Case No: C5/2008/2129

Neutral Citation Number: [2010] EWCA Civ 696

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM IMMIGRATION TRIBUNAL
IMMIGRATION JUDGE LOBO & IMMIGRATION JUDGE COHEN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2010

Before :

THE RIGHT HONOURABLE LORD JUSTICE PILL
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE SULLIVAN

- -

Between :

FA (IRAQ)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Raza Husain QC & Mr Nick Armstrong (instructed by **Refugee and Migrant Justice**) for the **Appellant**
Mr Alan Payne (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing dates: 20th May 2010

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Judgment

Lord Justice Longmore:

Introduction

1. The question of law raised by this appeal is whether, if a person has made a claim for asylum and both that claim and his related claim for humanitarian protection have been rejected by the Secretary of State but he has been given leave to enter or remain in the United Kingdom for over a year, any appeal against those refusals of the Secretary of State has to be confined to the asylum claim or can include an appeal in relation to the claim for humanitarian protection.

2. A person is a refugee and, therefore, entitled to asylum if, (in the words of Article 1 of the Geneva Convention) owing to well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, he 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.

3. A person not entitled to refugee status may nevertheless be eligible for "subsidiary" protection, pursuant to the Qualification Directive (2004/83/EC) ("the Directive"), if substantial grounds have been shown for believing that, if returned to his country of origin, he would face a real risk of suffering serious harm and is unable or, owing to such risk, unwilling to avail himself of the protection of that country. This is the result of a combination of Article 18 of the Directive and the definition of persons eligible for subsidiary protection in Article 2 as (relevant) persons who, if returned to their country of origin, would face a real risk of suffering serious harm. Article 15 of the Directive defines serious harm as consisting of

> "(a) death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international and internal armed conflict."

4. The effect of the Directive has been incorporated into the Immigration Rules under the head of "humanitarian protection". Para 339C of the Immigration Rules ("the Rules") is as follows:-

> "339C. A person will be granted humanitarian protection 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 does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and

(iv) he is not excluded from a grant of humanitarian protection.

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 return; 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."

5. FA asserts that, if returned to Iraq, he will face a real risk of suffering serious harm as defined in the Directive and the Rules. The question is whether he was entitled to raise that question by way of appeal at the same time as he appealed the decision of the Secretary of State to refuse him asylum.

6. The Secretary of State submits that by reason of our domestic statutory provisions FA cannot raise this question in the course of his asylum appeal but must wait until an instruction for his removal is given (if indeed it is ever given). FA submits that the matter can and should be decided along with his appeal against the refusal of asylum.

The Facts

7. FA was born in Kirkuk in Iraq on 21st October 1991. He arrived in the United Kingdom on 21st August 2007 as an unaccompanied minor aged 15 and applied for asylum. The Secretary of State considered his claim for asylum and also considered whether he qualified for humanitarian protection in accordance with paragraph 339C of the Rules. By letter of 9th October 2007 he rejected the claim for asylum and decided that FA did not qualify for humanitarian protection. He therefore refused the asylum claim pursuant to para 336 of the Rules and refused the claim for humanitarian protection pursuant to para 339F of the Rules. However, in accordance with the Secretary of State's policy in relation to unaccompanied minors, he granted FA discretionary leave to enter and remain in the United Kingdom until 21st April 2009 when FA reached the age of 17 years and 6 months. The formal notice of decision accompanying the letter informed FA that he was entitled to appeal the decision and enclosed a form of notice of appeal. It continued with the usual "ONE STOP WARNING" requiring all grounds on which FA claimed to be permitted to

enter or remain in the United Kingdom to be stated in that notice as well as any grounds relied on as showing that FA should not be removed from or should not be required to leave the United Kingdom. If any such grounds existed but were not stated and subsequently relied on in an application to the Secretary of State, the applicant might not be able to appeal against any refusal.

