



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/09331/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 26<sup>th</sup> February 2019

Decision & Reasons Promulgated  
On 12<sup>th</sup> March 2019

Before

Upper Tribunal Judge Chalkley

Between

O J  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

*For the Appellant:*

*Mr M Symes, Counsel instructed by Asylum Aid*

*For the Respondent:*

*Mr T Lindsay, Home Office Presenting Officer*

**DECISION AND REASONS**

**Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014**

*First-tier Tribunal Judge Henderson granted the appellant, OJ, anonymity. I have not discharged that certificate. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. This direction applies*

*both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.*

1. The appellant, OJ, is a national of Palestine who was born on 9<sup>th</sup> July 1991 and who first arrived in the United Kingdom on 11<sup>th</sup> October 2016. He has been granted a visa as a Tier 4 Student which expires on 30<sup>th</sup> January 2019.
2. The appellant claimed asylum on 18<sup>th</sup> January 2018 but that claim was refused by the respondent on 13<sup>th</sup> July that year. The appeal was made under Section 82 of the Nationality, Immigration and Asylum Act 2002.
3. The appellant was born in Saudi Arabia and lived there until 1999. He then moved to Gaza with his family. He and his family were registered with UNRWA in Gaza, where the appellant lived with his parents and one of his brothers.
4. In 2008 he was stopped for the first time by Hamas when he was walking down the street with a female friend. He was detained by Hamas but released after signing a document promising not to continue the behaviour that was complained of at the time. In March 2012 he had been involved in arranging a protest. Following this his father received a summons (in the appellant's name) and then spoken to the appellant about his behaviour; the appellant stopped all involvement in such protests.
5. In 2015 the appellant received a call from someone at Internal Security requesting that he attend a meeting. The appellant did not believe that this was an official summons and did nothing. There were no consequences from his failure to attend as far as the appellant is aware.
6. In October 2016 the appellant received another summons but this time in writing. He did not comply with that summons since he was about to travel to the United Kingdom on a scholarship to Oxford Brookes University to study. On 5<sup>th</sup> January 2018 the appellant's home in Palestine was raided by Hamas who took away his possessions, including the hard drive from his computer.
7. The appellant claimed asylum on 18<sup>th</sup> January 2018. He has no family in the United Kingdom and no health problems or medical issues. He fears return to Palestine where he believes the Hamas military wing would kidnap, torture and or in the alternative, arrest him. The judge heard oral evidence from the appellant and from the appellant's brother, AIJ. The judge also received and considered an expert report from Deborah Hyams dated 5<sup>th</sup> October 2018. The judge found the appellant and his brother to be "generally credible" witnesses. The judge was satisfied that the appellant had not exaggerated the consequences of his ignoring the various summonses and his brother confirmed that following the raid in January 2018 and his questioning after the raid, there had been no other adverse consequences for the appellant's family. The judge viewed a video which had been made at the time of the raid on the appellant's home and found the video to be genuine and that it showed armed men searching the appellant's bedroom.

8. The judge found that the appellant fell within the provision of Article 1D of the Refugee Convention in that he is at present receiving protection from UNRWA as evidenced by a certificate of June 2018. The judge refers to Counsel referring to the CJEU case of *El Kott* [2012]. The judge concluded that the appellant left Palestine of his own volition and not because he was concerned for his safety, but purely because he wished to study in the United Kingdom and concluded that the appellant was excluded from the protection of the Refugee Convention. The judge went on to consider humanitarian protection and noted that after being stopped by police officers in 2008 while walking on the street with a female friend, the appellant was held some two hours, required to sign a pledge and was then released. He has never since been detained or ill-treated. The appellant received a summons in 2011 but this was sent to the appellant's father and not to the appellant. The appellant's father warned him about engaging in political involvement, which he then ceased. The appellant then received a summons in October 2016, to which he did not respond and from which there were no adverse consequences. Whilst the video of the raid in January 2018 showed armed men searching his family home, it did not reveal any violence or ill-treatment of his family and the appellant and his brother's evidence confirmed that there had been no adverse consequences for his family following that raid. The judge concluded from the basis of the evidence he did not believe that the appellant had shown, on the lower standard of proof, that there was a serious risk of harm to him on his return. The judge dismissed the appellant's asylum claim and dismissed the appellant's humanitarian protection claim.
9. Permission was granted to appeal to the Upper Tribunal. There were two challenges. The first was that the judge erred in treating *El Kott* as definitive of the circumstances in which an asylum seeker from Gaza could qualify for refugee status and failed to consider the restrictive interpretation that should be given to exclusions from refugee status. The second ground suggested that the judge erred in law in concluding that the absence of past persecution and lack of mistreatment of the appellant's family members was determinative of the real risk of serious harm he might face on return given the expert's opinion that an ebb and flow of interest from the security forces in individuals such as the appellant could be explained by their other priorities, their lack of capacity, their waiting further "evidence" of "collaboration with the west from informants or surveillance of social media or due to the ebb and flow of military conduct". Whilst the judge held it against the appellant that he defied a summons without coming to harm, this takes account of highly relevant considerations that the appellant was receiving the summons on 8<sup>th</sup> October and departing from the UK on 10<sup>th</sup> October. A judge needs to give the most cogent reasons before holding the lack of harm eventuating for such a short period of time against an asylum seeker.
10. I was grateful to Mr Symes for addressing me succinctly. He took me through the decision in *El Kott*. He suggested that the appellant was not excluded, that the appellant cannot return to Palestine because of lack of effective protection. Mr Lindsay addressed me and suggested that it needs to be shown that the Immigration Judge was wrong in respect of his assessment of humanitarian protection, because though he had considered the risk facing the appellant, the judge carefully watched the video showing that his former home was being searched, but there was no

