Neutral Citation Number: [2008] EWCA Civ 1149

Case No: C5/2007/2422/AITRF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2008

Before:

LORD JUSTICE WARD
LORD JUSTICE SCOTT BAKER
and
LORD JUSTICE WALL

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Between:

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

- -
- -

Michael Fordham Q.C and Roger André (instructed by **Duncan Lewis & Co**) for the **Appellant**
Katherine Olley (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 9 July 2008

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Judgment

Lord Justice Scott Baker:

1. This is an appeal from a decision of the Asylum and Immigration Tribunal promulgated on 8 August 2007. That decision was a reconsideration following the rejection of the appellant's appeal by Immigration Judge Atkinson on 23 October 2006. The issues are whether a stateless Palestinian, a former habitual resident of the West Bank, who is likely to be refused re-entry by the Israelis, has a well founded fear of persecution for a Convention reason; and whether this court is bound by its decision in *MA (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 304.

2. The same point arises in *SH (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 1150. Unfortunately it did not prove possible for *SH* and the present case to be heard by the same constitution on the same occasion as the present appeal. The judgments have however been handed down together and I do not propose to repeat everything I have said in *SH.*

3. Briefly the history in the present case is as follows. The appellant, who is 28, arrived in the United Kingdom on 1 August 2006 and claimed asylum two days later on the basis that if returned to Palestine either Israeli forces would kill him or Hamas would capture, imprison and torture him. He is a stateless Palestinian from the West Bank.

4. On 24 August 2006 the Secretary of State refused his asylum claim, finding a number of "serious credibility issues". Major elements of his claim were, it was said, either exaggerated or totally fabricated to achieve his aim of remaining in the United Kingdom.

5. His appeal was rejected by Immigration Judge Atkinson, who found his account implausible for a number of reasons and inconsistent with the objective evidence. He found the appellant was not at risk from either the Israeli forces or Hamas. On 17 November 2006 reconsideration was ordered by Senior Immigration Judge Drabu whose reasons were:

> "I note that the Immigration Judge has made adverse comments on the appellant's credibility on the grounds of plausibility but it is properly arguable that all or some of those comments make no reference to the relevant objective evidence and are therefore in error of law as being unreasoned or inadequately reasoned findings. An order of reconsideration is made in respect of all issues raised in the grounds."

The issues raised in the grounds were all directed to the credibility findings.

6. The appellant claimed to have left the Occupied Territory of the West Bank on 16 or 17 July 2006 concealed in a lorry carrying vegetables. This was with the help of an Israeli merchant. After crossing into Israel, he boarded a bus and entered Gaza where he stayed for four or five days during which time he was introduced to an agent, Laviski.

7. Laviski and the appellant passed through a number of checkpoints to a port in Gaza where he was smuggled onto a cargo vessel to Egypt. He remained on board for

between two and seven days before disembarking in Cairo, where he remained in hiding for a further five or six days. Laviski provided him with a Saudi Arabian passport bearing his photograph but a false identity.

8. He flew from Cairo to Manchester arriving on 1 August 2006. He presented the false passport to the immigration officer at Manchester Airport, telling him he was a visitor and giving details of accommodation at the Regency Hotel. The appellant said he had travelled with Laviski to whom he returned the false passport. The appellant, who has no family or friends in the United Kingdom, claimed asylum two days later.

9. The reconsideration, which was a hearing de novo, was conducted by Designated Immigration Judge Wynne and Immigration Judge Grant-Hutchison. Like Immigration Judge Atkinson, they did not accept that the appellant's account, including his account of being smuggled out by Laviski, was credible. On this occasion, that conclusion is unassailable. Thus, were the appellant to return to his former home, he would not be at risk of persecution from the Israelis, Hamas or anyone else. The tribunal pointed out that he did not claim ever to have been persecuted by anyone, his case being that he had fled before the opportunity to persecute him arose.

10. The tribunal referred to, and strongly relied on, *MA* [2007] UK AIT *000*17 at tribunal level. It was a decision which had been promulgated six months before in February 2007. It was, the tribunal said at para 131, "the only current Country Guideline Case to date on the Occupied Territories." Merely being a Palestinian Arab in the Occupied Territories, even if a male aged between 16 – 35 from the northern part of the West Bank did not mean a person would face on return a real risk of persecution, serious harm or ill-treatment.

