it had been said by Scott Baker LJ that the Palestinians came between the status of citizenship and being stateless.

121. The facts in MT had been very similar. Reference was made to paragraphs 13, 16, 20, 25 and 39. There was no reason to go against the decision in MA. It was said that MA and MT were indistinguishable. The appellant did not want to go back because of the conditions in Gaza and would only return in an ideal world. Thereafter reference was made to paragraphs 41 to 47 and 50 and 53. The rest was overtaken by the decision in SH where the "something more" was equated with Article 3 treatment, so there the facts that had been referred to earlier were relevant. It might be said that the blockade was that something more. Reference was made to the distinction between discrimination and persecution at paragraphs 21, 23 to 28 in SH. These were binding authorities.

122. The academic article produced was interesting, but it was premised on the ICCPR point. There it was sought to strengthen the citizenship/statelessness gap. In any event, there would have to be Article 3 ill-treatment or refusal. Mr Wastell referred to paragraphs 13 to 17 of his speaking note which would be amplified at the resumed hearing. It was argued that if the appellant could not leave the country, then R (Khadir) v Secretary of State for the Home Department [2005] UKHL 39 and GH applied.

123. The Article 8 point made was a novel point. Reference was made to paragraph 48 of Mr Wastell's skeleton argument on this, in particular at vii and viii. Again he would return to that. He also referred to paragraph 20 of the speaking note and the skeleton argument at paragraph 49. The appellant's evidence today was relevant firstly to what her fear was and secondly that she would go back if she did not have six children, and that was relevant to the Tribunal's consideration of conditions in Gaza. She had said she would go back if the Israelis were gone, but they had withdrawn, being on the border. She had said she would return if there was security and safety, and Dr George had said it was relatively calm there today and there were references in the skeleton argument. She had had contact with her relatives every two to four weeks since she left so she would have known about the March 2008 conditions when she left.

124. There was reference in Dr George's first report at paragraph 37 to the conditions as of March 2008 and that was relevant to potential difficulties today and it was argued that they were not such as to give rise to Article 3 breach today, and also the appellant did not fear poverty and, by western standards, deprivation. Clearly the conditions in Gaza were poor and there was institutional poverty, food insecurity, and the threat of Israeli force, but that had been the case for a long time, including in

March 2008. It was to be noted that the structural problems had mostly pre-existed before Operation Cast Lead. The appellant had accepted that she made her claim because of the closure of the crossing, and had said what she would do on return. The Tribunal was asked not to disturb the Immigration Judge's finding concerning her husband. In any event, she had previously lived with her husband's father and her brother-in-law's children were now 2 to 6 and had been there in March 2008, albeit she had not been going to live with them. She had been evasive in saying "possibly – not sure". She had opportunities and there was substantial aid.

125. As regards the relevant law against which to assess the conditions, it was all a matter of Article 3. Persecution had to be a severe violation of a basic human right, and it could be seen, following through recitals 25 and 26 of the Qualification Directive to Article 15(b), that the definition of serious harm there equated exactly with the definition of Article 3. There needed to be extreme circumstances. They had to be extreme in the context of other dire humanitarian situations such as, for example, in Mogadishu or Zimbabwe. It would be a curious finding indeed to conclude that the general conditions of poverty and socio-economic conditions in Gaza would enable all its occupants to succeed. As to whether it could be said to be different as the Israelis were enforcing the situation, it was argued that that should not be the case. There was a high threshold with regard to general conditions and especially in connection with socio-economic circumstances and on this preamble 26 of the Qualification Directive was referred to and also what was said in QD at paragraphs 14 and 24 and paragraphs 37 and 38 in Elgafaji. Paragraph Article 15(c) required an exceptional situation, and Article 15(b) required individualisation as well.

126. Mr Wastell referred to the decision in NA v United Kingdom [2009] 48 EHRR 15 which was at Tab 6, particularly paragraphs 113 to 117 and paragraphs 119 to 122. Mr Wastell referred to his skeleton argument concerning this and argued that the NA principles applied. The decision in Limbuela v Secretary of State for the Home Department [2005] 3 WLR 1014 was in the appellant's authorities bundle at Tab 14 and the Tribunal's attention was drawn in particular to paragraphs 6 to 9. AH was referred to in the note and N v United Kingdom [2008] 47 EHRR 39-885 GC was relevant also to the high Article 3 threshold, which was higher for medical cases. It was argued that similarly the threshold was higher for socio-economic cases and was not lower where it was a matter of deliberate action, for example the blockade. The situation referred to in NA was clearly deliberate. Human rights could not be used in respect of disputes between countries. The same was relevant to socio-economic conditions, and paragraphs 29 to 31 were referred to. Paragraph 32 was relevant to the issue of socio-economic conditions and also paragraphs 42 to 45. The principle was as set out in paragraph 42 in N.

127. It was accepted on behalf of the Secretary of State that the situation in Gaza was poor, but the appellant said she feared for her children and there were healthcare and education and accommodation issues. If they were subject to expulsion they could not claim in respect of improved housing and educational circumstances here. The objective material showed hard circumstances, a very bad war, and expensive

food and crumbling hospitals, but also a lot of international humanitarian protection and huge reliance on aid. The Israelis in their own court had decided that they had to help to supply basic humanitarian goods and this was done. In the Goldstone report the executive summary made the point that it was not a court and paragraph 25 of the summary was relevant to that. It focused on the war and made mention of evidence of war crimes. The Israelis disagreed. With respect to the blockade, it was not a matter of looking at Article 3 or the effect of international humanitarian aid. Goldstone had not been given the Israeli side, for legitimate reasons. The report had focused on the Geneva Convention and not Article 3 which was much more draconian, it was argued, and there should be no impediment to food supplies, which there had been. Also there was the relevant provision of Article 55 referred to in the appellant's skeleton. There had been no finding of a breach of Article 55 but it had just been alluded to. The medical point had no merit, as today's report showed. Even if it would recur and there would be no treatment it would not amount to a breach of Article 3.

128. In the submissions made on behalf of the Secretary of State with regard to the issue of the ability of the appellant and her family to enter Egypt and cross into Gaza via the Rafah crossing, it is noted that Ms Holmes in her witness statement explained that, aside from Abdurrahman, the appellant, her husband and the other children have passports and documentation required to enter Gaza. The Palestinian General Delegation Office in London had confirmed that passport extensions could be obtained using a power of attorney. Ms Holmes also set out that children born in the United Kingdom could get a temporary passport which needed to be obtained by power of attorney and this could be presented with the birth certificate at the border. It is noted that this information came directly from an official at the PGDO. From Ms Holmes' further statement it is clear that a temporary passport can be obtained and a birth certificate will permit entry. The point is further made that even if this evidence were in some way inaccurate, Dr George's opinion was that the fifth child (Mohammad) alone might have difficulties in getting documentation to enter Gaza. In his third report he had concluded that Abdurrahman, the sixth child, would be able to enter Gaza on the strength of his UK birth certificate as a child under the age of 5. It was accepted that the information on the Palestinian Authority website was likely to say that a child under 5 would be able to enter Gaza with a birth certificate alone.

129. With regard to Mohammad and Dr George's view that it was highly unlikely that he would be able to obtain permission to enter Gaza from the Israeli authorities, the point is made that there is no evidence that Mohammad's Palestinian passport is a false passport and this was not part of the appellant's case. Dr George said that he did not know whether the identification number was valid and said that only the Israelis would know. The point is made that there is no cogent evidence that the identification number is false and that it is speculative to suggest otherwise. The use of a 9 prefix to previous ID numbers is said to be neither here nor there and neither the appellant nor Dr George know the system and it might be that 9 was a prefix that had now been dropped or that it did not apply to children and the position was not

clear. Dr George's objectivity is challenged in this regard, in that it is said he should have accepted that this was outside his expertise and his willingness to trespass into areas of speculation meant that his evidence should be treated with extreme caution. It is argued that even if the passport were false, it had been accepted by the British authorities and there was no suggestion that it would be rejected by the Egyptian authorities. Dr George had been unable to say whether the Egyptians would verify Mohammad's identification number with the Israeli authorities. There was no evidence that the Israelis would reject a young boy with a Palestinian passport, even if his ID number was not in the correct format. Dr George had accepted in cross-examination that he had not been able to verify with the Egyptian authorities whether or not they informed the Israelis of those individuals seeking to cross via Rafah, let alone sought their approval. The UKBA's evidence at bundle E, page 249 was that the Israeli government would not need to approve a return to Gaza.

130. With regard to the physical opening of the Rafah crossing, the objective evidence was that it would be open, so the appellant and her family could re-enter. It was clear that in practice it now opened regularly, and patients, students, returning family members and those returning for humanitarian reasons were allowed back in. The latest evidence was that it was now open on Thursdays and Fridays to let patients and students in and out. There was no reason to think that as a returning student the appellant and her husband and young family would be barred from entering. Ms Holmes had provided information obtained by UKBA, who were in dialogue with the Egyptian authorities, that the appellant should be granted visas by the Egyptians and would be permitted to enter. There was no evidence that the Egyptians would refuse to provide visas to the family or that they would not put them on any list to cross through Rafah into Gaza. Indeed Dr George accepted that they would probably be able to obtain permission to enter Gaza. Criticism is made of Dr George's comment that the Egyptians might not always rigorously apply procedures. The point is made that he has no idea of how many applications are refused or how many are granted and what reasons are given for refusal. The example given of a female American Palestinian journalist was said to be of little relevance. Nor was there any suggestion that prior arbitrary refusal of a visa was any bar to further applications. Dr Al-Khatib had told Dr George that once a Palestinian had a visa, the Egyptians "did what they could to facilitate the person's return to Gaza. The Egyptians did not want build-ups of Palestinians with visas languishing in Egypt".

131. It is said to be apparent that the appellant's family would be able to get visas and would therefore be able to get to Rafah and into Gaza. As regards Abdurrahman, in respect of the suggestion that he might not be able to get an Egyptian visa without a passport, the Secretary of State's evidence was that he would be able to get a passport like his brother or temporary travel documents; the appellant had not adduced evidence to suggest that if he could not get travel documentation in the UK the Egyptian authorities would not allow him to travel on a tourist visa alongside his mother, as is the ordinary case with young children; the appellant's evidence showed that children of a young age were not subject to strict documentary requirements and

thus a birth certificate would suffice to enter the Palestinian Territories, and the appellant's evidence was that the Egyptians did not rigorously apply rules.

132. It is therefore the Secretary of State's position that the appellant and her family would be able to get tourist visas from the Egyptian authorities, travel to Rafah and cross into Gaza. There was no evidence of a build-up of Palestinians waiting to cross, as confirmed by Dr George's oral evidence, his reported conversation with Dr Al-Khatib and Ms Holmes' first statement. The Gisha report is said to show that the Egyptians did control the periodic opening of the crossing and who crossed and the purported control exerted by Israel was that it could veto the opening of the crossing to regular traffic but the Egyptians have their own reasons to restrict openings, in particular the desire to prevent the spread of Hamas and extremism into Egypt. Dr George had confirmed in cross-examination that if there was a valid passport, and the individual was on the registry, he or she could enter Gaza. In his report he said that Egypt only allowed passage to Palestinians registered in the population registry. As regards the comment in the email from the UKBA officer that at the moment it was almost impossible for any Palestinian to enter Gaza, this is said to lack a clear context and might refer to it being very difficult for non-residents who were not abroad for legitimate reasons or it might be off the cuff regarding the prevailing situation which continued to change. The point is emphasised that it is the conduct of the Egyptian authorities which is critical to the appellant's ability to re-enter. Even if the hardest part was to get an Egyptian tourist visa, for which there was no evidence, the appellant would be able to submit repeated applications from the UK until one was granted. There is no evidence of the Egyptian authorities preventing Palestinians from getting tourist visas and re-entering.

133. As to the general position of children in the United Kingdom seeking documents to enter Gaza, the respondent's evidence was that for those born outside the OPT it would be possible to obtain a temporary passport. This is strongly supported by the fact that Mohammad had obtained a passport while in the United Kingdom. The point made by Dr George that if the child was born abroad then physical presence was required for registration and that the requirement for physical presence was in "detailed regulations" is said to be refuted by the fact that there is in fact no such regulation. A report relied upon by Dr George referring to Israel imposing a practical condition of requiring physical presence was at least three years out of date and perhaps longer, contained no reference to the Hamas takeover and the context referred to a freeze on family reunification as of October 2005. It is said to be clear that there have been dramatic changes in Israeli policy since that time, for example changes since 2005 permitting certain registration. There had been substantial family reunification since that report and Dr George admitted that it changed "all the time".

