Case No: C4/2004/2436

Neutral Citation Number: [2006] EWCA Civ 1117
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE IMMIGRATION APPEAL TRIBUNAL
(Appeal No. HX/44789/03)

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday 31st July 2006

Before :

THE PRESIDENT OF THE FAMILY DIVISION
(Sir Mark Potter)
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE RICHARDS

- -

Between :

	AK	**Appellant**
	- and -	
	Secretary of State for the Home Department	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Christopher Williams and Lois Cole-Wilson (instructed by **Salfiti & Co**) for the **Appellant**
Tim Eicke (instructed by **The Treasury Solicitor**) for the **Respondent**

- -

Judgment

LORD JUSTICE RICHARDS :

1. 1. This is an appeal against a determination of the Immigration Appeal Tribunal notified on 22 September 2004. It was linked to another case which raised similar issues but which, in the event, has not proceeded to a hearing. Delay was caused in part by the untimely death of counsel for the appellant in the linked case and in part by ultimately unsuccessful efforts on the part of the present appellant's legal representatives to obtain public funding for leading counsel.

2. 2. Permission to appeal was granted on the basis that the case appeared potentially to raise issues of statelessness in international law and the consequences in refugee law and human rights law of a situation in which a stateless person is denied entry by the state authorities to his place of former habitual residence. In the event, and in particular because I do not consider there to be any basis for interfering with the tribunal's relevant findings of fact, such issues do not in my view arise for decision.

3. 3. There is, however, a prior jurisdictional issue that I do think it appropriate to decide. It concerns the jurisdiction of the tribunal, on an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, to consider whether an appellant would be refused re-entry by the state authorities to his home country or place of former habitual residence (and, if so, what the legal implications of such refusal might be) in a case where no removal directions have been set by the Secretary of State. That issue involves consideration of the scope of the Court of Appeal's decision in *GH v Secretary of State for the Home Department* [2005] EWCA Civ 1182, [2006] INLR 26. Although the present case relates to the powers of the former Immigration Appeal Tribunal, the issue would appear to be equally relevant to the jurisdiction of the Asylum and Immigration Tribunal.

The factual and procedural background

1. 4. The appellant is a Palestinian from the Occupied Territories who claimed asylum in the United Kingdom at the end of 2002. His case was that he had lived in the Al Amari refugee camp on the West Bank and had joined Al-Fateh in July 1988 at the age of 14. On three occasions in the period 1989-1990 he was arrested and detained by the Israeli authorities and was then charged and imprisoned for substantial periods. He also claimed to have been arrested

and detained on many occasions since 1990, but could not remember the dates. He said that the Israeli authorities targeted all his family members: three of his brothers had been detained and imprisoned for lengthy periods in the 1990s.

2. 5. The appellant said that after 1995 his activities for Al-Fateh became less but that from the beginning of the Intifada in 2000 he had distributed leaflets, written slogans on walls and attempted to recruit members. In early 2002 he was called for interview by the Israeli security services but failed to attend. He claimed that the Israeli authorities wanted him to become a spy against his own people and that if he fell into Israeli hands and refused to collaborate he would be detained as before and might be executed. On 22 December 2002 he left the West Bank and travelled to Jordan, where he remained for four days with an uncle. While there, he was informed that a cousin with whom he intended to travel had been killed by the Israeli army. He therefore left Jordan alone on 28 December 2002 and flew to the United Kingdom, where he claimed asylum on arrival.

3. 6. The asylum claim and a related claim to human rights protection were refused by the Secretary of State by letter dated 30 May 2003. On 12 June 2003 the appellant was served with a notice of refusal of leave to enter. The notice also stated: "I have given / propose to give directions for your removal to Palestine". No removal directions had been set, however, and none have been set to this day.

4. 7. An appeal to an adjudicator on asylum and human rights grounds was heard on 28 August 2003. On that day the case was put back from 10.00 a.m. because the appellant's solicitor had not arrived. When telephone contact was made with the solicitor, he indicated that he had got lost on the way. In the light of the fact that the adjudicator had a full list in the afternoon, the case was called on at 12.40 p.m. even though the solicitor had still not arrived. The Home Office Presenting Officer was then given leave to amend the notice of refusal so as to substitute "Palestinian Territories" for "Palestine" in the reference to removal directions. Evidence and submissions were heard and the determination was reserved. When the appellant's solicitor eventually arrived at 2.15 p.m., he was allowed to review the evidence and make submissions, but the adjudicator refused to reopen the case beyond that. The adjudicator's determination was again reserved.

