Neutral Citation Number: [2008] EWCA Civ 304

Case No: C5/2007/1096

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATON TRIBUNAL
Ref No: AS537092003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2008

Before :

LORD JUSTICE MAURICE KAY
LORD JUSTICE LAWRENCE COLLINS
and
SIR WILLIAM ALDOUS

- -

Between :

MA (PALESTINIAN TERRITORIES)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Ms Jane Collier (instructed by **The Refugee Legal Centre**) for the **Appellant**
Mr Jeremy Johnson (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates : 16 and 17 January 2008

- -

Judgment

Lord Justice Maurice Kay :

1. This appeal is primarily concerned with the question whether a stateless person, whom the Secretary of State wishes to return to his habitual place of residence, is entitled to protection under the Refugee Convention or the European Convention on Human Rights and Fundamental Freedoms (ECHR) if there is a reasonable likelihood that, on such return, he would not be permitted entry by the authorities in that country. The appellant is a Palestinian Arab in his mid-twenties. He lived in Tulkarm in the northern part of the West Bank which has been occupied by Israel since 1967. He arrived in the United Kingdom on 29 June 2003 and claimed asylum. On 28 August 2003 the Secretary of State refused his application on asylum and human rights grounds. The appellant appealed against that decision. The procedural history of his appeal has been complicated.

2. On 16 April 2004 an Adjudicator dismissed the asylum appeal but allowed the human rights appeal by reference to Article 3. In essence, the failure of the asylum appeal resulted from the rejection by the Adjudicator as incredible the account given by the appellant that he had been and would be persecuted by members of Fatah or the Palestinian Authority. However, the Article 3 claim succeeded because the Adjudicator considered that, on return, the appellant would be subjected to controls and restrictions by the Israelis. He said:

> " … Israel's treatment of Palestinians generally …, whether or not they are terrorists or suspected terrorists, even if that is thought by Israel to be justified in the interests of state security, is in my view, on any ordinary definition of the word, treatment which is degrading of the Palestinian people within their own territory. It follows that I accept … that there is a real risk of the appellant, qua Palestinian, and especially as a young Palestinian male, being subjected to degrading treatment by the Israeli authorities if now returned to the West Bank."

3. The Adjudicator expressly found that the anticipated treatment "is clearly not such that it can be said to amount to serious harm and, therefore, persecution" but nevertheless considered that the necessary level of severity had been reached so as to amount to "degrading treatment" within the meaning of Article 3.

4. The Secretary of State sought permission to appeal to the Immigration Appeal Tribunal (IAT). I shall have to return to the pleaded grounds of appeal because, on behalf of the appellant, Miss Collier has raised a jurisdictional point about the subsequent appellate history. Permission to appeal was granted on 13 May 2004 but by the time that appeal came to be heard, the IAT had ceased to exist and the transitional provisions of and pursuant to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 transferred the case to the Asylum and Immigration Tribunal (AIT). Again, the detailed statutory provisions are relevant to the jurisdictional point and I shall consider them in that context. At this stage it is sufficient to record that on 17 March 2006 a panel of the AIT concluded that the determination of the Adjudicator contained an error of law and referred the matter for a second-stage reconsideration. The second-stage reconsideration took place before a different panel of the AIT on 15 November 2006. In a determination promulgated on 8 February 2007, it concluded that the appellant was not entitled to succeed by reference to the

Refugee Convention, the Immigration Rules or the ECHR. On 24 April 2007 the AIT refused permission to appeal to the Court of Appeal but on 6 July 2007, Richards LJ granted permission on two grounds but refused it on four further grounds. Before this Court, Miss Collier has pursued the two permitted grounds and has renewed the application in relation to the grounds upon which Richards LJ refused permission.

5. By the time of the second-stage reconsideration by the AIT, the case had changed. It was made clear on behalf of the Secretary of State that the intention was to return the appellant to the West Bank via Jordan and the King Hussein Bridge. Paragraph 1 of the determination states:

> "It was the agreed position of both parties … that the appellant would have to pass through checkpoints manned by the Israeli authorities at the King Hussein Bridge and that, thereafter, he would have to pass through checkpoints - 'several' [according to the Secretary of State], 'numerous' [according to the appellant] - in order to travel back to Tulkarm."

The AIT then record the agreed view of the parties that the issue was

> " .. whether there is a real risk that the appellant would be persecuted or subjected to ill-treatment under Article 3 … by the Israeli authorities on seeking entry through the King Hussein Bridge, and thereafter."