134. Further criticisms are made of Dr George's claimed lack of objectivity in producing a further report after giving his evidence on the first day. The appropriateness of producing a fourth expert report limited to one afternoon's enquiry in response to having his evidence undermined in cross-examination is made. The point is made that the reference to the issuing of travel documents looking like passports but for

people not on the population registry, made in the fourth report, may be based on an assumption that this is what Mohammad had but it was plain that he had in fact a full passport. Nor was there any evidence in any event that the Egyptians would not entitle the bearer of a temporary passport-like document to travel to Egypt. The fourth report also deals with the issue of new Palestinian passports, saying a child above 5 who wanted to get a passport would have to apply in person if they were not registered on the population registry, but does not deal with whether or not physical presence is required in order to be entered on the registry. A further point made in Dr George's report is that although children under 5 can enter on a birth certificate according to the Palestinian website, those between 5 and 16 need a visitor's permit. It is argued with respect to Dr George's reliance on the 2006 report that Israel has imposed a general freeze on the issue of visitor's permits since 2000, that this information is out of date with respect to children and it would appear that the Israelis have made specific exceptions for children and that would explain why the Palestinian Authorities continue to set out the criteria for visitor's permits for children on their website. In conclusion it is argued that children of Gazan residents born outside the Territory and not yet on the population registry will be able to get a passport or visitor's permit if needed and gain access to Gaza with their parents.

135. As regards the issue of general conditions in Rafah, it is said that there is overwhelming evidence that once the appellant gets to Egypt with the appropriate tourist visa she will be able to cross into Gaza with her family. There is said to be no evidence of large numbers of Palestinians stranded in Egypt for prolonged periods and the evidence was that the Egyptians would let them through to release the pressure. Nor was there evidence of harsh conditions or destitution facing people having to wait in Rafah. The Secretary of State's evidence was that there would be support from locals, other Palestinians and NGOs, such as the Red Crescent, and they would also be relatively free to work and live amongst the local populace and there had been no build-up of refugee camps. It was also said to be apparent that the appellant and her family have access to funds, and the appellant was prepared to travel back to Gaza whilst heavily pregnant in March 2008.

136. Further points are made in the Secretary of State's reply to the appellant's closing submissions. The point is made that the MECC report was not an expert report on Palestinian ID numbers and does not address the issue of the provision of passports or ID numbers to young children by the Palestinian Authorities. Reference is made to Ms Holmes' fourth witness statement of 4 May 2010, in the light of contact by the UKBA via the FCO with the Palestinian Authorities which determined that the ID number is genuine. The passport is said to be a short term or temporary passport and confirms that Mohammad can travel to Gaza on the passport and obtain entry.

137. In his submissions on the issues set out at paragraph 39 above, Mr Draycott referred to his skeleton argument and what was said there about the three Court of Appeal cases. In MA it was a question of de facto statelessness so it was important to see how that had come about. There had been limited evidence in all three cases. There had been no cogent evidence in any as to why the Israelis would refuse entry to those

people. The contention in each case was that it was obvious as the claimant in question was a Palestinian male, but there was an evidential vacuum in each case. In the instant case there was an abundance of evidence as to why the Israelis were blockading Gaza, as could be seen from the Goldstone report and the reports of Dr George and others. It was bound up with the election of Hamas which, by its constitution, denied the legality of the existence of the state of Israel, and within many of the Israeli authorities Hamas was seen as a terrorist organisation, and it was assumed that the people of Gaza were Hamas supporters and were part of the terrorist infrastructure in Gaza. This had led to the blockade and the previous destruction of factories and houses as they had all been seen as linked to terrorism. This was entirely envisaged at paragraph 44 and paragraph 50 of MA. It was a question of whether it was a case where the issues referred to there should be considered. Reference was made also to paragraph 47. Gaza had never been annexed by another state but was part of a notional Palestinian state in the eyes of the UN. Either all Gazans were de facto stateless or were under Egyptian or Israeli occupation. Reference was made to paragraph 50. These were not issues that had been raised before the AIT but were central to the current proceedings and were referred to in the grounds and the skeleton argument. There was a lot of evidence as to the Israeli motivation for the blockade and there was a difference between Gaza and the West Bank.

138. Mr Draycott referred to what had been said by Lawrence Collins LJ as quoted in his skeleton argument. He relied on the article by Kathleen Lawand and the conclusion that Israel could not abolish what had been established in law via unlawful conduct. This point had not been argued in MA. It was an issue the Tribunal would have to address, the question of Palestinian citizenship in international law today. It was also relevant in each of the three cases in the Court of Appeal to the question of risk on return and they had all been found not to be credible and there was a claim concerning refusal of entry at the border, which was the basis of the Article 3 claim. That contrasted with the situation in these cases. Israeli state policy had been confirmed by the evidence. So the risks to which the appellant referred were tangible and even recognised by the Secretary of State and it was agreed that there were serious problems in Gaza. These were attributable to Israeli state policy. It was a further reason to tackle these issues. The appellant would return but for the blockade and its consequences and that contrasted with the three Court of Appeal cases. The evidential vacuum in SH was relevant to this. There was the headnote in MT at Tab 2, paragraph 2. There had been little to bite on there and they had had to say the reason was obvious, but there had been no evidential basis to back it up.

139. Mr Draycott referred to the historical background. There was a lot in the skeleton at paragraph 5 and he referred to the decision in R v Ketter [1940] 14B 787 at paragraph 6 of the skeleton and also paragraphs 7 to 8 referring to ethnic cleansing. The distinguished identity of the academic's thesis supervisor added weight to the report. There had been unlawful use of force in 1947 to 1948 which had led to UN Resolutions and it was an ongoing issue up to today. Rights that had previously arisen could not be nullified. Reference was made to paragraph 9 of the skeleton and

to Tab 6. Palestinian citizenship had been found to be abolished and it could not be determined by the Israeli courts. Another issue was the events of 1967 and the International Court of Justice and the fourth Geneva Convention having been engaged in respect of the West Bank, and it was engaged across the territory of each party. The International Court of Justice said that Israel then became an occupying power in respect of the West Bank, so there were duties owed to the population in accordance with international humanitarian law. The Kuwait Airways Corpn v Iraqi Airways Co [2002] 2 WLR 1353 case applied what had been said in Trendtex Trading Corporation v Central Bank of Nigeria [1997] 1 QB 529 at pages 553 and 554. There was also what was said in Oppenheimer v Cattermole [1976] AC 249 at pages 22, 26 and 29 and what had been said by Lord Steyn at paragraphs 114 to 116.

140. The historical background was critical to this case. The three Court of Appeal cases had just examined the situation at that time but there had been no cognisance of what had gone before. All the factors had to be considered cumulatively. The current blockade could not be seen in isolation from the past. The academic article was useful in connection with this. Reference was made to paragraph 17 onwards of the skeleton argument. EB was somewhat different. It concerned an Ethiopian of Eritrean ethnicity whose documents had been seized by the Ethiopian authorities and so he could not return. This case involved removal of nationality 60 years ago and the state could not be allowed to benefit from this and it was still illegal and the article dealt with this and rights of return to the Palestinian Territories. There was the question of bonds still with the territory and whether they had been weakened because the Palestinians had been kept out and could not get the benefit. This was relevant to the question of persecution and reference was made to Professor Hathaway's hierarchy of rights. If a person had a right to live in their homeland and be a citizen and had all the pressures there were in Gaza, then there was a very potent argument to say that they were entitled to asylum. The Tribunal was referred to Article 9 of the Qualification Directive and the definition of persecution, and the situation here amounted to that.

141. Mr Wastell had argued there would be far-reaching consequences and referred to the situation in countries such as Sudan, but the Gaza situation was one that was unique in the world as there was such a defined state policy on the part of the Israelis and abundant evidence as to the reasons and the harsh consequences, even more so than in Zimbabwe. Sudan was more open-ended and fluid and closer to EB than the points in the three cases about stateless individuals. The position was somewhere between citizenship and statelessness, but the historical background had not been before the Court of Appeal. The three Court of Appeal cases said it was a question of fact and a matter of judgment whether refusal of entry amounted to asylum. There was no authority on the point and it was for the Tribunal to evaluate.

142. Reference was made to the decision of the Federal Court of Appeal in Thabet v The Minister of Citizenship and Immigration (1998) 4 CF 21FCA, which was also discussed at pages 10 to 11 of the skeleton. It could amount to persecution in appropriate circumstances. As to whether the consequence would be that all

Palestinians in Gaza could succeed, on that it was suggested that it could be the broad effect of what was being submitted but the Tribunal could also consider whether in the objective evidence women and children were seen as a separate risk category. The appellant had not finished her education and it would be very difficult for her. Also in Gaza there were professionals who would have stayed during the crisis. The appellant's family were in the north of Gaza. She had referred to Jabalia, which was subject to Israeli attacks, and the destruction of her housing and far worse in the north. There was aid and people were living in tents and there was food but people were forced out of the accommodation otherwise available, and this was a critical factor. It was a consequence of deliberate state policy and there was an analogy with what was said in Limbuela. It was the same for people in camps in Gaza and in any event it was only one facet of all the other problems and deficiencies, such as lack of water and housing and jobs. Houses were made of asbestos and the rubble of those had an environmental impact. Families had moved. The asylum claim was made out on this basis, it was argued. The skeleton referred to the relevance of international humanitarian law and interpretative matters and international and EU provisions.

143. Mr Draycott then referred to Article 3 and the decision in Demir v Turkey [2009] 48 EHRR 54 at Tab 13 of the bundle. He referred to Mr Wastell's argument that the matter should be seen as socio-economic and compared to cases of torture and inhuman and degrading treatment attributable to physical acts. N, at paragraph 31, was of relevance to this. The blockade was an internationally inflicted act and a positive state policy and no different from the enactment of s55 of the 2002 Act, and again Limbuela was relevant. Mr Draycott referred to paragraph 43 of N. One could not provide the necessary treatment in contrast to the United Kingdom and there was no adverse motive and that was contrasted with N and international state policy containing facets of discrimination. Paragraph 43 was relevant. Even if the blockade was not an act, it was an intentional omission. So paragraph 43 applied. The case was analogous to an allegation of torture in contrast to N, where no state responsibility was engaged.

144. Mr Draycott then referred to the decision in Moldovan v Romania (No 2) [2007] 44 EHRR at Tab 15. The Article 3 claim had succeeded and there was the issue of the manner of treatment by the authorities and living conditions after houses had been burned down. Paragraphs 69 to 70 and 100 to 101 showed the test. Reference was also made to paragraphs 110 to 111 and 113. That applied to this case. It was not vastly different from this case in connection with people on the margins of society in Gaza. There had been similar discriminatory remarks by officials and there was clearly a racial element. Reference was made to paragraph 42 of the skeleton and Judge Goldstone's report which had said that actions on both sides had led to atrocities. So if Moldovan showed how a human rights court would deal with the case, Article 3 could be breached by systemic racial discrimination forcing a minority group to live in bad circumstances. In Limbuela it had been said that all nationals are treated in the same way so it was not really discriminatory in contrast to Palestinians in Gaza.

145. As regards the argument that return to a war zone was not necessarily a matter giving rise to a breach of Article 3, paragraphs 114 to 115 seemed to leave the door ajar. There was also paragraph 116. Theoretically, for a Gaza resident at the margins of society, especially a female or a child, if they had no family home, or most of the housing had been destroyed in their family area then that would suffice even if there were quite a number of individuals in that group, for example the situation of the Ashraf in Somalia as considered by the Court of Human Rights in Saleh Sheekh v The Netherlands 1948/04 [2007] ECHR 36. The size of the group should not negate Article 3 protection. Paragraph 117 was relevant. The principle in Moldovan should be applied here. It was effectively genocide.

146. The Article 8 issue was argued as set out in the skeleton. There were other points there concerning international humanitarian law and the Wall case (Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ Reports 136). Article 12 was not relied on as at the forefront but was another factor and an interpretative tool. NA was flexible depending on the facts and was applicable to this case and it was a matter for the Tribunal.

147. As regards Dr George not having been to Gaza, there was quite a lot of case law on this, including such cases as FK (Kenya), where the fact that an expert had not been to the country on which they professed to be an expert was not seen as being a problem as they could be very well informed by reading materials within their own country and they might be able to get more from people as they would speak more freely. LP (Sri Lanka) was to similar effect. The matter of who was responsible for the Rafah crossing would be returned to at the resumed hearing. It might be necessary to come back to issues on Article 8 concerning the order for reconsideration and what had been agreed and decided at the stage one reconsideration hearing.

148. Returning to the three Court of Appeal cases, the point concerning a "mere denial without more" needed to be borne in mind. This was a different case from Qadir and MS and the reason why the appellant could not be returned was because of Israeli discriminatory policy, in contrast to those two cases. The UK government could not physically return them. Reference was made to the appellant's history in this regard. She had made an attempt to enter and the Tribunal had jurisdiction to consider this matter, as had been argued yesterday. It could only be at the Rafah border. As regards the socio-economic/humanitarian issue, Mr Wastell had argued that it was that rather than torture or violence, so he had said it should be treated differently from torture cases but it should be questioned why that was so. A contrast should be made between such cases as deliberate starvation and being forced to live in a toxic area and there was no good reason to distinguish it. AH (Sudan) was not really in point. It was relevant to whether it was unduly harsh to relocate a person in Khartoum refugee camps and little assistance could be derived from that.