5. 8. In his determination, promulgated on 3 September 2003, the adjudicator dismissed the appeal. It had not been in dispute before him that the appellant was a member of Al-Fateh or that he had been detained and ill-treated by the Israeli defence forces in the period 1989-1990. The adjudicator found, however, that mere membership of Al-Fateh and a previous record of arrests and detentions were not sufficient in themselves to establish a real risk of persecution. Nor was there any additional factor that would create such a risk. The appellant had much exaggerated his circumstances to bolster a weak and opportunistic claim. In particular, the adjudicator did not accept that the Israelis wanted to make the appellant a spy or collaborator or that they had sought him during 2002 or that the death of his cousin in December 2002 was in any way related to the appellant's own circumstances. Taking the evidence in the round he found the appellant to be no more at risk than the average male Palestinian between the ages of 15 and 50 with Al-Fateh sympathies or membership. That was not sufficient to establish either a well founded fear of persecution by the Israelis or a real risk of proscribed treatment sufficient to meet the article 3 ECHR threshold. Such fears as the appellant entertained for the future were found to be highly speculative.

6. 9. Permission to appeal to the tribunal was subsequently granted "in the interests of fairness", because the notice had been amended and evidence had been heard in the absence of the appellant's solicitor. At the hearing of the appeal, however, no issue was taken before the tribunal with regard to the amendment of the notice or the hearing of evidence in the solicitor's absence, and the appeal took the form of full argument on the substantive issues raised by the grounds of appeal.

7. 10. The case advanced on the appellant's behalf before the tribunal included arguments concerning the appellant's statelessness and whether his return to the Occupied Territories was possible. In relation to those arguments the tribunal found (at para 33) –

> "… that irrespective of the academic argument as to the statelessness or otherwise of Palestinians under international law, they are not, in general terms, to be deemed refugee on a basis of a claimed inability to be returned to their former habitual residence. The Tribunal is satisfied that there is no evidence to show refusal of re-entry to the appellant, or to Palestinians in general, to their formal habitual residence in Occupied Territories. They may properly be returned through Jordan and across, for example, the Allenby Bridge."

1. 11. The tribunal went on to find that, although the Israeli authorities carried out strict security checks and there was evidence of many problems in relation to freedom of movement within the Occupied Territories and arbitrary arrests and detentions, "these by and large relate to reactions to security measures designed to deal with demonstrations, civil disorder and terrorism" (para 34). The tribunal then expressed agreement with the adjudicator's assessment of the evidence, including his assessment that the appellant was not credible and had exaggerated his case (para 37). Having concluded that the adjudicator had made a proper assessment of the evidence and was correct in his interpretation of the relevant law, the tribunal upheld his decision and dismissed the appeal.

The issues in the present appeal

1. 12. On the appeal to this court, the appellant does not seek to challenge the tribunal's upholding of the adjudicator's adverse credibility findings or the resulting assessment that the appellant did not have a well founded fear of persecution within the Occupied Territories and was not at risk of ill-treatment there contrary to article 3 ECHR.

2. 13. The appellant's case on the appeal is essentially that (1) the tribunal erred in law in finding that it was possible for the appellant to be returned to the Occupied Territories through Jordan and across the Allenby Bridge; and (2) that was a material error because, if the tribunal had found as it should that return to the Occupied Territories was impossible, it would have had to consider a number of further legal issues which it might have resolved in the appellant's favour. Those further issues all concern the appellant's position as a stateless person: it is contended that (3) a state authority's denial of entry by a stateless person to his place of former habitual residence (in this case the Occupied Territories) engages the Refugee Convention where such entry is denied on a Convention ground; (4) removal of a stateless person from the United Kingdom in circumstances where he will be denied entry to his place of former habitual residence also engages the United Kingdom's obligations under article 3 ECHR; and (5) the Secretary of State failed to take into account a relevant consideration, namely the 1954 Convention relating to the Status of Stateless Persons, when deciding whether or not to grant discretionary leave to the appellant.

