UT Neutral citation number: [2023] UKUT 00293 (IAC)

Dani (non-removal human rights submissions)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard on 27 July 2023
Promulgated on 2 November 2023

THE IMMIGRATION ACTS

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Taulant Dani
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr R. Toal, Counsel, instructed by the Bureau for Migrant Advice and Policy
For the Respondent: Mr E. Terrell, Senior Home Office Presenting Officer

1) *The mere refusal of leave to remain under the EUSS is not, without more, a "human rights claim" under section 113(1) of the 2002 Act.*

2) *Consequently, the "new matter" regime does not regulate the Tribunal's consideration of non-removal human rights submissions.*

3) *But the Tribunal may only consider matters which it thinks are "relevant to the substance of the decision appealed against".*

4) *Whether Article 8 is engaged by a decision to refuse an EUSS application is not "relevant to the substance of the decision appealed against"; the Tribunal cannot not consider it. The Tribunal does not enjoy a broad, unencumbered jurisdiction to consider non-removal human rights submissions at large.*

5) *In any event, Article 8 will not, without more, be engaged by a decision to refuse leave to remain under the EUSS.*

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6) *Section 7(1)(b) of the Human Rights Act 1998 does not permit an appellant to advance a free-standing Article 8 claim in proceedings before the First-tier Tribunal.*

DECISION AND REASONS

1. There are two issues in these proceedings:

    a. First, do the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations") entitle an appellant to submit that a refusal of leave to remain under the EU Settlement Scheme ("the EUSS") breaches Article 8 of the European Convention on Human Rights ("the ECHR" or the "Convention"), other than as a "new matter" with the consent of the Secretary of State?

    b. Secondly, does section 7(1) of the Human Rights Act 1998 oblige the First-tier Tribunal to entertain free-standing submissions that a refusal of leave to remain, as opposed to the refusal of a "human rights claim" (as defined by section 113(1) of the Nationality, Immigration and Asylum Act 2002, "the 2002 Act"), is a breach of the ECHR?

2. These points are likely to be of broader relevance, particularly in relation to other statutory appeals brought in the Immigration and Asylum Chamber.

Factual background

3. The appellant is a citizen of Albania. He entered the UK clandestinely in 2013 and has resided here ever since. In 2016, he began a relationship with Carmen Maria Morente Fuentes, a Spanish citizen ("the sponsor"), now resident with leave under the EUSS. In late 2020, he applied for a residence card as the durable partner of the sponsor under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The application was refused; the Secretary of State did not accept that the appellant and the sponsor were in a durable relationship. The decision attracted a right of appeal, but the appellant appears to have been represented by different solicitors at the time, and those currently representing him have been unable to ascertain whether an appeal was brought against that decision.

4. The appellant and sponsor wanted to get married from May 2020 onwards, but their plans were delayed by the Covid pandemic. They eventually married on 24 April 2021, and the appellant applied for pre-settled status under the EUSS shortly afterwards. By a decision dated 28 November 2021, the Secretary of State refused the application; the appellant's marriage to the sponsor took place after the "specified date" in Appendix EU of the Immigration Rules, namely 11PM on 31 December 2020. Nor could the appellant succeed as a "durable partner"; their relationship had not been recognised in that capacity by the Secretary of State under the 2016 Regulations through the issue of a "relevant document".

5. The appellant appealed to the First-tier Tribunal against the Secretary of State's decision of 28 November 2021. The appellant was represented before the First-tier Tribunal by Mr Toal, as he was before us. Mr Toal's submissions before the judge were twofold.

6. First, he submitted that the decision to refuse the appellant's EUSS leave breached the appellant's Article 8 ECHR rights and was unlawful under section 6 of the Human Rights Act. The Secretary of State wrongly refused the appellant's application as a durable partner, before the "relevant date", and, in any event, they were prevented from getting married by the Covid pandemic. In the circumstances, there could be no public interest in the appellant's removal. Secondly, he advanced a range of submissions, and called evidence relating to, the strength of the appellant's relationship with the sponsor. He accepted that the appellant could not succeed under the Appendix EU as drafted, largely for the reasons given by the Secretary of State in the refusal letter.