The conclusions of the AIT

6. The primary conclusion of the AIT was that, as a Palestinian being forcibly returned from abroad, the appellant would not be allowed to re-enter the West Bank. He would get no further than the King Hussein Bridge, whereupon "he would simply have to turn back into Jordan". On the basis of the country guidance case of *NA(Palestinians – Not at general risk) Jordan CG* [2005] UKIAT 00094:

> "… ethnic Palestinians, whether or not recognized as citizens of Jordan, are not persecuted or treated in breach of their protected human rights by reason of their ethnicity, although they may be subject there to discrimination in certain respects in their social lives in a manner which does not cross the threshold from discrimination to persecution or breach of protected human rights."

7. That disposed of the appellant's case on the facts as found. However, the AIT went on to consider it on the hypothetical basis that the appellant would be permitted to re-enter the West Bank. It concluded that he had not established that any mistreatment would reach the minimum level of severity necessary for success under the Refugee Convention, the Immigration Rules or the ECHR. I now turn to the grounds of appeal.

Issue 1: the jurisdictional point

8. At the time of the determination of the Adjudicator, the right of appeal to the IAT was only on a point of law and it depended on a grant of permission to appeal by the IAT: Nationality, Immigration and Asylum Act 2002, section 101(1). For permission to be granted, the pleaded grounds of appeal had to disclose an arguable error of law: *Miftari v SSHD* [2005] EWCA Civ 481. When the transitional provisions of and under the 2004 Act apply, it is common ground that (a) the AIT is required to deal with the appeal in the same manner as if it had originally decided the appeal and it is reconsidering its own decision; (b) the Asylum and Immigration Tribunal (Procedure) Rules 2005 apply to reconsideration of appeals; and (c) by rule 31(2) and (3) of the 2005 Rules, the AIT is first required to decide whether the Adjudicator made a material error of law: only if it is decided that he did, may the IAT proceed to second-stage reconsideration. All this is common ground.

9. Miss Collier submits that (1) the Secretary of State's grounds of appeal to the IAT did not disclose an arguable error of law on the part of the Adjudicator; (2) the AIT at the first stage did not find a material error of law but only an arguable one; and (3) there was no error of law on the part of the Adjudicator in any event. In order to consider these submissions, it is first necessary to refer to the original documentation.

10. The Secretary of State's grounds of appeal read as follows:

> "The Adjudicator has allowed this appeal under Article 3, purely on the basis that a young Palestinian male will be stopped at road blocks and thus be exposed to a real risk of degrading treatment from the occupying Israeli authorities. It is submitted that the Adjudicator's decision to allow the appeal under Article 3 is in error for the following reasons. If the correct approach had been followed he would have dismissed the appeal in its entirety.
>
> 1. The objective evidence mentioned by the Adjudicator at paragraph 22 of the determination details incidents of harsh treatment of the Palestinians by the Israeli authorities. It is not, however, evidence that all Palestinians are subjected to this treatment nor is it evidence that this appellant faces a real risk of harsh treatment, which reaches the standard required to breach Article 3."

11. Two further grounds of appeal were then set out but, on behalf of the Secretary of State, Mr Johnson accepts that they did not assert arguable errors of law.

12. When the IAT granted permission to appeal, it did so on the basis that "the grounds of appeal are clearly arguable".

13. When the AIT engaged in the first-stage reconsideration, it expressed itself as follows:

> "<u>Reasons for the Decision that there is an Error of Law in the Determination</u>

> 1 … the Adjudicator found that there was not a real risk that the appellant would suffer torture or inhuman treatment at the hands of Israeli forces on the West Bank. The Adjudicator went on to find in the next paragraph that the restrictions on Palestinians amounted to degrading treatment and that returning the appellant to the West Bank would expose him to a real risk of degrading treatment contrary to Article 3 of the ECHR.
>
> 2. It is arguable that the treatment relied upon by the Adjudicator does not reach the level of ill-treatment required to engage Article 3.
>
> 3. The Adjudicator had found in paragraph 2 that the restrictions imposed on the Appellant did not amount to persecution within the meaning of the Refugee Convention.
>
> 4. The appellant had not put in a reply seeking to challenge that finding. The appellant submitted that if the restrictions on the appellant engaged Article 3, the Adjudicator should have found that the Appellant was also at risk of persecution. It was submitted that this was a *Robinson* obvious issue which should be pursued even though not specifically taken thus far. The [Secretary of State] did not oppose that course.
>
> 5. We therefore concluded that the Adjudicator had erred in his assessment of Article 3 or that he had erred in his assessment of the risk of persecution."

