Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21631/2011

THE IMMIGRATION ACTS

Heard at Field House
On 6 & 8 February 2012

Determination Promulgated

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Before

Mr C M G Ockelton, Vice President
Upper Tribunal Judge Pitt

Between

Raed Salah Mahajna

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Husain QC, instructed by Irvine Thanvi Natas Solicitors
For the Respondent: Mr N Sheldon, instructed by the Treasury Solicitor

DETERMINATION AND REASONS

Introduction

1. The appellant, a national of Israel, appealed to the First-tier Tribunal against the decision of the respondent on 29 June 2011 to make a deportation order against him. The First-tier Tribunal (Upper Tribunal Judge Renton and Immigration Judge C

Lloyd) dismissed his appeal. The appellant now has permission to appeal to this Tribunal.

2. The appellant is Palestinian. He is a prominent figure in Israel and internationally. He is the leader of the Northern branch of the "Islamic Movement" in Israel. The Islamic Movement is a political organisation, split into Northern and Southern branches, of which the former is apparently regarded as the more radical. He was elected Mayor of his home town Umm al-Fahm, which is the largest Arab town in Israel, in 1989, being re-elected in 1993 and 1997.

3. He has been to the United Kingdom on a number of previous occasions, in 1990, 1997, 1998-1999 and in March 2000. On the last three of those occasions he addressed conferences and other meetings. His presence in the United Kingdom now results from an invitation by the Middle East Monitor (MEMO), primarily to attend and give the main address at a meeting held at the House of Lords. He has travelled widely to other European countries, apparently without any disorder occurring.

4. It appears that in June 2011 the Secretary of State became aware that the appellant proposed to visit the United Kingdom again. For reasons that do not materially differ from those relevant to the decision presently under appeal, she personally directed that he be excluded from the United Kingdom, on the grounds that his presence would not be conducive to the public good. Notice of her decision was, however not served on him, and it is not suggested that he was aware of it. He made arrangements to travel. On 25 June 2011 he flew from Tel Aviv to Heathrow, and sought leave to enter. Immigration Officers had also not been made aware of the Exclusion Order, and he was therefore granted leave to enter for 6 months. His intention was to attend the meeting of Parliamentarians and researchers at the House of Lords to which we have referred, chaired by Baroness Tonge, and to address other meetings in the United Kingdom, departing on 5 July.

5. He attended the meeting on 27 June, but late at night on 28 June, he was arrested and taken to Paddington Green Police Station and on his arrival there (by which time it was 29 June) he was served with a notice of intention to deport him to Israel on the grounds that his deportation was conducive to the public good.

6. That decision carried a right of appeal, which the appellant exercised by Notice of Appeal to the First-tier Tribunal on 1 July 2011. His right of appeal arises under s82(2)(j) of the Nationality, Immigration and Asylum Act 2002; and by virtue of s92(2) of the same Act, the right of appeal can be exercised from within the United Kingdom. We mention the statutory provisions giving the appellant a right of appeal, because the fact that these proceedings are an appeal on the merits, against the deportation decision, rather than proceedings by way of judicial review, is, in our judgement, a matter of some importance. The appellant succeeded in Judicial review proceedings challenging the legality of his detention to a limited extent, Stadlen J holding that he was unlawfully detained for a short period of time before the reasons for his detention were properly notified to him. He appears before us on bail granted by a judge of the First-tier Tribunal.

7. The appellant's intention had been to leave the United Kingdom on 5 July 2011 after being here about a week. Following the Secretary of State's decision, however, and his appeal, he has remained in the United Kingdom. His appeal would, by statute, have to be treated as abandoned if he left the United Kingdom. One of the effects of the decision has therefore been that he has been in the United Kingdom for much longer than he otherwise would have been.

Decision and Appeal

8. The reasons for the decision are set out in the respondent's letter of 29 June 2011 as follows:

> "1. You travelled to the UK from Tel Aviv arriving in London on 25 June 2011. You were granted entry to the UK for a period of six months from 25 June 2011.
>
> 2. The British government has measures for excluding or deporting those individuals who foment terrorism or serious criminal activity, or who seek to provoke others to commit terrorist or criminal acts, as well as those who foster hatred which might lead to inter-community violence in the UK. The list of unacceptable behaviours covers any non-UK national whether in the UK or abroad who uses any means or medium including:
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> - writing, producing, publishing or distributing material;
> - public speaking including preaching;
> - running a website;
> - using a position of responsibility such as a teacher, community or youth leader;
>
> To express views which:
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> - foment or justify terrorist violence in furtherance of particular beliefs;
> - seek to provoke others to terrorist acts;
> - foment other serious criminal activity or seek to provoke others to serious criminal acts;
> - foster hatred which might lead to inter-community violence in the UK.
>
> 3. The list is indicative and not exhaustive.
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> 4. The Home Secretary has considered whether, in light of this list, you should be deported from the UK. After careful consideration, on 23 June 2011 she personally directed that you should be excluded from the UK on the grounds that your presence here would not be conducive to the public good. She reached this decision because you have brought yourself within the scope of the list of unacceptable behaviours by publicly expressing views that foster hatred which might lead to inter-community violence in the UK. Although erroneously granted entry on 25 June 2011 (in contravention of the extant exclusion order) the decision has now been taken that you should be deported from the UK.
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> 5. In taking this decision, the Home Secretary has noted that you are the leader of the northern branch of the Islamic Movement in Israel, a group that has links to Hamas.

The Home Secretary also notes that the following statements have been attributed to you:

6. The following poem is widely quoted as being written by you in 2003 and is published in the Islamic Movement's periodical:

"You Jews are criminal bombers of mosques, Slaughterers of pregnant women and babies. Robbers and germs in all times, The Creator sentenced you to be loser monkeys, Victory belongs to Muslims, from the Nile to the Euphrates".

7. You are quoted in 2009 as promoting martyrdom. It is reported you said:

"Netanyahu's plan is to dig tunnels under al-Aksa and replace it with a Jewish "Temple". You added: "We will not compromise on our principles or holy sites. We prefer to die as shahids and will welcome death joyfully".

8. You are quoted in 2007 as saying:

"Israeli history is drenched in blood" and "They want to build their "Temple while our blood is on their clothing, on their doorposts, in their food and in their water".

9. In light of these comments attributed to you, the Home Secretary considers that should you be allowed to remain in the UK there is a risk you would continue to espouse such views. In doing so, you would be committing listed behaviours and would therefore be behaving in a way that is not conducive to the public good. It is noted you have already given one talk in London on 27 June 2011.

10. In light of these and other related factors not detailed in this notice, the Home Secretary is satisfied you should be deported from the UK on the grounds that your deportation is conducive to the public good.

11. In taking this decision, due regard has been had to your rights under the European Convention on Human Rights specifically the rights to expression and association. It is considered that your presence in the UK is not conducive to the public good. It is considered interference with your rights is in accordance with legitimate aims and is proportionate. This decision will not prevent you communicating through modern communication methods.

12. The Secretary of State therefore deems it to be conducive to the public good to make a deportation order against you. The Secretary of State has decided to make an order by virtue of section 3(5(a) of the Immigration Act 1971 (as amended by the Immigration and Asylum Act 1999).

13. This order requires you to leave the United Kingdom and prohibits you from re-entering while the order is in force. Further, by virtue of section 5(1) of the Immigration Act 1971, upon the signing of a deportation order against you your existing leave to enter the United Kingdom will be invalidated.

14. The Secretary of State proposes to give directions for your removal to Israel, the country of which you are a national and of which there is reason to believe that you will be admitted.

9. Despite the vague reference to "other related factors" in para 10 of that letter, the position before the First-tier Tribunal was that Mr Sheldon on behalf of the Secretary of State relied on five areas of evidence. They were as follows: (i) the poem to which reference is made in para 6 of the decision letter; (ii) invocation of the blood libel in the speech to which reference is made in para 8 of the decision letter; (iii) encouragement of martyrdom to prevent the destruction of the al–Aqsa mosque, to which reference is made in para 7 of the decision letter; (iv) to indictments issued against the appellant on 23 June 2011 (a few days before the Secretary of State's decision) intended to lead to proceedings in the Jerusalem Magistrates' Court; (v) links to Hamas.

10. The First-tier Tribunal heard evidence from the appellant and from a number of other witnesses with varied expertise; it also saw a DVD. It dealt with each of the five elements of the evidence adduced by the Secretary of State separately.