149. In the appellant's submissions on the question of whether the appellant and her family would be able to enter Egypt and cross the Rafah crossing into Gaza, it is argued firstly that there is overwhelming evidence before the Tribunal that an Israeli approved ID number is a prerequisite to enable an individual to enter the Occupied Palestinian Territories. The appellant quotes from a letter produced by the Secretary of State from the Palestinian General Delegation Office of 5 January 2007 which states that Palestinian travel documents must have ID numbers authorised by the Israeli government. Reference is also made to a witness statement provided by Geoffrey Campbell, Inspector of Immigration in the UK Border Agency, made in connection with the proceedings in Rabah v Secretary of State for the Home Department [2009] EWHC 1044 (Admin) who was reporting on information given to him by the PGDO. Among other things he refers to the fact that any Palestinian living in the United Kingdom who wishes to apply for or renew a Palestine Authority travel document may do so by means of a power of attorney where the relevant nominee currently lives in the Occupied Palestinian Territories. This includes a requirement to provide the individual identity number. The same requirement is noted in the Gisha report and referred to above. It is argued in respect of Abdurrahman that he will not be able to obtain a travel document or temporary passport within the United Kingdom since ID numbers are only granted to Palestinians physically present in the Occupied Palestinian Territories. It is argued that obtaining a temporary passport using the power of attorney procedure described by Mr Kemble is only available to Palestinians who already have an Israeli approved identity number, and there is no reference to the facility of granting foreign born children temporary passports within the PGDO's letter to Mr Kemble of 30 January 2007. Reference is also made to what was said by Ms Shorafa to Dr George noted above. It is argued that the only reference to a temporary passport being granted to a foreign born child is to be found in an anonymous email from the Chief Immigration Officer to the Treasury Solicitors on 27 November 2009. This said:

> "For a child born in the United Kingdom, a temporary passport needs to be obtained using the same procedure as above and he/she can then travel with the parent to Palestine, present this and the birth certificate in respect of crossing. He/she will be given an ID number on entry which can then be used to obtain a permanent passport."

It is argued that this evidence is flawed because, firstly it does not engage with the facts that such a child should be able to complete the "questionnaire to Palestinians" without having an approved ID number, and, secondly, does not refer to the distinction accepted in these proceedings between the legal rules affecting children between 5 and 16 and children aged up to 5, which it is said suggests that the reference to children indicates that the email was produced in a careless fashion. Thirdly it is argued that the view that the child would be immediately provided with an Israeli ID number "on entry" is entirely inconsistent with objective evidence before the Tribunal confirming that even residents within the Occupied Palestinian Territories have to wait years to receive an ID number regularising their position. It is also noted that the email concerns the Occupied Palestinian Territories generally rather than being focused on Gaza residents and there is also reference in the email to the prevailing situation being such that it is almost impossible for any Palestinian to

enter Gaza. It is also argued that Abdurrahman would not be able to get a passport in the way in which Mohammad did, reference being made to Dr George's discussion with Ms Shorafa, with reference to the issuing until approximately eighteen months ago of some travel documents for Palestinians who were not on the population registry.

150. With regard to the ability of the appellant and her family to enter Egypt for the purposes of crossing via Rafah into Gaza, it is argued on behalf of the appellant that the International Air Transport Association (IATA) website indicates that a person in the position of Abdurrahman would require a passport. It is argued that there is no evidence to support the Secretary of State's view that Abdurrahman could be added as a child to the appellant's passport. Reference is also made to a communication from a Mr Mustafa of the International Organisation for Migration (IOM) that, as advised by the Egyptian Embassy, tourist visas or business visas are not acceptable for the purpose of transiting to Gaza. There is no reference to transit visas being available on the IATA website. This was linked with the information given to Dr George by the Egyptian Consulate in London on 16 February 2010.

151. In sum, it is argued that in the alternative if transit visas do exist there is no prospect of such a visa being granted as the border would never be open long enough for the appellant and her family to submit an application to the Egyptian Consulate, wait several days for it to be processed, collect the visa, book tickets to Egypt, travel to the airport, fly to Cairo, register their application to cross the border with the Egyptian Interior Ministry, travel to Rafah and cross into Gaza. There is reference to an email sent by the Egyptian Consulate to the appellant's husband on 18 March 2008 to transit visas (allowing entry for up to 72 hours) being issued for Palestinian nationals at the Palestinian Consulate when the Rafah border is open. The appellant cites remarks of Cranston J in R (Rabah, Woldemichael & Sadah) v Secretary of State for the Home Department [2009] EWHC 1044 (Admin), referring to the third claimant, a Palestinian, where the following was said by the Egyptian Embassy in a letter of 20 April 2006 to the claimant's previous solicitors:

> "Palestinian refugees, holders of Egyptian travel documents have no right to reside on a permanent basis in Egypt, nor to be granted an entry visa (unless being granted a residence visa in another country) and can only be issued after the approved competent authorities in Egypt."

Cranston J commented that on its face that seemed to mean that someone like the claimant in that case was not removable to Egypt. It is argued that this chimes with the remarks of the Egyptian Consulate in the email of 18 March 2008 that no visa will be granted to any Palestinian resident in Gaza unless there is guaranteed onward travel through Rafah within the duration of the transit visa. The email from Mr Mustafa to the appellant's solicitors of 23 March 2010 stated that they had not had any Palestinian from Gaza return home in the past year and referred to the practical difficulties, such as the difficulty in obtaining travel authorisation from the Egyptian authorities.

152. Thereafter the appellant's grounds refer to the issue of the validity of Mohammad's passport/ID number, and conclude that the number cannot be valid, since it is common ground that he has never been physically present within the OPT since his birth, and a number of explanations as to how the passport would have come to be issued are canvassed. These include Dr George's view that it may have been obtained as a favour, and also evidence which alleges that the Palestinian Authority in Ramallah has improperly issued numerous duplicate or forged passports, referring to an item on the Al-Qassam English Forum website of 28 July 2009 and a press release from the Palestinian Ministry of Interior of the same date, and concluding that whichever of these explanations is correct, Mohammad's passport will not be recognised by the Israeli or Egyptian authorities in terms of either allowing him to enter Egypt or to cross via Rafah into Gaza. The argument is made further about the claimed invalidity of the ID number on Mohammad's passport for the reasons set out above in reference to the background evidence, and it is also argued that the evidence makes it clear that there is no reasonable likelihood of Mohammad being granted a visitor's permit by the Israeli authorities. Although the Israelis have allowed a limited category of applications for family reunification, it is argued that there is no reason why Mohammad as a foreign born child seeking to return to Hamas-run Gaza would fall within the limited category of applications which have been allowed.

153. Thereafter, it is argued that Israel continues to exert significant, substantial and indirect control over the Rafah crossing. It is said in the Gisha report that Egypt closes the Rafah crossing as a result of pressure exerted on it by Israel and other parties and in order to promote its own interests. It is said that Israel continues to exercise control through its control of the Palestinian population registry which determines who is allowed to go through the crossing. There is also reference in the report of the United Nations Fact Finding Mission on the Gaza Conflict A/HRC/12/48 of 25 September 2009 (the Goldstone report) that Israel controls the border crossings including to a significant degree the Rafah crossing in Egypt and decides who and what gets in or out of the Gaza Strip.

154. In respect of openings of the Rafah crossing, it is contended that any opening is arbitrary, sporadic and unpredictable with only two days' notice before the opening of the crossing being provided, and that anyone wishing to cross Rafah needs to register themselves with the Egyptian authorities, which can take weeks to achieve, and once registered the individual must wait for a day on which their category of entrant will be allowed to cross by the Egyptian authorities and even then the entrants' ability to cross into or exit from Gaza is haphazard and unreliable. Reference is made to the Gisha report, the COIR of 7 December 2009, Ms Holmes' witness statement of 17 February 2010 and Dr George's report of 17 February 2010. It is argued that any available accommodation, even at the lower end of the market, is expensive and unsanitary and those unable to afford accommodation will have to sleep rough and there is either extremely limited humanitarian assistance available or none at all.

155. The appellant also refers to potential problems if, while waiting to cross, the visa expires before they had been able to cross, which is likely to be an especially acute problem if the appellant and her family are granted a 72 hour transit visa. Ms Holmes' evidence on this in her statement of 17 February 2010 was that applications for extensions of such visas are considered on a case by case basis by the Egyptian authorities and there was no reason to believe that the appellant and her family would not be granted such extensions should that become necessary. On behalf of the appellant it is argued that in such circumstances there would be a risk of removal by the Egyptian authorities.

Discussion

156. It is clear from Ms Holmes' first witness statement at paragraph 2 that copies of passports issued by the Palestinian Authorities are on the UKBA's files for the appellant and the first five of her children. All these passports were issued in Gaza. The sixth child, Abdurrahman, was born in the United Kingdom. It is relevant that we remind ourselves that we have upheld the credibility finding against the appellant's husband and therefore we adopt the original finding that he will travel to Gaza with the appellant and the children. The passports of the appellant and all the children other than Abdurrahman expired on 7 April 2009. Ms Holmes' evidence was that it had been confirmed to UKBA by the PGDO that if a passport has expired a new passport has to be obtained using a power of attorney application which the PGDO facilitates. This is done by application at the PGDO in London which, having confirmed that the person is Palestinian, issues a power of attorney form which is then sent to the nominated person, usually a family member, in the OPT who will then apply on the applicant's behalf at the relevant office in the OPT and the document once issued, which is understood will only take a couple of days, is then sent to the UK to the applicant or, if so directed, to the PGDO.

157. In order to get to Gaza the appellant and her family first have to get to Egypt, and therefore it is necessary that we address that issue first. At paragraph 33 of his third report Dr George said that on the assumption that the appellant and her children possessed valid Palestinian passports it was probable that the Egyptian Consulate would issue them with visas to enter Egypt. It does not appear to be contested that the appellant, her husband, and the first four children, have valid Palestinian passports, albeit that they would need to be renewed in accordance with the procedures set out by Ms Holmes. We deal first with the situation of Mohammad. We are satisfied that he has a valid Palestinian passport. We agree with Mr Wastell's submission that there is no evidence to show that this is a false passport and nor is there any persuasive evidence that the identification number is false. Suggestions that it is are, in our view, speculative only. The MECC report does not set out to consider the issue of ID numbers and does not purport to be determinative of that issue. It does not, as Mr Wastell points out in his submissions, address any distinction as to ID numbers issued to children as opposed to adults or in particular to those born outside the territory and it does not distinguish between those issued by the Palestinian Authority in Gaza as opposed to the West Bank. It is also relevant

to note Ms Holmes' fourth witness statement, to which is annexed firstly the redacted email from the General Director of passports in the Gaza Ministry of the Interior and secondly a further email from the FCO. There is confirmation from Mr Wisam Alramlawi at the Ministry of Interior that Mohammad's passport is genuine and registered on the database. The position with regard to ID numbers for adults is confirmed. It is clear that a child with a document such as Mohammad's will be able to cross into Gaza. Mohammad should therefore be in the same position as his parents and older siblings as regards access to Egypt or Gaza.

158. As regards Abdurrahman, we bear in mind the point at footnote 4, paragraph 35(b) of the Secretary of State's closing submissions, quoting from the Egyptian Consulate's website and showing that only one visa is required if a passport holder has children under 16 who are included on the parent's passport. It has not been shown that this would not apply to Abdurrahman. We see no reason to suppose that this facility would not be offered by the Palestinian Authority in respect of a child such as Abdurrahman who was born outside the Occupied Territories. In any event we see no reason to suppose that Abdurrahman would not be able to get a passport as Mohammad was able to. Mohammad, like Abdurrahman, was born outside the OPT, and yet he was clearly able to obtain a legitimate passport. So, either on the basis of being added to his mother's passport, or on the basis of a passport in his own right being obtained from the Occupied Palestinian Territories, we consider that Abdurrahman would be able to travel to and be accepted into Egypt.

159. We note from Ms Holmes' second witness statement, which is dated 17 February 2010, that UKBA's understanding from discussions with the Egyptian authorities is that Palestinians wishing to enter Gaza would need to acquire a visa from the Egyptian authorities prior to travel and that UKBA understands the Egyptian authorities consider such visa applications on a case by case basis and that such a visa, if or when issued, would be valid for a period of a month. The UKBA also understands that in the event that if the crossing is closed for a longer period than the Egyptian visa allows, Palestinians wishing to enter Gaza via Rafah would be able to apply for extensions of the visa in Cairo and again applications for extensions are understood to be considered on a case by case basis and there is no reason to believe that the appellant and her family would not be granted such extensions should that become necessary. This runs contrary to what was said by Mr Mustafa of the IOM in the email to the appellant's solicitors of 23 March 2010. Mr Mustafa, however, does refer to the alternative situation of Palestinians from Gaza being supposed to submit "copies of documents (such as passport and other) and written request stating their situation". That would appear to have the same effect as a tourist visa or business visa, and in the end it may come down to no more than a matter of nomenclature. In any event, we are satisfied from the evidence that the appellant and her family would be able to obtain visas from the Egyptian authorities to enter Egypt with a view to entering Gaza via the Rafah crossing.