finding that they were actually searching for the appellant. It is true that despite the search of the appellant's home, neither his parents nor his brother suffered any harm. I enquired whether it was accepted by the respondent that the summonses to which the appellant had made reference were genuine. Mr Lindsay suggested that they were not believed to be reliable and one of them was merely a photocopy or photograph. Mr Symes pointed out that the appellant had made a credibility finding at paragraph 39 and had not sought to rely on *Tanveer Ahmed v Secretary of State for the Home Department*\* [2002] UKAIT 00439. I reserved my decision.

11. Article 1D of the Refugee Convention provides as follows:-

"This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention."

12. The European Union case of *El Kott & Ors* was a reference to the court for a preliminary ruling. The details of the reference are set out in paragraph 41 of that decision and at paragraph 45 the court suggest that the exclusion must be narrowly construed. At paragraphs 49 and 50 they point out that simply leaving UNRWA's area of operations is not sufficient and at paragraph 56 point out that it is not only the abolition itself of the organ or agency giving protection or assistance which brings about cessation of the protection or assistance provided by that organ or agency within the meaning of the sentence of Article 12(1)(a) of Directive 2004/83, but also the fact that it is impossible for the organ or agency to carry out its mission. At paragraph 59 the court says this:-

"Mere absence from such an area or a voluntary decision to leave it cannot be regarded as cessation of assistance. On the other hand, if the person concerned has been forced to leave for reasons unconnected with that person's will, such a situation may lead to a finding that the assistance from which that person benefited has ceased within the meaning of the second sentence of Article 12(1)(a) of Directive 2004/83."

The decision goes on at paragraphs 60 and 61 to say this:-

"60 That interpretation is consistent with the objective of Article 12(1)(a) of Directive 2004/83, which is inter alia to ensure that Palestinian refugees continue to receive protection by affording them effective protection or assistance and not simply by guaranteeing the existence of a body or agency whose task is to provide such assistance or protection, as is also apparent from a reading of paragraph 20 of United Nations General Assembly resolution No 302 (IV) in conjunction with resolution No 2252 (ES-V).

61 For the purpose of determining whether assistance or protection have actually ceased within the meaning of that provision of Directive 2004/83, it is for the competent national authorities and courts to ascertain whether the departure of the person concerned may be justified by reasons beyond his control and independent of his volition which force him to leave the area in question and thus prevent him from receiving UNRWA assistance.”