11. So far as concerns (i) the poem, the First-tier Tribunal was aware that the passage in para 6 in the letter of decision is not a translation of any poem written by the appellant. It appears to be a reference to a poem published in the weekly publication of the Islamic Movement on 4 January 2002. It has been translated as follows:

"A message to the oppressors

By Sheikh Ra'ed Salah — Sawt al-Haqq wa-al-Huriyya, 4 January 2002

The face of the oppressors became ugly — the [killers], the criminals
The sly apostates — the frivolous, the corrupted
They corrupted our land — and dared (to offend) our honour
They became arrogant in our garden — Alas, how traitorous they are
They bombed the mosques, killing — the repentant, the worshippers
The kneeling, the prostrate (in prayer) — may the hands of the malevolent be ruined
They slaughtered the pregnant women and infants — and the children are fallen dead
Our elders, like a flock — became night travellers
Oh my oppressor, you are the mean — you are the wild, the upraised
You may revel for long, you sinner — as Allah is the best Judge
Allah enables long life to the tyrant — the adulterer, the fraudulent, the unjust
Bur this will not last forever — as Allah is the most victorious
Did you not hear of the consequence (faith) of the Armies/(of the destroyed nations) — of Aram, 'Aad and Thamud
The deviousness of Pharaoh the ungrateful — who all decayed and became perishable
Go on, set all countries on fire — and become arrogant over the worshippers
Go on, fill the world with corruption — may you perish you usurper
You, no doubt with any conscience — you are the germs of all times
The Creator had deemed you — to be monkeys (and) losers
[Do not rejoice, the dawn came], — from the Egyptian Nile to the Euphrates
The victory is the 'crown' of all good tidings — to the faithful Muslims"

12. The First-tier Tribunal noted that there was evidence indicating that the poem was not anti-Jewish but was simply about oppression, containing references to oppressive Arab tribes and to the Pharaohs. The witness before the First-tier Tribunal, Dr Sperl,

said that there were a number of Koranic allusions which would not be lost on a Middle Eastern reader.

13. So far as concerns (ii) the blood libel, the reference is to a speech made on 16 February 2007 and now made the subject of one of the indictments of 23 June 2011. The passage cited by the First-tier Tribunal is as follows:

> "We have never allowed ourselves, and listen well, we have never allowed ourselves to knead the bread for the breaking of the fast during the blessed month of Ramadan with the blood of children. And if someone wants a wider explanation, you should ask what used to happen to some of the children of Europe, whose blood would be mixed in the dough of the holy bread. God Almighty, is this religion? Is this what God wants? God will confront you for what you are doing".

14. The appellant's evidence to the First-tier Tribunal was that he was aware that the blood libel is a fabrication used to persecute Jews; he has never invoked it and would not do so. He was using "holy bread" as a metaphor for those who had exploited religion as a cover for oppression and crime. An expert witness, Professor Ilan Pappe, said that the speech was at times incoherent and emotive, but that in his view the speech did not include the blood libel; it was not anti-Jewish but directed to the violation of Muslim rights in Jerusalem, by anybody.

15. On (iii) Destruction of the al-Aqsa mosque, two speeches were before the First-tier Tribunal. In one, in February 2007, the appellant said this:

> "After the crime of Rafah Camp it was told that the Israeli establishment wants to build a temple for the purpose of worship, how insolent and what a liar he is, who issued this statement. He wants to build a house of God; it is irrational to build a house of God while our blood still stain their clothes, doors, food and drink, and our blood passes from a terrorist general to another,"

Later in 2009 the appellant is quoted as saying:

> "Netanyahu's plan is to dig tunnels under al-Aqsa and replace it with a Jewish temple. We will not compromise on our principles or holy sites. We prefer to die as Shahids and will welcome death joyfully".

16. The First-tier Tribunal's account of the relevant evidence and argument on this point is as follows:

> "According to the Respondent, this is a call to violence to protect the al-Aqsa Mosque, and to accept martyrdom in its defence. It was a justification for, and glorified, terrorism. The incitement to violence was successful in that following the address in February 2007, which took place near to the al-Aqsa Mosque, a crowd started rioting and throwing stones at the police which resulted in three police officers being injured. As the al-Aqsa Mosque was a holy shrine particularly important to Muslims, the allegations of its destruction led to great tension. The allegations were inflammatory and dangerous, and designed to justify violence and to radicalise those who heard them.

> The Appellant's case is that he was subject to a ban excluding him from the al-Aqsa Mosque and therefore gave his usual Friday prayer sermon at a site nearby. His theme in the sermon was only that worshippers in the mosque should be protected from harm so that they could worship in peace. Violating the sanctity of the mosque by its destruction would be akin to violating sanctity of God. After the sermon, there were prayers, and then the audience dispersed peacefully. There was no rioting. He contests the allegation that his actions that day led to disorder. We were shown a DVD of the occasion which did not include any signs of violence or disorder, although it was not clear if the DVD showed the event in its entirety including its aftermath, nor the whole of the area in which the event took place."

17. Item (iv) is the 2011 indictments. One is the indictment referred to in para 13. It alleges that the appellant's speech on 16 February 2007 led to a riot but, as the First-tier Tribunal pointed out, that is a matter which has yet to be established, in the proceedings commenced by the indictment. The other indictment relates to an incident on 17 April 2011 at the Allenby border terminal, when the appellant is alleged to have obstructed a police officer by objecting to his wife being searched. The First-tier Tribunal noted that they had seen a DVD of the incident, and concluded that the indictment had no relevance to this appeal.

18. We will set out in full what the Tribunal said about item (v), Hamas:

> "The military wing of Hamas is a proscribed organisation in the UK under the provisions of the Terrorism Act 2000. It is the Respondent's case that the Appellant is closely linked to this organisation as established by a prosecution of the Appellant in which it was alleged that the Appellant used charitable organisations as a front to provide Hamas with large sums of money. After a lengthy trial, the Appellant pleaded guilty to an amended indictment as part of a plea bargain as a consequence of which he was sentenced to six and a half years' imprisonment of which only three and a half years was to be served. Eventually the Appellant served something less that that term. What the Appellant says about this is that it was a political prosecution and he denies any links with Hamas. His only activity was to provide funds for genuinely charitable and humanitarian purposes. There is a statement from the Appellant's Israeli advocate, Tabajah Hassan stating that the plea bargain was made on the basis that it was accepted that the Appellant did not intend to harm the security of the State of Israel, and that the appellant entered into the bargain in order to avoid a biased and harsh ruling.

Article 10 in the First-tier Tribunal

19. Article 10 of the ECHR is as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it caries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national

> security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for the preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

20. The First-tier Tribunal set out the text of the Article, and noted that the deportation of the appellant would interfere with his rights under Article 10. It set out its task as deciding whether the interference is proportionate to the legitimate public end sought to be achieved by the deportation of the appellant. The elements of public interest in the case as presented to the First-tier Tribunal are set out in para 8 of the determination as follows:

> "The public interest is represented by the Secretary of State's policy in such matters. This is given in the Prevent Strategy, and is a published policy for which the Respondent is accountable. The Strategy relates to the Secretary of State's powers to exclude individuals from the UK on the grounds that their presence is not conducive to the public interest. It states that the Secretary of State will consider using the power to exclude when an individual has engaged in any of the activities appearing on an indicative rather than an exhaustive list of unacceptable behaviours. The Strategy also states that the Secretary of State will consider deportation under her statutory powers of individuals who have leave to enter or remain in the UK who have engaged in similar behaviour. The list of unacceptable behaviours has also been published, and includes any person who uses any means or medium including writing, producing, publishing or distributing material; public speaking including preaching; and using a position of responsibility such as a teacher, community or youth leader to express views which foster hatred which might lead to intercommunity violence in the UK."

21. Paragraph 9 of the determination is devoted entirely to the review of the evidence in relation to the five items, which we have summarised above. The next four paragraphs, 10-13, are as follows:

> "[10] We conclude from all this evidence, viewed in the round, that the Secretary of State was right to conclude that the words and actions of the Appellant relied upon by the Respondent do come within the Prevent Strategy and therefore in accordance with the Secretary of State's policy do justify a conclusion that the Appellant's removal would be conducive to the public good. Therefore in the balancing exercise necessary for any consideration of proportionality, great weight must be attached to the public interest of preventing disorder or crime. We are satisfied that the Appellant has engaged in the unacceptable behaviour of fostering hatred which might lead to inter-community violence in the UK. We are satisfied that the Appellant's words and actions tend to be inflammatory, divisive, insulting, and likely to foment tension and radicalism. They deal with issues which are highly sensitive in the context of the Israeli/Palestinian dispute. To make his point, the Appellant has often used historical references, such as the Spanish Inquisition, which have a particular resonance to those on either side of the dispute. He also spoke in vivid terms alleging that it was the intention to destroy the al-Aqsa Mosque, again a particularly sensitive issue, and notwithstanding the plea bargain, has admitted in criminal proceedings being involved with organisations used to fund Hamas, a group part of which is proscribed as being a terrorist organisation.

