Upper Tribunal
(Immigration and Asylum Chamber)

Dang (Refugee – query revocation – Article 3) [2013] UKUT 00043 (IAC)

THE IMMIGRATION ACTS

Heard at:	Field House	Determination promulgated 17 January 2013
On	12 September 2012	

Before

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

Between

Mr. Cuong Van Dang — Appellant

And

The Secretary of State for the Home Department — Respondent

Representation:

For the Appellant: Ms. E. Daykin, of Counsel, instructed by Ennon & Co. Solicitors.
For the Respondent: Ms. C. Gough, Senior Home Office Presenting Officer.

A decision to revoke or refuse to renew a grant of asylum under paragraph 339A of the Immigration Rules only relates to the individual's status under the Qualification Directive (European refugee status) and not his status under the Refugee Convention; further, it can only apply to cases in which the asylum application was made on or after 21 October 2004 and at least one of the provisions in sub-paragraphs (i)-(vi) of para 339A of the Immigration Rules applies.

If an individual was granted refugee status some time ago, there is no legal or evidential presumption that, for so long as he is a refugee under the Refugee Convention, removal would be in breach of Article 3. Whilst the past may be relevant in shedding light on the current situation and the prospective Article 3 risk, it remains the case that the question whether there is a real risk of Article 3 ill-treatment must be answered at the date of the hearing and is forward-looking.

DETERMINATION AND REASONS

1. The Appellant is a 35-year old national of Vietnam who has lived in the United Kingdom since the age of twelve, having left Vietnam at the age of eight and lived in Hong Kong with his family for about four years. He arrived in the United Kingdom on 4 July 1989 with his father and older siblings (a brother and a sister). His father was granted refugee status. It appears that the UK Border Agency no longer has any information about the reasons why the Appellant's father (who has since died) was granted refugee status. Ms. Daykin informed us that her papers indicate that the asylum claim of the Appellant's father was processed and decided in Hong Kong. Although the Appellant was also granted refugee status, it is clear that he did not have an independent asylum claim; he was dependent on his father's asylum claim. His siblings and his father were later naturalised as British citizens. The Appellant's application of 24 April 1996 for naturalisation as a British Citizen was refused on 24 June 1999 on the ground of his character.

2. The Appellant has been granted permission to appeal against the determination of the First-tier Tribunal (Designated Judge of the First-tier Tribunal J F W Phillips and Mr. M E Olszewski JP) (hereafter the panel) dismissing his appeal against a deportation order made against him on 6 October 2011 by virtue of section 32(5) of the U.K. Border Acts 2007. The deportation order followed the Appellant's conviction on 30 March 1999 at the Central Criminal Court of murder and wounding with intent to cause grievous bodily harm for which he received sentences of life imprisonment and seven years' imprisonment respectively.

3. Given that the Appellant had been sentenced to a period of imprisonment of at least two years, the panel upheld the Respondent's decision to apply the presumption under section 72 of the Nationality, Immigration and Asylum Act 2002 Act (the 2002 Act), that he had been convicted by final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom. The panel further found that the Appellant had gone nowhere near rebutting the presumption that he is a danger to the community. It found that he had been convicted of a particularly serious crime and that he was a danger to the community. These findings have not been challenged on the Appellant's behalf. Accordingly, the Appellant is a person whose refoulement is not prohibited by Article 33 of the Refugee Convention. It follows that it has been established that his removal would not be in breach of the United Kingdom's obligations under the Refugee Convention.

4. The Respondent revoked (or purported to revoke) the Appellant's refugee status under para 339A(v) of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the Immigration Rules). This mirrors the cessation clause in Article 1C(5) of the 1951 Geneva Convention relating to the Status of Refugees (the Refugee Convention), which provides that the Refugee Convention shall cease to apply to a person "*if he can no longer, because of circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality*". The panel found that the Appellant was still a refugee because the Respondent could not show that the cessation clause she sought to rely upon applied. This finding has not been challenged.