7. In relation to the first issue, Mr Toal accepted that under the appeal regime established by the 2020 Regulations, read with the 2002 Act, the appellant had not made a "human rights claim", as defined. He submitted that that was a jurisdictional point in the appellant's favour. While the 2020 Regulations

prevented consideration of a "human rights claim" in the absence of the Secretary of State's consent, that term as defined related to a claim made to the Secretary of State concerning an individual's prospective removal. It required a corresponding decision of the Secretary of State addressing the ECHR-compatibility of removal. In these proceedings, there had been no such claim to the Secretary of State, nor a corresponding decision by the Secretary of State, yet the refusal of leave to remain to the appellant meant that he remained liable to removal in the future, thereby breaching his Article 8 rights. Mr Toal submitted that there was no jurisdictional bar to the Tribunal considering general human rights-based submissions that sought to rely on general unlawfulness under section 6(1), which provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

8. Mr Toal also submitted to the judge that, pursuant to section 7(1)(b) of the Human Rights Act, the appellant was entitled to rely on human rights-based grounds in any event. The tribunal enjoyed the jurisdiction to consider whether the refusal of the appellant's application amounted to an unlawful interference with his rights under Article 8 of the European Convention on Human Rights ("the ECHR").

9. In her decision promulgated on 23 December 2022, the judge dealt with Mr Toal's Article 8 submissions as a preliminary issue from paragraphs 19 to 25. Rejecting them, she concluded that Mr Toal's interpretation of sections 6 and 7 of the Human Rights Act, if correct, would render the statutory delineation of appeal rights under the 2002 Act pointless. It would allow the "new matter" regime to be overridden at any time. The same applied to appeals under the 2020 Regulations. She concluded that the tribunal's jurisdiction was that which applied pursuant to the 2002 Act, as applied by the 2020 Regulations. The appellant enjoyed the ability to make a separate application for leave to remain, in which he could advance his Article 8 claim which, if refused, would enable him fully to argue his case before the tribunal.

10. The judge accepted that the appellant and the sponsor were in a genuine and subsisting relationship. Those findings have not been challenged. However, largely for the same reasons the Secretary of State had refused the appellant's EUSS application, and relying on *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC), she dismissed the appeal.

11. The appellant now appeals against the decision of the judge with the permission of Upper Tribunal Judge Lane, who considered that it was arguable that the judge had erred by declining jurisdiction to hear the appellant's appeal on Article 8 grounds.

Issues on appeal to the Upper Tribunal

12. The appellant relies on two grounds of appeal to demonstrate that the Secretary of State's decision to refuse to grant leave to him under the EUSS was a breach of the appellant's Convention rights:

    a. Ground 1: The judge was wrong to treat the appellant's submissions under section 6(1) of the Human Rights Act as being capable of amounting to a ground of appeal under section 84(1) of the 2002 Act, and therefore subject to the "new matter" restrictions under regulation 9(5) of the 2020 Regulations. She erred by ascribing determinative significance to the Secretary of State's decision to withhold her consent to address the appellant's substantive human rights submissions.

    b. Ground 2: The judge was wrong to conclude that section 7(1)(b) of the Human Rights Act did not permit the appellant to advance general human rights-based submissions in any event. It was an error for the judge to apply regulation 9(5), rather than section 7(1)(b) of the Human Rights Act.

13. Mr Toal relied on his skeleton argument dated 25 July 2023, and, resisting both grounds of appeal, Mr Terrell relied on the Secretary of State's skeleton arguments dated 19 and 26 July 2023. We permitted Mr Toal to make post hearing submissions addressing the Secretary of State's supplementary skeleton

argument. We are grateful to Mr Toal for his further written submissions dated 4 August 2023, and to both advocates for the quality of their assistance generally.

Issue (1): whether the appellant's Article 8 submissions were a "new matter" requiring the consent of the Secretary of State

Legal framework

14. The EUSS was established pursuant to the EU Withdrawal Agreement to make provision for the continued residence rights of EU citizens and their family members resident in the UK before 11PM on 31 December 2020. The 2020 Regulations were made by the Secretary of State under section 11 of the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act") to provide for rights of appeal against decisions taken under the EUSS.