8. FA did appeal but that appeal was dismissed by Immigration Judge Jhirad on 28th November 2007 "on asylum grounds and humanitarian protection grounds". On 21st December 2007 Senior Immigration Judge Mather ordered reconsideration because it appeared that Immigration Judge Jhirad had not considered whether there was a risk of serious harm pursuant to the Qualification Directive and para 339C of the Rules. When the matter subsequently came before Immigration Judge Lobo and Immigration Judge Cohen they concluded, in a determination dated 23rd June 2008, that FA's appeal was, by virtue of section 83 of the nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), limited to his asylum claim. They added in para 7 of the determination:-

> "The appellant cannot appeal at this moment of time on either human rights or humanitarian protection as he is not being removed from the United Kingdom and is therefore not at risk."

The Statutory Provisions

9. Before the enactment of the 2002 Act there was no express provision for a right of appeal against a refusal of asylum if the applicant had nevertheless been granted leave to remain. Section 8 of the Immigration Appeals Act 1993 gave rights of appeal to persons refused leave to enter or granted limited leave to enter or remain, as also to persons in respect of whom the Secretary of State had decided to make (or refused to revoke) a deportation order, as also in cases when certain directions for removal had been given. This court nevertheless construed section 8 of that 1993 Act as entitling a person who had been refused asylum to appeal against that refusal, even if he had leave to remain, see Saad v Secretary of State for Employment [2002] I.A.R 471.

10. The position on appeals has now been clarified by the much more detailed provisions of the 2002 Act. Section 82 lists a whole host of "immigration decisions" in respect of which, by virtue of section 82(1) a person can appeal, including

> "(d) refusal to vary a person's leave to enter or remain"
>
> and
>
> "(g) a decision that a person is to be removed from the United Kingdom by way of directions under" various sections of the Immigration and Asylum Act 1999 relating to the removal of persons unlawfully in the United Kingdom.

Section 83 gives an express right of appeal to a person whose claim for asylum has been rejected if he, like FA, has been granted leave to enter or remain for a period exceeding a year. Section 84 then sets out the available grounds of appeals:

> "**84 Grounds of Appeal**

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds:-

(a) that the decision is not in accordance with immigration rules;

(b) that the decision is unlawful; by virtue of section 19B of the Race Relations Act 1976 (c 74) [or Article 20A of the Race Relations (Northern Ireland) Order 1997] (discrimination by public authorities);

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

(2) In subsection (1)(d) "EEA national" means a national of a State which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (as it has effect from time to time).

(3) An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention"

The Submissions

11. Mr Raza Husain QC submitted:-

i) On the true construction of sections 82, 83, 84(3) and 86(3), when read with the definition of "asylum claim" in section 113 of the 2002 Act, there was a right to appeal in respect of any decision of the Secretary of State relating to a claim for "humanitarian" protection, which (he explained) was the same as "subsidiary" protection under the Directive;

ii) This was much reinforced by the consideration that if there was no such right of appeal and the words "asylum claim" could not encompass a claim for humanitarian protection, there could be no "in-country appeal" because such claims would be excluded from the exceptions in section 92 of the Act which specified those cases in which there could be an in-country appeal. That would mean that the protection of the Qualification Directive would be illusory;

iii) Another reinforcing argument related to the Secretary of State's power, under section 94, to certify that an asylum claim was unfounded in order to prevent an in-country appeal. If he was only able to certify an asylum claim or human rights claim, but could not certify a claim to humanitarian protection as being unfounded, that would emasculate the power to certify;

iv) If, contrary to his main submissions, there could be no appeal against the Secretary of State's decision on humanitarian protection, there would be a breach of the European Community law principle of equivalence because decisions on asylum claims could be appealed while appeals in relation to the protection conferred by the Qualification Directive could not.

12. Mr Payne for the Secretary of State submitted:-

i) The words of section 83 and 84(3) clearly meant that, in the limited number of cases, in which asylum had been refused but leave to enter had been given for a period of more than 12 months, any appeal had to be limited to the claim for asylum;

ii) Any decision by the Secretary of State to refuse humanitarian protection could, of course, be challenged by judicial review if there was an error of law or the decision was irrational. To the extent that this was an inroad into the one-stop principle which might result in two tribunals having to consider the same or related questions, it was not for the court to question the wisdom or convenience of what Parliament had enacted;

iii) Any question of humanitarian protection could (and should) be considered if and when removal directions were given once FA had achieved his majority. The situation in Iraq changed month by month and it was pointless to have an appeal on the question now;

iv) There was no breach of the EU principle of equivalence because claims pursuant to the Qualification Directive were in the same position as claims based on the human rights provisions of Article 2, 3 and 8 of the Convention. They could not be appealed under section 83 either.