5. The Respondent also revoked (or purported to revoke) the Appellant's refugee status under para 339A(x) of the Immigration Rules on the ground that, having been

convicted by a final judgment of a particularly serious crime, he constituted a danger to the community of the United Kingdom. The equivalent of this provision in the Refugee Convention is to be found in Article 33, which prohibits refoulement but provides, by virtue of Article 33, that the benefit of the non-refoulement provision may not be claimed by a refugee who, having convicted by a final judgment of a particularly serious crime constitutes a danger to the community of the United Kingdom. However, whilst the Refugee Convention does not give any hint that Contracting States may *revoke* the refugee status of the individual concerned, para 339A(x) of the Immigration Rules, which was intended to implement Article 14 of Council Directive 2004/83/EC (the Qualification Directive), provides for the individual's "*grant of asylum*" to be revoked or not renewed. An issue before us (issue (a)) is whether there is an inconsistency in this respect between the two and, if so, which should prevail.

6. Having found that the Appellant was a danger to the community, the panel considered that the Respondent was entitled to revoke the Appellant's refugee status under para 339A(x) of the Immigration Rules. Their reasons are set out at our paragraphs 14, 15 and 16 below.

7. In the panel's view, the revocation of the Appellant's refugee status meant that there was no longer a presumption that the Appellant's removal to Vietnam would be in breach of his rights under Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The second issue which has arisen (issue (b)) is whether there is a presumption, for so long as a person has refugee status under the Refugee Convention, that his removal from the United Kingdom would be in breach of his rights under Article 3 of the ECHR.

8. Having concluded that the Appellant's refugee status had been revoked under para 339A(x) with the result (in the panel's view) that there was no presumption of risk in relation to Article 3, the panel considered that it was therefore for the Appellant to show that his removal would be in breach of Article 3 (para 46). The panel went on to consider the evidence and found that the Appellant had not shown that he was at real risk of treatment in breach of his rights under Article 3. We summarise their reasons for their conclusion at our paragraph 17 below. No challenge has been made to the panel's finding (if it was correct to place the burden the proof in relation to Article 3 on the Appellant) that he had not discharged that burden.

9. The panel concluded that the Appellant had not shown that he was at real risk of serious harm in Vietnam. In any event, he was excluded from humanitarian protection pursuant to para 339D of the Immigration Rules, having been convicted of a serious crime (para 48 of the determination).

10. The panel also found that the Appellant's removal would not be in breach of Article 8 of the ECHR. This has not been challenged on the Appellant's behalf.

11. It is important to appreciate that the only reason issue (a) is advanced is to lay the ground for issue (b).

12. It should also be noted that we are not concerned with the cessation provisions in this appeal because the panel's finding that the Respondent had not shown that para 339A(v) applied has not been challenged.

The relevant provisions

13. The relevant provisions are set out below:

The Refugee Convention

Article 1

"A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
…

(2) …owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Article 1C

"This Convention shall cease to apply to any person falling under the terms of section A if:

(5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality;
Provided that this para shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

(6) …"

Article 33

"Prohibition of expulsion or return ('refoulement')

"1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

Nationality, Immigration and Asylum Act 2002

"72. Serious Criminal

(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is –

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years."

The Immigration Rules

"Grant of Asylum

334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;

(ii) he is a refugee, as defined by the [Refugee] Convention and protocol; and

(iii) refusing his application would result in him being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group."

"Revocation or refusal to renew a grant of asylum

339A. A person's grant of asylum under paragraph 334 will be revoked or not renewed if the Secretary of State is satisfied that:

…

(v) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality;

…

(ix) there are reasonable grounds for regarding him as a danger to the security of the United Kingdom; or

…

(x) having been convicted by a final judgment of a particularly serious crime he constitutes a danger to the community of the United Kingdom.

In considering (v) and (vi), the Secretary of State shall have regard to whether the change of circumstances is of such significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

Where an application for asylum was made on or after 21 October 2004, the Secretary of State will revoke or refuse to renew a person's grant of asylum where he is satisfied that at least one of the provisions in sub-paragraph (i)-(vi) apply."

Asylum and Immigration Appeals Act 1993 (the 1993 Act)

"1. Interpretation

In this Act-

'the Convention' means the Convention relating to the Status of Refugees done in Geneva on 28 July 1951 and the Protocol to that Convention.

2. Primacy of Convention

Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention."