[11] It is the Appellant's argument that he is not anti-Semitic and that he is not a racist. He says that he only has a political point of view, and that he has only been critical of the authorities of the State of Israel and those who he considers have broken the law of God and can be viewed as expansionist settlers. It is true that the Appellant is supported by anti-Zionist Jewish organisations such as the Jews for Justice for Palestine. However, we do not accept that the Appellant can successfully claim that what he has said can only be interpreted as expressing his opposition to oppression and injustice in general. We accept that the poem is not expressly addressed to Jews, and we must accept the opinion of such an eminent expert as Dr Sperl that the poem is not directed at the Jewish people as a whole but only at those among them who aim at Israeli territorial expansion and control at the expense of the Palestinians. However, our concern is with the impact of the poem and other sayings of the Appellant. The opinion of Dr Sperl is a heavily nuanced one derived from his considerable and sophisticated expertise and experience. It may be the case, as he said, that in the Middle East there is widespread Koranic knowledge, but we do not think that comment can apply generally to, for example, Jews resident in the UK.

[12] In any event, it is not necessary to satisfy the criteria of unacceptable behaviour for words and actions to be racist as such. That is not the test given in the policy. For the purposes of the Secretary of State's decision, they need only foster hatred which might lead to inter-community violence in the UK. This might be achieved by words and actions which are not necessarily racist. It might be achieved by words and actions critical of a section of the Jewish people if done in the way preferred by the Appellant as described above. Israel is a democracy, and therefore it must be the case that the actions and stance of its Government has a large measure of support of Jews living in Israel, and also within the wider Jewish Diaspora.

[13] We also come to our conclusion in the context that although it is not our task to rubber stamp a decision of the Secretary of State, nevertheless it is the Secretary of State who is responsible for the avoidance of disorder and crime, and therefore has a wide margin of discretion in deciding what is conducive to the public good. We are satisfied that this decision was made in accordance with the criteria set out in the factors listed in paragraphs 71 to 74 inclusive of the decision in **R (Farrakhan) v SSHD [2002] EWCA Civ 606**. We agree with Mr Hussain's submission that it is for the Tribunal to consider afresh the proportionality of any breach of the Appellant's Article 10 rights, but it was decided in **SSHD v Rehman [2001] UKHL 47** that the Tribunal should not in most cases interfere with the Secretary of State's assessment as to what is conducive to the public good. It is not our responsibility to find that the Secretary of State has proved each item of evidence upon which she relies as if they were counts on an indictment. We need only be satisfied that there is "material on which proportionately and reasonably the Secretary of State can conclude that there is a real possibility of activities harmful to national security". This is partly because, as remarked upon in **Rehman**, the Secretary of State "has the advantage of a wide range of advice from people with day-to-day involvement in security matters". In this particular case according to the evidence of Mr Rosenorn-Lanng, the Secretary of State acted upon information provided by the Department for Communities and Local Government (DCLG) which in turn took advice from the Community Security Trust (CST) and the Jewish Board of Deputies. It is of concern that apparently the Secretary of State did not consult with any Muslim or Palestinian organisations, and we note the evidence of both Professor Miller and Mr Lambert that whereas the CST has done invaluable work in identifying threats to the Jewish community in the UK from the far right such as the British National Party (BNP), it failed to distinguish between anti-Semitism and criticism of the actions of the

Israeli State and therefore gives an unbalanced perspective, but they did not say that it was improper for the Secretary of State to seek the views of the CST in this matter, and it was the evidence of Mr Rosenorn-Lanng that the Secretary of State gave this issue serious consideration and looked upon all of the evidence with a discerning eye."

The First-tier Tribunal's decision

22. The First-tier Tribunal went on to consider factors personal to appellant, including the fact that he has behaved entirely lawfully in this country and that he has been 'the victim of unfairness and procedural irregularity'. It noted that the appellant had taken no steps to challenge the exclusion order (although we have to say that in the circumstances of this case it is far from clear what those steps would be). It took the view that the infringement of Art 10 by his exclusion would be limited because the appellant could communicate his message from abroad by 'modern methods of electronic communication'. Despite the positive factors the First-tier Tribunal concluded, on balance, that given the potential impact of the appellant's presence in the UK, … the interference with the freedom of expression by the deportation order is proportionate to the legitimate aim of preventing disorder or crime as represented in the criteria of the Prevent Strategy'.

23. The First-tier Tribunal then considered the other submissions made on behalf of the appellant, based on articles 8, 9 and 11 of the ECHR, and on a legitimate expectation said to arise from his admission to the UK without hindrance. It rejected them all and therefore dismissed the appeal.

Grounds of Appeal to the Upper Tribunal

24. The grounds of appeal to this Tribunal have been summarised by Mr Sheldon on behalf of the Secretary of State, accurately we think, as follows:

(i) The FtT erred in finding that the appellant's rights as protected by Articles 8, 9 and 11 ECHR were not engaged.
(ii) The FtT erred in its assessment of the degree of interference with the appellant's rights as protected by Article 10 ECHR.
(iii) The FtT made an error of law in its conclusion as to the intensity of the review to which the Secretary of State's assessment of the risk proposed by the appellant to public safety should be subjected.
(iv) The FtT failed to give adequate reasons in support of its decision that the appellant's deportation was conducive to the public good and proportionate.
(v) The FtT failed to have sufficient regard to matters of evidence which the appellant considers to be supportive of his case.
(vi) The FtT failed to take adequate account of the evidence which demonstrated that the Secretary of State considered the question of whether to subject the appellant to an exclusion order to be "finely balanced".

The Views of the Secretary of State: Weight and Deference

25. Ground (iii) is central to the determination of this appeal. It is clear that the Secretary of State's conclusions as to the public interest are entitled to great weight, but are not conclusive. It is the appellant's case that the First-tier Tribunal erred in its approach to its task, and failed to give the individual facts of this case sufficient importance in seeing whether the Secretary of State's views should prevail. The Secretary of State's position is that the First-tier Tribunal made no error in either its approach to its task or its application of the law to the facts.

26. It may not be quite right to say that, in examining a case such as this, a court or tribunal *defers to* the view of the Secretary of State. As the House of Lords put it in Huang v SSHD [2007] 2 AC 167, in dealing with the Secretary of State's analysis of an Article 8 case, at [16]:

> "The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is the performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgement of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed. "

27. At Tribunal level, there are at least three reasons why the Secretary of State's assessment has to be given great weight. The first is that it is the Secretary of State's constitutional task to assess matters on behalf of the public as a whole. What are the interests of the nation, as a matter of national security, or in respect of the public interest generally, is a matter to be determined in principle by politicians, not by judges. Secondly, as a matter of common sense, the Secretary of State is likely to have access to information and expertise in assessing what the interests of the British public are, and her assessment, based on expert analysis, is therefore clearly entitled great weight. If authority is required for that proposition, it is to be found in the judgment of Lord Hoffmann in Rehman v SSHD [2003] 1 AC 53 at [58]. Lastly, and by no means least, the Tribunal is required to attach weight to the Secretary of State's view because it is bound by authority to do so.

(a) the authorities

28. The authorities have recently been examined by the Court of Appeal in Naik v SSHD [2011] EWCA Civ 819 and we gratefully set out Gross LJ's summary at [88]:

> "[D]ecisions of the SSHD to refuse entry to this country to an alien on national security or public order grounds are entitled to great weight and must, by their nature, enjoy a wide margin of appreciation (or discretion). Let it be accepted that such decisions, when resulting in the engagement of Art. 10, warrant the most careful scrutiny on the part of the Court; crucially, even so, the decision-maker is the SSHD not the Court. As Carnwath LJ expressed it (at [62] above), the Court is not substituting its own view for that of the SSHD. The Court's task remains one of review. By way of elaboration:

i) The starting point is that the SSHD's decisions in this area are entitled to "great weight", to adopt, with respect, Lord Bingham's wording in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [29]. For my part, I would regard this as self evident, given the subject-matter under consideration; the "cost of failure" (see [45] above) is a most pertinent consideration. See, further, the authorities cited by Cranston J, at [43] – [46] of the judgment.

ii) Given the nature of the decision, the SSHD must be accorded a wide margin of appreciation (or discretion). This is an area where, again adopting an observation of Lord Bingham (*loc cit*), "reasonable and informed minds may differ". Take, for instance, the "Prevent" strand in the UK government's counter-terrorism strategy, to which reference was made in the evidence; judgment calls of no little difficulty will be required in determining the extent, nature and termination of engagement with those of extreme views. Further and as will be emphasised below, it is of the first importance that the Court does not substitute its views for those of the SSHD; a reminder that the SSHD enjoys a wide discretion serves as a useful warning to the Court against straying into territory more properly that of the SSHD.