Construction

13. It is, of course, commonplace that in the great majority of cases both the Secretary of State and, on appeal, the Asylum and Immigration Tribunal will consider asylum claims, human rights claims and (to the extent that they are different) claims for humanitarian protection at one and the same time. The great majority of such appeals are conducted pursuant to section 82 of the 2002 Act in the context of an actual

immigration decision as defined in that section and the status of the appellant as a refugee who may be entitled to asylum will be considered in the course of that appeal against the relevant immigration decision. Section 83 is the only section which gives the right to appeal against a decision refusing the applicant asylum and as such it can be legitimately categorised as a "status appeal" as opposed to an appeal against a particular immigration decision. It is nevertheless a restricted right; it is in the first place, restricted to persons who have been given leave to enter for a period of more than twelve months. This is presumably to ensure that cases which the Secretary of State is, in any event, going to reconsider in the near future do not have a right to appeal which may be on-going at the same time as the Secretary of State is reconsidering the position.

14. In the second place the grounds of appeal must, pursuant to section 84(3) be that removal (if threatened) would breach this country's obligations under the Refugee Convention. The question is, as Mr Husain says, whether those grounds must constitute the only grounds of appeal. In the context of this legislation my conclusion, subject to the EU point, is that they are the only legitimate grounds of appeal. A similar question would be whether there is any right to appeal on grounds that removal would breach this country's obligations under the Human Rights Convention. The answer to this question is that there can be no such right because that is expressly conferred in relation to an appeal in relation to an immigration decision under section 82 by virtue of section 84(1)(c) and/or (g) in addition to an appellant's rights under the Refugee Convention. The confinement of an appellant's rights, under section 84(3) to his rights under the Refugee Convention must mean, by necessary implication, that he cannot, on an appeal under section 83, raise the possibility of a breach of the Human Rights Convention. By necessary implication the word "must" must mean "must only" and an applicant cannot, in this limited category of cases, appeal against a refusal of humanitarian protection either. A resolution of these questions must, always subject to the possibility of judicial review, await the making of an immigration decision (if one is ever made) and be made in the context of that decision.

15. It follows that I would accept Mr Payne's argument that convenience does not come into the matter. Subject to the EU argument, if Parliament has decided that human rights or humanitarian protection cannot be considered in the context of a section 83 appeal that is the end of the argument on construction. Likewise even if Mr Husain's arguments in relation to section 92 and 94 are correct, that is nothing to the point. But I should say that I do not think they are correct because if no appeal in relation to human rights or humanitarian protection is possible, the question whether any such appeal (if there were one) was to be pursued in or out of country or be certifiable as unfounded is completely academic.

The EU position

16. The above conclusion makes it necessary to consider the arguments on the EU principle of equivalence. There is no doubt that the Qualification Directive is directly applicable as a matter of Community law. I have already mentioned that its effect has been incorporated into the Immigration Rules. It is, however, equally clear that the Immigration Rules do not, as such, constitute the law of the United Kingdom. Their status is no more than an indication of the way in which the Secretary of State will or will not exercise his or her discretion in relation to immigration matters see Odelola v

Secretary of State [2009] UKHL 25 [2009] 1 WLR 1230. It is therefore doubtful if it can be said that the Qualification Directive has been formally transposed into United Kingdom law at all. Since it is directly applicable, that is a matter of no consequence.

17. It was of still less consequence while the view prevailed that the Qualification Directive did not add anything of substance to the obligations of the United Kingdom under the European Convention of Human Rights. The provisions of Article 15 are, on the face of it, not at all dissimilar to the provisions of Article 2 and 3 of the Human Rights Convention. The relevant paragraphs of the Rules were, on that view, entirely adequate as an indication of how in relevant cases the Secretary of State would exercise her discretion.