The Qualification Directive

"THE COUNCIL OF THE EUROPEAN UNION,

Whereas:

(3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.

(30) Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit.

Article 1

"Subject matter and scope

The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted."

Article 2

"Definitions

For the purposes of this Directive:

(a) 'international protection' means the refugee and subsidiary protection status as defined in (d) and (f);

(b) 'Geneva Convention' means the Convention relating to the status of refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967;

(c) 'refugee' means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such a fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) 'refugee status' means the recognition by a Member State of a third country national or a stateless person as a refugee;"

Article 11

"Cessation

1. A third country national or a stateless person shall cease to be a refugee, if he or she:

   (e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;

2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded."

Article 13

"Granting of refugee status

Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III."

Article 14

"Revocation of, ending of or refusal to renew refugee status

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 11.

4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

   (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

   (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken."

Article 21

"Protection from refoulement

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

   (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
   (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies."

Article 24

"Residence permits

1. As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require, …"

The panel's reasons

14. The panel gave the following reasons for its conclusion that the Respondent was entitled to revoke refugee status under para 339A(x) of the Immigration Rules. First,

no argument was advanced on the Appellant's behalf to suggest that the fact that the Refugee Convention does not provide for revocation of refugee status in circumstances where the Immigration Rules do contain such a provision should have any bearing on the lawfulness of the Respondent's decision.

15. Second, the panel was not persuaded by the contents of a letter dated 25 May 2011 from the United Nations High Commissioner for Refugees (UNHCR). It noted that the UNHCR drew attention to the fact that the Refugee Convention does not provide for revocation of refugee status and said that the Respondent's guidance (reflected in para 339A(x) of the Immigration Rules) was *"not in keeping with international norms"*. The panel also noted that there was no legal authority for the suggestion in the UNHCR's letter to the effect that the Immigration Rules cannot provide for revocation of refugee status in circumstances where the Refugee Convention only allowed for refoulement of the refugee rather than the revocation of refugee status.

16. Third, the panel considered that Parliament had intended to create a provision allowing for the revocation of refugee status in circumstances where the refugee Convention only allowed for the refoulement of the refugee. In this regard, the panel quoted from, and relied upon, para 124 of IH (s.72; 'Particularly Serious Crime') Eritrea [2009] UKAIT 00012, which reads:

> "In our view, Mr Draycott's submission (scaled down or otherwise) is doomed to fail in the light of the clear and unchallenged statements of the law in the speeches of Lords Bingham of Cornhill and Hope of Craighead in Asfaw. There is no suggestion that any of the other members of the House disagreed. As a result, in our judgment, the 'incorporation' of the Refugee Convention into English Law effected by s.2 of the 1993 Act is limited to that provision's impact upon the content of immigration rules or any wider policy. Of course, the Tribunal must, when called upon to do so, deal with the argument that an individual's removal in consequence of a particular immigration decision will be a breach of the Refugee Convention. That much follows from the statutory ground of appeal in s.84(1)((g) of the 2002 Act. Beyond that however, at its highest, reliance upon the Refugee Convention is confined to the established interpretative axiom that when construing legislation giving effect to a treaty obligation Parliament should be taken to have intended to give effect to that treaty's terms unless clear contrary words are used. The problem faced by Mr Draycott in this appeal is that Parliament both in s.72 and the 2004 Order has clearly done just that. Parliament has unambiguously presumed to lay down a meaning of some of the words in the Convention, despite any autonomous international meaning that those words might have. No ordinary principle of statutory interpretation in English Law could led to a different reading of s.72(4) read with s.72(6) – the presumption that certain crimes are *per se* "particularly serious" ones is irrefutable."

17. The panel gave its reasons for its conclusion that the Appellant had not shown that he was at real risk of Article 3 ill-treatment in Vietnam at para 47 of the determination. It rejected the Appellant's contention that there would be investigations into his links and his family's past, which it considered was not supported by any background material. The panel noted that the Appellant's father, upon whom the entire family had based their fear of return, had returned to Vietnam without difficulty more than once. The Appellant's elder brother and sister, both of whom had left Vietnam as adults, had also been able to return to Vietnam on a number of occasions. The panel found it wholly incredible that the Appellant's elder brother, who left Vietnam at the age of 26 with his wife and children, had no idea why his father had left Vietnam with his wife and children, if there was some specific reason for their departure rather than the general situation existing in Vietnam. The panel accepted that in returning to Vietnam the Appellant's father and siblings had been able to do so with the protection

and security of the British nationality but it found it incredible, if there had been specific adverse interest in the family, that they would have taken the risk of returning to Vietnam.