iii) As it seems to me (and with great respect to the extensive discussion of such matters in the literature), it matters little whether an approach which accords great weight and a wide margin of appreciation to decisions of the SSHD in this area is best described in terms of "deference" or "demarcation of functions" (Lord Bingham, *loc cit*). The point is the same. Put simply and whether as a matter of "deference" or "demarcation", in areas such as national security or public order, the SSHD is likely to have advice and a perspective not or not readily available to the Court.

iv) Nothing in the above observations precludes the Court from reviewing the decision of the SSHD by reference to what Carnwath LJ has termed ([62] above) "public law and human rights principles". Where Convention rights are involved, that review will be an "intensive review": *A v Secretary of State for the Home Department, supra,* headnote at p.69. Such a review would (as appropriate, see Carnwath LJ at [48] above) extend to the rationality, legality, procedural regularity and proportionality of a Ministerial decision. If it is necessary, which I am not sure it is, to add descriptive phrases to "intensive review", then, no doubt, intensive review will involve "the most careful scrutiny": *Cox v Turkey* [2010] Imm AR 4 at [38].

v) But, whatever the intensity of the review, it is crucial that the Court should not substitute its views for those of the SSHD. The Court does not assume the role of the decision-maker; the Court's task is and remains one of review. It follows that a measure of judicial reserve or restraint must be prudent in this sphere - serving to underline the Court's proper role and to guard against usurping, however inadvertently, the role of the decision-maker. In any event, a Court will not lightly overturn a decision of the SSHD as to what is conducive to the public good, still less a decision made by the SSHD personally."

29. In Naik, as in the present case, the arguments adduced by Mr Husain centred on Article 10; but Mr Naik had been effectively excluded from the United Kingdom. He had no statutory right of appeal, and was confined to challenging the decision by means of judicial review. It was in that context that Carnwath LJ expressed at [62] the view to which Gross LJ referred:

"Mr Husain criticised the judge for asking himself whether the Secretary of State was "entitled" to conclude as she did, rather than himself "grappling with" Dr Naik's

> explanation. I do not accept this criticism. Even in the context of article 10, the court is not substituting its own view for that of the Secretary of State. We are reviewing her decision by reference to public law and human rights principles. It is not incorrect for that purpose to ask whether she was "entitled", acting rationally and proportionately, to reach the view she did.

30. Before us, Mr Sheldon argued that there was no distinction in this area between the test to be applied on judicial review and that to be applied on an appeal. As he pointed out, the nature of the proceedings does nothing to alter the fact that the Secretary of State has particular experience of making assessments and has access to specialist advice; and secondly, because in Article 10 cases, the court will apply the most careful scrutiny on judicial review, there can be little scope for an appellate court to do more.

31. It cannot be denied that the observations of the court of appeal in Naik were directed to determining what would be appropriate in a judicial review action based on Article 10, hence the clear repudiation of any decision made by the court itself. On the other hand, not all of the authorities are judicial review cases. Huang was an appeal, as was Rehman, although in the latter case the court was not readily able to undertake an examination of the facts, because of the exiguous nature (not entirely due to the closed procedure) of the decision of the Special Immigration Appeals Commission. There is also a line of decisions on appeals demonstrating, as Cranston J noted at first instance in Naik v SSHD [2010] EWHC 2525 (Admin), "the test for curial intervention is very high". He cited N (Kenya) v SSHD [2004] EWCA Civ 1094, OP (Jamaica) v SSHD [2008] EWCA Civ 440, and CB (United States of America) v The Entry Clearance Officer (Los Angeles) [2008] EWCA Civ 139. In the last of those cases the court held that the Immigration Judge had erred in failing to give adequate reasons for differing from the respondent's view as to the public good. Laws LJ (with whom Richards LJ agreed) said at [15]:

> "In this particular area, unlike some other areas of immigration and asylum law, a degree of deference is due to the original decision maker. The subject matter is the good of the United Kingdom generally. That, it may be said, has strategic or overreaching elements where the Secretary of State and indeed his Entry Clearance Officers have special responsibility."

32. Nevertheless, as it appears to us, there are significant differences even in this area, between appeals and judicial reviews. In the first place, as recognised by Carnwath LJ in Naik, in judicial review the court is likely to be confined to the material before the Secretary of State or other decision-making authority. In an appeal, however, the Tribunal has access to all relevant evidence, including in most cases (the exceptions are in s85A of the 2002 Act) material arising after the date of the decision. The possibility of the existence of such material demonstrates that, in an appeal, although the executive view is entitled a great weight, the judicial decision may be being made on material different from that available to the executive decision-maker. The function of the appeal is more than scrupulously to re-examine the material prompting the original decision: it is to examine all the material relevant to the decision.

33. Secondly, as a matter of constitutional propriety, it is probably right to say that the rationale for the view that decisions as to public interest should be left to the executive as its task, is of less force in an appeal. The reason for that, as Mr Husain pointed out, lies in the different origins of judicial reviews and appeals. Judicial review is the residual process by which the judiciary supervise executive decisions. It is an entirely judge-made process, and it is an area where, provided that the process of review can be effective, judicial restraint is likely to be found. An appeal, however, necessarily has a statutory basis. The court or tribunal dealing with an appeal is able to do so because it has been given jurisdiction by the legislator. In an appeal, remaking the executive decision is not a usurpation of executive functions: it is an exercise of a power constitutionally given to the judiciary. Thus, while recognising always that the Secretary of State's views about what the public interest requires are likely to be particularly well-informed and therefore particularly influential, the court or tribunal dealing with the matter on appeal should, in our judgement, not shrink from subjecting them to proper examination in the light of the circumstances in which those views were reached, and the material upon which they were reached; and it may have to decide the extent to which it can give to those views the weight that would be properly and usually attributed to them.

(b) Policy

34. In the present case, the Secretary of State relies particularly on the fact that the decisions to exclude and to deport the appellant were made under the government's published "Unacceptable Behaviours Policy".

35. The history of that policy and its principal content was set out by Cranston J in his judgement at first instance in Naik, and we can do no better than to cite what he said at [39]-[42]:

> "[39] Following the London bombings on 7 July 2005 ("7/7"), the then Secretary of State for the Home Department, Rt Hon Charles Clarke MP, made a statement to Parliament on 20th July 2005 (Hansard, column 1255). He said that since 7 July, many had raised concerns about extremists who sought to come to the country to foment terrorism, or to provoke others to commit terrorist acts. He had reviewed the government's powers to exclude such people. He had powers to exclude individuals on the grounds that their presence in the United Kingdom was not conducive to the public interest. Those powers needed to be applied more widely and systematically both to people before they arrived and when they were here. In recent decades, for all Home Secretaries the criteria for exercising these powers had generally been on grounds of national security, public order or risk to the country's good relations with a third country. In going beyond those grounds, there was a need to tread very carefully in areas related to free speech. However, in the current circumstances he had decided that it was right to broaden the use of these powers to deal with those who fomented terrorism, or sought to provoke others to commit terrorist acts. To that end, Mr Clarke MP intended to draw up a list of unacceptable behaviours which fell within these powers, for example, preaching, running websites or writing articles intended to foment or provoke terrorism. The list would be indicative rather than exhaustive. There would be consultation because it was important that the government worked with communities.

Where there were grounds for considering that a person had been engaged in such activities, or would do so in the United Kingdom, exclusion would be considered.

[40] Mr Clarke MP told the House of Commons that he had asked his officials, together with the Foreign and Commonwealth Office and the intelligence agencies, to establish a full database of individuals around the world who had demonstrated the relevant behaviours. That database would be available to entry clearance and immigration officers and would be added to the current warnings index. Entry on the index did not necessarily mean exclusion, but in all cases it would trigger the possibility of a decision to exclude by Ministers. In addition to using that list to ensure that those conducive powers were applied more widely and systematically at the point of entry, the specified unacceptable behaviours would not be permitted for individuals who had leave to enter or remain in this country. That power arose in various categories. For those in the United Kingdom temporarily, for example, as visitors, students or workers, or their dependants, and for those with indefinite leave to remain, any breach would lead to termination of their leave or deportation; asylum seekers, as a general rule, would be detained and their claims fast tracked; and with refugees, consideration would be given to whether the behaviours described fell within one of the categories for exclusion from protection under the 1951 Refugee Convention. The power of exclusion was necessarily targeted at those outside the country. When people who are already in the United Kingdom engage in the kind of behaviour that he had identified it may well be appropriate to deport them under statutory powers.