3. 14. Mr Eicke, for the Secretary of State, takes issue with each aspect of the case so advanced. He puts at the forefront of his submissions, however, a jurisdictional point which, if correct, would make it unnecessary to consider any of the substantive issues raised by the appellant. He submits that the appeal to the adjudicator (and thus the further appeal to the tribunal) was concerned only with the question whether the appellant would be at risk of persecution or of ill-treatment contrary to article 3 if he were to be returned to the Occupied Territories. The adjudicator's conclusion, as upheld by the tribunal, that there was no risk of persecution or of article 3 ill-treatment within the Occupied Territories was therefore determinative of the appeal. The question whether it would be *possible* for the appellant to re-enter the Occupied Territories, and the legal consequences if that were not possible, did not arise for decision on the appeal. Those issues will fall to be addressed if and when the Secretary of State sets removal directions that engage them; and a challenge to any such removal directions will have to be brought by way of a claim for judicial review rather than an appeal to an adjudicator. All that lies in the future, however, since no removal directions have yet been set and the Secretary of State has not committed himself to any particular course of action.

4. 15. The jurisdictional issue raised by Mr Eicke falls logically to be considered first.

The jurisdictional issue

1. 16. The appeal from the Secretary of State's decision refusing leave to enter was brought under section 82 of the Nationality, Immigration and Asylum Act 2002. Section 82(1) provides a right of appeal where an immigration decision is made in respect of a person. By section 82(2)(a), "immigration decision" includes a refusal of leave to enter. Section 84(1) specifies the grounds on which an appeal may be brought. The relevant ground for present purposes is:

> "(g) that the removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act as being incompatible with the appellant's Convention rights."

1. 17. The effect of these provisions was considered in *GH v Secretary of State for the Home Department* [2005] EWCA Civ 1182, [2006] INLR 26 (to which I will refer simply as "*GH*"). The appellant in *GH* was an Iraqi Kurd from the Kurdish Autonomous Area in northern Iraq who claimed asylum in the United Kingdom. It was found that in the conditions prevailing following the toppling of Saddam Hussein's regime he could live safely in his former home area. But the appellant contended that he would still be at risk when travelling within Iraq from the point of arrival to his home area, and that the tribunal could and should consider the safety of the route and method of return. The tribunal held that if there is a real risk of persecution in the home area, then the practicability of travel to a safe haven in the appellant's own country may be relevant for the purposes of the question of internal relocation, but unless such a real risk in the home area is established it is not necessary or appropriate to embark on an inquiry as to the practicability of travel. The appellant's case in the Court of Appeal was that the tribunal had thereby erred in law.

2. 18. The issue before the Court of Appeal was defined as follows (para 1):

> "On an appeal under s.82 of the 2002 Act brought on the grounds that removal from the UK would breach the UK's obligations under the Geneva and Human Rights Conventions, does the Immigration Appellate Authority have jurisdiction to take into account what may happen in the course of the immigrant being removed from the United Kingdom and travelling to his safe home area in the country concerned?"

1. 19. For the Secretary of State it was contended in *GH* that section 84(1)(g) is concerned with removal in principle and that where an appeal is brought under that provision against an immigration decision the issue is whether removal *per se* would breach the United Kingdom's international obligations: this involves consideration of the circumstances in the country of origin and the facts of the particular case, but not the route of return or travel arrangements. For the appellant, it was argued that section 84(1)(g) is to be read more broadly as encompassing a ground of appeal that the particular route or method of proposed removal would breach the United Kingdom's obligations: "removal" includes the detail of how it is to be achieved, and method of return is an integral part of removal.

2. 20. The court pointed to the fact that removal directions are normally quite separate and distinct from the immigration decision. It is a two-stage process in which the removal directions are normally given separately and later. Under the previous legislation, namely section 69(5) of the Immigration and Asylum Act 1999, removal directions themselves were capable of attracting a right of appeal. By contrast, the 2002 Act does not list the making of removal directions as a decision against which an appeal may be brought. The court attached decisive weight to that absence of express provision in the 2002 Act.