Assessment

Issue (a)

18. The Appellant is a person who has been granted refugee status and is lawfully in the United Kingdom as such. However, he is not protected from removal by Article 33(2) of the Refugee Convention, because of his conviction for murder and wounding with intent to cause grievous bodily harm and the unchallenged finding that he constitutes a danger to the community.

19. The Refugee Convention is the basic document in refugee protection. It has wide acceptance throughout the world. Its terms have been adopted and expanded in a number of other countries and regions. One of the regions is that of the European Union. The adoption of a regional instrument relating to refugee protection cannot dispense from the obligations of individual State parties to the Refugee Convention. Rather, a regional instrument may introduce provisions that are to be seen as alongside and supportive of those obligations. The Qualification Directive is such an instrument. Its preamble makes the primacy of the Refugee Convention clear, but the incidents of recognition as a refugee under the Qualification Directive (which we shall call "European refugee status") are in some respects different from those envisaged by the Refugee Convention. For example, it is clear that European refugee status may itself be subject to restrictions: but it is equally clear that restrictions on European refugee status do not of themselves affect an individual's rights under the Refugee Convention in any State that is a party to the latter.

20. The provisions of the Refugee Convention which are that in the circumstances of a case like this, a person remains a refugee but is removable, are apparently inconsistent with those of Article 14(4) of the Qualification Directive and para 339A(x) of the Immigration Rules which provide for revocation of his status. There are three possible ways of dealing with this argument. The first is to say that there is such an inconsistency and that the Qualification Directive takes precedence over the Refugee Convention. The second is the say that there is such an inconsistency and that the Refugee Convention takes precedence over the Qualification Directive and the Immigration Rules. The third is to say that the status revoked under those provisions is different from the individual's status under the Refugee Convention and that there is in fact no inconsistency. The third is the right answer, in our judgment. Our reasons are as follows:

21. A person is a refugee if he satisfies the definition of a refugee in the Refugee Convention. This is so even if his status has not been recognised by the Contracting State in question. The view that an individual's status as a refugee exists independently of any recognition of his status is supported by paragraph 28 of the foreword to the 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (cited by Lord Brown in Hoxha v. Special Adjudicator [2005] UKHL 19):

> "28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."

22. Article 1A of the Refugee Convention itself distinguishes between those who have been recognised as refugees (see Article 1A(1), which refers to a person who "*has been considered a refugee* …") and a person who satisfies the definition in Article 1A(2). Accordingly, a distinction needs to be drawn between a refugee *simpliciter* (one who objectively satisfies the definition) and a person who has been recognised as a refugee.

23. That this distinction exists was clearly established in Hoxha. This has been more recently confirmed in the judgment of the Supreme Court in R (on application of ST (Eritrea)) v. SSHD [2012] UKSC 12 upholding the judgment of the Court of Appeal in the case in SSHD v. ST (Eritrea) [2010] EWCA Civ 643.

24. Apart from Article 28 of the Refugee Convention, which provides for Contracting States to issue to refugees lawfully staying in their territory travel documents *for the purpose of travel outside their territory*, there is no provision under the Refugee Convention for any document to be issued to a refugee in recognition of the individual's status as a refugee, nor is there any provision for the grant of asylum or the grant of any form of leave. Even where an individual is recognised as a refugee, this does not, of itself, confer a right to remain in the United Kingdom, as Stanley Burnton LJ said in ST (Eritrea) (para 53). If it were otherwise, a refugee with a right of residence in a safe third country would have a right to remain in the United Kingdom.