[41] The consultation Exclusion or Deportation from the UK on Non-Conducive Grounds was launched on 5 August 2005. Following it, on 24 August 2005, the Home Secretary announced a list of behaviours which would form the basis for excluding and deporting individuals from the United Kingdom. The behaviours encompassed by the policy are as follows:

"The List of Unacceptable Behaviours
3. The list of unacceptable behaviours is indicative rather than exhaustive. It covers any non-UK national whether in the UK or abroad who uses any means or medium including:

(i) Writing, producing or distributing material;
(ii) Public speaking including preaching
(iii) Running a website; or
(iv) Using a position of responsibility such as teacher, community or youth leader

To express views which:

(v) Fomentt, justify or glorify terrorist violence in furtherance of particular beliefs;
(vi) Seek to provoke others to terrorist acts;
(vii) Foment other serious criminal activity or seek to provoke others to serious criminal acts or;
(viii) Foster hatred which might lead to inter-community violence in the UK."

[42] On 28 October 2008 the then Secretary of State, Rt Hon Jacqui Smith MP, made a written statement to Parliament on the unacceptable behaviours policy. She said

> (Hansard, column 26 WS) that she had reviewed existing policy on the exclusion from the United Kingdom of those individuals who engaged in violence or hatred in support of their ideology. The government would create a presumption in favour of exclusion in respect of all those who had engaged in the types of behaviour set out in the Home Secretary's statement of 24 August 2005. Where an individual claimed to have repudiated their previous extremist views or actions, the burden of proof was on them to demonstrate that that was so and has been publicly communicated."

36. There has been a further review of this policy, and we were shown a document entitled "*Prevent* Strategy" of June 2011, of which we were referred in particular to passages in chapter 8, emphasising the continuance of the Unacceptable Behaviours policy, which contains the present government's developed views and on the basis of which, as we say, the decision was made in the present case.

37. In the context of an appeal, a published policy is relevant for a number of reasons. First, a decision made in accordance with a published policy may thereby avoid being one made "not in accordance with the law" in an Abdi (DS Abdi v SSHD [1996] Imm AR 576) sense. Secondly, the use of a policy may protect decisions from being criticised on the ground of unfairness or capriciousness: see re Findlay [1985] AC 318. Thirdly, and most important to the present case, the policy itself demonstrates the research and analysis conducted by or on behalf of the Secretary of State. Here, the policy has its origins in particular incidents and the political reaction to public disquiet; and its formulation and development derived from the results of wide consultation. A decision actually made in accordance with such a policy, would, we think, in all circumstances be entitled to the greatest weight.

38. Whether on judicial review or an appeal, however, a court or tribunal is clearly entitled to consider whether a policy has been correctly applied to the facts in hand, or whether the facts established on appeal can lead properly to the invocation of the policy. Even on judicial review, to refer again to the judgment of Carnwath LJ in Naik, it is right to ask whether the Secretary of State is entitled, acting rationally and proportionately to reach the view that she did, that is to say that the decision is one merited by her policy.

Error of Law

39. In this appeal to the Upper Tribunal, we are first concerned with whether the First-tier Tribunal erred in law. If it did, we may set its decision aside and remake the decision on the appeal. As we indicated at the hearing, we have reached the view that the First-tier Tribunal did err in law in its approach to the weight to be attributed to the Secretary of State's views in the circumstances of this case.

40. The Upper Tribunal reached its findings of fact on the basis of the evidence before it. It then considered issues of proportionality under Article 10, bearing in mind not only the Unacceptable Behaviours Policy, but the Secretary of State's views. It is at this last stage that we consider that the First-tier Tribunal fell into error.

41. As we have said above, the Secretary of State's views are entitled to great weight because they result from an expert analysis of the facts, and incorporate a judgement on the public interest arising from those facts. But that consideration works in both directions. The Secretary of State's views on what the position would be, if the facts were different from what they are, is likely to be of limited assistance to a tribunal on an appeal. In the present case it is clear that the facts upon which the Secretary of State made her decision are very different from the facts that she should have had in mind when making her decision. In particular, the text of the poem is not as she thought, and the other items in the list have at least to be looked at in the light of the First-tier Tribunal's findings on them. The Secretary of State did not seek to review her decision at any stage, and indeed Mr Sheldon told us that he is not aware that the Secretary of State has even now had the correct translation of the poem drawn to her attention. So the only view of hers that was available to the First-tier Tribunal is a view based partly on mistaken facts and partly on matters that the First-tier Tribunal thought ought not to have been taken into account.

42. This was a point which, as it seems to us, the First-tier Tribunal failed to recognise. It considered the application of the policy as though the way in which the policy applied to the facts of the present case was a matter on which the Secretary of State had expressed a view. She had not. She had expressed a view only about a different set of facts, and the truth of the matter is that neither the First-tier Tribunal nor we have any basis for saying that her decision would, ought to be, or even could lawfully be the same, on the facts as now found. In those circumstances it appears to us that the weight to be attributed to the Secretary of State's view is very limited indeed. There is no doubt that the First-tier Tribunal did reach the view that the appellant's behaviour fell within the policy and merited his deportation, and from that point of view they carried out their task. But the reasoning process that they brought to it was defective for the reason we have given, and the weight they gave to the Secretary of State's view was in the circumstances an inadmissible one.

Re-making the Decision

43. This is a case in which the error was such that it is not appropriate to seek to preserve the First-tier Tribunal's decision. We therefore proceed to substitute our own decision. In order to do that we ourselves consider the five factors on which the Secretary of State relies, and other relevant matters. There was no oral evidence before us, but we had the advantage of a transcript of the proceedings before the First-tier Tribunal as well as the extensive documentary evidence considered there.

(i) The Poem

44. The respondent now accepts that the poem did not refer to "You Jews" but maintains, nevertheless, that the references to "oppressors" who "decayed our land" and to "germs", "monkeys" and "losers" could only be read sensibly as referring to Jews. Mr Sheldon also pointed out that the poem was considered to be profoundly anti-Jewish by the Community Security Trust (CST), whom the Secretary of State consults. In the course of the hearing before us, as before the First-tier Tribunal, there

were suggestions that the CST may be over sensitive in its detection of anti-Semitism (in the sense of anti-Jewish rather than generally anti-Semitic attitudes): but whether or not that is so, the Secretary of State is clearly entitled to consult CST and take account of its advice.

45. Mr Sheldon prefaced his analysis of the evidence, including the poem, with the warning that, following Naik, we should avoid "refined textual analysis" when establishing the real meaning of the words or acts. Following that approach, the poem is addressed to the "oppressors" and refers to "oppressors" only. Even a cursory reading of the poem, however, shows that the "oppressors" referred to by the appellant include Pharaoh, infamous for oppressing the Jews. The CST concede in their critique on page 203 of the bundle that the poem also refers to the Arab tribes of 'Aad and Thamud who were destroyed in an earthquake as punishment for their behaviour. There are therefore examples of "oppressors" in the poem who were clearly not Jewish or associated at all with the modern state of Israel. The comments of the CST at page 203 of the bundle suggest that the appellant should be challenged to state who else he could mean but Jews. It is obvious to us that by oppressors he meant oppressors in general including but not limited to the State of Israel, indicated by the references to the oppressors who "corrupted our land" and "bombed the mosques". In our judgment the poem cannot be read as addressed to Jews.

46. Mr Sheldon submitted that the manner in which the poem was later reported, albeit inaccurately, was "plainly relevant to any assessment of its impact". That may be so; but in deciding whether the way in which the poem was reported is relevant to a decision to deport the appellant we have to consider where the responsibility lies. If a person makes statements that can bear an interpretation later placed on them, and it is that interpretation that is said to motivate an immigration decision, the interpretation (or reporting) are clearly relevant. But if the interpretation (or reporting) are wholly inaccurate, it is difficult to see any justification for the Secretary of State's to act on the inaccuracy rather than to protect an individual's general right to freedom of speech.

47. There is no reason to suppose that the appellant is remotely responsible for the travesty of the poem upon which the Secretary of State relied. It is not clear where this originally came from. The version in the Jerusalem Post of 6 July 2011 post-dated the respondent's decision. She must have been provided with a version from elsewhere but we do not know where. Where the original poem written by the appellant differed so greatly from the incorrect version we did not find it reasonable for him to be held responsible for any adverse consequences arising from the incorrect version. We were not, in fact taken to any evidence that incorrect version of the poem had fostered hatred or led to inter-community violence; and, of course, there is no evidence that the actual poem has done any such thing in the ten years since it was published.

48. There is no need to refer in detail to the lengthy and complex explanations of the poem given by the appellant and his expert witness, which sought to reduce still further any adverse interpretation of the poem. The position is that the poem as written by the appellant came does not come within the Unacceptable Behaviours

Policy and cannot contribute to an argument that the public good requires the deportation of the appellant.