3. 21. Scott Baker LJ stated his conclusions as follows:

> "44. In my judgment the first and fundamental matter that is fatal to the appellant's case is that no removal directions have ever been set. Even assuming jurisdiction, there is nothing against which any appeal could bite.
>
> 45. In my judgment, the fact that the 2002 Act does not include 'removal directions' within the description of 'immigration decision' against which there is a right of appeal is determinative of Parliament's wish that there should be no free-standing right of appeal against removal directions. This seems to me to be entirely consistent with the desire to streamline the appellate process in immigration and asylum cases and prevent repeat applications. That, however, leaves open the question of jurisdiction in cases where removal directions are given as part of, or are entirely incidental to, an immigration decision that is itself appealed as falling within s.84(1)(g). Also, there may be circumstances where the Secretary of State adopts a routine procedure for removal or 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.
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> 46. In my view the appellate tribunal's jurisdiction attaches to an immigration decision, as defined in s.82(2) of the 2002 Act. In order to found an appeal an appellant would have to challenge one or more of the decisions specified in (a)-(k). If the Secretary of State chose to give removal directions at the same time as and linked to, for example his refusal of leave to enter the UK (which is not, as I understand it, his ordinary practice at the present time), then it seems to me that common sense dictates that both should be considered at the one appeal. That would be entirely in keeping with the policy of the legislation. It also accords with the approach of the court in *Kariharan*. Furthermore, I regard the wording of s.84(1)(g) as wide enough to permit this.
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> 47. What I do not think the present legislation permits is an appeal against entirely free-standing removal directions, as would be the case when they are made separately on a later occasion. In such circumstances the remedy for unlawful directions would be a judicial review. It is, however, unnecessary for present purposes to decide the extent of the appellate tribunal's jurisdiction in circumstances where removal directions are given at one and the same time as an appealable immigration decision, or where there is an established route of return which it is known will be used.
>
> 48. The present appeal in my judgment fails because no removal directions have been set. The question whether, when they are, there could be a breach of the UK's international obligations, is wholly academic. What directions the Secretary of State eventually decides to give, if any, are a matter for him. If, when he gives directions, it is contended that they are unlawful because they breach the UK's international obligations, the remedy would be judicial review. There is no right of appeal under the 2002 Act."

1. 22. Keene LJ agreed, stating that it was of fundamental importance that no removal directions had yet been given and that the method of return to the appellant's home area and the route which would be taken in pursuance of such directions were therefore wholly unknown. In such circumstances the appellant was in no position to establish either a well-founded fear of persecution or a risk amounting to a breach of articles 2 or 3 ECHR arising solely as a consequence of the method or route of return to his home area. But Keene LJ, too, was of the view that there would be cases where the tribunal could properly consider the route and method of return:

> "51. It may be that there will exist cases where the appellant may be able to make good this deficiency, even in the absence of removal directions, because 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 UK that a particular method and route would 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 s.82(1). It would be open to an appellant to rely on ground (g) under s.84(1), just as he could if the Secretary of State had chosen to give removal directions as part of the immigration decision. Like Scott Baker LJ, I take the view that the wording of s.84(1)(g) is wide enough to give the appellate tribunal jurisdiction to take into account the 'en route' risks in such cases. But I share Scott Baker LJ's view … that the legislation does not enable an appeal to be brought against free-standing removal directions.
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> 52. In the present case, no method or route of return has been specified as yet by the Secretary of State. The appellant was, in effect, asking the appellate tribunal to speculate about such matters and to assess the risks involved in a hypothetical situation. The tribunal was right to reject such a course of action. If, in due course, removal directions are set which allegedly give rise to a real risk to the appellant, any challenge to those directions will have to be by way of judicial review …."

1. 23. Sir Mark Potter P agreed with both judgments.

2. 24. The Secretary of State's case before us, as put by Mr Eicke, was that the principles laid down in *GH* are directly applicable to the appellant's claim and that the tribunal had no jurisdiction to consider the question whether the appellant would be refused re-entry to the Occupied Territories if his removal from the United Kingdom were attempted. Mr Eicke placed stress on the two-stage process referred to in *GH* and submitted that it is only at the second stage, once removal directions are actually set, that questions relating to the practicability and risk of particular routes or methods of return can arise for consideration. As in *GH*, that second stage has not yet been reached since no removal directions have been set.