160. We also consider, on our assessment of the evidence as a whole, that it has not been shown that the circumstances the appellant and her family would face in Egypt, and

in particular in the area around the Rafah crossing would be such as to give rise to any breach of their human rights or other rights. We accept that there might well be difficulties and periods of delay that might necessitate the obtaining of extensions from the authorities in Cairo, but we are satisfied that the possibility of obtaining such extensions exists, and we note, for example from Dr George, the absence of any evidence to indicate a build up of Palestinians waiting to cross. It is clear that the crossing is opened periodically, indeed, it is in the interests of the Egyptians to do so, so as to prevent excessive build ups, and there is no reason to suppose that the appellant, as part of the family of a student, together with her husband and the children, would not be among the groups of people permitted to cross into Gaza via the Rafah crossing. Dr George confirmed in cross-examination that a person with a valid passport, being on the register, would be able to enter Gaza. The comment referred to in the UKBA email of it being almost impossible for any Palestinian to enter Gaza appears to go contrary to the main thrust of the evidence. It may refer to a particular period. As we say it appears to be out of kilter with the other evidence and accordingly we do not consider that it shows a real difficulty in this regard.

161. We do not consider there is evidence of harsh conditions or anything remotely resembling destitution for persons awaiting crossing into Gaza. We note the Secretary of State's evidence that there is support available to returnees from locals and other Palestinians and NGOs such as the Red Crescent. There is also the possibility of working and living amongst the local populace. It is perhaps of significance that there has been no build up of refugee camps. It is of relevance also to note, as argued on behalf of the Secretary of State, that the appellant was quite prepared to travel back to Gaza whilst heavily pregnant, in March 2008, and there is evidence that she and her family have access to funds, a matter to which we shall have to return in due course. Accordingly we do not consider that there will be any breach of the family's human rights while awaiting crossing into Gaza.

Jurisdiction to Consider Practical Difficulties of Return

162. We must next address the issue of the Tribunal's jurisdiction to consider practical matters concerning the appellant's return to Gaza. It is argued on behalf of the Secretary of State that the Tribunal lacks jurisdiction since no removal directions have been set, and reference is made to what was said by the Court of Appeal in GH [2005] EWCA Civ 1182. There it was held that there was no jurisdiction to consider the practical difficulties facing a failed asylum seeker travelling within Iraq to a safe location because no removal directions had been set. It was held in AK [2006] EWCA Civ 1117 that what was said in GH regarding route and method of return did not bite on the question of refusal of re-entry upon which the claim of the appellant in that case was based. It was argued on behalf of the Secretary of State that that decision was on the basis that the Court of Appeal saw no distinction between ill-treatment within the territory and the position at the border of the territory. It is argued therefore that AK does not accept that there is jurisdiction to consider delays and practical difficulties in getting to the border if the appellant voluntarily returns. It also is argued that it does not include consideration of the conditions in Egypt if the

appellant is turned away. It is thus contended that whilst treatment at the border including the legal effect of being turned away is within the Tribunal's jurisdiction, the consequences while she waits in Egypt are not. This is not an issue for the Tribunal unless and until removal directions are set for Gaza.

163. On behalf of the appellant it is argued that it is important to bear in mind what was said by Scott Baker LJ in GH at paragraph 45:

> "There may be circumstances where the Secretary of State adopts a routine procedure for removal and return so that the method or route of return is implicit within the decision to remove. There would obviously be advantages in such cases for all issues including any arising out of the proposed route or method of removal to be dealt with at one and the same time."

Keene LJ, at paragraph 51, agreed, referring to cases where:

> "The Secretary of State has committed himself through a policy statement or otherwise to a particular method and route of return. In such a case, it may be implicit in the decision to remove from the United Kingdom that a particular method and route may be adopted, and, if so, the safety of that method and route may be considered by the Appellate Tribunal as being part and parcel of the 'immigration decision' under Section 82(1)."

As an example of this, reference is made to the decision of the Tribunal in MA (Palestinian Arabs – Occupied Territories – risk) [2007] UKAIT 00017 where it was accepted that ethnic Palestinians forcibly returned to the West Bank would be denied entry, and consideration was given as to whether they would face persecution or denial of their human rights by being turned back into Jordan. The point is made that in respect of the instant proceedings the only way the appellant and her children will currently be able to enter Gaza is by obtaining a visa to Egypt, travelling to Rafah and then crossing into Gaza through that entry point. It is argued that what is referred to as the GH exception is thereby brought into play. Reference is also made to the decision of the Court of Appeal in HH (Somalia) [2010] EWCA Civ 426, where it was said at paragraph 58:

> "We consider that, in any case for which it can be shown either directly or by implication what future method of return is envisaged, the AIT is required by law to consider any determination and challenge to the safety of that route or method."

It is relevant to note that HH was cited by the Supreme Court in MS (Palestinian Territories) v Secretary of State for the Home Department [2010] UKSC 25, without disagreement.

164. We consider the appellant is right on this point. We do not accept that our jurisdiction is limited to consideration of treatment at the border including the legal effect of being turned away, but we consider that it extends to assessing the consequences while the appellant and her family wait, if they have to, in Egypt. This

is, in our view, a case where it is clear what route and method of return is envisaged, and an argument has been raised that there may not be a safe route of return and hence that it is a matter, as was said at paragraph 84 in HH, with which the Tribunal is required to deal. We have set out above our views on the issues that would arise in this regard, and we have concluded, as set out above, that there would be no real risk of breach of the appellant and her family's human rights or give rise to a real risk of persecution or real risk of a need for humanitarian protection.

Whether Mohammad Has a Permanent Right to Reside in the United Kingdom

165. The next matter with which we must deal is the argument made on behalf of the appellant that Mohammad has a permanent right to reside in the United Kingdom under the Citizens Directive. (It was not argued that Mohammad, and through him, the appellant, could succeed in accordance with the principles elaborated by the European Court of Justice in Chen and Others [2004] EUECJ C-200/02 (19 October 2004), presumably on the basis that it could not be shown that he is covered by appropriate sickness insurance and his carer has sufficient resources for him not to become a burden on the public finances of the United Kingdom.) The main thrust of the appellant's submissions in this regard is that the Tribunal in LG and CC [2009] UKAIT 00024, noting what had been said previously by Stanley Burnton LJ in HR (Portugal) [2009] EWCA Civ 371 and by the Court of Appeal in McCarthy v SSHD [2008] EWCA Civ 641, to the effect that mere physical presence in the United Kingdom was not sufficient, but that the necessary five year period required in order to obtain permanent residence had to be "in accordance with the Regulations", i.e. exercising a Treaty right as a "qualified person" within the meaning of Regulation 6 of the EEA Regulations (e.g. as a job seeker, worker or student) or as a relevant family member of such a person (within the scope of the Regulations), had not had before it the decision in Kaczmarek and Secretary of State for Work and Pensions [2009] 2 CMLR 85. As a result it is contended that LG and CC and HR are per *incuriam* on the point and it is noted that permission to appeal to the appellant in CC (Portugal) has been granted by the Court of Appeal which, it is said, clearly therefore does not regard HR and LG and CC as the last word on the issue.

166. In response it is argued on behalf of the Secretary of State that Kaczmarek does not even refer to Article 16 of the Citizens Directive, and the necessary conditions which entitle an EEA national to reside in other Member States have not been fulfilled in the case of Mohammad, who has only ever been in the United Kingdom by virtue of his non-EEA parents.

167. Clearly on the face of it the point is answered by what was said by the Tribunal in LG and CC and also in particular by what was said in HR and McCarthy. It is necessary therefore for us to consider Kaczmarek to see whether that can properly be said to make a real difference. The appellant in Kaczmarek was a Polish national who had come to the United Kingdom initially as a student, in April 2002, and later worked in a nursing home between June 2003 and July 2004. She was on maternity leave between August 2004 and February 2005. She had intended to return to work, but

did not do so as her child was unwell and she could not afford a childminder. In May 2005 she applied, unsuccessfully, for income support. She regained employment in October 2006. It was common ground that she was not entitled to income support under domestic legislation, which essentially restricted entitlement to EEA nationals who were economically or educationally active or otherwise self-sufficient. She argued that she was entitled to income support under Articles 12 and 18 of the EC Treaty. With respect to the former, she asserted that she had been lawfully resident for three years at the time of her claim and for most of that time she had been active as a student or an employee and had demonstrated the kind of social integration envisaged by the ECJ in Trojani when propounding a test of lawful residence "for a certain time". In respect of Article 18 she argued that it was disproportionate to deny a right of residence and thereby entitlement to income support to a person who was lawfully resident and as substantially settled as she was.

168. In regard to Article 18, the Court of Appeal held that the reference to lawful residence "for a certain time" was a reference to specific qualifying periods which gave rise to an express right of residence. It would be wholly undesirable if Article 12 were to give rise to an open-textured temporal qualification. In respect of Article 18, it was not disproportionate to deny the appellant a right of residence. Maurice Kay LJ referred to Directive 2004/38, the Citizens Directive, which, he said, provided for a right of permanent residence after five years' lawful residence which is not, once acquired, conditional on the claimant being economically active or self-sufficient.

169. Even if it is right to argue, as the appellant does, that this is part of the ratio of Kaczmarek, it seems to us to refer to a significantly different situation from that of Mohammad. We do not read what was said by Maurice Kay LJ as supporting the notion that an EEA national, purely by dint of residence in another EEA state for five years thereby acquires the right of permanent residence. His remarks were in the context of there being no condition of the claimant being economically active or self-sufficient. Maurice Kay LJ went on to refer to a five year qualification as being proportionate and that in the light of that it was all the more difficult to argue that it was disproportionate to exclude this appellant from income support when at the time of her claim she had been in the country for three years and had become economically inactive. He made the point that rights conferred by the Directive upon those whose lawful presence is less than five years are conditional upon, amongst other things, self-sufficiency. We do not read this passage as being in any sense inconsistent with what was said by Stanley Burnton LJ in HR or the Court of Appeal in McCarthy or the Tribunal in LG and CC. (It is relevant to note that, subsequent to the receipt of closing submissions in this case, the Court of Appeal in Carvalho v Secretary of State for the Home Department [2010] EWCA Civ 1406 upheld the decision of the Tribunal in LG and CC.)

170. Also, the appellant emphasises passages from the decision of the Grand Chamber of the ECJ in Metock v Minister for Justice, Quality and Law Reform [2008] 3 CMLR 39-1167. The following quotation is emphasised:

> "Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to lead a family life in another Member State or in a non-member country."

171. This seems to us a long way away from the situation of Mohammad, who is the only EU national in his family, and who cannot be said to have exercised Community rights while in the United Kingdom.

172. Nor do we see force to the other arguments put forward on behalf of the appellant in this regard. It is argued for example in relation to Teixeira and London Borough of Lambeth and Secretary of State for the Home Department Case C-480/08, where it was concluded that if the child of a migrant worker takes up residence in a Member State or was born there they are entitled to a right of access to the education system under Article 12 of Regulation 16, 12/68, that if the child has such a right then their primary carer must also have an associative right. It does not say, however, that Ms Teixeira obtained rights as a consequence of spending five years in the United Kingdom not acting in accordance with the exercise of rights and Community law. Although a passage from paragraph 119 of the Advocate General's opinion is emphasised, where it is said that furthermore consideration should be given to whether Ms Teixeira was not in this case entitled under national law to remain in the United Kingdom for certain periods of time, independently of Community law, since under Article 16(1) of Directive 2004/38, a Union citizen must only have resided legally for a continuous period of five years in the host Member State in order to acquire a right of permanent residence, that paragraph goes on to say that this applies primarily to Union citizens who have resided in the host Member State "in compliance with the conditions laid down in this Directive" during a continuous period of five years. The passage goes on to state that nonetheless, according to Article 37, Directive 2004/38 expressly does not affect any more favourable laws, Regulations or administrative provisions laid down by a Member State. It is worth recording that Ms Teixeira had accepted in the main proceedings that she was not entitled to a right of permanent residence, albeit that the Advocate General regarded this as surprising. In conclusion on this, we do not consider that the Advocate General's opinion can be said to support the submission that five years' continuous residence, lawful under domestic law, gives rise to a right to permanent residence as such. (Since the receipt of submissions in this case, the European Court of Justice has clarified, in its decision in Lassal (European Citizenship) [2010] EUECJ C-162/09 (7 October 2010), that continuous periods of five years' residence completed before the date of transportation of Directive 2004/38 ("the Citizens' Directive"), namely 30 April 2006, in accordance with earlier European Union law instruments, must be

taken into account for the purposes of the acquisition of the right of permanent residence pursuant to Article 16. The claimant had been a worker for the purposes of EU law between January 1999 and February 2005, and after a ten month visit to France, was in receipt of Job Seeker's Allowance between January and November 2006. We do not see this decision as requiring a different approach or conclusion from those we have adopted.) In light of the authorities that we have considered above, we do not agree that it is an appropriate matter for reference since we regard the law as being "*acte clair*".

Whether Refusal of Re-Entry to Gaza Amounts to Persecution

173. An alternative submission on behalf of the Secretary of State is that even if the appellant were to be refused re-entry to Gaza, this would not amount to persecution or ill-treatment. The starting point in this regard must be the decision of the Court of Appeal in MA (Palestinian Territories) v Secretary of State for the Home Department [2008] IAR 617. The claimant in that case was a stateless Palestinian Arab from the northern part of the West Bank. The issue, as identified by Lord Justice Maurice Kay at paragraph 1, was the question whether a stateless person whom the Secretary of State wished to return to his habitual place of residence was entitled to protection under the Refugee Convention or the European Convention on Human Rights if there was a reasonable likelihood that on such return he would not be permitted entry by the authorities in that country.