(ii) The blood libel

49. The respondent also relies on a statement made by the appellant as part of a sermon he gave in Jerusalem on 16 February 2007. The context of the sermon was that at that time the appellant was banned under Israeli law from entering the compound of the al-Aqsa mosque in Jerusalem. The respondent maintains that the appellant attempted to enter the mosque with a large group of supporters but was turned away. He then went to a location nearby and gave a sermon to some hundreds of people. These events have led to charges being made against the appellant of inciting racism and inciting violence and we discuss those in detail below under (iv). The allegations against the appellant using unacceptable language regarding the destruction of the al-Aqsa mosque and about martyrdom discussed in (iii) also arise, in part, from this sermon.

50. The respondent's first concern about this sermon, however, is that it referred to the "blood libel", a long-standing form of abuse used against Jews, alleging that they used the blood of children to make bread. The blood libel insult was in use by medieval times in Europe and has re-emerged in various places and in various forms since then, for example the notoriously anti-Jewish fabrication known as the "Protocols of the Elders of Zion". The blood libel is something that cannot but be deeply offensive to Jews and, given its close association with the history of persecution of the Jews across Europe over centuries, we accept that iterations of it have the potential to foster hatred which might lead to inter-community violence in the UK.

51. Given the lack of accuracy in the basic text of the poem that had originally been relied on, we clearly need to look at exactly what the appellant said. It was agreed that the version of the sermon that we should consider was at pages 367 to 371 of the appellant's bundle. It was immediately clear that this version did not contain any reference to "Jewish holy bread" as had been suggested in paragraph 39 of the statement of the respondent's witness, Mr Rosenorn-Lanng. This incorrect attribution to the appellant of a statement referring to Jews again appears to have been published in an Israeli newspaper, on this occasion, Ha'Aretz. The incorrect version unfortunately continues to play a part in this matter as the rebuttal statements of the appellant and his expert, Professor Pappe, both appear to be predicated on the basis that the allegation remains that the sermon directly referred to "Jewish" holy bread, which it did not.

52. The particular passage relied on concerning the blood libel is as follows:

> "We are not a nation that is based on values of envy. We are not a nation that is based on values of vengeance. We have never allowed ourselves, and listen carefully; we have never allowed ourselves to knead the bread for the breaking [of] fasting during the blessed month of Ramadan with the blood of the children. And if someone wants a wider explanation, then he should ask what used to happen to some of the children of Europe, when their blood used to be mixed in the dough of the holy bread. God

> almighty, is this religion? Is this what God wants? Allah's curse be on you: how you are deluded away from the Truth. How dare you to lie to God? How dare you to fabricate things on God? "

53. The overall impression conveyed by this quite long sermon is that it was a very strongly-voiced objection to the perceived intention of the Israeli authorities to take over the site of the al-Aqsa mosque in Jerusalem. The choice of this topic for the sermon was in keeping with the undisputed evidence before us that the appellant has campaigned for the protection of the mosque for many years. Indeed, this was the main purpose of his visit to the UK. The topic was even less surprising given that the sermon was preached immediately after the appellant had been (lawfully but contentiously) prevented from entering al-Aqsa. The sermon ranges over a variety of other subjects, however, including the mistreatment of the Palestinians by Israeli occupiers and oppressors. There are numerous references to blood and violent conflicts that have occurred in Israel and beyond since the creation of the State of Israel, for example events in the Jenin refugee camp and the Sabra and Shatilla camps in Lebanon. The second paragraph refers to "terrorist" generals in the Israeli army. There are the references to martyrdom which we address below in more detail under (iii). It is, to our minds, at the very least, intemperate in expression and something which would offend and distress Israeli Jews and the wider Jewish community or even a non-partisan bystander given the degree of violence in the language used and even though the main concern of protecting the al-Aqsa mosque may be a legitimate one. Indeed, the expert relied on by the appellant, Dr Pappe, described the sermon as "incoherent and emotive".

54. We consider, however, that, as in the poem, the intemperate language in the sermon is addressed towards the Israeli state rather than Jews as such. Further, the appellant refers at the beginning of the sermon to the Islamic acceptance of Moses and Jesus as prophets. He expresses the inclusive concept of Jews, Christians and Muslims all being "People of the Book" who should "come to common terms". He also refers to a caliphate being established in Jerusalem and that then "the almond trees of Jerusalem will blossom once again, and the leaves for the olive trees will be green again". He also describes "honour" being returned to "all shrines", churches and the Holy Sepulchre and states that "we are not malicious" and therefore "will also protect the honour of the Jewish synagogues". So the sermon was not all fire and brimstone.

55. The appellant denies that the reference to "blood" being used in "holy bread" was a reference to the blood libel against Jews. In paragraph 167 of his first witness statement he states:

> "The SSHD's presentation of this quote is irresponsible and incorrect. I have never invoked the blood libel and I would not do so. I could not say in respect of the Jews, or in respect of the followers of any religion, that they actually mix children's blood with the bread. I know that this is not a Jewish tradition and that the allegation has been fabricated and used to persecute Jews";

and in paragraphs 171 to 180, he mounts a long explanation of what he says he did mean, making reference to the Spanish Inquisition, the conflict in Bosnia (neither of

which is mentioned in the sermon itself), and the use by many religions of religious doctrine to defend the shedding of enemies' blood. He also points out that when he was interviewed by the police in Israel, he was not asked about the reference to 'holy bread' or the blood libel. In his oral evidence before the First-tier Tribunal the appellant said that in referring to the Spanish Inquisition he meant to draw a parallel with the 'Israeli opposition forces'.

56. The appellant also relies on the evidence of Professor Pappe, who gives his impression of the sermon as 'neither anti-Semitic nor even anti-Zionist', but directed against 'the occupation in general and the violation of the Muslim rights'. He asserts that there is no reference to the blood libel (even though, as we have said, he was originally asked to comment of a version of the sermon containing the phrase 'Jewish holy bread').

57. In our judgment this is all wholly unpersuasive. The appellant is clearly aware of the blood libel against Jews. If his intention had been to draw an analogy between events of the Spanish Inquisition and actions of the Israeli state he could have said so in clearer terms that did not require over ten paragraphs of explanation for his true meaning to be made clear. If he had meant to refer to Christians using the blood of others to make bread, which he seems to consider less offensive than referring to Jews doing so, then he could have inserted the word "Christian" into the text of his the sermon as he does in paragraph 175 of his explanation. Allusion to historical examples of children being killed in religious conflict does not require reference to their blood being used to make "holy bread". The truth of the matter is that the conjunction of the concepts of 'children's blood' and 'holy bread' is bound to be seen as a reference to the blood libel unless it is immediately and comprehensively explained to be something else altogether.

58. Besides, even the explanation does not quite work. Professor Pappe accepts that "superficially" the reference could appear to be to the blood libel but that the "sentence without the adjective Jewish is not a repetition of the blood libel." He maintains that the next sentence of the sermon is a reference to a chapter in the history of the Inquisition. But neither the appellant nor Professor Pappe identified a source for this "chapter" of the Inquisition where Christians used blood of Muslim (or any other) children for Christian holy bread. There is no evidence that this is a commonly known matter in any of the communities in Israel, so that those hearing the sermon would recognise the reference. The explanation now put forward would not, so far as the evidence goes, moderate the meaning of the words in the sermon as actually delivered.

59. We agree with Professor Pappe that the purport of the sermon as a whole was against the actions of the state of Israel towards the al-Aqsa mosque and that the focus was not on the blood libel. We have taken into account that the same sermon contained more moderate language and concepts and positive references to Jewish prophets and synagogues. Nevertheless we do not find this comment could be taken to be anything other than a reference to the blood libel against Jews and nothing said by the appellant or Professor Pappe explains why it would be interpreted otherwise from the original Arabic text or in the English text before us. We accept that this

sermon was given on a somewhat turbulent day when the appellant had been refused permission to pray at one of the holy sites of his religion, one that he genuinely fears is under threat from the Israeli authorities. That is not sufficient to negate his comment and the hatred that might be fostered by it and lead to inter-community violence in the UK. We conclude, therefore, that it was a comment that the respondent was entitled to take into account and take seriously when considering whether the appellant should be deported.

(iii) Destruction of the al-Aqsa Mosque and Martyrdom

60. As indicated above, the main theme of the sermon was the perceived threat to the site of the al-Aqsa mosque from the Israeli authorities. The respondent does not dispute that there are legitimate concerns amongst some sections of the community in Israel and, indeed, the international community concerning excavations underneath the site of al-Aqsa. Indeed in 2011 there was a call from UNESCO for excavations in the old city of Jerusalem and the area of the al-Aqsa mosque to be halted. The respondent maintains, rather, that the appellant's statements in the 2007 sermon and elsewhere went beyond such legitimate protest.