3. 25. Mr Williams sought to distinguish *GH* on the basis that in the instant case, unlike *GH*, the court is not concerned with *en route* risks to the appellant but with the question of what will happen when he reaches the border of his place of former habitual residence, namely the West Bank, and the likelihood that he will be refused re-entry into the West Bank. He submitted that consideration of denial of re-entry is no different in substance from consideration of what would happen inside the West Bank once the applicant was returned there. Each situation properly engages the question, under section 84(1)(g), whether removal of the appellant "in consequence of" the relevant immigration decision, namely the refusal of leave to enter, would breach the United Kingdom's obligations under the Refugee Convention and be unlawful under the Human Rights Act. That question can and should be considered at the point where the tribunal hears an appeal against the immigration decision, rather than by way of an application for judicial review at a later stage when removal directions are set.

4. 26. For my part, I would accept the substance of Mr Williams's submissions on this issue. In my judgment the circumstances of the present case are materially different from those under consideration in *GH*, and what the court said in *GH* in relation to the route and method of return does not bite on the question of refusal of re-entry upon which this aspect of the appellant's claim is based.

5. 27. It is common ground that the tribunal, on an appeal under sections 82(1) and 84(1)(g), can and must consider the position that would exist *within* an appellant's home country or place of former habitual residence if he were removed there in consequence of the immigration decision. In a case where no removal directions have been set it is in a sense a hypothetical question, even if the notice of refusal of leave to enter states, as in this case, that it is "proposed" to issue removal directions. The need to consider that question follows, however, from the very terms of section 84(1)(g): the ground of appeal is that removal in consequence of the immigration decision *would breach* the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act.

6. 28. I see no difference of principle between consideration of the position *within* the territory and consideration of the position *at the border* of the territory. Thus, if an appellant claims to fear persecution or article 3 ill-treatment by reason of the conduct of the state authorities at the border, there is no reason why that claim should not be examined by the tribunal in the same way as a claim to fear persecution or ill-treatment by reason of the conduct of the state authorities within the territory. The one question is neither more nor less hypothetical than the other, and section 84(1)(g) is equally apt to cover both. Indeed, there can be no doubt that the tribunal *would* be required to examine, for example, a claim to fear torture at the hands of the authorities at the border. In my view it should make no difference that the conduct relied on takes a different form, namely the authorities' refusal of re-entry into the territory where that refusal is alleged to amount to persecution or article 3 ill-treatment. (Whether there is any substance to the argument that refusal of re-entry would amount to persecution or article 3 ill-treatment is a different question. The question here is whether the tribunal has jurisdiction to address that issue at all.)

7. 29. To put the above point in a slightly different way, in *GH* it was contended for the Secretary of State that section 84(1)(g) is concerned with removal "in principle"; but it seems to me that the argument that the appellant would be denied re-entry into the Occupied Territories and that this would amount to persecution or article 3 ill-treatment relates as much to the principle of his removal (or attempted removal) as does the question whether he would be at risk of persecution or article 3 ill-treatment within the Occupied Territories. Both aspects are central to the case raised under the Refugee Convention and under article 3, and both fall more naturally to be determined in the appeal against the immigration decision rather than by way of a later challenge to removal directions.

8. 30. Further, the appellant's case does not depend upon assuming a particular route or method of removal. His case is that he would be denied re-entry whatever route or method the Secretary of State might choose. So the issue does not depend upon some future contingency or variable. The court in *GH* was of the view that the tribunal would have jurisdiction to determine the safety of a particular route and method where it was clear at the time of the appeal that that route and method would be adopted. If the statutory provisions governing an appeal confer jurisdiction in those circumstances, then in my view they must equally confer jurisdiction to determine the issue whether, irrespective of the particular route or method of return, there would be a refusal of re-entry amounting to persecution and article 3 ill-treatment.