11. The facts in *MA*, to which I shall return in more detail shortly, were very similar to those in the present case. MA subsequently appealed to this court (Maurice Kay L.J., Lawrence Collins L.J. and Sir William Aldous) and their decision is at [2008] EWCA Civ 304.

12. Towards the end of its determination the tribunal in the present case gave some consideration to the risk to Palestinian Arabs who are forcibly returned and whether they would be successful in gaining re-entry into the West Bank via the King Hussein Bridge. It concluded there was nothing to overtake the decision of the tribunal in *MA*.

13. The single ground of appeal being pursued by Mr Fordham Q.C. before us is phrased in the following terms in the notice of appeal:

> "Refusal of entry to the place of habitual residence (Palestine) and deprival of citizenship by the controlling authority is an act of such severity that it amounts to persecution and breach of third party rights. It is submitted that the court should look anew at *MA (Palestinian Territories CG)* UK AIT 00017; and now in the light of *EB (Ethopia)* [2007] EWCA Civ 809, which post-dates the determination being appealed."

In the meantime the appeal in *MA* was decided in this court on 9 April 2008.

14. Mr Fordham puts the point in this way. The appellant is an ethnic, but stateless, Palestinian who is excluded from returning to the West Bank which is the country of his former habitual residence. If, as submitted is the case, he can show that his exclusion is for a Convention reason i.e. on the grounds of race and ethnic origin, he has a sustainable refugee claim. Never mind that the whole basis of his claim under Article 3 of the ECHR and the primary basis of his Convention claim, a well founded fear of persecution by the Israeli authorities and/or Hamas has failed, and that he does not wish to go back to the West Bank, when he is returned against his will he will be prevented from reaching the West Bank and thus has a viable asylum claim under the Convention. It goes without saying that, if Mr Fordham's argument is correct, there are likely to be a great many stateless Palestinians who would, likewise, have valid asylum claims. Mr Fordham makes it clear that his argument relates solely to a Refugee Convention claim. No claim is any longer pursued under Article 3 of the ECHR.

15. Now the fundamental obstacle in Mr Fordham's way is the decision of the Court of Appeal in *MA*, which was decided after the tribunal decided the present case. Unless the present appeal is distinguishable we are bound by that decision and the appellant's appeal must be dismissed whatever the merits of Mr Fordham's arguments.

16. Mr Fordham submits that all *MA* decided was that a stateless person returning to his country of former habitual residence is not for that reason of itself entitled to the protection of the Convention. What, he submits, the court did not decide in *MA* is whether a stateless person, excluded from returning to their country of former habitual residence where the exclusion is on the ground of race, is for that reason entitled to protection under the Convention.

17. At this point it may be helpful to say a word about the history of the West Bank. I gratefully adopt the account of Lawrence Collins L.J. in *MA* (see para 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, but were similar to, but not the same as British protected persons. The Supreme Court of Israel decided that Palestinian citizenship ceased as from the establishment of the State of Israel in 1948. 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 Palestinian citizen before 15 May 1948 and resided in Jordan between 20 December 1949 and 16 February 1954.

18. 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 claim to the West Bank, and that henceforth its inhabitants would cease to be Jordanian citizens. 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 that a sovereign state had the power to determine who were its citizens.

19. As was pointed out by the International Court of Justice in its advisory opinion of 9 July 2004 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* ICJ Reports 2004, p136) at para 78:

> "The territories situated between the Green Line see paragraph 72 above and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power."

20. What I draw from this is that stateless Palestinians from the West Bank fall somewhere in between persons who have rights of citizenship at one end of the spectrum and stateless habitual residents of a territory who have no rights at the other.

21. MA was a Palestinian Arab from Tulkarm in the northern part of the West Bank. It was proposed to remove him to the Palestinian Occupied Territories via Jordan and the King Hussein Bridge (also known as the Allenby Bridge, the Al-Karemeh Bridge and the Malik Hussein Bridge). This is the point at which a returnee will be asking the Israeli security forces for permission to re-enter the West Bank. It was agreed that, if re-admitted, he would thereafter have to pass through a number of checkpoints in order to travel to Tulkarn, his home town. However, the primary conclusion of the AIT was that, as a Palestinian being forcibly returned from abroad, he 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 to Jordan. The AIT concluded in para 62 that the position in Jordan was as described in the Country Guidance case of *NA (Palestinians – Not at general risk) Jordan CG* [2005] UKIAT 00094:

> "….ethnic Palestinians, whether or not recognised 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."