25. In contrast to the fact that the Refugee Convention makes no provision for the grant of leave to a refugee or for the status of a refugee to be recognised, Article 13 of the Qualification Directive requires Members States to "*grant refugee status to a third country national ….., who qualifies as a refugee in accordance with Chapters II and III*." It should be noted that, whereas some of its provisions import the equivalent provision of the Refugee Convention by using the same words and others make a specific reference to a particular article of the Refugee Convention, Article 13 refers to a person "*who qualifies as a refugee in accordance with Chapters II and III*" of the Qualification Directive. The use of this language is intentional, in our view. In the case of such a person, Member States are required by Article 24 to issue a residence permit "*which must be valid for at least three years and renewable unless …*". The requirement under the Qualification Directive for residence permits to be issued goes further than the Refugee Convention, as the Supreme Court noted in ST (Eritrea) (para 45). Since the scheme of the Qualification Directive makes provision for the grant of residence permits to an individual who qualifies as a refugee under its provisions, it makes sense for there to be provisions to revoke those permits where an individual is no longer entitled to it under its terms. In our view, this is the rationale for the provisions in the Immigration Rules which give effect to the Qualification Directive and which permit the Respondent to "*revoke, end or refuse to renew*" a grant of asylum in certain circumstances, including those set out in para 339A.

26. In other words, what Article 14 permits Member States to "*revoke, end or refuse to renew*" is the status that was granted by that Member State to the individual pursuant to its obligations under the Qualification Directive. It is therefore necessary to

distinguish between refugee status granted pursuant to the provisions of the Qualification Directive and refugee status under the Refugee Convention which exists independently of any recognition. We have already referred to the former as "*European refugee status*" to distinguish it from refugee status under the Refugee Convention. Given that section 2 of the 1993 Act prohibits the Immigration Rules from laying down any practice that is contrary to the Refugee Convention, the provision in para 339A for revocation or non-renewal of the grant of asylum can only refer to European refugee status. In other words, the true effect of any revocation under para 339A(x), when read with the Qualification Directive, is that the individual's European refugee status is revoked. Such revocation does not affect the individual's status under the Refugee Convention.

27. These conclusions do not seem to us to be materially affected by the fact that the Refugee Convention is not strictly a part of the law of the United Kingdom or of community law. Its provisions are given primacy by both and it is in our judgment inconceivable that the Qualification Directive dispensed with the benefits it provides. Of course, the Immigration Rules cannot lawfully do so, given that section 2 of the 1993 Act makes it clear that nothing in the Immigration Rules shall lay down any practice which would be contrary to the Refugee Convention.

28. Our interpretation, that the revocation etc permitted by Article 14 concerns European refugee status and not refugee status under the Refugee Convention, makes sense when one considers that preamble 30 of the Qualification Directive specifically provides that "*Member States may lay down that the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit.*"

29. Given that there is no inconsistency between (on the one hand) the Refugee Convention and (on the other hand) para 339A(x) of the Immigration Rules and Articles 14 and 21 of the Qualification Directive, there is no need to make any reference to the CJEU.

30. We therefore agree with the opinion of the UNHCR in its letter dated 25 May 2011 that the words "*status granted to a refugee*" in Article 14(4) of the Directive refers to the "*asylum status*" granted by a Member State under the Qualification Directive rather than being a refugee in the sense of Article 1A(2) of the 1951 Convention. The panel had before it a complete copy of the UNHCR's letter which, insofar as relevant, reads:

> "UNHCR finds [the Secretary of State's guidance on Cancellation, Cessation & Revocation of Refugee Status] not to be in keeping with international refugee norms and continues to consider it to be an inappropriate use of the cessation clauses if they are invoked on the basis that an individual has committed a crime and the country of refuge is looking to withdraw refugee status in order to be able to expel the individual on this basis, rather than for one of the reasons set out in Articles 1C (1) to (6) of the 1951 Convention. The fact that a refugee has been convicted of a criminal offence is irrelevant and should not be taken into account when making a decision on the application of Article 1C of the 1951 Convention. It should be noted that the cessation clauses are negative in character and exhaustively enumerated.
>
> In making this comment, UNHCR appreciates that Article 14(4)(b) of the European Council Qualification Directive 2004/83/EC repeats the provisions of the second paragraph of Article 33(2) as a ground for States to "revoke, end or refuse to renew the status granted to a refugee". UNCHR continues to reiterate that Article 14(4) of this Directive runs the risk of introducing substantive modifications to the exclusion and cessation clauses of the 1951

> Convention, by adding the provision of Article 33(2) of the 1951 Convention as a basis for exclusion, revocation, or termination of refugee status. Assimilating the exceptions of the *non-refoulement* principle permitted under Article 33(2) to the exclusion clauses of Article 1F or to Article 1C would therefore be incompatible with the 1951 Convention. To avoid such an outcome, "status granted to a refugee" in Article 14(4) of the Directive is therefore understood to refer to the asylum ("status") granted by a State rather than refugee status in the sense of Article 1A(2) of the 1951 Convention."