61. The appellant's words do go further than calling for a halt to excavations: they are to the effect that the Israeli state intends to demolish the al-Aqsa mosque and build a Jewish temple in its place. The appellant refers to this at the beginning of the sermon:

> "… the Israeli establishment wants to build a temple for the purpose of worship, how insolent and what liar he is, who issued this statement. He wants to build a house of God; it is irrational to build a house of God while our blood still stains their clothes, doors, food and drink, and our blood passes from one terrorist General to another."

62. Later he asserts that the Israelis are "longing to demolish al-Aqsa mosque gradually". The respondent also maintains that the appellant made similar claims at the University of Haifa in 2009 and 2011. It will be obvious that the objection from the respondent is not to the protest itself but the use of what we have already acknowledged as, at least, intemperate language. The earlier extract from the sermon shows that the comments about the mosque being destroyed are immediately followed by further statements calling the Israeli state a "liar", repeated references to "blood" and to "terrorist Generals" which create a heightened context to the comments. At the end of the sermon the appellant calls for an international "intifada" or uprising to support the mosque and would appear to be aware of the potential impact of his statements: he acknowledges that he has been accused of "inciting" and suggests that his words might lead to court proceedings.

63. We agree with Professor Pappe, that the these statements were made about the Israeli state and not Jews and that the references to blood at this point of the sermon, as elsewhere, were to that of Palestinians killed or injured rather than a threat to the safety of Israeli citizens. The words used by the appellant are "incoherent and emotive" but we cannot see that they are sufficient to bring the appellant within the Unacceptable Behaviours policy or justify deportation.

64. There is, however, another feature of the appellant's homiletic upon which the

respondent particularly relies. On three occasions he is said to have made reference to the possibility of his hearers "dying as shahids" (martyrs), in response to the perceived threat to al-Aqsa. In the 2007 sermon he proclaimed:

> "Thus I would say if you think that you are mighty, and disguise prophets' teachings, if you keep this way justifying bloodshed, rejoice at widows' tears, dance on the wounds of martyrs, smile over orphans hunger and become delighted at freedom prisoners cries (sic) , if you keep on this way, then your value in the eyes of God will be as the prophet Mohammad described: "less than a wing of Mosquito". And thus we proceed in our path, fearing nobody but the Almighty Allah, That is why I say, those who thought they have a bloody history, generals of killing and massacres, those, if they think that by instigating against us on Channel 1 and channel 2, those who thought they are instigating against us on channel 10 (all three main Israeli channels) and Gale Tsahal (Israeli military radio station), we fear nobody but the Almighty Allah, the most beautiful moments of our destiny will be when we meet Allah as martyrs in the premises of the Al-Aqsa mosque."

65. What is said to be a quotation from a speech made at the University of Haifa in 2009 is to similar effect:

> "In February 2011, Salah was banned from attending an event at the University of Haifa. This was due to an inflammatory speech he gave to Arab students at the university in June 2009, which almost caused a riot. (Jewish students were not allowed into the event for security reasons). In 2009, Salah proclaimed to the students that Israel planned to destroy the al-Aqsa Mosque and build the Third Temple, and asserted: "We love life, our families, our homes and our children, but if they suggest that we give up our principles and holy sites, we would rather die and we will welcome death".

66. The respondent also relied on a statement made in a speech at the University of Haifa at the end of June or early July 2011, according to an article from the Jerusalem Post dated 6 July 2011:

> "According to Salah, "Netanyahu's plan is to dig tunnels under al-Aksa and replace it with a Jewish Temple." He added: "We will not compromise on our principles of holy sites. We prefer to die as shahids and will welcome death joyfully."

67. We approach the second and third sources with some caution as they are reports of what the appellant is supposed to have said and we were not provided with either the original Arabic transcript of the speeches or a translation. The appellant does not seek to deny them, however. Rather, he maintains that these references are to passive martyrdom and to peaceful protestors being killed or injured when defending the al-Aqsa site.

68. We do not dispute that deaths and injuries have occurred due to the specific conflict over this part of the old city of Jerusalem and that some of those affected will have been legitimate and peaceful protestors. But it does not appear to us that there can be anything "passive" about the context of the references to martyrdom in the 2007 sermon. The first passage quoted above from the sermon begins with what is a threat of the retribution of God to the Israeli state. It goes on to refer to blood, killings and massacres. The reference to welcoming martyrdom cannot be a call to peaceful

protest. Clearly ideas of violent protest are being put forward.

69. We are not persuaded that the same is true of the 2009 and 2011 speeches, however, even if they also referred to martyrdom. No context for the words quoted was offered to us; and without that it is in our judgment impossible to say that they imported a call to retribution, violent protest, or active seeking of martyrdom.

(iv) The 2011 Indictments

70. Two indictments were brought against the appellant on 23 June 2011. The first is for inciting violence and inciting racism. The charges both arise directly from the statements made in the sermon of 16 February 2007 discussed in (ii) and (iii) above. The appellant clearly disputes the statement in the indictment that the crowd listening to the 2007 sermon "started rioting and throwing stones towards the police force". Before the First-tier Tribunal he submitted a video of the sermon, in which no violence was shown. The allegations have not been tested in court. If there were good reason to suppose that the Israeli authorities were seriously concerned about the appellant's words in 2007, that might well be a matter for the Secretary of State to take into account, even if the charges had not been proved. But these indictments did not follow the alleged incident with any promptness: all we know is that this indictment, like the other, was framed at the time the Secretary of State was making her decision. There had been a lapse of many years since the alleged incident and no subsequent incident of a similar nature is specified. In the circumstances we do not think that the mere existence of the indictment gives any good reason to suppose that what it alleges can be made out, and for that reason this indictment should not have been taken into consideration by the respondent.

71. Mr Sheldon told us that formally the second indictment, with a charge of obstructing a police officer in the line of duty, remained part of the case against the appellant but acknowledged the comments of the First-tier Tribunal that it was a "minor incident which has no bearing on the central issues in this appeal". We were not asked to go beyond that finding and do not do so. There is nothing in this indictment relevant to the decision made by the Secretary of State.

(v) Funding Hamas

72. It is not disputed that in 2003 the appellant was convicted of contact with a foreign agent, providing funding for an unlawful association, possessing funds belonging to unlawful associations and committing and act with a prohibited asset. After a plea bargain, he was sentenced to three and a half years in prison, most of which, if not all, had already been served on remand. There was general agreement that the documents relating to the final plea bargain that led to the conviction were not entirely easy to follow. The shorthand used by the respondent is that the appellant plead guilty to raising funds for Hamas.

73. The detail would appear to be something along the following lines. The appellant set up two fundraising organisations. They became part of an umbrella organisation, The Union of Good, which consisted of Islamic organisations raising funds for the

Palestinian territories. The appellant was also a director of The Union of Good. Some of the organisations involved in The Union of Good, in particular the al-Aqsa Fund, Interpal, The Committee for Assistance and Solidarity with Palestine and "The Holy Land Fund" were banned in Israel as being part of Hamas. The al-Aqsa Fund was also banned in the UK, USA and Germany. Interpal was banned in the USA but remains a registered charity in the UK. The two organisations set up by the appellant, as part of The Union of Good, mixed funds with the banned organisations, thereby funding Hamas. The Union of Good was banned in 2008 in Israel and the USA. In 2009 all UK charities that were members of The Union of Good were forced to terminate their membership of it.

74. There are a number of difficulties for the respondent in relying on this conviction. As properly pointed out by Mr Sheldon, only part of Hamas is banned in the UK. The precise use to which the funds were put remains unclear so it is not known if the (legal) political or (illegal) military wing of Hamas benefited from the activities for which the appellant was convicted. The appellant maintains that his purposes were entirely charitable but that he had no option but to plead guilty when, following a change in the law in Israel, activities that he had lawfully undertaken became unlawful. The respondent is right to point out that the appellant has not shown that the funds with which he was involved were exclusively put to proper charitable purposes. Against this, the respondent's concession is that no clear conclusion can be reached that the funds were put to improper purposes. Further, what amounts to a criminal offence in Israel would not necessarily be the case in the UK: for example, assisting the political wing of Hamas, banned in its entirety in Israel; or supporting Interpal, which although banned in Israel remains a legal charity in the UK; and it is difficult to see therefore why support of it, even if contrary to the law of Israel, should be regarded in the UK as posing any threat to anyone.

75. We also note, first, that the activities of the appellant that led to the conviction in 2005 occurred some years earlier and that there was nothing to suggest any similar sort of activity at all since then; secondly, that the sentence is not of such a length as to indicate that the support of terrorism was in any sense save a purely formal one before the court; thirdly, that comments made by the prosecutor during the sentencing session of the court suggest that the charges were not on the basis that any of the defendants posed a danger to the public of the State of Israel; and fourthly, that it is now some years since even the conviction, with no evidence that it, or the activities that gave rise to it, have caused community hatred or led to violence anywhere since then. Our conclusion is that the conviction does not bring the appellant within the Unacceptable Behaviours policy, nor is otherwise relevant in making or reviewing the decision against which the appellant appeals.