15. Appeals against EUSS decisions lie to the First-tier Tribunal, on the basis of one (or both) of two grounds of appeal specified in regulation 8(2) and (3) of the 2020 Regulations. The two grounds of appeal are each multifaceted, but, in broad terms, enable an appellant to contend that the decision breaches the rights enjoyed by the appellant under, in the case of paragraph (2), the EU Withdrawal Agreement (or the EFTA or Swiss agreements, as the case may be), and in the case of paragraph (3), the EUSS and other specified domestic primary and secondary legislation.

16. The 2020 Regulations do not make free-standing provision for an appellant to rely on human rights-based grounds of appeal, but instead permit an appellant to rely on a ground of appeal of a kind listed in section 84 of the 2002 Act, in the circumstances specified by regulation 9:

> "**9.— Matters to be considered by the relevant authority**
>
> (1) If an appellant makes a section 120 statement, the relevant authority must consider any matter raised in that statement which constitutes a specified ground of appeal against the decision appealed against. For the purposes of this paragraph, a 'specified ground of appeal' is a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act.
>
> (2) In this regulation, 'section 120 statement' means a statement made under section 120 of the 2002 Act and includes any statement made under that section, as applied by Schedule 1 or 2 to these Regulations.
>
> (3) For the purposes of this regulation, it does not matter whether a section 120 statement is made before or after the appeal under these Regulations is commenced.
>
> (4) The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision.
>
> (5) But the relevant authority must not consider a new matter without the consent of the Secretary of State.
>
> (6) A matter is a 'new matter' if—
>
> > (a) it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act, and
> >
> > (b) the Secretary of State has not previously considered the matter in the context of—
> >
> > > (i) the decision appealed against under these Regulations, or
> > >
> > > (ii) a section 120 statement made by the appellant."

17. For present purposes, the "relevant authority" means the First-tier Tribunal.

18. The grounds of appeal listed in section 84 of the 2002 Act include that listed in subsection (2):

> "(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."

19. "Human rights claim" is a defined term under section 113(1) of the 2002 Act:

> "'human rights claim' means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention)."

Issue (1) submissions

20. Mr Toal relied on the definition of a "new matter", which anchors the concept to issues which "constitute a ground of appeal of a kind listed in regulation 8 [of the 2020 Regulations] or section 84 of the 2002 Act" (see regulation 9(6)(a) of the 2020 Regulations). He accepted that the refusal of leave to remain would not constitute a ground of appeal under either provision – but relied on that distinction as a point in the appellant's favour. Regulation 8 did not encompass human rights grounds of appeal, and section 84 of the 2002 Act, read with sections 82(1)(b) and 113(1), defined an appealable "human rights claim" as the refusal of a claim that an appellant's prospective *removal* would breach the appellant's rights under the ECHR. The appellant's case was that it was the mere refusal of leave that would breach his rights under the ECHR; on his case, he did not have to go so far as to make that claim by reference to his prospective removal. That being so, the "new matter" restrictions were of no purchase in relation to the appellant's human rights-based submissions before the First-tier Tribunal because, properly understood, those submissions were incapable of amounting to a new matter.

21. Mr Toal submitted that since the tribunal "may also consider any matter which it thinks relevant to the substance of the decision appealed against…" under regulation 9(4), the tribunal was empowered to address such broader human rights-based arguments simply on the basis that they were relevant to the substance of the decision under regulation 9(4). The consent of the Secretary of State was not required because the consent regime only applied to human rights-based arguments of a kind relating to removal, rather than a refusal of leave to remain.

22. Mr Terrell submitted that, even if the appellant's Article 8-based submissions did not amount to a "new matter" as defined by the 2020 Regulations, there still had to be a source of jurisdiction for the tribunal to hear the claim.

Article 8 not engaged by EUSS refusal decision

23. Our analysis of this issue is structured as follows:

    a. What is the correct categorisation, for the purposes of the 2020 Regulations and the 2002 Act, of human rights-based submissions which do *not* amount to a "human rights claim" as defined in section 113(1) of the 2002 Act (that is, a claim relating to an individual's prospective *removal* from the UK)?

    b. Was determining whether Article 8 was engaged "relevant to the substance of the decision appealed against"?