174. Maurice Kay LJ noted the definition of the term "refugee" in Article 1A of the Refugee Convention and also that it was axiomatic that nationality was not a condition of protection under the ECHR. He noted the distinction drawn by Richards LJ in LK v Secretary of State for the Home Department [2006] EWCA Civ 1117, at paragraph 47, as to the difference between a state's denial of entry to one of its own citizens and denial of entry to a stateless person who, unlike a citizen, had no right of entry into the country. He clearly doubted that, as regards the latter, this could be said to be a denial of his third category rights of sufficient severity to amount to persecution.

175. Maurice Kay LJ noted authorities such as Altawil v Canada (Minister of Citizenship and Immigration) [1996] 114 FTR 211; Thabet v Minister of Citizenship and Immigration [1998] 4 FC 21 and Refugee Appeal Number 73861, 30 June 2005 (New Zealand Refugee Status Appeals Authority), which he considered at their highest to go no further than accepting that in some circumstances, to deny a stateless person re-entry might amount to persecution. He noted also Article 9 of the Qualification Directive which states at Article 9(2) that acts of persecution can take the form of:

> "(b) Legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner."

176. He noted the transposition of the Directive into domestic law by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006. He did not consider, however, in the absence of a serious violation of human rights, that the Directive and Regulations took the matter any further. The case was not comparable with the discriminatory treatment of the national in EB (Ethiopia) v Secretary of State for the Home Department [2007] EWCA Civ 809.

177. Maurice Kay LJ went on to say that in principle it was not persecutory without more, to deny a stateless person re-entry to "the country of his former habitual residence". He drew a distinction between the impact on the rights of a stateless person and those of a national. He stated that there was a fundamental distinction between nationals and stateless persons in that respect. It was one thing to protect a stateless person from persecutory return to the country of his former habitual residence, as done by the Refugee Convention, but it would be quite another thing to characterise a denial of re-entry as persecution. He noted that the Convention relating to the Status of Stateless Persons (1954) had not been incorporated into domestic law, though the United Kingdom was a party to that Convention, and it had not been suggested that it protected the appellant in the instant case.

178. Maurice Kay LJ went on to consider the International Covenant on Civil and Political Rights, Article 12(4) of which states:

> "No-one shall be arbitrarily deprived of the right to enter *his own country*."

He did not consider that this, nor points made in commentaries on the Covenant, advanced the appellant's case under the Refugee Convention, nor did it provide a right enforceable by itself in the AIT. Even if the suggested broader construction of "his own country" was correct it was difficult to see how it could avail someone who had eschewed "close and enduring connections" and "special ties". He noted comments by Keith J, sitting in the High Court of Hong Kong, in Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service [1995] 5 HKPLR 490 that "his own country" in Article 12(4) "can only be the country of which he is a citizen as defined by that country's nationality".

179. In MT (Palestinian Territories) v Secretary of State for the Home Department [2009] IAR 290, essentially the same issue fell to be considered by the Court of Appeal, which at the same time in a slightly different constitution had to consider the appeal in SH (Palestinian Territories) v Secretary of State for the Home Department [2008] EWCA Civ 1150, to which we shall come shortly. In essence the argument before the Court of Appeal in MT was that all that MA had decided was that a stateless person returning to his country of former habitual residence was not, for that reason of itself, entitled to the protection of the Convention, and had not decided whether a stateless person, excluded from returning to their country of former habitual residence where the exclusion was on grounds of race, was for that reason entitled to protection under the Convention.

180. Scott Baker LJ, who delivered the leading judgment, concluded at paragraph 39 that the cases of MA and MT appeared to be indistinguishable on the facts. In addition to such authorities as Thabet and Altawil, to which we have referred above, Scott Baker LJ also considered what had been said in Revenko v Secretary of State for the Home Department [2001] QB 601, which he considered went no further than to establish that mere statelessness was insufficient in itself to confer refugee status and left open what, if any, additional features might be sufficient to tip the scales. On behalf of the appellant, as we have seen, there was argued to be an additional feature in the instant case, i.e. exclusion on the ground of race. It was argued on behalf of the appellant that the all-important reason why the appellant would be refused re-entry was because he was a stateless Palestinian Arab and had a well-founded fear of being persecuted for a Convention reason, namely race, because, as a Palestinian, he would not be readmitted to the West Bank.

181. Although Scott Baker LJ admitted the force of this argument, he questioned why, if this was so in the present case, was it not so in MA. It seemed to him inconceivable that the Court in MA did not have clearly in mind that the appellant was a Palestinian Arab. He noted the International Covenant on Civil and Political Rights (ICCPR) of 1996, to which we have referred above in the context of MA, and also to a report submitted by the Human Rights Committee established under Article 28 of the ICCPR. He noted also that the court in MA was aware of the ICCPR point. It had been dealt with, as we have seen above, by Maurice Kay LJ.

182. On behalf of the Secretary of State it was argued that the "something more" was ill-treatment that would engage Article 3 of the ECHR or something akin to it of a physical nature. Scott Baker LJ did not wish to express a view on what factors might constitute the additional circumstances envisaged by the court in MA. The "additional factor" relied upon by the appellant in MT was that the reason for the refusal of re-entry would be that the appellant was a Palestinian, but that was the same for the appellant in MA and in the court's view the ratio of MA covered stateless Palestinians being returned to the West Bank and the present case was indistinguishable. Without up-to-date evidence as to what would be likely to happen at the King Hussein Bridge to stateless Palestinians who were forcibly returned and full argument from the Secretary of State he did not wish to express an opinion on the validity of the arguments in that regard.

183. In SH (Palestinian Territories) v Secretary of State for the Home Department [2009] IAR 306, heard at almost the same time as MT, it was concluded that, for the reasons given in MT, MA was indistinguishable from the present case and was binding authority. Scott Baker LJ also delivered the leading judgment with which his colleagues agreed. The relevant "something more" as noted above, was severe violation of a basic human right, in that case that enshrined in Article 3. Not all violations of basic human rights were categorised as persecution within the meaning of Regulation 5 of the 2006 Regulations; they were required to be severe violations. Thus, even if refusal of re-entry was discriminatory, it would not be persecutory unless it amounted to persecution within the meaning of Regulation 5(1).

184. The court went on to consider whether it made any difference if the appellant wanted to return to the West Bank. It noted paragraph 33 in MA where Maurice Kay LJ said he was content to assume that there was something in the argument on the part of MA that there was no finding by the Tribunal in that case that the claimant would not wish to return to the West Bank if the alternative were not remaining in the United Kingdom but turning back into Jordan. The court concluded that accordingly, even were there a finding by the AIT that the appellant in SH positively wanted to enter the West Bank, it would not avail her. The court would still be bound by the decision in MA.

185. We are clearly bound by these authorities. It has not been asserted on behalf of the appellant that she would suffer a severe violation of Article 3 of the ECHR at the Gaza border. We therefore conclude, in line with what was said by the Court of Appeal in MA, MT and SH, that denial of return to a stateless person to their country of former habitual residence does not of itself give rise to recognition as a refugee under the 1951 Convention. We note that human rights issues were also part of the reasoning of the Court of Appeal in MA and we therefore conclude that it would not give rise to an arguable breach of the appellant's human rights either. We see no merit to any argument in this regard in respect of Article 8 either. The "something more" required to make refusal of re-entry persecutory does not exist in this case. Therefore, even if we were wrong in our assessment of the practical issues of return set out above, we consider as a matter of law that it would not be persecutory or in breach of the appellant's human rights for her and her family to be refused re-entry to Gaza.

Whether Conditions in Gaza Are Such that to Return the Appellant There Would Breach Her Refugee Convention or Other Rights

186. The next issue is whether, if the appellant is able to gain access to Gaza, the humanitarian conditions there are now so serious that she should succeed under the Refugee Convention or in a claim for humanitarian protection or under Article 3 or Article 8 of the Human Rights Convention. On behalf of the appellants it is argued that their claims in this regard are strengthened by the fact that the policies of the Israeli authorities and their conduct of Operation Cast Lead are clearly in breach of accepted principles of customary international law. In the alternative it is argued that the appellant succeeds on the facts of her case because she and her family will have no means of sustenance or accommodation on their return to Gaza, as the remaining members of their respective families live in Jabalyia, which was the scene of some of the greatest destruction of civilian property during Operation Cast Lead and the humanitarian situation will be extremely detrimental to the welfare of the six children.

187. A specific issue raised on behalf of the appellant is that the Tribunal has jurisdiction to consider the appellant's arguments that Israel has acted in breach of customary international law in respect of its treatment of Palestinians within the Occupied

Palestinian Territories. It is argued that it is an accepted point of law that international criminal law (ICL) and international humanitarian law (IHL) amount to customary international law, and reference is made to the advisory opinion of the International Court of Justice (ICJ) in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories of 9 July 2004. In addition, it is argued that the prohibition against the unlawful use of force also amounts to customary international law, and in this regard reference is made to Kuwait Airways Corporation v Iraqi Airways Co (Numbers 4 and 5) [2002] 2 WLR 1353.

188. Reference is made to the decision of the House of Lords in Oppenheimer v Cattermole [1976] AC 249, in support of the proposition that where a sovereign state has acted in flagrant breach of its international obligations, there is a common law public policy exception which allows UK courts and tribunals to uphold the relevant international obligations when determining a set of domestic proceedings which either directly or indirectly involve the sovereign state's conduct. In Oppenheimer the claimant was a German Jew who had fled Nazi Germany in 1939. In November 1941 he was stripped of his German nationality of grounds of his race and because he was abroad at the date that the decree was implemented. As a result the taxation commission had held that he was not entitled to relief under the Double Taxation Relief Order because he had ceased to be a German national. The House of Lords held that a law of this sort (i.e. the stripping of German nationality) constituted so grave an infringement of human rights that the courts of the United Kingdom ought to refuse to recognise it as a law at all.

189. It is also argued that principles of customary international law in appropriate cases can be adopted as principles of domestic common law as is the case with the prohibition on torture and the admissibility of evidence obtained by way of torture under the UN Convention against Torture of 1984. Reference is made to the decision of the House of Lords in A and Others v Secretary of State for the Home Department (Number 2) [2005] 3 WLR 1249. It is noted that in the present proceedings the unlawfulness of the Israeli seizure of Palestinian territory was expressly recognised in UNSC Resolution 242 [1967] of 22 November 1967, as noted by the ICJ in its advisory opinion. Reliance is also placed upon the UNGA Resolution 2949 of 8 December 1972 which was express recognition of a flagrant breach of the UN Charter by Israel in respect of its continuing occupation of the Palestinian territory. Reference is made to numerous other such resolutions of similar effect since that time, most recently that of 8 January 2009 when the UNSC Resolution 1860, which recalled Resolution 242, expressly criticised the continuing Israeli blockade of Gaza. It is argued that, in respect of Israel's conduct towards the Palestinian people since 1948, there is no reason for the Upper Tribunal to take a different approach from that of the House of Lords in Oppenheimer in view of the abolition of Palestinian citizenship, the ethnic cleansing of Palestinians from the territory under Israeli control and the Israeli seizure of the Palestinians' lands, homes and assets. It is argued that it was clearly intended by Lawrence Collins LJ in MA that this would need to be done in an appropriate case.

190. On behalf of the Secretary of State it is argued that one of the aims behind the appellant asking the Tribunal to adjudicate on matters of international law arising in the conflict between Israel and the Palestinian Territories is to assert that Palestinians are not in fact stateless. It is argued that these issues are not justiciable in the domestic courts. Reference is made to the decision of the Divisional Court in Al-Haq v Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 1910 (Admin), that arguments as to breaches of international law by the Israelis in relation to their actions in Gaza during Operation Cast Lead were not justiciable and should not be determined by the English courts. The court rejected the argument that the Kuwait Airways case applied such that the court could rule upon Israeli actions which allegedly violated international law. It held that to decide whether Israel was in breach of its international obligations was beyond the court's competence and it was, unlike the Kuwait Airways case, not a case where the breach of international law was plain and acknowledged the way it was clear to the court. It was also pointed out by Cranston J that the state of Israel has sovereign immunity and unless that is waived it would not be obliged to appear before the court. He said that it was not without significance that the International Court of Justice would have no jurisdiction to resolve a dispute concerning Israel's actions in Gaza without Israel's consent. He also held that the application failed because it was not even arguably justiciable.

191. On behalf of the appellant it is argued that the Secretary of State's reliance upon the judgment in Al-Haq is misconceived. The point is made that Al-Haq concerned a challenge to the UK Government's foreign policy in respect of the Palestinian issue rather than concerning, as in the instant proceedings, the Tribunal's determination of the appellant's statutory appeal as to whether the 1951 Convention, the Qualification Directive or the ECHR would be violated upon her return to the Occupied Palestinian Territories. The appellant quotes from paragraph 45 of Al-Haq in the judgment of Pill LJ:

> "This case is readily distinguishable from those in which a claimant is asserting a readily identifiable right, such as a right in certain circumstances to claim asylum,"

And at paragraph 54 it was said by Cranston J that:

> "The claimant advances asylum claims to justify its contention that these matters are justiciable, but there courts make findings about matters such as a well-founded fear of persecution in other states because they are authorised to do so under domestic legislation."