22. The AIT went on to say that given its decision that refusal of re-entry does not of itself amount to persecution, serious harm or degrading or inhuman treatment, they would nevertheless go on to consider the appellant's case on the hypothetical basis that he 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 to succeed under the Convention or the ECHR.

23. The Court of Appeal dismissed his appeal on the two grounds on which leave had been granted. The first ground was a jurisdictional ground and was whether there was an error of law justifying re-consideration by the AIT. The court held the AIT was

properly seized of the matter at the second stage re-consideration. The second ground was whether a stateless person who is denied entry on return to the country of his former habitual residence thereby becomes a victim of persecution. The court held that he does not. It is necessary to be clear about what precisely the court did decide in *MA* in order to ascertain whether this court is bound by the decision.

24. The Court of Appeal is bound to follow previous decisions of its own. The only exceptions to this rule (see *Young v Bristol Aeroplane Co. Ltd* [1944] 1 KB 718, 729) are:

> "(1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords; and (3) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam."

None of these three exceptions applies in this case. Mr Fordham accepts that no case or legislative provision was missed and he also accepts that it is not open to the court to look for a reason for not following *MA* if the decision on the face of it covers the present case. The crucial question, he submits, is what *MA* decided.

25. He says that, when the judgment in *MA* became available, it was clear that that case was a missed opportunity to deal head on with arguments which are put forward by the appellant in the present case which, if they are right should have yielded a different result. The fact, however, that *MA* might have been argued differently is not, in my judgment, a good reason for not following the decision. What matters is what *MA* actually decided.

26. Mr Fordham submits that the members of the court in *MA* were careful to describe what they were deciding. He refers us to critical passages in the judgment of Maurice Kay L.J:

> "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'." (para 26).
>
> and
>
> "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." (para 29).

27. Lawrence Collins L.J. said he agreed that the appeal should be dismissed for the reasons given by Maurice Kay L.J. and added:

> "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." (para 44).

Sir William Aldous agreed with both judgments.

28. So, submits Mr Fordham, the denial of re-entry to a stateless person is not *of itself* persecution and that is all *MA* decided, but the reason for it may be. The mere fact of shutting the door is not persecutory but why it was shut may make it so.

29. Both in the initial appeal before Immigration Judge Atkinson and in the reconsideration before Designated Immigration Judge Wynne and Immigration Judge Grant-Hutchison the main thrust of the appellant's case was about the treatment he feared receiving if returned to the West Bank. However, in both instances it was also argued that refusal of entry to a former habitual resident of the Occupied Territories could amount to persecution. Both sides referred to *AB and others (Risk-Return-Israeli checkpoints) Palestine C.G.* [2005] UKIAT 00046 and to *AK* [2006] EWCA Civ 1117. Immigration Judge Atkinson, having concluded that the appellant was not at risk of serious harm from the Israeli authorities or Hamas went on to hold that a finding of returnability was sustainable and that the denial of return to a person's place of former habitual residence for a stateless person did not amount to persecution.

30. *AB* appears to be the first reported decision in which the AIT (or IAT as it then was) considered the position of a returned failed asylum seeker of Palestinian ethnicity from the Occupied Territories when he would have to pass through a checkpoint manned by the Israeli authorities. That case involved three appellants but there was scant evidence of what was likely to happen to them (see paras 12, 13, 24 - 26). The Tribunal concluded (para 31) that there was no evidence that any of the three appellants was capable of successful removal to any part of the Occupied Territories or Israel. It continued at para 33:

> "We accept that each of the Appellants is stateless but on the totality of the evidence they do not, as we have said, satisfy us that there is real risk to them either should they in the course of any return be placed in a position where they are under the control of the Israeli Authorities…..The only relevant evidence is that the Israeli Security Forces will not allow ethnic Palestinians being forcibly returned from abroad to re-enter the Occupied Territories."

And at para 35:

> "The mere fact of being stateless, whilst we acknowledge the difficulties which it poses for each of the Appellants, cannot of itself amount to persecution or a breach of their human rights because there is no country which is excluding them from a nationality to which they would otherwise be entitled. There is no state of Palestine to offer them citizenship and neither is there any international obligation on the state of Israel, who

> retain a large measure of control over the Occupied Territories, to offer them citizenship."