24. For the reasons set out below, we have concluded that:

    a. A mere refusal of leave to remain under the EUSS is not, without more, a "human rights claim" under section 113(1) of the 2002 Act.

    b. Consequently, the "new matter" regime does not regulate the Tribunal's consideration of non-removal human rights submissions.

c. But the Tribunal may only consider matters which it thinks are "relevant to the substance of the decision appealed against".

d. Whether Article 8 is engaged by a decision to refuse an EUSS application is not "relevant to the substance of the decision appealed against," thereby preventing the Tribunal from considering it. The Tribunal does not enjoy a broad, unencumbered jurisdiction to consider non-removal human rights submissions at large.

e. In any event, Article 8 will not, without more, be engaged by a decision to refuse leave to remain under the EUSS.

Refusal of EUSS leave is not the refusal of a "human rights claim"

25. It is common ground that the appellant's human rights-based submissions were not a permitted ground of appeal under regulation 8 of the 2020 Regulations. Subject to the permitted grounds of appeal, the tribunal may "also consider any matter which it thinks relevant to the substance of the decision appealed against…" But there are restrictions on considering a "new matter": a new matter (as defined) may only be considered by the tribunal with the consent of the Secretary of State: see regulation 9(5).

26. Not every "matter" is capable of amounting to a "new matter". Under regulation 9(6)(a), a "new matter" must constitute a ground of appeal of a kind listed in regulation 8 of the 2020 Regulations or section 84 of the 2002 Act. It must also not have been considered by the Secretary of State in the context of the decision appealed against, or a statement issued in response to a notice served under section 120 of the 2002 Act, whereby an appellant is required to state additional grounds to resist removal: regulation 9(6)(b).

27. We agree that the appellant's human rights-based submissions do not constitute a ground of appeal of a kind listed in section 84 of the 2002 Act. A "human rights claim" is defined by reference to an appellant's prospective removal from the UK. As it was put in *Charles (human rights appeal: scope)* [2018] UKUT 89 (IAC) at paras 47 and 48:

> "47. The definition of 'human rights claim' in section 113(1) of the 2002 Act involves the making of a claim by a person that to remove him or her from or to require him or her to leave the United Kingdom would be unlawful under section 6.
>
> 48. The task, therefore, for the Tribunal, in a human rights appeal is to decide whether such removal or requirement would violate any of the provisions of the ECHR. In many such cases, including the present, the issue is whether the hypothetical removal or requirement to leave would be contrary to Article 8 (private and family life)."

28. It follows that the appellant's human rights-based submissions before the judge (namely that the refusal of leave under the EUSS *itself* was a breach of Article 8) were not a "human rights claim" for the purposes of section 113(1). Consequently, we agree with Mr Toal that the "new matter" regime in regulation 9(6) was of no purchase in relation to the broader, non-removal human rights-based submissions the appellant relied upon before the judge. That is because a matter is only capable of amounting to a "new matter" where "it constitutes a ground of appeal listed in regulation 8 or section 84 of the 2002 Act".

Article 8 not "relevant to the substance of the decision appealed against"

29. The mere fact that the appellant's non-removal human rights submissions were incapable of amounting to a ground of appeal under section 84 is not, contrary to Mr Toal's submissions, a jurisdictional point in his favour.

30. The permitted grounds of appeal under the 2020 Regulations define and thereby limit the tribunal's jurisdiction. There is no general human rights-based ground of appeal under the 2020 Regulations, and there is no basis to adopt an expansionist approach to the tribunal's jurisdiction (and see below in relation to section 7(1)(b) of the Human Rights Act). It follows that the non-applicability of the "new

matter" regime to non-removal human rights claims does not, contrary to Mr Toal's submissions, permit such broader human rights claims to be entertained by the tribunal.

31. The new matter regime is the means by which an exception may be made to the jurisdictional constraints that would otherwise apply to the tribunal's consideration of issues before it. Where the criteria for a new matter are not capable of being met, that does not permit the tribunal to consider other free-standing matters at large and without the requirement for the Secretary of State's consent. It means that the tribunal simply does not have the jurisdiction to consider such matters in the first place, for there is no permitted ground of appeal pursuant to which such submissions may be advanced.

32. This is underlined by the regulation of the role of the tribunal upon hearing an appeal. Regulation 9(4) provides that the tribunal "may also consider any matter which it thinks relevant to the substance of the decision appealed against…" The effect of regulation 9(4) is to anchor the matters which may legitimately be considered by tribunal in an appeal to those which are "relevant to the substance of the decision appealed against".