192. We note the points made on behalf of the appellant concerning the different context in the instant proceedings from that before the Divisional Court in Al-Haq. Certainly, taken in isolation, the remarks of Pill LJ at paragraph 45 of Al-Haq and to an extent the final sentence of paragraph 54 in Cranston J's judgment lend support to the argument that there is a real distinction, but these matters have to be seen in context. There is a world of difference between the everyday jurisdiction of this Tribunal to adjudicate on claims that persons are at risk of persecution by their state

of nationality or habitual residence and the suggested jurisdiction to determine whether a state has acted in breach of customary international law towards the nationals of that state. In paragraph 45, Pill LJ went on to say that the claimant purported to assert a right, but in deciding whether a right existed it was relevant to consider what exercise of the right would entail. He went on to note at paragraph 46 that constitutionally, the conduct of foreign affairs is exclusively within the sphere of the Executive and that while there might exceptionally be situations in which the court would intervene in foreign policy issues, this case was far from being one of them. Certainly one of the issues he considered to be of relevance was the fact that it was a claim against the government rather than the situation in the instant case, and he was also concerned with the issue of standing which is of course not a matter before us.

193. Cranston J went on, at paragraph 56 of his judgment, to state that if the matter were to proceed, Israel's obligations would need to be defined and then breaches identified and proved on the basis of events occurring outside the jurisdiction. Were Israel to appear, any justification it advanced, such as proportionality, would need to be explored. Once this was done, the claimant's case would turn on an enquiry into breaches by the United Kingdom of its obligations and they would need to be defined and breaches would need to be proved through a close examination of the conduct of United Kingdom foreign policy. All of this, he noted, would entail determinations of law and fact and would be against the backdrop of possibly the most serious, protracted and controversial dispute in international affairs today. It was not a case where the issue was purely one of law and there were no disputed issues of fact and nor was it a case like Kuwait Airways where breaches of international law were plain. He went on to note the absence of what had been described by Lord Wilberforce in Buttes Gas and Oil Co v Hammer [1982] AC 888 of 938B "judicial or manageable" standards. He noted that the advisory opinion of the International Court of Justice in the Wall case was directly applicable to Gaza and that much of the ground the claimant sought to have the court traverse would be more appropriately entrusted to a Committee of Enquiry, with expertise in diplomacy and international law.

194. These points seem to us to identify insuperable practical and legal difficulties to the suggestion that the Tribunal has jurisdiction to consider Israel's claimed violation of the Prohibition on the Unlawful Use of Force within the UN Charter and the requirements of International Criminal Law (ICL) and International Humanitarian Law (IHL). We bear in mind the argument made at paragraph 127 of the appellant's closing submissions that principles of international law are of the utmost importance in the application and construction of the provisions of the UN Convention and the EU Directives and the ECHR. In particular the argument is made that if Israel's conduct towards the Palestinians violates ICL, IHL or the UN Charter that it makes it more likely that the same amounts to persecution, serious harm, degrading treatment or a flagrant violation of the appellant and her family's Article 8 rights. The evidence in this regard is clearly important, and requires to be taken into consideration in our assessment of these issues. That evidence will be given full and careful consideration

in due course. But we decline jurisdiction to adjudicate on the issue as such of the legality in customary international law of the treatment by Israel of Palestinians within the Occupied Palestinian Territories.

195. The next matter we need to consider is whether the conditions that the appellant and her family would experience on return to Gaza are such as to amount to persecution or breach of their human rights or such as to place them in need of humanitarian protection. The appellants rely on a number of pieces of evidence in this regard. Firstly there is the report of the United Nations Fact Finding Mission on the Gaza Conflict A/HRC/12/48 of 25 September 2009 (the Goldstone Report). It is accepted on behalf of the appellants that the conclusions within the report are not equivalent to judicial findings, but it is argued that it is akin to a report produced as part of an extremely detailed criminal investigation and, bearing in mind the low standard of proof in the current proceedings, the Goldstone Report's findings are said to be clearly of the utmost importance. Since the publication of the report, on 16 October 2009 the UN Human Rights Council passed a Resolution endorsing the report. On 5 November 2009 the UN General Assembly passed Resolution 64/10 endorsing the findings reached in the Goldstone Report, and providing Israel and the Hamas regime with a period of three months to conduct "independent, credible investigations" into the serious violations of international humanitarian and human rights law that were committed during the conflict in Gaza that broke out in late December 2008". A follow-up report was issued on 4 February 2010 by the UN Secretary General, recording the various investigations conducted by the Israeli authorities into the findings in the Goldstone Report that IHL and ICL were violated during Operation Cast Lead. However a further Resolution was passed by the UN General Assembly on 25 February 2010 describing the Secretary General's report as "inconclusive" and requesting a further report in five months' time. On 25 March 2010 the UN Human Rights Council passed a Resolution reiterating the UNGA's Resolution that independent, credible investigations must be carried out into the findings of the Goldstone Report.

196. In its conclusions the Goldstone Report at paragraph 1877 makes the point that the Israeli military operation in Gaza between 27 December 2008 and 18 January 2009 and its impact cannot be understood or assessed in isolation from developments prior and subsequent to it. It is said that the operation fits into a continuum of policies aimed at pursuing Israel's political objectives with regard to Gaza and the Occupied Palestinian Territories as a whole. It goes on to say that many such policies are based on or result in violations of international human rights and humanitarian law. It is said at paragraph 1878 that the continuum is evident most immediately with the policy of blockade that preceded the operations and that in the mission's view amounts to collective punishment intentionally inflicted by the government of Israel on the people of the Gaza Strip. It is said that when the operations began, the Gaza Strip had been under a severe regime of closures and restrictions on the movements of people, goods and services for almost three years. This included basic necessities of life, such as food and medical supplies, and products required for the conduct of daily life, such as fuel, electricity, school items and repair and

construction material. The measures were said to have been imposed by Israel purportedly to isolate and weaken Hamas after its electoral victory in view of the perceived continuing threat to Israel's security that it represented and the effect of this was compounded by the withholding of financial and other assistance by some donors on similar grounds. Adding hardship to the already difficult situation in the Gaza Strip, the effects of the prolonged blockade did not spare any aspect of the life of Gazans. Prior to the military operation, the Gaza economy had been depleted, the health sector beleaguered, the population had been made dependent on humanitarian assistance for survival and the conduct of daily life of men, women and children was psychologically suffering from longstanding poverty, insecurity and violence, and enforced confinement in a heavily overcrowded area. The dignity of the people of Gaza had been severely eroded. The effect of the military operations in Operation Cast Lead and the manner in which they were conducted considerably exacerbated the aforementioned effects of the blockade and the result in a very short time was unprecedented long term damage, both to the people and to their development and recovery prospects.

197. It was said to the Mission by both Palestinians and Israelis that, despite the hard conditions that had been long prevailing in the Gaza Strip, victims and long time observers stated that the operations were unprecedented in their severity and that their consequences would be long lasting. When the mission first visited the Gaza Strip in early June 2009 it considered that the devastating effects of the operations on the population were unequivocally manifest. In addition to the visible destruction of houses, factories, wells, schools, hospitals, police stations and other public buildings, the sight of families, including the elderly and children, still living in the rubble of their former dwellings, of which no reconstruction was possible due to the continuing blockade, was evidence of the protracted impact of the operations on the living conditions of the Gaza population. Reports of the trauma suffered during the attacks, the stress due to the uncertainty about the future, the hardship of life and the fear of further attacks pointed to less tangible but not less real long term effects. It was said at paragraph 1882 that women were affected in significant ways and their situation required specific attention in any effort to address the consequences of the blockade, of the continuing occupation and of the latest Israeli military operations.

198. The operation was said to have been in furtherance of an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas, and possibly with the intent of forcing a change in such support. The mission considered this position to be firmly based in fact, bearing in mind what it saw and heard on the ground and what it read also from, for example, former military officers and political leaders. More than 1,400 people were killed in just three weeks. The mission recognised that not all deaths constituted violations of international humanitarian law, but the Israeli actions indicated a deliberate policy of disproportionate force aimed not at the enemy but at the "supporting infrastructure" which in practice appeared to have meant the civilian population. It is said at paragraph 1189 that the repeated failure to distinguish between combatants and civilians appeared to the mission to have been the result of deliberate guidance

issued to soldiers, as described by some of them, and not the result of occasional lapses. It was said that, allied to the systematic destruction of the economic capacity of the Gaza Strip, there appeared also to have been an assault on the dignity of the people, seen not only in the use of human shields and unlawful detentions sometimes in unacceptable conditions, but also in the vandalising of houses when occupied and the way in which people were treated when their houses were emptied. At paragraph 1895 it is said that, whatever violations of international humanitarian and human rights law may have been committed, the systematic and deliberate nature of the activities described in the report left the mission in no doubt that responsibility lay in the first place with those who designed, planned, ordered and oversaw the operations.

199. In its summary of legal findings from paragraph 1918 onwards, the Mission found that in a number of cases Israel failed to take feasible precautions required by customary law reflected in Article 57(2)(a)(ii) of Additional Protocol 1 to avoid or minimise incidental loss of civilian life, injuries to civilians and damage to civilian objects. The Mission found that the different kinds of warnings issued by Israel in Gaza could not be considered as sufficiently effective in the circumstances to comply with customary laws reflected in Additional Protocol 1, Article 57(2)(c). The Mission found numerous instances of deliberate attacks on civilians and civilian objects (individuals, whole families, houses, mosques) in violation of the fundamental international humanitarian law principle of distinction, resulting in deaths and serious injuries. In these cases the Mission found that the protected status of civilians was not respected and that the attacks were intentional, in clear violation of customary law, reflected in Article 51(2) and 75 of Additional Protocol 1, Article 57 of the 4th Geneva Convention and Articles 6 and 7 of the International Covenant on Civil and Political Rights. In some cases the Mission additionally concluded that the attack was also launched with the intention of spreading terror among the civilian population. The Mission found a violation of the right to life (ICCPR, Article 6) in respect of the policemen who were killed in deliberate attacks on police stations where the policemen were not members of the Palestinian armed groups. Further adverse findings were made in respect of such matters as the use of human shields, detention and destruction of property. The blockade policies implemented by Israel against the Gaza Strip were found to amount to a violation of Israel's obligations as an occupying power under the 4th Geneva Convention and the Mission found a number of grave breaches of the 4th Geneva Convention committed by the Israeli armed forces in Gaza, including wilful killing, torture or inhuman treatment. Acts depriving the Palestinians in the Gaza Strip of their means of subsistence, employment, housing and water and denying their freedom of movement and access to a court of law and an effective remedy could lead a competent court to find that the crime of persecution, a crime against humanity, had been committed.

200. The appellant also relies on the Amnesty International Report "Israel/Gaza: Operation Cast Lead: 22 Days of Death and Destruction" of 2 July 2009. This also refers to wanton destruction, attacks violating fundamental provisions of international humanitarian law, notably the prohibition on direct attacks on civilians

and civilians' objects, the prohibition on indiscriminate or disproportionate attacks, and the prohibition on collective punishment. The report considered that the actions of the Israeli forces in action demonstrated that they considered all individuals and institutions associated with Hamas to be legitimate targets. There were also references to Israel not having fulfilled its duties as an occupying power in relation to the Gaza Strip and that many of the fundamental Rights of the Child were blatantly violated during this crisis. It was also said that Israel is in continuing violation of Article 39 of the Convention in that, by actively preventing reconstruction efforts, it does not fulfil its obligations to "take all appropriate measures to promote physical and psychological recovery and social integration of a child victims of armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

201. It is said, at paragraph 142 of the appellant's closing submissions, that the background evidence shows that the fiercest fighting and the greatest destruction of civilian targets took place in northern Gaza, where the appellant's family and her husband's family live. Reference is made to the ICG's report "Gaza's Unfinished Business" of 23 April 2009 and the Amnesty International Report of 2 July 2009 to which we have referred above. Specific references to the civilian infrastructure being destroyed in Jabalyia itself are also found in the Amnesty Report and the Goldstone Report among others.

202. As regards the general humanitarian situation in the aftermath of Operation Cast Lead, the ICRC's report "Gaza: 1.5 Million People Trapped in Despair" of 29 June 2009 states that six months on, restrictions on imports are making it impossible for Gazans to rebuild their lives and that the quantities of goods now entering Gaza fall well short of what is required to meet the population's needs. For example, in May 2009, only 2,662 truckloads entered Gaza from Israel, a decrease of almost 80% on the 11,392 truckloads allowed in during April 2007, before Hamas took over the territory. It is said that the increase in poverty is taking a heavy toll on the population's diet, and for tens of thousands of children this has led to deficiencies in iron, vitamin A and vitamin D. It is said that those worst affected are likely to be children, who make up more than half of Gaza's population. It is also said that Gaza's alarming poverty is directly linked to the tight closure imposed on the territory, and that the crisis has become so severe and entrenched that even if all crossings were to open tomorrow, it would take years for the economy to recover. Comments to similar effect are to be found in the International Crisis Group (ICG) report "Gaza's Unfinished Business" dated 23 April 2009. The UNOCHA's Report of August 2009 entitled "Locked In" refers to the degradation of the living conditions of the population, caused by the erosion of livelihoods and the gradual decline in the state of the infrastructure and the quality of vital services in the areas of health, water and sanitation and education. It is said that over the last three months Israel has allowed entry into Gaza of a small number of truckloads carrying goods previously prevented from entering, including limited construction, water, sanitation and education materials and that while these are welcome steps, their actual impact is negligible when compared to the current level of needs in Gaza. It is said that many people report a growing sense of being

trapped, physically, intellectually and emotionally, and that the blockade is collectively punishing the entire Gaza population. Dr George in his report of 10 July 2009 and the Human Rights Watch Report of 18 February 2009 are to similar effect.