31. Although this appeal only concerns the effect of revocation or refusal to renew in circumstances falling within para 339A(x), the same reasoning must apply to para 339A(ix), which mirrors the other scenario in Article 33(2) where refoulement of a refugee is permitted under the Refugee Convention. We have not considered the remaining provisions of para 339A, which include the cessation provisions in the Refugee Convention.

32. The panel concluded that the Respondent was entitled to revoke the Appellant's refugee status. It is plain that it had in mind the Appellant's refugee status under the Refugee Convention, not least because of its rejection of the opinion in the UNHCR's letter. For the reasons given above, we are satisfied that the panel erred in law in concluding that the Respondent was entitled to revoke the Appellant's refugee status under the Refugee Convention.

33. However, there is another reason why the panel erred in law in reaching this conclusion. This arises from the final paragraph of para 339A, which provides that, where an application for asylum was made on or after 21 October 2004, the Respondent will revoke or refuse to renew a person's grant of asylum where she is satisfied that at least one of the provisions in sub-paragraphs (i) to (vi) apply. This is consistent with Article 14.1 which requires Members States to "*revoke, end or refuse to renew*" refugee status if an individual has ceased to be a refugee in accordance with Article 11 of the Qualification Directive and the individual's application for asylum was made on or after the date on which the Directive came into force. The Qualification Directive came into force on 20 October 2004.

34. One possible interpretation of the final paragraph of para 339A is to say that the power to revoke or refuse to renew an individual's grant of asylum is not available if an asylum application was made before 21 October 2004; it is only available if an asylum application was made on or after 21 October 2004 and at least one of the provisions in sub-paragraphs (i) to (vi) apply.

35. The second is to say that, in the case of an asylum application made before 21 October 2004, the power is available if any one of the ten possibilities in para 339A applies but, in the case of an asylum application made on or after 21 October 2004, only if one of the provisions in sub-paragraphs (i) to (vi) apply.

36. The second interpretation runs the clear risk of having the result that, in the case of an asylum application made before 21 October 2004, the Immigration Rules permit a practice that is contrary to the Refugee Convention because there is nothing in the Refugee Convention which allows for the revocation of status; and the conditions expressed in sub-paragraphs (vii) – (x) are expressed more widely than the exclusion provisions in the Convention. It is also inconsistent with the principle that refugee status under the Refugee Convention is something that exists independently of any recognition by a Contracting State.

37. We therefore prefer the first interpretation, which gives effect to section 2 of the 1993 Act which provides that nothing in the Immigration Rules shall lay down any practice which would be contrary to the Refugee Convention.

38. Accordingly, the Respondent's decision to invoke para 339A(x) can have no effect, because the Appellant was recognised as a refugee in the late 1980s or early 1990s, nearly fifteen years before the date referred to in the final para of para 339A; he has never had European refugee status. The Appellant's status remains that of a refugee under the Refugee Convention.

39. However, the errors made by the panel as identified above do not make any difference to the outcome and therefore do not justify the setting aside of the decision of the panel. As stated at para 4 above, the Appellant's removal would not be in breach of the Refugee Convention. The only reason for issue (a) to be advanced on the Appellant's behalf is to lay the ground for issue (b). For the reasons we give below in relation to issue (b), we are satisfied that the panel was correct to determine the Article 3 claim without applying a presumption that the Appellant's removal would be in breach of Article 3, albeit for different reasons. The result is that issue (a) is not relevant to the outcome of this appeal.