9. 31. Whilst the argument before us concentrated on *GH*, I should also mention the decision of the Asylum and Immigration Appeal Tribunal in *JM (Rule 62(7); human rights unarguable) Liberia** [2006] UKAIT 00009, which concerned an appeal against a refusal to vary leave to remain where no removal directions had been set. In the course of that decision, at paras 31-33, the tribunal made some observations about the scope of an appeal under sections 82 and 84(1)(g). It stated that the appellate authorities have a duty to ascertain whether appellants are refugees even if their

removal is not imminent, but that human rights issues fall to be considered only at a later stage, when an actual decision is taken to remove. The tribunal suggested that any removal would not be "in consequence of" the decision to refuse to vary leave to remain, but "in consequence of" a separate decision to remove. Although the tribunal's decision was promulgated several months after *GH*, it makes no reference to *GH* and its reasoning does not sit well with that in *GH*. I think it unnecessary, however, to say anything more about the decision. Mr Eicke did not rely on the decision in support of his jurisdictional argument; and the tribunal's observations, even if taken at face value, would not be decisive in the present case, where the main thrust of the appellant's substantive arguments concerns his status as a refugee rather than separate human rights issues.

10. 32. For the reasons I have given, I take the view that it fell within the tribunal's jurisdiction to consider the issues that the appellant seeks to raise before us concerning the appellant's position as a stateless person and the implications of refusal by the state authorities to allow him re-entry into the Occupied Territories.

11. 33. That makes it necessary for me to move on to examine the first step in the appellant's substantive arguments, namely the challenge to the tribunal's finding that return was possible as a matter of fact.

Whether the tribunal erred in law in finding that return was possible

1. 34. Mr Williams submitted that the tribunal erred in law in finding that it was possible for the appellant to be returned to the Occupied Territories through Jordan and across the Allenby Bridge. The error is said to have lain primarily in the statement that there was "*no evidence* to show refusal of re-entry to the appellant, or to Palestinians in general, to their former habitual residence in Occupied Territories" (emphasis added). It is said that there was such evidence. The 2003 US Department of State report for Israel and the Occupied Territories recorded that:

> "In December [2003] three Palestinians deported from abroad to the West Bank and Gaza were denied entry at the Allenby Bridge border crossing. The three were returned to the deporting country, where they currently resided as stateless persons."

That passage was contained in a section of the report on freedom of movement within the Occupied Territories, foreign travel, immigration and repatriation. The whole section was included in the bundle of documents before the tribunal. Mr Williams submitted that the tribunal must have overlooked the passage or failed to take it into consideration, and further that there was no material before the tribunal upon which the tribunal's finding that return was possible could have been based.

1. 35. Mr Williams also relied on the fact that a contrary conclusion was reached by a differently constituted tribunal a few months later in the country guidance case of *AB, IM & ZX (Risk – Return – Israel Check Points) Palestine CG* [2005] UKIAT 00046. The essential issue in *AB* was whether failed asylum-seekers of Palestinian ethnicity from the Occupied Territories would be at real risk of persecution at the point of return where they would have to pass through a checkpoint manned by the Israeli authorities in order to regain the West Bank or the Gaza Strip. There are three relevant features of the evidence in that case. First, the tribunal pointed to deficiencies in the evidence filed by the Secretary of State and observed that "[t]here is, therefore, no evidence before us that anyone has been successfully removed to any part of the Occupied Territories or that the Secretary of State would seek the procurement of any Emergency Travel Documents other than such as might be issued via the Palestine General Delegates Office in London" (para 24). Secondly, the tribunal had before it reports from two experts, Dr Tamimi (who also gave oral evidence) and Mr Joffe, as to restrictions on entry into the Occupied Territories, and in particular about the need for *Israeli* travel documentation, and as to the absence of any known case of an ethnic Palestinian being forcibly returned to the Occupied Territories. Thirdly, the tribunal referred to the relevant section from the 2003 US Department of State report, including the passage quoted above, and said that in its view it was implicit from what was said in the section that movement without the requisite Israeli documents either into or out of the Occupied Territories was not possible.