33. In the case of an EUSS appeal, whether Article 8 is engaged by the Secretary of State's underlying refusal decision is not a matter which is relevant to the substance of the decision, for the following reasons.

34. First, it was not the appellant's case in his application to the Secretary of State that he was entitled to leave to remain on Article 8 grounds.

35. Secondly, even if the appellant *had* maintained or implied to the Secretary of State that he was entitled to Article 8-based leave in the course of making an EUSS application, his primary application to the Secretary of State was for leave under the EUSS. His EUSS application would have been framed by reference to EUSS criteria, which are based on the EU Withdrawal Agreement, not the ECHR. Neither the EUSS nor the EU Withdrawal Agreement feature criteria commensurate with the general Article 8-based submissions the appellant sought to rely upon before the judge. Appendix EU of the Immigration Rules, which establishes the EUSS, has not been framed to give effect to the UK's ECHR obligations. The ECHR is, of course, an entirely different international treaty from the EU Withdrawal Agreement. The Secretary of State has made quite separate provision under the Immigration Rules, for example in Appendix FM, to give effect to the UK's Article 8 ECHR obligations. Mr Toal's attempt to achieve cross-pollination between two entirely separate regimes is misconceived.

36. Thirdly, nothing in the Secretary of State's EUSS decision purported to engage with any matters relating to Article 8 ECHR, or the Immigration Rules which seek to give effect to the UK's Article 8 ECHR obligations.

37. Fourthly, since the appellant's case is expressly premised on the footing that he did *not* make an Article 8 claim based on his prospective removal, there was no sense in which the Secretary of State's decision to refuse EUSS leave engaged his rights under Article 8(1) ECHR.

38. To the extent that an EUSS decision does not provide an applicant with their hoped-for means of regularising their otherwise unlawful residence with the consequence that the individual (like this appellant) remains exposed to the future possibility of enforced removal, the prospect of such enforced removal is, at best, an indirect consequence of the EUSS decision. It is not a matter relating to the "substance" of the decision.

39. At para. 14 of his skeleton argument, Mr Toal relied upon *R (oao Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673 at para. 91, as authority for the proposition that the refusal of leave to remain, as opposed to a decision to remove a person or require him or her to leave, may engage and be incompatible with their ECHR rights.

40. We reject that submission. In *Balajigari*, the applicants held leave to remain prior to the submission of their in-time applications to the Secretary of State, such leave having been extended by section 3C of the Immigration Act 1971 while the applications remained under consideration following the expiry of their leave. The functional effect of the refusal decisions in those cases was to expose the unsuccessful applicants to a requirement to leave the UK, or to render them liable to removal, in circumstances

where they were not previously so required or exposed. The refusal decisions included an "Enforcement Warning", requiring the applicants to leave or regularise their stay through other means. See para. 80, which summarises the submissions the Court of Appeal accepted at para. 91.

41. In contrast to the position of the parties in *Balajigari*, this appellant has never held leave. The EUSS refusal decision merely left him in the same position he was in prior to the submission of the EUSS application. The decision carried no enforcement warning. While the decision conferred no immigration benefit upon the appellant, it did not expose him to any immigration jeopardy to which he was not already subject. Its effect was not to render him liable to removal, for he was already unlawfully resident and so liable upon submitting the application. His unlawful residence was not caused by the EUSS decision, it was simply not remedied by it. *Balajigari* is of no assistance to the appellant; on the contrary, it confirms the nexus between prospective removal and the engagement of Article 8.

42. Pausing here, we observe that in some circumstances a decision to refuse to grant a particular category of leave may engage Article 8 even where removal is not in issue. The paradigm example is a decision to confer only restricted leave on an applicant, rather than a more beneficial form of leave. See, for example, *MS (India) and MT (Tunisia) v Secretary of State for the Home Department* [2017] EWCA Civ 1190 at para. 124, *R (oao MBT) v Secretary of State for the Home Department (restricted leave; ILR; disability discrimination)* [2019] UKUT 414 (IAC), headnote (1), para. 75. Challenges to such decisions are usually brought by means of an application for judicial review, precisely because the statutory jurisdiction of the First-tier Tribunal on a human rights appeal under the 2002 Act is engaged by reference to the prospective removal of an appellant, not the claimed Article 8 implications of a lesser form of leave (see section 113(1)).