Issue (b)

40. Ms. Daykin did not refer us to any authority for the proposition that, for as long as an individual has refugee status, there is a presumption that his or her removal would be in breach of Article 3. We reject this proposition, which we consider is simply wrong. The extracts we quote below from decided cases of the European Court of Human Rights (to which we were not referred) settle the issue so clearly that no further discussion is required on our part:

Saadi v. Italy, no.37201/06, 28.02.2008, [2008] ECHR 179

> "133. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Chahal*, cited above, §§ 85 and 86, and *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004). This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court (see *Mamatkulov and Askarov*, cited above, § 69). Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive. "

Sufi & Elmi v the United Kingdom [2011] ECHR 1045

> "*1. General principles applicable in expulsion cases*

> 215. If the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi v. Italy*, cited above, § 133). A full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account

information that has come to light after the final decision taken by the domestic authorities (see *Salah Sheekh*, cited above, § 136, [2007] ECHR 36).

216. The foregoing principles, and in particular the need to examine all the facts of the case, require that this assessment must focus on the foreseeable consequences of the removal of the applicant to the country of destination…

218. … the sole question for the Court to consider in an expulsion case is whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention…

41. The fact that an individual is a refugee or has been recognised as a refugee in the past does not mean that there is any legal or evidential presumption that removal to his or her country will be in breach of Article 3. Where an individual's asylum and Article 3 claims are decided at the same time and it is found that removal would be in breach of the Refugee Convention, a real risk of Article 3 ill-treatment will usually also be found. This will usually be because the factual basis is the same, the risk factors are the same and the feared ill-treatment amounts to both persecution and inhuman or degrading treatment, and *not* because of the existence of any presumption of Article 3 risk arising from the fact that the asylum claim was successful.

42. However, where an individual was recognised a refugee at some point in the past, the past may be relevant in shedding light on the current situation and the prospective Article 3 risk but it remains the case that the question whether there is a real risk of Article 3 ill-treatment must be answered at the date of the proceedings before the court and is forward looking.

43. The panel misdirected itself in assuming that there was a presumption of a real risk of Article 3 ill-treatment for so long as an individual is a refugee. It did not err in assessing the Appellant's Article 3 claim on the basis that it was for him to establish a real risk of treatment in breach of Article 3.

Summary of conclusions

(i) The Qualification Directive sets out minimum standards for qualifying for refugee protection to be applied by Member States. It also requires Member States to grant refugee status to a person who qualifies as a refugee under its provisions (Article 13) and to issue a residence permit to such a person (Article 21). These requirements go further than the Refugee Convention.

(ii) A decision to revoke or refuse to renew a grant of asylum under para 339A of the Immigration Rules only relates to the individual's status under the Qualification Directive (European refugee status) and not his status under the Refugee Convention. However, it is necessary to bear in mind that the circumstances under which para 339A is invoked may also result in a cessation clause under the Refugee Convention applying.

(iii) A decision to revoke or refuse to renew a grant of asylum under para 339A can only apply to cases in which the asylum application was made on or after 21 October 2004 and at least one of the provisions in sub-paragraphs (i)-(vi) of para 339A of the Immigration Rules applies.

(iv) The effect of the final paragraph of para 339A read together with section 2 of the 1993 Act is that any purported decision to revoke or refuse to renew a grant of asylum in a case in which the asylum application was made before 21 October 2004 cannot have any effect on the individual's recognition of refugee status under the Refugee Convention. He accordingly continues to be entitled to the benefits of that Convention, subject of course to the limitations in, for example, Articles 32 and 33.

(v) If an individual was granted refugee status some time ago, there is no legal or evidential presumption that, for so long as he is a refugee under the Refugee Convention, removal would be in breach of Article 3. Whilst the past may be relevant in shedding light on the current situation and the prospective Article 3 risk, it remains the case that the question whether there is a real risk of Article 3 ill-treatment must be answered at the date of the hearing and is forward-looking.

Decision:

The First-tier Tribunal did err in law. The Appellant is a refugee but is not immune from removal to Vietnam. Any entitlement under the Qualification Directive has been validly revoked. His removal to Vietnam is not shown to breach Article 3. For those reasons, we set aside the First-tier Tribunal's decision and now dismiss his appeal.

Upper Tribunal Judge Gill Date: 16 January 2013