Against this documentary background, I now turn to Miss Collier's submissions.

(1) Did the grounds of appeal raise a point of law?

14. To this first question there is, in my judgment, a plain answer. Although *Miftari* requires the point of law to be apparent on the face of the grounds of appeal, it does not call for a particularly stringent process of construing the document. Such an approach would be inappropriate, not least because the proposed appellant/applicant will usually be an asylum-seeker, often acting with only a modicum of professional assistance, rather than the Secretary of State. What is required is a fair and reasonable examination of the grounds of appeal to see whether a point of law is identifiable. I consider that, fairly and reasonably construed, the part of the grounds of appeal which I set out in paragraph 10, above, disclosed an assertion that the Adjudicator had not followed "the correct approach" because, if he had, he would have been bound to conclude that there was no evidence to support a finding of a real risk of harsh treatment of the appellant, having regard to the minimum level of severity required to establish a breach of Article 3. In other words, a perversity challenge was indicated. No doubt the pleading could have been clearer but I am satisfied that it was adequate.

(2) Did the AIT find and sufficiently explain a material error of law at the first-stage reconsideration?

15. The material parts of rule 31 of the 2005 Rules provide:

> "(2) Where the reconsideration is pursuant to an order under section 103A –
>
> (a) the Tribunal carrying out the reconsideration must first decide whether the original Tribunal made a material error of law; and
>
> (b) if it decides that the original Tribunal did not make a material error of law, the Tribunal must order that the original determination of the appeal shall stand.
>
> (3) Subject to paragraph (2), the Tribunal must substitute a fresh decision to allow or dismiss the appeal."

16. Miss Collier's first attack on the reasoning of the AIT at the first-stage reconsideration is in the form of a submission that it amounted to no more than a finding of an arguable error of law, that being the language of paragraph 2 of the reasons. Her second submission is that, read as a whole, the five paragraphs of reasons reach no conclusion as to whether the legal error related to the finding of the Adjudicator that a breach of Article 3 had been established or to his finding that no persecution within the meaning of the Refugee Convention had been established. In other words, merely to refer to or imply an inconsistency does not in itself determine which of the inconsistent findings was right and which was wrong. She seeks to support these submissions by reference to authorities which have emphasised the importance of the AIT, at the first-stage reconsideration, identifying the legal error with precision so as to assist in the definition and clarification of issues for the second-stage reconsideration.

17. Mr Johnson accepts that a first-stage reconsideration which finds no more than an arguable legal error has not decided that there was a material error of law and so does not unlock the door to a second-stage reconsideration, given the terms of rule 31(2). That is undoubtedly correct. However, his submission is that, when one reads the first-stage reconsideration as a whole, it becomes clear that, in the circumstances of this case, the AIT found an actual and not just an arguable material error of law. I find his submission to be utterly convincing. There is on the face of it (and Miss Collier does not really dispute this) a logical inconsistency between the findings of the Adjudicator on degrading treatment and his findings on persecution, torture and inhuman treatment, notwithstanding that the threshold test of the requisite level of severity is the same in each case. Where the legal error is inconsistency of findings, it will often be inappropriate for the AIT at the first-stage reconsideration to reach a final view as to which of the findings is sustainable and which is not. It may not be possible, without hearing further evidence at the second-stage reconsideration, to do so. In my judgment, this is just such a case. I am satisfied that, read as a whole, the reasoning of the AIT on the first-stage reconsideration amounted to a finding of an actual and not just an arguable error of law. The error lay in the inconsistent findings

but it was understandable and permissible for the AIT to leave the final decision as to which finding was correct and which was not to the second-stage reconsideration. That is what it meant when it described the case for the Secretary of State on Article 3 to be "arguable". The conclusion, as explained in paragraph 5 of the reasons, was that, one way or the other, there was an error. That is also apparent from the heading "Reasons for the Decision that there is an Error of Law in the Determination".

18. The authorities referred to by Miss Collier – *Mukarkar v SSHD* [2006] EWCA Civ 1045, *DK (Serbia) v SSHD* [2006] EWCA Civ 1747 and *HF (Algeria) v SSHD* [2007] EWCA Civ 445 – demonstrate the need to limit the scope of a second-stage reconsideration so that matters unaffected by the identified error of law are not revisited. However, they do not lay down an invariable rule that would prevent the AIT from approaching an error of logical inconsistency in the way adopted at the first-stage consideration in this case. In my judgment, that approach was permissible in the circumstances of this case.