31. The case of each of the appellants failed because, on the evidence, there was no realistic prospect any of them could be returned to any part of the Occupied Territories or, on the basis of the removal directions, that they could be removed from the United Kingdom. It was, said the tribunal, a highly unsatisfactory state of affairs, that in those circumstances they should be deprived of any status in this country.

32. In *AK* the tribunal had held it appeared possible to return Palestinians with the correct documentation to the Occupied Territories (para 37). The Court of Appeal held that although the factual correctness was in doubt given subsequent developments (para38) it did not amount to an error of law (para 41). Richards L.J said this:

> "46. Mr Williams submitted that the Israeli authorities' refusal of entry to his former habitual residence in the Occupied Territories would amount to persecution of the appellant. The argument ran along the following lines. A state's refusal to permit the return of one of its citizens can amount to persecution: "(i)f 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" (per Hutchison L.J. in *Adan and Others v Secretary of State for the Home Department* [1997] 1WLR 1107, 1126, original emphasis). So, too, a state's systematic and discriminatory denial of "third category" rights such as the right to work or the right to basic education can amount to persecution if the consequences are sufficiently severe: *Gashi v Secretary of State for the Home Department* [1997] INLR 96, 105H – 106C and 113F. To deny a stateless person re-entry into his place of former habitual residence is akin to a refusal to permit the return of a citizen and can amount in any event to a denial of his third category rights. In the appellant's case he was denied his third category rights while he was in the West Bank, and denial of re-entry would constitute an extension of the treatment he suffered then. The consequences would be sufficiently severe for this denial to amount to persecution. Such persecution would be on a Convention ground, in that it would be by reason of the appellant's racial origin or nationality or membership of a social group as a Palestinian.
>
> 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)."

Richards L.J.'s observations formed no part of the decision in *AK* and were obiter. They do in my view, however, carry considerable weight.

33. On the reconsideration in the present case which was, as I have said, de novo, again the primary focus was on what might happen to the appellant if he was returned to the West Bank. Again the tribunal did not find the appellant's account credible. By this time *MA* in the tribunal, [2007] UK AIT 00017, had become the relevant country guidance case. Judge Wynne giving the judgment of the tribunal said this at para 131 quoting from para 111 in *MA*.

> "It is a possibility that a young Palestinian Arab male between 16 and 35 years old from the northern part of the West Bank who is being returned or who returns after having lived abroad may attract the adverse attention of the Israeli security forces at the border and thereafter, but in our judgment, the risk is not such as to make this reasonably likely to happen. The same is true of any Palestinian Arab who does not have this profile. There is no evidence to show that the possession of valid travel documents would ensure re-entry."

34. Judge Wynne then said they found *MA* very much in point because he was about 24 years of age and came from Tulkarn in north part of the West Bank whereas the appellant was then about 27 and came from Zeta, only about 10 kilometres from Tulkarn. On the evidence there was nothing in particular to distinguish the case from *MA*. The appellant was of no interest in the past and would not be of any interest to the authorities on return.

35. He then recited part of para 62 of the AIT judgment in *MA*:

> "If a Palestinian Arab formerly resident in the West Bank who is being removed to the West Bank is refused re-entry into the Occupied Territories at the Israeli checkpoint on the King Hussein Bridge, then he would simply have to turn back into Jordan. The country guidance case on the situation of Palestinians in Jordan is *NA (Palestinians – Not at general risk) Jordan CG* [2005] UKIAT 00094……."

36. It is of note that, as recorded by Judge Wynne, counsel for the appellant asked for an adjournment of the original tribunal hearing because the appellant wished to instruct an expert on issues relating to the returnability of a stateless person to the West Bank, but no such expert evidence was called on the re-consideration hearing 10 months later.

37. In neither *MA* nor the present case was any evidence called to establish what was likely to happen when the individual concerned was forcibly returned to the King Hussein Bridge. Both tribunals proceeded on the basis that it was reasonably likely that they would be turned back. The tribunal in *MA* referred at para 60 to *AB* in which there was evidence which indicated that the Israeli security forces would not allow ethnic Palestinians being forcibly returned from abroad to re-enter the occupied territories. The tribunal went on to say that there was no indication whether Palestinian Arabs being forcibly returned from abroad would be successful in gaining

re-entry into the West Bank via the King Hussein Bridge. It had seen no background evidence to persuade it to take a different view from that taken by the tribunal in *AB*.