203. In a joint agency report entitled "Failing Gaza" of 22 December 2009, it is said that a year after Israel launched Operation Cast Lead, little of the extensive damage caused to homes, civilian infrastructure, public services, farms and businesses has been repaired. Reference is made to over US$4 billion being pledged in March 2009 by the international community to assist reconstruction in Gaza and to support the Palestinian economy, but it is said that little of this committed money has been spent, goods and equipment earmarked for rebuilding languish in storage outside Gaza and much of Gaza lies in ruin. Since Operation Cast Lead, only 41 truckloads of construction materials for all purposes have been permitted into Gaza, and thousands of truckloads are required to rebuild all the houses destroyed. This is said to be quite apart from all the remaining reconstruction desperately needed for schools, hospitals and other buildings and the water network. It is said that in the period before the blockade, an average of 70 truckloads of exports left Gaza a day and 583 truckloads of goods and humanitarian supplies came in. In the first two years of the blockade, an average of just 112 truckloads per day were allowed into Gaza and exports have been entirely banned with the exception of several small shipments for the Dutch market. It is said that currently Israel only regularly allows about 35 categories of items entering into Gaza and there is no published list of permitted items and there appears to be no consistency in what is, and what is not, permitted. Humanitarian goods that are in theory let in are subject to unpredictable delays and restrictions, for example shelter kits (average delay 85 days), health and paediatric kits (average delay 68 days) and household items such as bedding and kitchen utensils (average delay 39 days). It is said that despite efforts by the international community, after months of negotiations and Israeli foot dragging almost nothing has been allowed into Gaza under a specific plan formulated by the UN in May 2009 to deliver construction materials for a package of stalled UN projects for the shelter, health and education sectors, worth US$77 million.

204. The problems are further illustrated in the Gisha report to which we have referred above and in the UNOCHA Report "Locked In" of August 2009, among others. In the latter report there is reference to the fact that some 10,000 people in northern Gaza still do not have access to running water due to a lack of available building materials to maintain and upgrade the water network, and 80 million litres of raw and partially treated sewage are being discharged daily into the environment which has led to further pollution of the sea and the underground aquifer, creating serious health concerns. An IRIN article "Analysis: Looming Water Crisis in Gaza" of 15 September 2009 says that unless urgent action is taken, the supply of water fit for human use in the Gaza Strip will be depleted in five to ten years. It is said that Israel has constructed some 37 trap wells inside Israel along Gaza's eastern political border which siphon water supplies from the aquifer before they reach Gaza.

205. There is also evidence of rising food insecurity set out at paragraph 157 onwards in the appellant's closing submissions. A PCHR report "23 Days of War, 928 Days of Closure" of January 2010 states that 60.5% of Gazans are considered to be food insecure and a further 16.2% to be vulnerable to food insecurity. The Goldstone Report referred to the destruction of the El Bader flour mill, the effect of which was greatly to diminish the capacity of Gaza to produce milled flour, the most basic staple ingredient of the local diet and it appeared to the Mission that the strikes on the flour mill were intentional and precise.

206. It is also argued that the steel wall being built on the Gaza/Egyptian border will worsen the humanitarian situation. The UNOCHA Protection of Civilians Report of 27 January to 2 February 2010, among other pieces of evidence, refers to this.

207. The UNOCHA Report in the context of the Gazan economy states that in the first quarter of 2009, according to the Palestinian Central Bureau of Statistics, over 140,000 Gazans, willing and able to work, were unemployed, constituting 41.5% of Gaza's workforce, up from 32.3% in the second quarter of 2007. It is thought that the actual rates might be even higher as the bureau records workers not formerly laid off but not working and not receiving salaries as being "temporarily absent employees" rather than as "unemployed". The Deputy Secretary General of the Palestinian Federation of Industries, Mr Amr Hamad, was interviewed by the Goldstone mission and he indicated that 324 factories had been destroyed during the Israeli military operations at a cost of 40,000 jobs.

208. The Amnesty International Report of 2 July 2009 refers to the destruction of vast areas of cultivated land, such as farms and orchards, as causing a devastating amount of that year's harvest to be lost and to have left even more people food insecure. There is also a reference, at paragraph 168 of the closing submissions, to the imposition by the Israeli authorities of a 300 metre buffer zone within Gaza, which has a severely detrimental effect upon the agricultural sector. 90% of the people of Gaza suffer power cuts of four to eight hours a day, according to the joint agency report of 22 September 2009, while the rest have no power at all. There had been a slight improvement by the end of the reporting period considered by the UNOCHA Report of 27 January 2010 to 2 February 2010, as a result of which the scheduled blackouts were reduced to six to eight hours four to five days a week throughout Gaza, though some 40,000 people remained completely without electricity. Electricity cuts were directly affecting refrigerated food and water pumping and the provision of essential basic services, including water supply, sewage removal and treatment and medical treatment. There was a decline in the quantity of cooking gas to a significant extent. All these matters had impacted adversely on the provision of education to the children of Gaza. During the 2008 to 2009 academic year, 14,000 students (or 6.76% of students in all UNRWA schools in Gaza) failed all subjects of the standardised tests.

209. On behalf of the Secretary of State it is argued that the "findings" of the Goldstone Report are not in fact findings and that there has been outspoken criticism of the

report, for example by Alan Derschowitz, and also referring to an article regarding Judge Goldstone's interview with the Jewish Daily Chronicle in which he said that nothing had been proven and it was a roadmap for investigators and contained no actual evidence of wrongdoing. It is said that from the Israeli point of view, as of March 2009, the government of Israel instructed bodies dealing with the matter to allow food stuffs entry without restriction and that cooking and heating gas was not subject to limitation. The Israelis had published the weekly summary of humanitarian supplies in a summary of humanitarian activity in 2009 to international organisations, where the Gaza Coordination Liaison Administration confirmed the supply of food and medicine to meet the needs of the Palestinian population in Gaza. The interim responses of the Israelis and Palestinians to the requirement of the UN that both parties respond to the Goldstone mission's report by explaining what investigations they were carrying out into the matters contained within the report, have now been received and these are set out in the Secretary of State's evidence.

210. It is further argued on behalf of the Secretary of State that, though the situation facing the appellant is poor, in the context of the reduced levels of violence that now exist in Gaza there the evidence suggests that there are significant levels of aid and international support, and that though there are shortages of supplies of some basic goods, people are fulfilling their basic needs and there is no malnutrition, widespread displacement or lack of basic medical treatment. Thus, from the Country of Origin Information Report (COIR) of 6 August 2009, at paragraph 2.3 the United Nations Conference on Trade and Development (UNCTAD) Report of July 2008 reported that for the Occupied Palestinian Territories in 2007 the unemployment rate was 29% as compared with 21% in 1999 and unemployment was much higher in the Gaza Strip and was likely to deteriorate further. According to the World Health Organisation Country Profile of September 2009, the average life expectancy was 71.5. The point is made in the COIR that in contrast to the West Bank there are no longer any Israeli settlements or military establishments in Gaza. The UNRWA provides education, health, relief and social services to eligible Palestinian refugees, including in the Gaza Strip, with eight camps in Gaza, and provides support to many Palestinian families who are unable to meet their own basic needs. The Jane's Information Group in its 2009 country assessment, updated on 26 November 2008, and quoted at paragraph 23.03 of the COIR, says that despite being severely short of funds, the standard of healthcare remains inadequate, although child immunisation programmes have suffered from restrictions on movement and people have been unable to access a number of specialist treatments. It is said that this is especially true in the case of the Gaza Strip, where border closures had restricted access to hospitals in Israel or Egypt and electricity cuts have seen hospitals run on emergency power for a majority of the 24 hour cycle. It also says that the continuing closure and sanctions on the Gaza Strip have hit the health sector hard, with no new clinics being constructed and a poorly maintained sewage system threatening the outbreak of more diseases and that this was exacerbated by the Israeli campaign in late 2008 and early 2009 that saw hospitals damaged and medical supplies seriously depleted. Aid agencies warned that despite massive donations and assistance, the situation is critical with an estimated 90,000 people having been left homeless.

211. At paragraph 24.01 of the COIR, there is a quotation from the ECOSOC report "Economic and Social Repercussions of the Israeli Occupation on the Living Conditions of the Palestinian People" dated 7 May 2009. This refers to the consequences of the occupation of the Palestinian Territory and the use of arbitrary detention, the disproportionate use of force, house demolitions, severe mobility restrictions, lack of building permits and closure policies as continuing to intensify the economic and social hardship of the Palestinian residents of the Occupied Palestinian Territories. Reference is also made to internal Palestinian conflict as causing problems in this regard. Despite the constraints that are identified, it is said that the Palestinian Authority managed to make some progress in areas such as security, public financial management, local public infrastructure and health and education services, not least because it was able to pay civil servants fully every month. The report goes on to state that Israeli settlement and outpost expansion, land confiscation and the construction of a barrier in the Occupied Palestinian Territories, contrary to the roadmap of the Geneva Convention and other norms of international law, isolate Occupied East Jerusalem, severely intrude into the West Bank and curtail economic and social life. The same report is quoted at paragraph 25.08 as stating that Gaza's crossings remained closed for most of 2008, and smuggling through the tunnels played an increasing role in the economy. Some humanitarian assistance was allowed to enter Gaza, including the bulk entry of wheat grain, medicines and limited amounts of educational materials, but it proved to be very difficult to import other humanitarian goods, such as cement and generators. The Rafah crossing remained officially closed, and a few hundred Palestinians, mainly persons seeking medical care, students and pilgrims, were able to cross each month for specific purposes. This is from the UNECOSOC Report "Assistance to the Palestinian People" of 7 May 2009.

212. The Secretary of State also quotes from the OCHA in a report of 2009 entitled "Occupied Palestinian Territory Mid Year Review" published under the auspices of the United Nations. It is said that during the first five months of the year, the overall humanitarian situation in the Occupied Palestinian Territories continued to deteriorate. As of June 2009 the 2009 consolidated appeal for the Occupied Palestinian Territories had received US$412 million of aid, 51% of its 2009 requirement. It can be seen from the table at page 143 of the Secretary of State's bundle B, that more than US$312 million worth of aid had gone to Gaza for a variety of projects, including those concerning agriculture, cash for work, education, health, water sanitation and hygiene and shelter. This is as of 19 June 2009. About 75% of Gaza's 1.5 million residents require some form of assistance. It is said at page 150 of the bundle, page 11 of the report, that humanitarian assistance has been impartially provided to the most vulnerable populations. A number of examples of this are given, including 1,365,000 Palestinians in Gaza receiving food assistance from the World Food Programme and other organisations, access to health being maintained for 125,000 marginalised people living in Gaza, 85,000 litres of water being distributed for domestic use and drinking in Gaza and 500,000 beneficiaries in Gaza receiving NFIs (hygiene kits, baby kits, water kits, household tanks). It is said in the

conclusions at page 30 of the report that the humanitarian community in the Occupied Palestinian Territories reacted quickly when the worst case scenario as the COP2009 unfolded at the beginning of the year with a combination of fighting in Gaza and a continued interfactional rift between Palestinian parties. They promptly assessed changing needs, readjusted its response plans and priorities and channelled the necessary resources into Gaza to address the humanitarian situation. This continues.

213. In August 2009 OCHA noted that over the past three months Israel had allowed entry into Gaza of a small number of truckloads carrying goods previously prevented from entering, including construction, water, sanitation and education materials. In October 2009 the OCHA noted that the Israeli authorities had continued to allow the entry of limited supplies for water and sanitation repair and rehabilitation projects, including eleven truckloads during October, although delays in the approval of additional supplies, as well as other coordination difficulties, had significantly slowed down the implementation of these highly needed projects. A total of 2,364 truckloads of goods entered Gaza in the month of October, with food supplies and cleaning materials making up 92% of this and the remainder consisting of food supplies, including cooking gas but excluding industrial fuel delivered to Gaza's power plant (3%), agricultural raw materials (3%) and other items (2%). The monthly average of humanitarian truckloads since the beginning of the decline in those numbers (July to October 2009) was 78% higher than the 2008 monthly average. It is said that in other words the recent decrease is relative to the high levels of humanitarian aid that entered Gaza in the first six months of the year, during and in the aftermath of the Cast Lead offensive.

