IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004680
UI-2023-004695

First-tier Tribunal No:
RP/50094/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 April 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE
and
UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SA (by her Litigation Friend, David Wedgwood)
(Anonymity Order Made)

Respondent

Representation:
For the Appellant: Ms Elliott, instructed by the Government Legal Department
For the Respondent: Mr Gajjar, instructed by SAJ Legal Solicitors

Heard at Field House on 12 February 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the anonymity order made by the First-tier Tribunal is to continue in force. It is appropriate to maintain that order on account of the fact that the appellant claims to be the victim of a sexual offence or human trafficking (paragraph 160 of the First-tier Tribunal's decision refers.)

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to

identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Secretary of State appeals with the permission of UTJ Blundell against the decision of a panel of the First-tier Tribunal ("FtT") comprising Resident Judge Froom and Resident Judge Holmes. By that decision, which was issued on 1 September 2023, the FtT dismissed SA's appeal against the revocation of her protection status on Refugee Convention grounds but allowed the appeal on humanitarian protection ("HP") grounds. Both parties sought permission to appeal. The same panel of the FtT refused both applications. On renewal, UTJ Blundell refused SA's application for permission to appeal but granted permission to the Secretary of State.

2. For the sake of continuity, we will refer to the parties as they were before the FtT: SA as the appellant and the Secretary of State as the respondent.

Background

3. As we will explain shortly, the Secretary of State's challenge to the decision of the FtT is one of jurisdiction. He contends, in short, that the FtT was not entitled to consider the appeal on HP grounds or to allow it on that basis. In the circumstances, it is not necessary to set out very much of the factual background or of the detailed findings made by the FtT in its decision of 160 paragraphs. The following outline will suffice.

4. The appellant claimed asylum on 27 February 2002. She stated that she was a citizen of Saudi Arabia who was born on 2 April 1982. She claimed that she would be at risk from the Saudi Royal Family on return. International protection was refused but an appeal against that decision was allowed in 2009. The appellant and her daughter, who was dependent on her claim, were granted leave to remain as refugees. They were granted Indefinite Leave to Remain ("ILR") on 14 August 2014.

5. On 24 September 2021, following the necessary consultation with the United Nations High Commissioner for Refugees ("UNHCR"), the respondent issued a decision entitled 'Revocation of Refugee Status'. As the FtT suggested at [11]-[12] of its decision, that was something of a misnomer. The true character of the respondent's decision was cancellation of the refugee status on the basis that it should never have been granted. The respondent reached that decision because he had concluded that the appellant was in truth a national of Yemen who was born on 1 January 1977.

The Appeal to the First-tier Tribunal

6. The FtT concluded that the appellant had at all material times been a Yemeni citizen who was born in Yemen in 1977, and that she had always known that to be the case: [89]-[124]. It was not satisfied that the appellant was genuinely a Saudi Arabian citizen: [125]-[149]. The FtT

found that the appellant had deliberately and dishonestly sought to conceal her Yemeni citizenship when she made her application for asylum and in the course of her first appeal: [150]-[152]. As such, the FtT concluded that the core of the asylum claim was nothing more than a fiction and the appeal was dismissed on the Refugee Convention ground of appeal: [153]-[157].

7. The reasons given by the FtT for allowing the appeal on the Humanitarian Protection ground of appeal are to be found in two sections of its decision. Rather than attempting a synopsis of these important sections, we reproduce them in full:

> [20] We note that no decision has been made to cancel, or to revoke, the grant of indefinite leave to remain that has been made to the Appellant. The Respondent accepts that even if the Appellant is a citizen of Yemen, and no other country, the humanitarian situation within Yemen is such that she would face a real risk of harm sufficient to breach her Article 3 rights in the event that she were to be removed to Yemen as a national of that country. The Respondent confirmed therefore before us that there is no intention to make such a decision.
>
> [21] Mr Gajjar agreed at the commencement of the hearing that an appeal brought under section 82(1)(c) of the Nationality, Immigration and Asylum Act 2002, as this is, could only be pursued on the grounds provided by section 84(3)(a) and (b). It was common ground therefore that the decision under appeal before us did not engage the Appellant's rights under either Article 3, or, Article 8.
>
> [22] Although Mr Gajjar confirmed the Appellant relied on the ground of appeal provided by section 84(3)(b) to show that the decision breached the United Kingdom's obligations to grant humanitarian protection, and we observed that Mr Wain's concession in relation to Article 3, which was based on the general insecurity in Yemen, would potentially bring the appellant within the definition of 'serious harm' in Article 15(b) of the Qualification Directive, neither representative addressed us further on that, once the concession in relation to the Appellant's ILR was confirmed.
>
> […]
>
> [158] The Appellant is not a refugee. However, as mentioned above, Mr Gajjar did confirm that the Appellant also appealed on the ground provided by section 84(3)(b) albeit he chose not to elaborate further. It follows from the concession made by Mr Wain that removing the Appellant to Yemen would breach her rights under Article 3 of the Human Rights Convention and our finding that the Appellant is Yemeni, not Saudi, that she is entitled to a grant of Humanitarian Protection by virtue of paragraphs 339C and 339CA(iii) of the Immigration Rules. Removal is not in prospect but her circumstances entitle her to status. We reach this conclusion notwithstanding our inability to rule out that the Appellant may have other nationalities which she has not disclosed to us.

> [159] Accordingly the appeal is allowed on the ground provided by section 84(3)(b) of the 2002 Act.

The Appeal to the Upper Tribunal

8. The respondent advanced two grounds of appeal in her application for permission from the First-tier Tribunal. The first was that the concession made by the Presenting Officer as recorded at [20] of the FtT's decision, was contrary to published policy and the FtT had provided 'no rationale for the concession', which was contrary to the stance adopted in the Respondent's Review document. The second ground was that the FtT had materially misdirected itself in law by considering Humanitarian Protection at all.

9. The panel considered neither of those grounds to be arguable. It stated that the Tribunal could not be expected to 'second guess' the thinking behind a concession and that there was no proper basis to allow that concession to be withdrawn, whether or not it was contrary to the CPIN or the Review. In respect of the jurisdictional ground, the panel said this:

> [3] The grounds argue, firstly, that the Tribunal had no jurisdiction to allow the appeal under section 84(3)(b) because the Appellant did not have the benefit of a grant of Humanitarian Protection and therefore no such status could be revoked by the decision under appeal. Reliance is placed in the grounds on Essa (Revocation of protection status appeals) [2018] UKUT 00244 (IAC). That case was not cited to the Tribunal and in any event the factual circumstances under consideration were quite different. The Tribunal requested the assistance of both representatives on the position of the Appellant vis a vis her entitlement to humanitarian protection. The Respondent did not advance the arguments that she now seeks to make, and did not seek any further time to consider her position or to formulate any argument on the matter. The hearing having taken its course over more than one day there was in any event ample time for instructions on the issue to have been taken. Even now the lengthy grounds fail to identify any proper basis upon which the Respondent could decline to grant humanitarian protection to the Appellant as a citizen of Yemen in line with the Tribunal's finding to that effect (a finding which the Respondent does not challenge, and which is consistent with the case that she advanced before the Tribunal). The challenge advanced in ground 1 is therefore fundamentally flawed, but even if it were technically correct, it could serve no purpose since the Respondent identifies no basis upon which she could properly decline to grant humanitarian protection to the Appellant.

10. The respondent's renewed grounds advanced only the jurisdictional ground. UTJ Blundell considered the single ground to be arguable.

Submissions

11. The parties filed helpful skeleton arguments before the hearing.

12. For the Secretary of State, Ms Elliott submitted in her skeleton argument that the appeal had been brought against a decision of the kind specified in s82(1)(c) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). As that decision was to revoke the appellant's refugee status, the only ground on which that appeal could be brought was that contained in s84(3)(a) of the 2002 Act. The FtT had not been entitled, in those circumstances, to go on to consider whether the appellant might be eligible for a grant of HP. The respondent relied upon Essa (revocation of protection status appeals) [2018] UKUT 244 (IAC) and Virk & Ors v SSHD [2013] EWCA Civ 652 in support of these arguments.