38. The tribunal referred to the CAABU (Council for the Advancement of Arab-British Understanding) Report of 18 May 2006 at p. 230:

> "Israel has revoked the residency rights of thousands of Palestinians living in the West Bank on the pretext of their having lived abroad for long periods. These individuals now find themselves separated from their families and their livelihoods …… Today, a number of them are trapped in Jordan after repeated attempts to return to their homes in the West Bank."

39. The appellant and MA are both young stateless Palestinian males from the West Bank. They live within a few kilometres of each other and both are failed asylum seekers in the sense of what they alleged would happen to them if returned to their former place of abode. Both would be returned against their will. The cases of the two seem to me to be indistinguishable on the facts. In the apparently likely event that the appellant would be refused re-entry, there is no evidence it would be for any reason other than the reason for which MA was refused re-entry. The reliance on refusal of re-entry was in both cases subsidiary to the main asylum claim. Each is being refused the opportunity to do something he expressly does not wish to do i.e. re-enter the place of his former habitual residence. The fact is that the appellant did not advance any evidence to the AIT on the question of re-entry; as to whether it would be granted or refused and as to whether, if refused, the reasons and whether such reasons would be discriminatory. Nor was there any evidence whether any such discrimination would be justified, or as to the practical effect of refusal on the appellant. There were no specific findings on these matters for the simple reason that there was no evidence on which to make any such findings. The court appears to have proceeded both in the present case and in *MA* on the basis of the country guidance case *AB* in which it was said (para 33) that the only relevant evidence was that the Israeli security forces would not allow ethnic Palestinians being forcibly returned from abroad to re-enter the Occupied Territories.

40. For my part I would like to know whether, if this is still the case, it applies to all Palestinians regardless of age, sex or circumstances. For example I can see that young males might be perceived generally as more of a threat than others in a different category. It is also to be noted that we are over three years down the line from the decision in *AB* and things change.

41. What Mr Fordham submits emerges from *MA* is that denial of re-entry to a stateless person *may* amount to persecution. He argues that all that *MA* decided is that it is necessary to prove something more than mere denial. This, he submits, is apparent from the careful choice of words of Maurice Kay L.J. at para 29 where he says that denial of re-entry to a stateless person is not *of itself* persecutory and the almost identical words of Lawrence Collins L.J. at para 44. The present appeal, he submits, raises the further question *why* ethnic Palestinians are refused entry. This is the additional factor to which Maurice Kay L.J. adverted at para 26 when he posed 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.

42. The 1951 Geneva Convention Relating to the Status of Refugees as modified by the 1967 New York Protocol ("the Convention") provides in Article 1A(2):

> "A. For the purposes of the present Convention, the term "refugee" shall apply to any 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 who, not having a nationality and being outside the country of his former habitual residence……. is unable or, owing to such fear, is unwilling to return to it."

43. Mr Fordham observes that *MA* was decided in line with earlier authority. In *Revenko v Secretary of State for the Home Department* [2001] QB 601 the issue was whether a stateless person who is unable to return to the country of his former habitual residence was, by those facts alone within the meaning of the 1951 Convention as modified. Revenko was born in a part of the USSR that in 1991 became the independent state of Moldova. Under the new rules of citizenship he was not considered a citizen of Moldova and was unable, having left the country on a visit to the United Kingdom, to return there. He was refused asylum on the basis that, although stateless, he was not a refugee within the definition in the Convention. The Court of Appeal upheld that decision. Each member of the court concluded that the paragraph in Article 1A(2) should be read as a whole and that it set out a single test for refugee status. Clarke L.J. said at 628H that it was clear that the purpose of the 1951 Convention was not to afford general protection to stateless persons. He added at 629A:

> "It is true that the 1951 Convention made some provisions with regard to stateless persons, but it would, in my view, be surprising if it intended to put stateless persons in a better position than nationals, which is, I think, the effect of the construction urged on the behalf of the applicant."

44. I do not think the decision in *Revenko* goes any further than to establish that mere statelessness is insufficient in itself to confer refugee status. It leaves open what, if any, additional features may be sufficient to tip the scales. Mr Fordham accepts that mere statelessness is, on its own, insufficient. He argues that there is an additional feature in the present case, namely exclusion on the grounds of race.