2. 36. It was on the basis of all that evidence that the tribunal in *AB* reached the following conclusions:

> "31. The objective evidence therefore supports what has been said both by Dr Tamimi and Mr Joffe and there is no evidence before us that any of the three Appellants are capable of successful removal to any part of the Occupied Territories or Israel. We have no reason to doubt Dr Tamimi's specific evidence that without relevant Israeli issued documents any such returnee via Jordan would be prevented from onward travel by the Jordanian authorities.
>
> 32. We have therefore come to the conclusion on the totality of the evidence before us that there is no reasonable likelihood that any of the Appellants would reach the Israeli checkpoints through which they would have to pass in order for the removal directions made to be effective …."

1. 37. Mr Eicke, for the Secretary of State, took issue with the contention that the tribunal in the present case erred in law in finding that the appellant's return was possible. He submitted that such a conclusion was properly open to the tribunal on the evidence before it. Nor was there any uncontentious and objectively verifiable mistake of fact capable of amounting to an error of law in accordance with the principles laid down in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 531. Nevertheless he informed the court that in the light of the later decision in *AB* the Secretary of State had accepted until recently that it was not possible to remove the present appellant forcibly to the West Bank. In the light of more recent developments, however, the Secretary of State no longer accepted that this reflected the true factual position. It now appeared to be possible to return Palestinians who held the correct

documentation to the Occupied Territories. But the position on the ground was constantly changing and it was therefore difficult at any point in advance of the actual removal directions to indicate with any degree of certainty how such return would be effected. The Secretary of State also continued to investigate the possibility of securing the appellant's voluntary return to the West Bank.

2. 38. I would reject Mr Williams's submissions on this issue. I do not think that the tribunal can be said to have fallen into legal error in finding that the appellant's return was possible, even if the factual correctness of that finding may be open to doubt in the light of subsequent developments.

3. 39. First, in my view the tribunal plainly had regard to the passage in the US Department of State report about the denial of entry to three Palestinians deported from abroad. That passage had been deployed by the appellant's solicitor in his submissions in reply and was referred to expressly by the tribunal in summarising those submissions shortly before the paragraph in which it said that there was "no evidence to show refusal of re-entry to the appellant, or to Palestinians in general, to their former habitual residence in Occupied Territories". Moreover the passage itself contained no details of the circumstances in which entry was denied and, taken by itself, did not amount to evidence showing either that Palestinians in general were refused re-entry or that a person in the position of the appellant would be refused re-entry.

4. 40. Secondly, the section containing the passage in question contained information that, on its face, supported the possibility of re-entry by Palestinians into the Occupied Territories despite the various restrictions placed on free movement. It stated, for example, that as a result of restrictions imposed by the Israelis, "most Palestinians could exit and enter the West Bank and Gaza only via the Allenby Bridge or Rafah crossing points, respectively, which were closed completely several times during the year". Although the tribunal in *AB* considered it implicit that movement into or out of the Occupied Territories was not possible without the requisite Israeli identification documents, the section contained nothing explicit to that effect, and it seems to me that the tribunal's view was conditioned by the other evidence it had received. Nor was there anything in the section to show that Israeli identification documents would not be sought or would be unobtainable for a person in the appellant's position. In short, the section provided some support for, and certainly did not negative, the possibility of the appellant's return.

5. 41. Thirdly, the decision in *AB* does not make good the appellant's case, because that decision post-dated the present decision and was based on different and far more extensive evidence than was adduced in the appellant's case. Moreover, despite the broad nature of the tribunal's findings in *AB* and the fact that until recently the Secretary of State accepted those findings, the decision in *AB* is not sufficient to show that the decision in the appellant's case was vitiated by a mistake of fact amounting to a mistake of law on the principles in *E v Secretary of State for the Home Department*. There were and are too many factual uncertainties in this area to enable such a conclusion to be drawn.

6. 42. I would therefore hold that the applicant's case, although not ruled out on jurisdictional grounds, fails at the first substantive hurdle. The failure to establish an error of law by the tribunal means that the appeal is bound to fail.

7. 43. Nevertheless I propose to go on to outline the remainder of Mr Williams's arguments, not least in order to indicate the existence of additional, very substantial obstacles in his path.

Statelessness under the Refugee Convention

1. 44. The appellant's case was that denial of re-entry by the Israeli authorities to the place of his former habitual residence would amount to persecution within the Refugee Convention.