43. *TY (Sri Lanka) v Secretary of State for the Home Department* [2015] EWCA Civ 1233 concerned whether a decision to refuse a residence card under the Immigration (European Economic Area) Regulations 2006 (which preceded the 2016 Regulations) to a failed asylum seeker with no lawful basis of residence engaged Article 8 ECHR. Jackson LJ said, at para. 35:

> "It is impossible to say that the Secretary of State's decision to withhold a residence card (a decision which is correct under the EEA Regulations) will or could cause the UK to be in breach of the Refugee Convention or ECHR . The UK will only be in breach of those Conventions if in the future the appellant makes an asylum or human rights claim, which the Secretary of State and/or the tribunals incorrectly reject."

44. By analogy, the EUSS decision at the heart of these proceedings does not engage Article 8 for the same reasons.

45. Fifthly, the appellant enjoyed (and continues to enjoy) the ability to make an in-country human rights claim to the Secretary of State based on his hypothetical removal.

46. Mr Toal sought to draw assistance from Schedule 2 to the 2020 Regulations. Pursuant to regulation 11, Schedule 2 provides that certain specified provisions of the 2002 Act apply to appeals under the 2020 Regulations. The provisions include section 72 (concerning the construction of Article 33(2) of the Refugee Convention), which, Mr Toal submitted, demonstrates that a broad approach should be taken to the determination of whether a matter is "relevant to the substance of the decision appealed against". If the 2020 Regulations envisage that questions of expulsion and refoulement under Article 33(2) of the Refugee Convention may be explored in an appeal against an EUSS decision, it follows that a correspondingly broad view must be taken of "relevance" under regulation 9(4), he submitted.

47. We disagree. Section 72 of the 2002 Act will plainly be capable of being engaged where an appellant, either in response to a section 120 notice or as a new matter with the consent of the Secretary of State, relies on a ground of appeal mentioned in section 84(1)(a) or (3)(a). Paragraph 3(2) of Schedule 2 modifies the application of section 72 in EUSS appeals expressly to cater for situations where an individual has relied on Refugee Convention-based grounds in a response to a section 120 notice, thereby underlining the Regulations' expectation that an appellant's reliance on such grounds of appeal

will be pursuant to the specific gateways envisaged by the Regulations, not by reference to an overly broad reading of what amounts to "relevant to the substance of the decision appealed against".

48. Drawing this analysis together, Mr Toal is correct in one sense. An Article 8 argument not involving prospective removal is not a "human rights claim" as defined by section 113(1) of the 2002 Act and is therefore not a ground of appeal of a kind listed in section 84 of the 2002 Act. A non-removal Article 8 claim is not, therefore, capable of being a "new matter" and so is not subject to the consent of the Secretary of State to be relied upon by an appellant. But a purported Article 8 claim not framed by reference to the prospective removal of the appellant in these proceedings is, in reality, no Article 8 claim at all. It will not be "relevant to the substance of the decision appealed against", with the result that the First-tier Tribunal would lack the jurisdiction to consider it under the 2020 Regulations and the 2002 Act in any event.

49. We therefore reject ground 1.

Issue (2): section 7(1) of the Human Rights Act

50. Pursuant to ground 2, Mr Toal submits that section 7(1)(b) of the Human Rights Acts provides a general ability for an appellant to rely on ECHR rights at large, without the jurisdictional constraints outlined above.

51. Section 7 of the Human Rights Act provides, where relevant:

> "**7 Proceedings**
>
> (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> > (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> >
> > (b) rely on the Convention right or rights concerned in any legal proceedings,
> >
> > but only if he is (or would be) a victim of the unlawful act.
>
> (2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.
>
> […]
>
> (6) In subsection (1)(b) "legal proceedings" includes—
>
> > (a) proceedings brought by or at the instigation of a public authority; and
> >
> > (b) an appeal against the decision of a court or tribunal."