(3) Was the finding of an Article 3 breach open to the Adjudicator on the evidence?

19. Miss Collier submits that, in any event, the finding of an Article 3 breach was open to the Adjudicator on the evidence. However, in view of my conclusions about the legal error found by the AIT, this issue does not require a decision in the context of jurisdiction. Nor does the converse point taken on behalf of the Secretary of State in a Respondent's Notice, namely that the breach finding was not open to the Adjudicator on the evidence before him. Accordingly, I now turn to the issues that arise on the footing that the AIT was properly seized of the matter at the second-stage reconsideration.

Issue 2: statelessness

20. Where a stateless person is to be returned to his habitual place of residence, he enjoys the protection of both the Refugee Convention and the ECHR in relation to the decision to return him. Article 1A of the Refugee Convention provides:

> "For the purposes of the Convention the term 'refugee' shall apply to <u>any</u> person who …
>
> (2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or <u>being outside the country of his former habitual residence</u> as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Moreover, it is axiomatic that nationality is not a condition of protection under the ECHR.

21. The question that arises is whether a stateless person who will be denied entry on return to the country of his former habitual residence thereby becomes a victim of

persecution. It was considered, but not decided, in *AK v Secretary of State for the Home Department* [2006] EWCA Civ 1117, in which Richards LJ said, *obiter*, at paragraph 47:

> "That line of argument is beset with difficulties. I am far from satisfied that there is a true analogy 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, has no right of entry into the country), or that denial of entry to a stateless person can be said to constitute a denial of his third category rights of sufficient severity to amount to persecution (especially given the possibility of his exercising those rights elsewhere)."

22. The words of Richards LJ expressly informed the decision of the AIT in the present case and led to this conclusion (at paragraph 58):

> "In our judgment, in the event that a Palestinian Arab is denied re-entry to the Occupied Territories at the Israeli end of the crossing at King Hussein Bridge, this would not amount to persecution. Palestinian Arabs from the Occupied Territories are stateless and have no right of re-entry into the Occupied Territories, unlike a citizen. For the same reason, we do not consider that the denial of re-entry would in itself amount to degrading or inhuman treatment contrary to Article 3."

23. In support of her submission that the *obiter* view of Richards LJ and the conclusion of the AIT are erroneous, Miss Collier refers to a number of matters. First, she cites a number of Commonwealth authorities, including *Altawil v Canada (Minister of Citizenship and Immigration)* (1996) 114 FTR 211 (FCTD), *Thabet v Minister of Citizenship and Immigration* [1998] 4 FC 21 and *Refugee Appeal No.73861*, 30 June 2005, (New Zealand Refugee Status Appeals Authority). In my judgment, however, these authorities at their highest go no further than acceptance that, in some circumstances, to deny a stateless person re-entry may amount to persecution. They do not support the proposition that a denial of re-entry is in itself persecutory. Nor are they binding on this Court. Secondly, she refers to Goodwin-Gill and McAdam, *The Refugee in International Law*, 2nd edition, pp 69-70, where, drawing on the Commonwealth authorities, a "single test" approach is advocated, with "no substantial difference … between stateless and other refugees". However, this opinion is contradicted by Professor Hathaway: *The Law of Refugee Status*, pp 62-63. Thirdly, Miss Collier observes that things have moved in her direction as a result of the Qualification Directive (Civil Directive 2004/83/EC of 28 April 2004), Article 9 of which provides that acts of persecution within the meaning of Article 1A of the Refugee Convention must be sufficiently serious to constitute a serious violation of human rights or an accumulation of various measures "which is sufficiently severe as to affect an individual in a similar manner". Article 9(2) then states 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."

24. The Directive has been transposed into domestic law by The Refugee or Person in Need of International Protection (Qualification) Regulations 2006. Miss Collier emphasises persecution by means of discriminatory administrative measures. However, absent a serious violation of human rights, I do not see how the Directive and Regulations take the matter further. The case is not comparable with the discriminatory treatment of the national in *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809.