(vi) Other matters

76. We have looked at the five factors separately, and have found that only the appellant's comments on the blood libel and martyrdom in his sermon in February 2007 have the potential to come within the Unacceptable Behaviours policy and justify his deportation. It is right to look at the appellant's profile as a whole rather than in discrete units, but for the reasons we have given we do not think that any of

the other factors fell properly to be taken into account by the Secretary of State in making her decision.

77. It is necessary to put into context the two factors that we have found were relevant. The context itself has two aspects.

78. First, and as pointed out by Professor Pappe, there is no reliable evidence of the appellant using words carrying a reference to the blood libel save in the single passage in a sermon delivered five years ago. Similarly, the reliable evidence relating to calls to martyrdom is confined to the same occasion. The absence of other evidence is striking, for at least two reasons. The appellant is a prominent public figure and a prolific speaker. The first indictment shows that his speeches are of interest to the authorities in Israel. In these circumstances we think it can fairly be said that the evidence before us is not a sample, or 'the tip of the iceberg': it is simply all the evidence that there is.

79. This is not a case like Naik, or like GW v SSHD [2009] UKAIT 00050, where the individual in question had a clear agenda in his public pronouncements that was pervasive and potentially offensive or dangerous. In this case the danger or offence can only be discovered by a detailed examination of the appellant's output, and then can only be reliably based (as it turns out) on a few words on one occasion. So from that point of view the context is that the matters upon which the Secretary of State relies are not at the heart of the appellant's message; and indeed it is not easy to see that any reasonable observer would associate the appellant with them in any general sense. That is not, of course, to say that the two factors that we have found relevant are not to be taken into account at all, but it is necessary to look at the whole picture.

80. The second aspect of context is the evidence relating to any actualisation of the risk that the appellant's exclusion or deportation was supposed to obviate. There has never been any evidence that his previous visits to any country have prompted or threatened hatred or inter-community violence. That does not show that the risk does not exist. Events move on; and the Secretary of State's decision was made at what she may have thought was a particularly sensitive time.

81. But, as we remarked earlier, one of the features distinguishing an appeal from Judicial Review is the admissibility of evidence of matters since the date of the decision. Although the Secretary of State originally intended that the appellant should not be here at all, and although until the present decision was made the appellant proposed to depart promptly, the fact is that he has been in the United Kingdom for over seven months. We have not been told of anything that might suggest that his presence here is any threat to the public or to public order; and there is similarly no evidence that it has provided endorsement of any view the expression of which might pose a threat. The assessment of a threat is a matter on which the Secretary of State's views must in all cases be entitled to weight; but it is very much less necessary to try to predict what will happen when there is instead evidence of what has (or rather has not) happened.

Decision

82. The appellant had available to him any of the grounds of appeal permitted by s84(1) of the 2002 Act. Expressly or by necessary implication he has raised those in paragraphs (c) (or (g)), (e) and (f). He says that the decision to make a deportation order against him was one which was not made in accordance with the law, that it breaches his rights under the ECHR, in particular article 11, and that the discretion used in making it should have been exercised differently.

83. The appellant is not a British citizen and is in the United Kingdom. His deportation is permitted by s3(5) of the Immigration Act 1971 on the ground that it would be conducive to the public good. To that extent the legality of the decision is beyond question. The decision in the present case was, however, expressly based on the terms of the published policy. The result of our analysis of the evidence is that in purporting to apply that policy to the facts of the case the Secretary of State acted under a misapprehension as to the facts. Most importantly, she was misled as to the terms of the poem written by the appellant, a matter on which there is now no room for dispute. As we have decided, she took irrelevant factors into account in relation to the indictments and the Hamas conviction. Even if as a matter of law the defects could be cured by an assertion that the decision would have been the same without the errors, there has been no attempt to make that assertion and it is far from clear that it could properly be made. The decision is one in respect of which a challenge on traditional public law grounds would have succeeded and accordingly the ground under s 84(1)(e) is made out.

84. The ground in s84(1)(c) is that the decision under appeal is unlawful as contrary to the appellant's Convention rights; that under paragraph (g) is that his removal in consequence of the decision would be incompatible with his Convention rights. There is no material difference between them for present purposes. It is accepted that his deportation amounts to an infringement of his rights under article 10: the question is therefore whether it is proportionate. The task is to decide an appeal, in which we are not constrained (as we are in relation to the paragraph (e) ground) by the basis upon which an application for Judicial Review might succeed.

85. The right to freedom of speech is, as numerous authorities show, a right entitled to general protection; it is a 'strong' right, in the sense that weak arguments are unlikely to show that its suppression in an individual case is justified. In the present case we consider the arguments to be very weak. As we have indicated, the matters raised by the Secretary of State are not a fair portrayal of the appellant's views or words as a whole; and they are in essence confined to words on one day, that are not shown to have caused any difficulty at the time or since. There is no evidence that the danger perceived by the Secretary of State is perceived by any of the other countries where the appellant has been, nor, save for the very tardy indictment, is there any evidence that even Israel sees the danger that the Secretary of State sees. The essence of the decision under appeal, once the facts are properly analysed is that because of a few sentences in the sermon in February 2007, which nobody seems to have regarded as harmful at the time, the appellant is to be prevented from being in the United Kingdom or saying anything here (save by telecommunication), for an indefinite

period of time. By the time that we come to look at the evidence the position is that his presence here and what he has said here have caused no difficulty of any sort. We have no indication of the Secretary of State's view in relation to the facts as we have found them: we can take into account only the terms of the policy itself. We have no difficulty in concluding that the Secretary of State's decision has not been shown to be proportionate to the need to preserve community harmony or protect the United Kingdom from the dangers to which the policy refers. On the contrary, the position is that it appears to have been entirely unnecessary to achieve that purpose. It follows that as was as a disproportionate interference with the appellant's Convention rights, the human rights grounds are made out.

86. Before the First-tier Tribunal, the appellant relied also on allegations of breaches of his rights under articles 8, 9 and 11. In view of the decision we have reached in relation to article 10, we do not need to deal with the other articles in any detail. For completeness, however, we say that it appears to us that in respect of all of them Mr Sheldon's submissions on behalf of the Secretary of State are essentially unanswerable. Those submissions were, in brief, as follows. (a) There was no evidence to show that the appellant's reputation had been damaged by the decision, in breach of article 8 as he alleged. (b) The decision had no impact on the appellant's ability to practise his religion, and in any case restriction on freedom of religion was clearly not the reason for the decision. Following the decision of the European Court of Human Rights in Nolan v Russia (App No 2512/04) 'deportation does not … as such constitute an interference with the rights guaranteed by Article 9, unless it can be established that the measure was designed to repress the exercise of such rights …'. (c) The decision did not affect the rights of the appellant under article 11 to associate anywhere other than in the United Kingdom, and so far as his rights in the United Kingdom were concerned the claim under article 11 adds nothing to that under article 10 and could not succeed if the latter did not.

87. If the appellant had not been able to show that the decision was unlawful as a breach of his human rights we should have had to consider whether, even so, the discretion should have been exercised differently. We do not take into account the fact that, as we remarked earlier, the practical effect of making the deportation decision was that the appellant has been here for many months instead of a few days. That is part of the background. We have no basis for saying that it is wrong to make a deportation decision, carrying a right of appeal on the merits and therefore enabling the merits to be properly analysed, simply because the subject of the decision may leave the country of his own accord.

88. We do, however, note that following a Freedom of Information Act request, the appellant's representatives were able to show that those advising the Secretary of State considered that even on the facts that they were assembling for her consideration, the case was 'finely balanced'. The removal of the poem from consideration must necessarily affect the balance; and the other matters to which we have referred must tip it further in the appellant's favour. We are not aware of anything going against the appellant that was not considered right at the beginning. For these reasons, if the matter had depended on the exercise of discretion we should have decided, with the benefit of the evidence available to us and on the facts as we

have found them, that the discretion should have been exercised differently.

89. In summary, then, the appellant's appeal against the decision to make a deportation order against him succeeds on all grounds.

90. We conclude by indicating what that means in practice. First, it means that the decision itself is not to be the subject of any action. Secondly, it means that there is no lawful basis for the Secretary of State to implement the exclusion order that was based on exactly the same material.

91. The decision we have made is based on the evidence before us. It does not amount to a declaration that the appellant is entitled to entry to the United Kingdom whatever he may say or do in the future, or whatever in the future he may be found to have said or done in the past. Our decision relates only to the decision under appeal and the Secretary of State's reasons for making it as argued at the hearings in the two Tribunals.

C. M. G. Ockelton

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 5 April 2012