13. In her oral submissions, Ms Elliott stated that the respondent was considering whether to deprive the appellant of her ILR and the finding that the appellant was eligible for HP was an obstacle to that consideration. The proper course – in the event that the appellant's refugee status was cancelled – was for the appellant to make any representations she saw fit thereafter. Ms Elliott pointed to the language of s84 of the 2002 Act which, in her submission, supported the proposition that an individual only had the HP ground of appeal available to them when they had originally been granted HP. The procedures in the Immigration Rules supported that approach. Essa was materially indistinguishable. The FtT had been in error when it had 'shoe-horned in' consideration of HP from [157]-[160] of its decision, which had been correct in law to that point. Neither R (Nirula) v SSHD [2012] EWCA Civ 1436; [2013] 1 WLR 1090 nor Virk v SSHD [2013] EWCA Civ 652 supported Mr Gajjar's alternative argument that the decision had become irreversible.

14. For the appellant, Mr Gajjar submitted in his skeleton argument that the FtT had jurisdiction to consider HP or, in the alternative, that the point had been reached at which the decision, if taken without jurisdiction, had become irreversible. The appellant had available to her the grounds in section 84(3)(a) and (b) and the question under the latter subsection was whether the appellant was eligible for HP. The Asylum and Immigration Tribunal had not allowed the appeal on HP grounds in 2009 but that was only because the ground could only arise if the appellant was not a refugee. As to the alternative argument, the Presenting Officer had been content to 'follow the Tribunal's lead' in concluding that HP was in play, and that decision had become irreversible in the manner described at [23] of Virk v SSHD.

15. Mr Gajjar submitted orally that Essa was distinguishable on the facts and that the FtT's refusal of permission was correct. There had been no attempt to pursue a HP argument in Essa, and it could not come into play in any event; with a crime of that nature, the appellant would have been automatically excluded. The natural and ordinary construction of section 84(3) was that the Refugee Convention ground and the HP ground were available, as alternatives, whenever either form of protection status was revoked. It was wrong to suggest that the only ground of appeal available was that which related to the original status granted. It was also wrong to suggest that removal had to be in contemplation for the ground in s84(3)

(b) to be available. In the alternative, Mr Gajjar submitted that the issue of jurisdiction had crystallised at the date of the FtT hearing and that decision had become irreversible.

16. Ms Elliott replied, submitting that Essa was obviously relevant and that the factual dissimilarities were immaterial. In her submission, the available ground of appeal was 'tied' to the original grant of status. The alternative submission made by the appellant was also unfounded; it would mean that the issue of jurisdiction had been settled before the FtT had issued its decision and, in any event, the stance adopted by the Presenting Officer as to jurisdiction was far from clear.

17. We reserved our decision at the conclusion of the submissions. We are grateful to counsel for their economical submissions.

Legal Framework

18. Sections 82 and 84 of the 2002 Act have at all material times provided as follows:

> *82 Right of appeal to the Tribunal*
> (1) A person ("P") may appeal to the Tribunal where—
> (a) the Secretary of State has decided to refuse a protection claim made by P,
> (b) the Secretary of State has decided to refuse a human rights claim made by P, or
> (c) the Secretary of State has decided to revoke P's protection status.
>
> (2) For the purposes of this Part—
> (a) a "protection claim" is a claim made by a person ("P") that removal of P from the United Kingdom—
> (i) would breach the United Kingdom's obligations under the Refugee Convention, or
> (ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
> (b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions—
> (i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;
> (ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
> (c) a person has "protection status" if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;
> (d) "humanitarian protection" is to be construed in accordance with the immigration rules;
> (e) "refugee" has the same meaning as in the Refugee Convention.
>
> (3) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part.

84 Grounds of appeal

(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds—
   (a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;
   (b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
   (c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

(3) An appeal under section 82(1)(c) (revocation of protection status) must be brought on one or more of the following grounds—
   (a) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention;
   (b) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection.

19. We were also referred by Ms Elliott to the following provisions of the Immigration Rules:

Definition of a claim for humanitarian protection

327EA. Under this Part, a claim for humanitarian protection is a request by a person for international protection due to a claim that if they are removed from or required to leave the UK, they would face a real risk of suffering serious harm (as defined in paragraph 339CA) in their country of origin, and they are unable, or owing to such risk, unwilling to avail themselves of the protection of that country

[…]

Misrepresentation

339AB. This paragraph applies where the Secretary of State is satisfied that the person's misrepresentation or omission of facts, including the use of false documents, were decisive for the grant of refugee status and the person does not otherwise qualify for refugee status under paragraph 334.