13. I have concluded, therefore, that in respect of the first challenge to the decision of First-tier Tribunal Judge Henderson, the judge did not err. The appellant’s departure from Palestine had nothing at all to do with him being forced to leave; it was his choice to leave Palestine and, therefore, the protection of UNRWA assistance in order that he could study at Oxford Brookes University in the United Kingdom. I am satisfied that the judge did not err in finding that the appellant was excluded from the protection of the Refugee Convention.
14. In dealing with the question of humanitarian protection, the judge noted that the respondent had not challenged the appellant’s account of being stopped by police officers in 2008 and being held for two hours and being required to sign a pledge before being released. The judge noted that the appellant was never himself ill-treated. The judge was not referred to any evidence from the appellant’s friends who had been detained. The judge noted that the appellant received a summons in 2011, but this was sent to the appellant’s father and not to the appellant directly. Quite why this was I do not know and it does not appear to be something that the judge enquired about. The judge noted that the appellant’s father had been warned about the appellant engaging in political involvement and that it had then ceased. He also noted that the appellant received a summons in October 2016, to which he had not responded and from which there were no adverse consequences. Having viewed the video of the raid which took place in 2018, the judge noted that armed men searched his home, but that the video did not reveal any violence or ill-treatment towards his family and it had been confirmed by the appellant and his brother that there had been no adverse consequences for his family following the raid. It was on that basis that the judge concluded that the appellant had failed to show to the lower standard of proof that there was a serious risk of harm to him upon his return.
15. The judge had earlier considered the expert report of Deborah Hyams and quotes from parts of it at paragraphs 104 to 110 of the determination. The judge also refers to a Human Rights Watch document. He noted that since January 2016, the Hamas led Justice Ministry has detained a total of 45 people over social media posts and that 81 people were arrested during protests that took place in January 2018 during which public property was damaged, but those people were released within 24 hours without any further court action on condition they agreed not to protest again. As of April 2008, the Interior Ministry held 4,071 men in detention for “security cases” such as “collaboration with the occupation”. The report then noted specific cases of Fattah and activists. I have examined and taken careful note of the report of Deborah Hyams. Ms Hyams spent four years living and working with local NGOs in the West Bank and eighteen months living with a Pakistani family in the largest of three refugee camps in Bethlehem while working with Shiraa’ Association for

Development, a grass roots organisation serving workers and their families. She is fluent in Levantine Arabic and proficient in Hebrew and completed her Masters dissertation in Development Studies at the London School of Economics. Her dissertation was based on field work conducted in the occupied West Bank. She is clearly an expert.

16. At paragraph 98 of her report, the expert says this:-

“To summarize this consideration of the future risk to [the appellant] if returned to the Gaza Strip, under the first scenario, on the basis that his entire account is true, in my assessment he would face a very serious risk of being abducted, tortured and possibly killed by the Al-Qassam Brigades during the next round of full-scale hostilities with Israel. Even before that, he would face very serious risks of being detained by the Internal Security and tortured or otherwise ill-treated during interrogation, which could lead to him facing charges of ‘collaboration’ in a military court. Under the second scenario, based on the facts for which there is corroborating evidence, his risk of detention and interrogation by the Internal Security would be quite similar, with the same potential outcome of being charged with ‘collaboration’ in a military court. He would also still face a risk of abduction and torture by Palestinian armed groups, which would escalate significantly during periods of active hostilities.”

17. The expert report states that Al-Qassam Brigades have been known to abduct, illegally detain and in some cases torture and kill individuals during periods of relative calm when major hostilities with Israel are not taking place, although these cases are rarer and less well-documented than those occurring during previous wars, but apart from the risks from Al-Qassam Brigades he would also face, she believed, a very serious risk of being detained and interrogated by Hamas’ Internal Security. The threats and accusations he reports receiving during his previous interrogations by the Internal Security, the phone call he reports receiving after his return from the West Bank in June, 2015 in which he was threatened by someone claiming to be from the Internal Security, his failure to report to the Internal Security subsequently as the caller requested, and the summons he reports was delivered to his brother while he was in the UK, all indicate persistent interest in him from Internal Security.
18. The judge noted the provisions of paragraph 339K of the Immigration Rules and the fact that the only incident to which the appellant could refer was his detention in 2008 (relating to his walking in public with a female friend) which, while unpleasant and causing anxiety, could not be regarded as serious harm or persecution. Further, the incident occurred ten years ago and has not been repeated since then. I agree that the absence of past persecution and the lack of mistreatment of the appellant’s family members is not determinative of the real risk of serious harm this appellant may face on his return. The risk is very clearly identified by the expert’s evidence and I concluded therefore that the judge was wrong to dismiss the appellant’s humanitarian protection claim. I set aside that part of the judge’s decision and substitute my decision that **the appellant’s humanitarian appeal is allowed.**

Summary

19. I find that the judge was correct to find that the appellant does fall within the provision of Article 1D of the Refugee Convention in that he is presently receiving protection from UNRWA as evidenced by the certificate of June, 2018. **He is therefore excluded from the protection of the Refugee Convention and I find that Judge Henderson did not err in so finding. However, I believe that the judge did err in dismissing the appellant's humanitarian protection claim. I set aside that part of the judge's decision. For the reasons I have given I have concluded that the appellant would be at risk of serious harm on return to Palestine and I allow his humanitarian protection claim.**

*Richard Chalkley*

Upper Tribunal Judge Chalkley

TO THE RESPONDENT  
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable for the following reason. On the evidence the appellant was entitled to the grant of humanitarian protection and leave to remain as a result.

*Richard Chalkley*

Upper Tribunal Judge Chalkley

Dated 07 March 2019