45. Mr Fordham's argument finds support in the Canadian case of *Thabet v The Minister of Citizenship and Immigration* [1998] 4 CF 21. Linden J.A, with whom the other members of the court agreed, referred to the words of Simpson J. in *Altawil v Canada* (1996) 114 FTR 241 (FCTD):

> "While it is clear that a denial or right to return may, in itself, constitute an act of persecution by a state, it seems to me that there must be something in the real circumstances which suggests persecutorial intent or conduct."

Then he said:

> "To ensure that a claimant properly qualifies for Convention refugee status, the Board is compelled to ask itself why the applicant is being denied entry to a country of former habitual residence because the reason for the denial may, in certain circumstances, constitute an act of persecution by the state. The issue, therefore, is whether the Board asked itself this question."

46. The court in *MA* was referred to these authorities and Maurice Kay L.J. summarised counsel's arguments based on them and the opinions of the academic writers. He said that in his judgment, the authorities, which were not binding at their highest, went 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. I agree with this assessment. What the authorities, including *MA*, leave open is the kind of additional circumstances that might render persecutory the denial of re-entry of a stateless person to his country of former habitual residence. What is the "more" referred to by Maurice Kay L.J. at para 26 without which denial of re-entry would not be persecutory? Whilst shutting the door is not on its own persecutory, the reason for doing so may be. So, submits Mr Fordham, the all important factor is the reason why the appellant will be refused re-entry. The answer, he submits, is obvious; it is because he is a stateless Palestinian Arab. Viewed in this light the appellant has a well founded fear of being persecuted for a Convention reason namely race because, as a Palestinian, he will not be readmitted to the West Bank.

47. I can see the force of this argument, but if it is so in the present case why was it not so *MA*? The facts, it seems to me, are so close it is impossible to put a sheet of tissue paper between them. Mr Fordham submits that there is an issue here that was not decided in *MA*, but both the appellant in *MA* and the appellant in the present case are young Palestinian Arabs from the same part of the West Bank and there is nothing, other than the fact that the appellant is by race a Palestinian, that it is submitted amounts to additional circumstances to take the present case outside the general principle propounded in *Revenko* and followed in *MA*. It seems to me inconceivable that the court in *MA* did not have clearly in mind that he was a Palestinian Arab.

48. Neither in *MA*, nor in the present case, was any evidence before the court as to what would happen to the individuals concerned at the Israeli end of the King Hussein Bridge. As Maurice Kay L.J. pointed out in *MA* at para 32 there was something of an evidential vacuum in relation to the logistics of returning the appellant via Jordan and the King Hussein Bridge and that no arrangement had yet been made in that or any similar case.

49. Mr Fordham also relied on *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809. After the war had broken out between Ethiopia and Eritrea in 1998, Ethiopia deprived many people of Eritrean origin of their Ethiopian citizenship. EB's identity documents were taken from her so that she would have difficulty in proving her Ethiopian nationality. Her case, which succeeded, was that she had effectively lost her nationality or citizenship when her identity documents were removed by the executive arm of the state of Ethiopia and that she had a well founded fear of persecution when she left Ethiopia which continued. Longmore L.J. said at para 70:

> "The question, therefore, is whether the fact that *EB* had her identity documents taken from her in Ethiopia with the aim of making it difficult for her in future to prove her nationality and the fact that she has now indeed lost her nationality *prima facie* entitles her to refugee status on the basis that the taking of identity documents constituted persecution when it happened and constitutes persecution for as long as that deprivation lasts. It seems to me that there can be no difference between such circumstances and an actual deprivation of citizenship. The precariousness is the same; the "loss of the right to have rights" is the same; the "uncertainty and consequent psychological hurt" is the same. In these circumstances the taking of EB's identity documents was indeed persecution for a Convention reason when it happened……It is the arbitrary nature of the state employees' action that, in my view, distinguishes this case from *Revenko v SSHD* [2001] QB 601 where, as my Lord says, the arguments were, in any event very different."

50. Mr Fordham argues that the reasons her documents were removed was because of her ethnic origin. The present case he submits is stronger, exclusion being on racial grounds. But EB seems to me to have an important distinction from the present case; EB had citizenship and thus rights of which she was de facto deprived. Habitual residence is a state of affairs rather than something that confers rights. Refusal of re-entry is refusal of a right the appellant never had.