52. Mr Toal also submitted that since the Human Rights Act has the quality of a constitutional statute, it cannot be subject to implied repeal. To the extent that the 2020 Regulations established an appellate framework that is inconsistent with the Human Rights Act, it is that Act that prevails. The 2020 Act did not confer upon the Secretary of State power impliedly (or expressly) to repeal the Human Rights Act insofar as it would permit the appellant to rely on section 7(1)(b). It cannot be read or applied as having that effect. The appellant was entitled to advance human rights-based submissions before the judge, pursuant to section 7(1)(b). The judge erred by not permitting him to do so.

53. For the Secretary of State, Mr Terrell relied on Lord Hope's summary of the distinction between section 7(1)(a) and (b) in *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12 at para. 45:

> "45. As Clayton & Tomlinson, *The Law of Human Rights*, 2nd ed. (2009), para 22.03, puts it:

> 'This section contemplates two ways in which a person may advance a contention that a public authority has acted in a way which is incompatible with his Convention rights: either by making a free standing claim based on a Convention right in accordance with section 7(1)(a) or by relying on a Convention right in proceedings in accordance with section 7(1)(b).'

In *R v Kansal (No 2)* [2002] 2 AC 69, 105-106 I said that section 7(1)(a) and section 7(1)(b) are designed to provide two quite different remedies. Section 7(1)(a) enables the victim of the unlawful act to bring proceedings under the Act against the authority. It is intended to cater for free-standing claims made under the Act where there are no other proceedings in which the claim can be made. It does not apply where the victim wishes to rely on his Convention rights in existing proceedings which have been brought against him by a public authority. His remedy in those proceedings is that provided by section 7(1)(b), which is not subject to the time limit on proceedings under section 7(1)(a) prescribed by section 7(5) ; see also *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, para 90. The purpose of section 7(1)(b) is to enable persons against whom proceedings have been brought by a public authority to rely on the Convention rights for their protection."

Section 7(1)(b): a shield not a sword

54. We agree with Mr Terrell that, properly understood, section 7(1)(b) enables a litigant to rely on Convention rights to defend proceedings brought against him or her, rather than as a means to prosecute alleged breaches.

55. Section 7(1)(a) is capable, in principle, of enabling a litigant positively to advance a free-standing human rights-based submissions against a public authority. But reliance on subsection (1)(a) is restricted to the "appropriate court or tribunal", defined in subsection (2) to mean "such court or tribunal as may be determined in accordance with rules…" While CPR7.11 makes provision for bringing section 7(1)(a) claims before the courts, the only tribunals upon whom section 7(1)(a) jurisdiction has been conferred by rules are the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission. No provision has been made for the First-tier Tribunal. Section 7(1)(a) cannot assist the appellant.

56. Mr Toal sought to resist Mr Terrell's reliance on *A* on the basis that Lord Hope was not giving an exhaustive account of all proceedings in which section 7(1)(b) applies. He was not addressing the situation, such as the proceedings before the First-tier Tribunal, in which there are *existing* proceedings within which a litigant seeks to rely on Convention rights which are not proceedings brought by a public authority. For example, in *Manchester City Council v Pinnock* [2011] 2 AC 104 at para. 80, the Supreme Court held that section 7(1)(b) confers the necessary jurisdiction on county court judges when it is necessary for them to deal with a defence in possession proceedings which relies on an alleged breach of ECHR rights. Similarly, in *Re V (A child) (Care Proceedings: Human Rights Claims) (Practice Note)* [2004] 1 WLR 1433 at para. 8(4), the Court of Appeal held:

> "…any allegation made in care proceedings pursuant to HRA 1998 section 6(1) that a local authority has acted in a way which is incompatible with a Convention right, including any allegation which involves a breach of a party's rights under either Article 6 or 8 of the Convention can and should be dealt with in the care proceedings by the court hearing those proceedings under HRA section 7(1)(b)."

57. Mr Toal also relied on *Somerville v Scottish Ministers* [2007] UKHL 44, in which Lord Mance said, at para. 175, that section 7(1)(b) may be relied upon:

> "…in the development or application of common law principles."

58. We are not persuaded by Mr Toal's submissions. In *A*, Lord Hope summarised the distinction between section 7(1)(a) and (b) in a comprehensive manner, applicable to all cases. Nothing in the authorities relied upon by Mr Toal requires or permits a different interpretation.