25. The Secretary of State relies on the decision of this Court in *Adan v Secretary of State for the Home Department* [2006] 1 WLR 1107. Although that case concerned the refusal of re-entry to a national, Mr Johnson submits that the following passage from the judgment of Hutchison LJ is of assistance when considering the position of a stateless person (at page 1126):

> "If a state arbitrarily excludes one of its citizens, thereby cutting him off from enjoyment of all those benefits and rights enjoyed by citizens and duties owed by a state to its citizens, there is in my view no difficulty in accepting that such conduct can amount to persecution. Such a person may properly say both that he is being persecuted and that he fears (continued) persecution in the future … However, even accepting that refusal to permit return can constitute persecution for a Convention reason, I would not myself accept that that would be so in the case of those who, like the applicants, are anxious at all costs not to return: how can they be said to be harmed by such a refusal?"

Mr Johnson relies on this passage for two reasons. The first is that the rationale for equating a denial of re-entry with persecution is firmly rooted in "the rights enjoyed by citizens". The second relates to the final sentence in the passage which, Mr Johnson submits, fits the facts of the present case since, at all material times, the appellant has been "anxious at all costs not to return" to the West Bank. I shall return to that second submission.

26. It is now necessary to confront the question whether, in principle, it is persecutory without more, to deny a stateless person re-entry to "the country of his former habitual residence". In my judgment, it is not. The denial does not interfere with a stateless person's rights in the way that it does with the rights of a national. There is a fundamental distinction between nationals and stateless persons in that respect. It is one thing to protect a stateless person from persecutory return to the country of his former habitual residence (as the Refugee Convention does), but it would be quite another thing to characterise a denial of re-entry as persecutory. The lot of a stateless person is an unhappy one, but to deny him a right that he has never enjoyed is not, in itself, persecution. Stateless persons are themselves the subject of an international treaty, namely the Convention relating to the Status of Stateless Persons (1954). The United Kingdom is a party to that Convention but it has not been incorporated into domestic law and Miss Collier does not suggest that it protects the appellant in this case.

27. Since we heard oral submissions, counsel have drawn our attention to 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."

28. The Human Rights Committee established under Article 28 of the Covenant has opined that "his own country" is broader in scope than "country of his nationality" and embraces "at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien". It refers to "close and enduring connections": General Comment 27, Freedom of Movement (Article 12), 2 November 1999. Commentators have suggested the possible relevance of Article 12 in the context of Palestinians seeking to return to the West Bank: Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights*, 2nd ed, 2004, para 12.37 and Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd ed, 2005, pp 287-288. Miss Collier seeks to rely on Article 12 in support of her submission that the AIT's consideration of statelessness was inadequate. In my view, however, this material does not advance the appellant's case under the Refugee Convention, nor does it provide a right enforceable by itself in the AIT. Moreover, even if the broader construction of "his own country" is correct, it is difficult to see how it can avail someone who has eschewed "close and enduring connections" and "special ties". As we have only had limited written submissions on this point, I am reluctant to say more about it in this judgment, save to observe that in *Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service* [1995] 5 HKPLR 490, Keith J, sitting in the High Court of Hong Kong, held (at paragraph 26) 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".

29. I am satisfied that the AIT did not fall into legal error when it held that the denial of re-entry to a stateless person is not in itself persecutory under the Refugee Convention.

Issue 3: the stateless person who will be denied re-entry

30. Having concluded that the appellant will be denied re-entry by the Israeli authorities, the AIT then considered the consequences and concluded that:

> "he would simply have to turn back into Jordan [where] ethnic Palestinians, whether or not recognized as citizens of Jordan, are not persecuted or treated in breach of their protected human rights by reason of their ethnicity, although they may be subject to discrimination in certain respects in their social lives in a manner which does not cross the threshold from discrimination to persecution or breach of protected human rights."

31. As this finding was firmly based on the Country Guidance case of *NA (Palestinians – Not at general risk) Jordan CG* [2005] UKIAT 00094 and no evidence to the contrary had been adduced, it cannot be said that it was legally erroneous.

32. It is pertinent to observe that, before the AIT, there was something of an evidential vacuum in relation to the logistics of returning the appellant via Jordan and the King Hussein Bridge. Since the hearing in this Court we have been informed that no such arrangement has yet been made in this or any similar case, that any arrangement would have to involve cooperation with the Jordanian authorities prior to removal and

that no decision has yet been reached as to whether the appellant would be escorted or unescorted. However, the fact that all this raises obvious hypothetical questions does not undermine the finding of the AIT.