51. Mr Fordham also referred to and relied on the International Covenant on Civil and Political Rights (ICCPR) 1996. This is not part of our domestic law, but the United Kingdom is a signatory to the Covenant. Article 12.4 provides that no one shall be arbitrarily deprived of the right to enter his own country. It is notable that that word "country" is used in contradistinction to "state" in Article 12.1. "Own country" is on the face of it broader than nationality. Further support for the relevance of this is to be found in the Law of Refugee Status by Professor Hathaway at pages 109 and 113 which suggests that protection from this kind of harm (being deprived of the right to enter one's own country) falls within the definition of persecution.

52. Article 28 of the ICCPR provides for the establishment of a Human Rights Committee which, by Article 40.4, is to study the reports submitted by the states parties to the Covenant and transmit its reports and general comments to the states parties. The committee did just that with regard to Article 12 on 2 November 1999. This is what it said at para 20:

> "20. The wording of Article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is nationality acquired at birth or by conferral; it 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. This

> would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of Article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, states parties should include in their reports information on the rights of permanent residents to return to their country of residence."

The point is made that the phrase "close and enduring connections with" is wider than habitual residence."

53. This court in *MA* was aware of the ICCPR point although it was only drawn to its attention after oral submissions had concluded. Maurice Kay L.J. disposed of it at para 28 as follows:

> "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 58) 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."

54. The final point made by Mr Fordham to which I should refer is that Article 1A(2) of the Convention incorporates unwillingness to return as well as inability to return.

55. Ms Katherine Olley, for the Secretary of State, accepts the court should proceed on the basis that there is a real risk that the appellant will be refused re-entry if he is forcibly returned to the King Hussein Bridge. However, she submits that it would be unreal to suppose that the Court of Appeal in *MA* did not have in mind that *MA* was an ethnic Palestinian and that accordingly the facts of the present case are on all fours with *MA* and this court is bound by the decision in that case. It cannot be persecution to deprive a person of a right he never had. As a stateless person he has no right of re-entry to his place of former habitual residence.

56. Ms Olley has no quarrel with the line of authority that requires something more than mere refusal of re-entry to a stateless person to his country of former habitual

residence. She argues that the 'something more' is ill treatment that would engage Article 3 of the ECHR, or something akin to it of a physical nature. It would I think follow that the reason for a bare refusal of re-entry is irrelevant.

57. Our attention was drawn to Paragraph 5 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (S.1. 2006/2525) which transposes into English Law Art 9 of Council Directive 2004/83/EC of 29 April 2004 and prescribes minimum standards for the qualification and status of third country nationals or stateless persons as refugees. However, Ms Olley did not really develop any argument upon it, simply submitting that the "something more" was in the nature of Article 3 ill treatment. The point was more fully developed in *SH* and for the reasons I there give I think para 5 of the 2006 Regulation supports Ms Olley's contention that the "something more" would have to be in the nature of Article 3 ill treatment, otherwise it would not reach the threshold required for persecution.

58. Refusal of re-entry to a stateless person to the country of his former habitual residence is a subject that raises difficult issues of law and I would not wish to express a view on what factors might constitute the additional circumstances envisaged by this court in *MA*. The 'additional factor' relied on by Mr Fordham is that the reason for refusal of re-entry will be that the appellant is a Palestinian Arab. But so was the appellant in *MA.* In my judgment the court is bound by the decision in that case. The ratio of *MA* covers stateless Palestinians being returned to the West Bank. The present case is indistinguishable. Without up to date evidence about what is likely to happen at the King Hussein Bridge to stateless Palestinians who are forcibly returned, and full argument from the Secretary of State, I would prefer not to express an opinion on the validity of Mr Fordham's powerful arguments.

Conclusion

59. The appellant's expressed desire is *not* to return to the West Bank. His claim that if returned there he will be persecuted by the Israelis and/or Hamas has been disbelieved. His claim that refusal of re-entry when forcibly returned to the King Hussein Bridge will amount to persecution for a Convention reason (race) is unsustainable in the light of the decision in *MA,* quite apart from the fact that he does not wish to go back to the West Bank anyway. I would dismiss the appeal.

Lord Justice Wall:

60. I agree.

Lord Justice Ward:

61. I also agree.