214. In July 2009 the World Health Organisation provided an assessment of Gaza's health needs and concluded that although the health sector had been severely affected by the prolonged closure of Gaza's borders and by Operation Cast Lead, most health services had been functioning normally. An estimated 4,600 tonnes of donated medical supplies and equipment entered the Gaza Strip during and immediately after the conflict, creating enormous logistical challenges for the Ministry of Health and Central Drugstore. The referral of patients out of Gaza had been severely disrupted, albeit that significant numbers were still referred abroad and into Israel (with emergency referrals even during Operation Cast Lead). By August 2009, the World Health Organisation found that almost 30% of patients who applied for permits to cross Erez into Israel were delayed, lost their hospital appointments and had to restart the whole process. The UNRWA continues to provide substantial support and large scale emergency assistance programmes which has expanded since the Hamas assumption of power, and UNICEF are providing assistance to the population and are developing twenty family centres in severely affected areas of Gaza with the aim of enabling vulnerable families to meet basic needs and live in dignity.

215. On behalf of the Secretary of State, it is argued that, in so far as there is an issue concerning the epilepsy of the appellant's daughter, it was held in the appeal in

October 2008 that she no longer suffers from fits, and that it seems continues to be the case. There is no medical evidence to support the contention that her fits could return if she were living in Gaza, but it is argued that in any event the evidence shows that medical facilities have continued to be available, although there have been shortages of some medical supplies including anti-convulsion drugs at one time.

216. That is, in essence, the evidence concerning the conditions that the appellants would face on return to Gaza. It is necessary now for us to consider the relevant legal tests that apply and then go on to consider the evidence and make findings on it in the context of the legal tests.

217. It is argued on behalf of the appellants that to return them to the conditions they would face in Gaza is persecutory and/or in breach of their rights under Articles 3 and 8 of the European Convention on Human Rights and gives rise to a need for humanitarian protection. Dealing first with the Refugee Convention, the point is made in the appellant's amended skeleton argument that, in line with what was said by the Tribunal in Gashi and Nikshiqi and Secretary of State for the Home Department (UNHCR intervening) [1997] INLR 96, any interpretation of the term "persecution" should be approached with the basic principles of an internationally shared surrogate protection, rooted in fundamental human rights. It was said also that the term persecution included a failure to protect firstly those rights that were non-derogable, even in times of national emergency, secondly those rights which are derogable during an officially recognised life-threatening public emergency, thirdly some aspects of those rights which require states to take steps to the maximum of their available resources to progressively realise rights in a non-discriminatory manner (the right to earn a livelihood; the right to a basic education; a right to food, housing and medical care). It is also said that in order for deprivation of welfare benefits to be classified as persecution, there must exist an element of discrimination. Article 9 of the Qualification Directive defines acts of persecution as follows:

> "1. Acts of persecution within the meaning of Article 1A of the Geneva Convention must:
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
>
> 2. Acts of persecution as qualified in paragraph 1, can inter alia take the form of:
>
> (a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner…"

218. As regards Article 3 of the Human Rights Convention, expulsion of an individual by a contracting state to the Convention may give rise to an issue under Article 3 and thus engage the State's responsibility under the Convention where substantial grounds have been shown for believing that the person concerned, if removed, faces a real risk of being subject to treatment contrary to Article 3 which prohibits in absolute terms removal for a person who would face inhuman and/or degrading treatment or punishment.

219. It was made clear by the Court of Human Rights in NA v United Kingdom (Application No. 25904/07) [2009] 48 EHRR 15, that the ill-treatment the applicant alleges he or she will face on return must attain a minimal level of severity which will depend upon all the circumstances of the case. It is also necessary to show that the authorities of the receiving state are not able to obviate the risk by providing appropriate protection. A general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion. The example is given at paragraph 114 in NA in the case of Muslim v Turkey [2006] 42 EHRR 16 where the Court considered the expulsion of an Iraqi national of Turkmen origin to Iraq that the possibility of ill-treatment because of the unstable situation in the country at the material time would not in itself amount to a breach of Article 3. The Court would only be likely to find a breach of Article 3 in the most extreme cases of general violence where it was argued that the situation in the country of destination would be of a sufficient degree of intensity as to involve breach of the Article 3. There would have to be shown to be a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return. However exceptionally, in cases where an appellant alleges that they are a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 enters into play where the applicant shows that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned.

220. On behalf of the appellants it is argued that a violation of Article 3 can occur if a sovereign state deliberately singles out a sizeable minority group for degrading and discriminatory treatment on the ground of their race or some other immutable characteristic, citing the decision in Salah Sheekh v The Netherlands [2007] 45 EHRR 50 where the Court accepted that all members of the minority Ashraf clan faced a real risk of violation of their Article 3 rights upon being returned to Somalia. In such a case the applicant could not be required to establish the existence of further special distinguishing features concerning them personally in order to show that they were and continued to be personally at risk. Reference is also made to the decision of the Court of Appeal in RS (Zimbabwe) v Secretary of State for the Home Department [2008] EWCA Civ 839, where the Court of Appeal allowed the appellant's appeal and remitted the issue of whether the Mugabe regime's denial of food and medical care to those suspected of opposition activities would amount to a violation of Article 3 in

itself. In this regard, however, it is relevant to mention the recent decision of the Tribunal in RS, EC and BR [2010] UKUT 000 (IAC) in which the Tribunal held that, though there is some evidence of discrimination in access to AIDS medication and food in Zimbabwe, it is not such as to show any real risk of such discrimination. It is relevant also to note the decision in N in the case involving an HIV sufferer from Uganda, where it was held that there would be no infringement even where the effect of removal was to preclude treatment which would lead in a very short time to a revival of symptoms from which the patient was originally suffering, and thereafter to an early death.

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 3 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.

223. We do not consider it can be said that the appellant and her family are at risk of such a high level of indiscriminate violence that there are substantial grounds for believing that they would face a real risk threatening their life or person solely by being present there and nor is this an exceptional case coming within the ambit of the exception in NA. The risk in terms of actual violence is minimal, since the ceasefire declared on 18 and 19 January 2009 between Israel and Hamas, and the existence of only limited clashes and intra-Palestinian violence subsequently. We note that the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) in its mid-year review of July 2009 reported that since the cessation of hostilities violence has dropped to relatively low levels, although rockets and mortars have continued to be fired from Gaza into Israel and Israel has responded with a number of airstrikes in Gaza.

224. As regards the general socio-economic and humanitarian situation in Gaza, there is on the whole common ground in the evidence provided by both sides, although some of the evidence on the part of the Secretary of State indicates some small level of improvement in various respects. There has to be shown to be a severe deprivation with denial of shelter, food and the most basic necessities of life for the appeal to succeed. It is relevant to note the conclusion of the AIT in AM & AM (Armed conflict – risk categories) Somalia CG [2008] UKAIT 00091 that to succeed in

a claim for protection based on poor socio-economic or dire humanitarian living conditions under the Refugee Convention, Article 15 of the Qualification Directive or Article 3, the circumstances would have to be extremely unusual (see e.g. para 157). The Secretary of State draws an analogy with decisions of the Tribunal concerning Zimbabwe, Somalia and Sudan, and in particular there is a reference to AH and Others (Sudan) [2008] 1 AC 678, concerning the settlements in Khartoum. Both Lord Bingham and Lord Brown refer to the high threshold to be met in cases of persecution and Article 3, and it was said that the Refugee Convention was far from being designed to meet all humanitarian needs given the countless millions who would otherwise be entitled to its benefits. The appellant and her family have relatives in Gaza, and, even if they are unable to accommodate them, they have friends also, and there is a good deal of humanitarian aid. Saja, the appellant's daughter, no longer suffers from epileptic fits and, even if the fits recurred, there is medical support available in Gaza. It is necessary to bear in mind the reduced levels of violence, and the fact that basic goods are, to a limited extent, being imported into Gaza whether with Israeli assistance or as a consequence of being brought in through the tunnels, and though the situation is a serious one, we do not consider that it crosses the Article 3 or Refugee Convention threshold.

225. We summarise our conclusions on the general issues arising in this case as follows:

(1) The Tribunal has jurisdiction to consider practical issues concerning the return of a Palestinian family to Gaza. GH [2005] EWCA Civ 1182 and HH (Somalia) [2010] EWCA Civ 426 applied.

(2) 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.

(3) The conditions likely to be experienced by Palestinians in Egypt while awaiting crossing into Gaza are not such as to give rise to breach of their human rights.

(4) On the basis of the authorities: MA [2008] Imm AR 617; MT [2009] Imm AR 290 and SH [2009] Imm AR 306, it would not be persecutory or in breach of their human rights for Palestinians to be refused entry to Gaza.

(5) The Tribunal does not have jurisdiction to decide whether Israel has acted in breach of customary international law in respect of its treatment of Palestinians within the Occupied Palestinian Territories.

(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.

Article 8

226. As regards family life, the family would return together, bearing in mind the credibility finding made in respect of the appellant's husband, and the absence of any sustainable Community right in respect of Muhammad, and hence there would be no interference with the appellant's family life if she were to be returned to Gaza. With regard to private life, it is argued on behalf of the appellant, citing the decision of the European Convention on Human Rights in Sisojeva v Latvia [2006] 43 EHRR 33, that there may be an interference with Article 8 rights in particular where the persons concerned possess strong personal or family ties in the host country which are liable to be seriously affected by an expulsion order. The three applicants in that case, who were of Soviet ethnicity (the third applicant had been born in Latvia and lived all her life there), were denied a resident permit by the Latvian authorities as the first two applicants had obtained passports from the former USSR. No formal deportation order was issued against them, but they were reminded by the state authorities of their obligation to leave Latvia. It was held that this amounted to a disproportionate interference with their right to private life.

227. However, as we have concluded above, the appellant and her family will be able to re-enter Gaza. She has not been refused re-entry to Gaza nor at any time while living there has she been told to leave. The existence of practical difficulties in returning does not amount to a breach of her or her family's right to respect for their private life. Clearly there may be circumstances, such as in Sisojeva, where the links a non-national has to a state may be such as to make their removal disproportionate, but that is far removed from the situation in this case, given our findings above. Nor do we consider that the amount of time the appellant and her family have spent in the United Kingdom and the private life they have developed during that time would make their removal disproportionate. It is not a matter that Mr Draycott emphasised, and we have little evidence of activities going beyond the spending of time in the United Kingdom.

228. The appeal is dismissed.

Signed

Senior Immigration Judge Allen,
Judge of the Upper Tribunal

APPENDIX: LIST OF DOCUMENTATION CONSIDERED

Item	Document	Date
1	The Independent, "Israel admits soldiers were wrong to shell UN site"	1 February 2010
2	United Nations Office for the Coordination of Humanitarian Affairs, "Protection of Civilians, 27 January – 2 February 2010"	2 February 2010
3	UN Secretary-General, "Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict (A/64/651)"	4 February 2010
4	Palestinian Centre for Human Rights, "23 Days of War, 928 Days of Closure: Life One Year after Israel's Latest Offensive on the Gaza Strip, 27 December 2008 – 18 January 2009"	23 December 2009
5	Amnesty International UK *et al.*, "Failing Gaza: No rebuilding, no recovery, no more excuses: A report one year after Operation Cast Lead"	22 December 2009
6	Chief Immigration Officer, anonymous email to Treasury Solicitors	27 November 2009
7	World Health Organisation, "Country Profile: Palestine"	September 2009
8	United Nations Fact-Finding Mission on the Gaza Conflict, "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict (A/HRC/12/48)"	25 September 2009
9	IRIN, "Analysis: Looming water crisis in Gaza"	15 September 2009
10	United Nations Office for the Coordination of Humanitarian Affairs, "Locked In: The Humanitarian Impact of Two Years of Blockade on the Gaza Strip"	August 2009

Item	Document	Date
11	UK Border Agency, "Country of Origin Information Report: Occupied Palestinian Territories"	6 August 2009
12	Middle East Cancer Consortium, "Manual of Coding and Staging: Version 5.1"	July 2009
13	World Health Organisation, "Gaza Health Assessment"	July 2009
14	Palestinian Ministry of the Interior press release	28 July 2009
15	United Nations Office for the Coordination of Humanitarian Affairs, "Occupied Palestinian Territory: 2009 Consolidated Appeal: Mid-Year Review"	21 July 2009
16	Amnesty International, "Israel/Gaza: Operation 'Cast Lead': 22 days of death and destruction"	2 July 2009
17	International Committee of the Red Cross, "Gaza: 1.5 million people trapped in despair"	29 June 2009
18	Defence for Children International / Palestine Section, "Palestinian Child Prisoners: The systematic and institutionalised ill-treatment and torture of Palestinian children by Israeli authorities"	11 June 2009
19	International Crisis Group, "Gaza's Unfinished Business"	23 April 2009
20	Gisha – Legal Center for Freedom of Movement and Physicians for Human Rights - Israel, "Rafah Crossing: Who holds the keys?"	25 March 2009
21	Amnesty International, "Gaza blockade – collective punishment"	4 July 2008
22	Congressional Research Service report to the US Congress	February 2008
23	Kathleen Lawand, "The Right to Return of Palestinians in International Law", International Journal of Refugee Law, Vol 8, No 4	1996