33. At this stage, it is appropriate to return to Mr Johnson's second submission made by reference to the judgment of Hutchinson LJ in *Adan*. It is not a point that was ventilated before the AIT but it is advanced here on an *a fortiori* basis. It is put in this way: as the appellant has spent the years since arriving in this country resisting any effort to return him to the West Bank, how can he now say that it would amount to persecution or a breach of his human rights if he were to be denied re-entry? In the words of Hutchison LJ, he is "anxious at all costs not to return". Miss Collier's response is that even if Hutchison LJ's proposition is correct, it does not impact on the present case because there was no finding by the AIT that the appellant would not wish to return to the West Bank if the alternative was not remaining in the United Kingdom but was "turning back into Jordan". I am content to assume that there is something in this submission. To that extent, I do not intend to apply Hutchison LJ's proposition to the facts of this case and I shall reject Mr Johnson's *a fortiori* submission. However, this still leaves the finding of the AIT intact.

Issue 4: persecution and/or harsh or degrading treatment on return to the West Bank

34. In a simple world, once the AIT had concluded that the appellant would be denied re-entry to the West Bank, the need to consider what would happen to him if re-entry were to be achieved would fall away. However, this is not a simple world. By his appeal to the AIT, the appellant was challenging the decision of the Secretary of State to return him to the West Bank. The effect of sections 84, 85 and 86 of the Nationality, Immigration and Asylum Act 2002 (as amended) is that the AIT remained obliged to address the situation in the West Bank. It did so. After a detailed consideration of the evidence, it concluded:

> "Whilst we have every sympathy for the plight of Palestinians caught up in this situation, we have nevertheless concluded that, considering all the factors cumulatively (that is, travel restrictions, treatment at checkpoints, economic situation, food insecurity, access to healthcare etc), the minimum level of severity for serious harm (or treatment in breach of Article 3) is not reached."

35. A number of proposed grounds of appeal seek to attack this conclusion. However, although the appellant was granted permission to appeal in relation to the issues which I have already considered, Richards LJ refused permission on these proposed grounds. Miss Collier has renewed the application for permission before us. Like Richards LJ, I do not consider that any of them has a real prospect of success, nor do I find any other compelling reason to grant permission. I shall deal with them as briefly as I can, prefacing what I have to say with the observation that, whereas the AIT was obliged by statute to consider the (in the event) hypothetical question of the situation in the West Bank, no such obligation applies to this court because any error of law, on the part of the AIT on this issue would not be a material error of law, having regard to the conclusion that the primary finding of the AIT (denial of re-entry) survives.

(1) <u>Dr George</u>

36. The appellant relied on an expert report by Dr A George. A number of his opinions and conclusions were rejected by the AIT. It said:

> "There were … features of Dr George's report which led us to attach less weight to it that we would otherwise have. We also found that his opinion that the Northern part of the West Bank has become a particular focus of attention by the Israeli security forces is not consistent with the rest of the background evidence."

37. Those "features" included (i) Dr George referred to his expertise on the region as having been accepted with approbation by the courts without mentioning that in *KK, IH, HE (Palestinians – Lebanon – camps) Palestine CG* [2004] UKIAT 00293 the Tribunal had found his evidence to contain "the occasional sweeping generalisation"; and (ii) his use of the words "colonisation of the West Bank" was tendentious.

38. Miss Collier submits that by attaching less weight than they would otherwise have done to the report of Dr George the AIT fell into legal error. When rejecting that submission on paper, Richards LJ said:

> "The Tribunal dealt fully and carefully with Dr George's report and gave an adequately reasoned basis for accepting or rejecting relevant parts of his evidence in the course of examining the various factual issues. It cannot be said that the Tribunal erred in law in not attaching greater weight to his evidence than it did. The argument about … the word 'colonisation' attaches too much significance to what was a small point."

39. I respectfully agree. Where the AIT significantly rejected the evidence of Dr George, it expressed a preference for other evidence and gave proper reasons for so doing.

(2) CAABU

40. The appellant also sought to rely on a report by the Council for Arab British Understanding which expressed the opinion that he would be subjected to inhuman and degrading treatment in the West Bank. The AIT concluded that that opinion was not consistent with other background evidence. It preferred the latter and stated that "the general tone of the language in which CAABU's opinion is expressed shows that the subjective and partisan view of the organisation on the political situation has been allowed to influence their decision concerning their opinion on the appellant's case". Is that approach arguably vitiated by legal error? In my judgment, plainly it is not.