[…]

Grant of humanitarian protection

339C. An asylum applicant will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
(i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;

(ii) they are not a refugee within the meaning of Article 1 of the 1951 Refugee Convention;
(iii) substantial grounds have been shown for believing that the asylum applicant concerned, if returned to the country of origin, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and
(iv) they are not excluded from a grant of humanitarian protection.

339CA. For the purposes of paragraph 339C, serious harm consists of:
(i) the death penalty or execution;
(ii) unlawful killing;
(iii) torture or inhuman or degrading treatment or punishment of a person in the country of origin; or
(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

20. We also note paragraph 327 of the Immigration Rules:

327. Under this Part:

i) An "application for asylum" (or an "asylum application") is a claim by a person to be recognised as a refugee under the Refugee Convention on the basis that it would be contrary to the United Kingdom's obligations under the Refugee Convention for them to be removed from or required to leave the United Kingdom, and which is recorded as valid or a claim deemed to be an application for asylum in accordance with paragraph 327EC.

ii) An "asylum applicant" is someone who makes a claim under paragraph 327(i) or who is deemed to have made such a claim in accordance with paragraph 327EC.

Analysis

21. In our judgment, the ground of appeal in section 84(3)(b) was available to the appellant, and the Secretary of State is in error in submitting that it was not. We reach that conclusion for the following reasons.

22. Firstly, the plain language of the statute does not support the Secretary of State's construction. As drafted, the intention was quite clearly that a person whose protection status (as defined in s82(2)(c)) was revoked should be able to advance 'one or more' of the grounds described in s84(3)(a) and (b). Those words require some consideration. A person cannot hold refugee status and HP simultaneously. Entitlement to the latter status only arises where there is no entitlement to the former. So much is clear from paragraph 339C(ii) of the Immigration Rules, as it was from Article 2(e) of the Qualification Directive. The intention must therefore have been that a person who held either type of protection status could advance one or both of the grounds in s84(3).

23. It would have been a simple matter for the draftsman to stipulate that a person whose protection status as a refugee was revoked might only appeal on the ground that the decision breached the United Kingdom's

obligations under that Convention, or that a person whose protection status as a person eligible for HP was revoked might only appeal on the ground the revocation of that status breached the United Kingdom's obligations in relation to such a person. The fact that the draftsman chose not to do so provides cogent support for Mr Gajjar's argument that the right of appeal is not restricted in the manner contended for by Ms Elliott.

24. Secondly, we accept Mr Gajjar's submission that Essa is of no assistance to the Secretary of State. UTJ Blundell was persuaded to grant permission largely because of the sentence which appears at the end of [4] of that decision: 'The only ground upon which the claimant could appeal to the Tribunal was that set out in s84(3)(a), that 'the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention.' When read in its proper context, however, that sentence does not bear the weight which Ms Elliott sought to place upon it.

25. Essa was not a case in which the appellant could advance the HP ground of appeal in s84(3)(b). As is clear from [2] of the decision, it was accepted on all sides that he was a refugee because he had 'a well-founded fear of persecution in Sudan as a non-Arab Darfuri'. As a refugee within the meaning of Article 1 of the Refugee Convention, the appellant was not, as a result of paragraph 339C(ii) of the Immigration Rules, a person who was eligible for HP. Essa was not therefore a case in which any entitlement to HP was, or could have been, in issue. Instead, it was a case which concerned the Refugee Convention ground of appeal and the relationship between the domestic legal framework and the UK's obligations under that Convention. It is of no assistance to the Secretary of State and we respectfully consider that the FtT was correct to state in refusing permission that it was 'quite different'.

26. Thirdly, it is in our judgment irrelevant that the appellant has never made a discrete application for humanitarian protection as defined in paragraph 327EA of the Immigration Rules, and it is equally irrelevant that the decision under appeal was not one to revoke humanitarian protection on the basis of misrepresentation, under paragraph 339GD of those Rules. As a matter of statutory construction, a person who has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection may advance either of the grounds in section 84(3) when they appeal against the revocation of either form of protection status.

27. For these reasons, we reject Ms Elliott's primary submission that the FtT was not entitled as a matter of jurisdiction to consider the HP ground of appeal in section 84(3)(b).