59. In *Manchester City Council*, the context was the ability of a defendant to possession proceedings to rely on human rights-based arguments under section 7(1)(b) as a means to defend the proceedings, and resist possession. Section 7(1)(b) was thus used as a shield.

60. In *Re V*, the Court of Appeal endorsed long-established authority that a parent, in seeking to resist care proceedings commenced by the local authority in respect of their child, could rely on section 7(1)(b) to contend that the local authority had failed to respect the parents' ECHR rights (see, e.g., paras 37, 47, 111). In our judgment, section 7(1)(b) performs the role of a shield and not a sword in those circumstances, for it provides a means for a parent facing the removal of their child by an emanation of the State to attempt to resist a care order being made, on Convention grounds. Moreover, the context of family proceedings and the best interests of the child were plainly central to that approach. In contrast to the non-engagement of Article 8 by a decision to refuse EUSS proceedings, the conduct of a local authority prosecuting care proceedings may be highly relevant to the central issues in those proceedings. ECHR issues would be embedded within the overall final analysis and would overlap with the substantive issues under consideration. Adjourning any human rights aspects of the proceedings to be heard by the High Court in circumstances when an appropriately authorised Family Court judge would be available to deal with the issues (as had been suggested at one stage in the history of the litigation in *Re V*) would be anathema to good case management and could elongate the proceedings, leading to delay and uncertainty for all involved, including the children at the heart of the case.

61. *Somerville* does not assist Mr Toal's submission. Nothing in Lord Mance's partially dissenting opinion was inconsistent with the approach Lord Hope would later take when delivering the majority judgment in *A*. Mr Toal's submissions overlook two vital features of Lord Mance's opinion. First, at para. 172, Lord Mance expressly rejected the submission that section 7(1)(b) may be relied upon in circumstances in which a free-standing claim under section 7(1)(a) could be pursued. If that were so, "it would often make it a matter of chance, or choice for a claimant, whether the time limit [in section 7(5)] applied". The appellant remains free to pursue a section 7(1)(a) claim before the appropriate court should he choose to do so. Secondly, in his summary of section 7(1) at para. 175, Lord Mance underlined the very distinction which Mr Toal contends his dissenting judgment eroded:

> "Section 7(1)(a) and consequently section 7(5) apply to claims brought for breach of Convention rights, by whatever procedure they are pursued and whether or not they are pursued alone or in conjunction with other claims… Section 7(1)(b) enables reliance on Convention rights in situations not within section 7(1)(a), as where a Convention right is relied upon in defence in civil or criminal proceedings brought by a public authority or in the development or application of common law principles."

62. Mr Toal relied on Lord Mance's reference to "the development or application of common law principles" to demonstrate that section 7(1)(b) was not an exclusively defensive provision. Section 7(1)(b) has a broader sphere of application, he submitted. We disagree. Nothing in Mr Toal's submissions demonstrates how considering non-removal human rights arguments in an EUSS appeal furthered the development or application of common law principles. Still less did Mr Toal indicate which common law principles would have been developed or applied by the judge by acceding to his submissions. Nor did Mr Toal address how the First-tier Tribunal, which is not a superior court of record, could have contributed to the development or application of those principles.

63. It follows that Lord Hope's summary of section 7(1) in *A* was comprehensive. Section 7(1)(b) does not permit an appellant to advance a free-standing Article 8 claim in proceedings before the First-tier Tribunal. It is a shield for a litigant to "rely" on, not a sword with which to prosecute alleged breaches of the Convention. No question of an unlawful or *ultra vires* implied repeal of the Human Rights Act by the 2020 Regulations arises: the Regulations are entirely consistent with the Act. The judge did not err by declining to entertain the appellant's free-standing Article 8 submissions. She rightly confined her analysis to the grounds of appeal under the 2020 Regulations. Her summary of the jurisdictional position was entirely correct.

64. Of course, it remains open to the appellant make a human rights claim to the Secretary of State based on his prospective removal should he wish to do so, as the judge observed.

Conclusion

65. There was no challenge to judge's decision to dismiss the appeal on EUSS grounds. This appeal is dismissed.

<u>Notice of Decision</u>

The appeal is dismissed.

The decision of Judge Veloso did not involve the making of an error of law such that it must be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 November 2023