(3) Standard of proof

41. The point of law that Miss Collier seeks to advance is that the AIT "applied too high a standard of proof". I consider this submission to be utterly unsustainable. In paragraphs 45 and 46 of its determination, the AIT correctly set out the test as "a reasonable degree of likelihood or a real risk". The fact that in a 45 page determination there are occasional lapses into the subjunctive does not begin to give rise to a justified concern that it did not faithfully apply the correct standard.

(4) The Qualification Directive and the Protection Regulations

42. In paragraphs 23 and 24 of this judgment, I referred to Miss Collier's invocation of the Directive and the domestic Regulations and I explained why, in my judgment, they do not assist the appellant because the requisite level of severity has not be established. I find no arguable, material, legal error by the AIT in relation to the Directive and the Regulations.

Conclusion

43. It follows from what I have said that I would dismiss this appeal in respect of the grounds upon which permission to appeal was granted. I would refuse permission to appeal on the other grounds.

Lord Justice Lawrence Collins:

44. I agree that the appeal should be dismissed for the reasons given by Maurice Kay LJ. In particular I agree that the AIT was not in error when it held that the denial of the right of re-entry to a stateless person is not in itself persecutory under the Refugee Convention. In this case the appellant is relying on the very fact that he may be excluded as a reason for not wishing to be given the right of re-entry.

45. Consequently the impact of general principles of international law and humanitarian law on the type of statelessness involved in this appeal does not fall to be decided. It was touched on in the submissions but was not the subject of full argument. In particular, in my judgment it would be necessary to consider why it is that residents of the West Bank are stateless, and the implications for the application of those general principles.

46. The appellant's father was from Tulkarm, and had gone to Kuwait to work. The appellant was born in 1982 in Kuwait, which does not bestow its nationality on the children of foreigners born there.

47. Prior to 1948 the nationality of persons living in Palestine under the British Mandate was regulated by the Palestine Citizenship Order in Council 1925-1942, which conferred something called Palestinian citizenship. They were not British subjects *(R v Ketter* [1940] 1 KB 787), but were similar to, but not the same as, British protected persons: Mervyn Jones, *Who are British Protected Persons?* (1945) 22 BYIL 122, at 127. The Supreme Court of Israel decided that Palestinian citizenship ceased as from the establishment of the State of Israel in 1948: *Hussein v Governor of Acre Prison* (1950) 17 Int LR 111; *Naqara v Minister of Interior* (1953) 20 Int LR 49.

48. After 1948, the West Bank was occupied by Jordan. In December 1949 Palestinians living in the West Bank were given the right to claim Jordanian citizenship. In April 1950 Jordan annexed the West Bank, which gave all Palestinians living there Jordanian citizenship. By Article 3 of the Jordanian Citizenship Law of 1954 Jordanian citizenship was conferred on any person (other than a Jew) who was a Palestine citizen before May 15, 1948 and resided in Jordan between December 20, 1949 and February 16, 1954.

49. The West Bank came under the occupation of Israel from 1967, but the inhabitants continued to have Jordanian citizenship until 1988, when King Hussein announced that Jordan was renouncing its claims to the West Bank, and that henceforth its inhabitants would cease to be Jordanian citizens. In *Al-Kour v Governor of the Department of Inspection, Minister of Interior*, 1991, in (1990-1991) 6 Palestine Yb Intl L 68 the Jordanian High Court decided that the effect of the decree was that a person who held a Jordanian passport issued in 1987 could be deported to the West Bank from Jordan. The basis of the decision was that the decree was an act of state, and a sovereign state had the power to determine who were its citizens. For limitations on the right to withdraw nationality and create stateless persons see Weis, *Nationality and Statelessness in International Law*, 2nd ed. 1979, pp 117 et seq.

50. The questions which might arise are (a) whether the traditional principle of international law that a state may deny entry to non-citizens applies in such a case; (b) whether Article 12(4) of the International Covenant on Civil and Political Rights is capable of applying. The United Kingdom and Israel are parties to the International Covenant and the International Court of Justice, in its Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 ICJ Rep 136 expressed the view (at paragraphs 102-111) that the obligations on Israel imposed by the International Covenant applied to the occupied territories. But these are difficult, controversial and politically sensitive issues which would have to be considered in the light of the legal and political background, and this court should only express a view on them with the benefit of full argument and in a case in which they arise for decision.

Sir William Aldous:

51. I also agree.