28. It remains, however, for us to consider the proper focus of the enquiry required by section 84(3)(b). The question posed by the ground of appeal was whether the revocation of the appellant's protection status breached the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection. By section 82(2)(d), humanitarian protection

is to be construed in accordance with the Immigration Rules. The definition of 'humanitarian protection' in paragraph 6 of the Immigration Rules is 'status granted under paragraph 339C and which has not been revoked under paragraphs 339G to 339H'.

29. We have reproduced paragraph 339C in its current form above. We note that it has been subject to amendment since the appellant lodged her appeal with the First-tier Tribunal. It was amended by paragraph 11.36 of HC17 at 4pm on 11 May 2022. The change took effect immediately and there were no transitional provisions. The reasons for the absence of any transitional provisions need not lengthen this decision but can be found at paragraphs 3.4 to 3.5 of the Explanatory Memorandum. The change effected by HC17 was to substitute the words 'country of origin' in paragraph 339C(iii) for the original words 'country of return'.

30. Had the original words remained, the material question for the FtT under s84(3)(b) would (in summary) have been whether the appellant faced serious harm if returned to the 'country of return'. It has never been suggested in this case that the appellant currently faces return to Yemen and it would, in our judgment, have been quite inappropriate prior to 4pm on 11 May 2022 for a decision maker to consider whether or not there existed a risk in a country to which return had not been proposed.

31. The FtT heard and determined this appeal in 2023, however, and it was bound by the principle in Odelola v SSHD [2009] UKHL 25; [2009] 1 WLR 1230 to apply the Immigration Rules as they stood at that time, given the absence of any transitional provisions. It is apparent from the sections of the FtT's decision which we have reproduced above that it received no proper argument on the propriety of considering whether the appellant was eligible for HP by reference to Yemen. The FtT apparently proceeded on the basis that it should consider that question because it had found Yemen to be the appellant's country of origin.

32. In so doing, we consider the FtT to have fallen into error. Whilst it was not required by paragraph 339C to focus on the potential country of return, it was required to frame its enquiry by reference to the application which the appellant had originally made. She had only ever made an application for asylum and had only ever been an asylum applicant (as defined in paragraph 327 of the Immigration Rules) by reference to a claim that she faced persecution or serious harm in Saudi Arabia. That historical claim provided the 'country of origin' on which the FtT was to focus in this appeal. Having concluded that the appellant was not from Saudi Arabia and was not at risk there, that sufficed to dispose of the appeal against the appellant in respect of the Refugee Convention and HP grounds of appeal.

33. It had been made clear in the Secretary of State's decision that the appellant might 'submit representations in regards to her protection needs as a Yemen national' if she wished to do so. There was a clear statement to that effect at the start of the letter and at [58]-[62]. We consider that the Secretary of State's decision reflected the proper focus of the Tribunal's subsequent assessment. It should have focused on the United

Kingdom's obligations towards the appellant as a claimed national of Saudi Arabia and it should not have acceded to Mr Gajjar's submission, made at [23]-[28] of his skeleton argument, that it should consider the risk to her in Yemen. The applicant had never asserted a risk on return to Yemen and, in the event that she wished to assert that there was such a risk, it was for her to do so in the manner set out in the Secretary of State's decision. Until she did so, the only country of origin on which the FtT was entitled to focus was that previously identified to the Secretary of State.

34. We note, and have recorded, the submission which was made by the Presenting Officer before the FtT "that removing the Appellant to Yemen would breach her rights under Article 3 of the Human Rights Convention". The FtT was obviously correct to note that no questions under the ECHR arose in the appeal, given the grounds of appeal available to the appellant. For the reasons we have set out above, however, we consider that the FtT was wrong to attach any significance to that concession as it was irrelevant to the determination of the appeal before it. The appellant may wish to rely on that concession in any representations she might now make to the Secretary of State but it provided no proper basis for allowing the appeal.

35. For the reasons we have given, we consider that the First-tier Tribunal fell into error in considering whether the appellant would be at risk in Yemen. The finding that it had reached in relation to the appellant's nationality sufficed to resolve both grounds of appeal against her and the only proper outcome, in respect of both grounds of appeal, was the dismissal of the appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. We allow the Secretary of State's appeal and substitute a decision dismissing the appeal on all grounds.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 March 2024