2. 45. Article 1A(2) of the Refugee Convention defines a refugee as including any person who –

> "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*" (emphasis added).

It was held in *Revenko v Secretary of State for the Home Department* [2001] QB 601 that the paragraph should be read as a whole and that the requirement of a well-founded fear of persecution on Convention grounds applies to stateless persons as it does to nationals.

1. 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 LJ in *Adan & Others v Secretary of State for the Home Department* [1997] 1 WLR 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.

2. 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).

3. 48. But in any event this was not how the case was argued on the appellant's behalf in the grounds of appeal to the adjudicator or to the tribunal. Nor do such arguments appear to have been included in the written or oral submissions before the adjudicator or the tribunal: the contention advanced in each case was of a more general nature, that the appellant's statelessness and the impossibility of return ought to lead in themselves to recognition of the appellant as a refugee. Indeed, Mr Williams accepted before us that the point on third category rights was not raised before the tribunal. He submitted that it was an obvious point in the *Robinson* sense (*R v Secretary of State for the Home Department, ex parte Robinson* [1998] QB 929), but in my view it was plainly not so. In those circumstances, I would have declined to entertain the arguments on the present appeal even if Mr Williams had persuaded me that the tribunal erred in finding that the appellant's return to the Occupied Territories was possible.

Article 3 ECHR

1. 49. It was submitted that the denial of re-entry to the Occupied Territories by reason of the appellant's Palestinian identity was capable of constituting degrading treatment contrary to article 3 ECHR. Mr Williams accepted, however, that the point would stand or fall with that under the Refugee Convention. He also accepted that it was not argued before the tribunal. The point was certainly dependent on displacing the tribunal's finding that it was possible to return the appellant to the Occupied Territories, since it was expressed in terms of the existence of a routine and systematic practice not to admit Palestinians in the position of the appellant to their place of former habitual residence. In the circumstances, however, I think it unnecessary to say anything more about it.

2. 50. Certain other submissions under article 3 and under article 8 were raised in Mr Williams's skeleton argument but were not pursued by him at the hearing.

The 1954 Convention relating to the Status of Stateless Persons

1. 51. The United Kingdom is a party to the 1954 Convention relating to the Status of Stateless Persons, though the Convention has not been incorporated into domestic law. Article 31 of the Convention provides that the contracting states "shall not expel a stateless person lawfully in their territory save on grounds of national security or public order". A decision of the Immigration Appeal Tribunal in *Kelzani v Secretary of State for the Home Department* [1978] Imm AR 193, 197, cited a letter from Dr Goodwin-Gill, then Legal Adviser to the Representative of the UNHCR, in which it was said that "[t]he 1954 Convention contains no provision obliging a State Party to grant residence to a stateless person, but clearly the discretion of a State to remove stateless persons is circumscribed by its international obligations", and reference was made to a 1960 Parliamentary statement. Mr Williams submitted that in the present case the Secretary of State ought to have considered the 1954 Convention in deciding whether or not to grant the appellant discretionary leave outside the Immigration Rules, and that the Secretary of State's failure to consider it meant that his decision was open to appeal under section 82 of the 2002 Act on the ground that it was "otherwise not in accordance with the law" within section 84(1)(e).

2. 52. This argument, too, is beset with difficulties. Since the issue was not raised before the Secretary of State and was not the subject of any published policy, it is difficult to see how his decision could be challenged for failure to consider the point. Moreover there was no challenge on this ground to the Secretary of State's decision. The issue was not raised in the grounds of appeal to the adjudicator or to the tribunal; and although there was reference to the 1954 Convention in the skeleton arguments, the argument was not advanced in this form. To the extent that the issue of statelessness was raised as an aspect of the case under the Refugee Convention, it was dealt with properly by the tribunal. The tribunal could not be said to have erred in law by failing to deal with a separate ground of challenge under section 84(1)(e) which was not raised before it.

Conclusion

1. 53. I would dismiss this appeal.

LORD JUSTICE MOORE-BICK:

1. 54. I agree.

THE PRESIDENT OF THE FAMILY DIVISION:

1. 55. I also agree.