18. This position changed as a result of the decision of European Court of Justice in Elgafaji [2009] 1 WLR 2100. In that decision the court explained that while Article 15(a) and (b) were indeed co-extensive with Article 2 and 3 of the Convention, Article 15(c) was addressing the different situation of indiscriminate violence which, while not being aimed at a particular individual, could nevertheless be said to constitute an individual threat to such person. The ramifications of this decision have been analysed by this court in QD and AH (Iraq) v Secretary of State [2009] EWCA Civ 620 and it is now tolerably clear that Article 15 is wider than Article 2 and 3 of the Human Rights Convention and to that extent is itself directly applicable in all EU countries including the United Kingdom.

19. Mr Payne for the Secretary of State submits that none of this is of any relevance because the Secretary of State will, as a matter of course, consider FA's rights pursuant to the Qualification Directive and para 339C of the Immigration Rules as and when any immigration decision is made with respect to him.

20. Mr Husain's submission is that this is not good enough for the purpose of the EU law. If the Secretary of State makes a decision in respect of FA's claim to asylum which he can appeal and she chooses to make a decision about his claim to humanitarian protection, then the principle of equivalence requires that there also be an appeal in relation to that decision as well.

21. It is, of course, for the domestic legal system of each Member State to lay down relevant rules governing actions intended to ensure the protection of rights conferred by Community law but it is also well-settled that such rules must comply with two conditions:-

    i) they must not be less favourable than the rule governing similar domestic actions (the principle of equivalence); and

    ii) they must not render the exercise of Community rights virtually impossible or excessively difficult (the principle of effectiveness).

    See Tridimas, The General Principles of EU Law, 2nd ed. Page 423.

22. It is the principle of equivalence that is in issue in the present case. Mr Payne submitted that the domestic equivalent of the "subsidiary protection" granted by the Qualification Directive was the "humanitarian protection" afforded by Rule 339C of the Immigration Rules and that, since a decision about humanitarian protection under

the Rules could not be appealed pursuant to section 83 of the 2002 Act, it was not a breach of the principle of equivalence that a claim for "subsidiary protection" could not be appealed either.

23. This argument is, in my judgment, misconceived. The humanitarian protection afforded by the Rules is essentially the same protection as afforded by the subsidiary protection afforded by the Directive. It is true that in one respect the Rules are wider since they include the concept of an unlawful killing as well as a court sentence of death but that is beside the point. The similar claim for the purpose of the principle of equivalence is not the self-same claim to subsidiary/humanitarian protection afforded by the UK Rules but the claim for that other species of international protection available under the Refugee Convention. If a right of appeal is given in respect of that, so should a right of appeal be given in respect of what the Directive calls subsidiary, and the Immigration Rules call, humanitarian protection.

24. This is all the more important since, as Mr Husain pointed out, the grant of subsidiary or humanitarian protection confers much the same status as a grant of refugee status in relation to family reunion, education, employment and social welfare, see Article 23-24 and 26-28 of the Directive and paragraphs 339Q, 344B and 352FA, FD and FG of the Rules.

25. This will mean that certain sections of the 2002 Act will have to be read as containing a reference to the Qualification Directive but the adjustments will not be extensive. The definition of "asylum claim" will have to have the words "and/or the Qualification Directive 2004/83/EC" added at the end of the definition and those words would also have to be added at the end of section 84(3). It is not necessary to decide whether any similar adjustment is required to section 84(1)(g) of the 2002 Act but the probability is that it is so required.

Conclusion

26. For these reasons I would allow this appeal and direct that the Tribunal do now consider the appellant's appeal against the refusal of humanitarian protection.

Lord Justice Sullivan:

27. I agree with both judgments.

Lord Justice Pill:

28. I agree with Longmore LJ that, subject to the impact of Council Directive 2004/83/EC of 29 April 2004 ("the Qualification Directive"), the Secretary of State's submissions on statutory construction are to be preferred.

29. The statutory rights of a person refused asylum have evolved over the years. In the Asylum and Immigration Appeals Act 1993, there was no provision for someone granted exceptional leave to remain to challenge a refusal of asylum though there was a right of appeal against an immigration decision consequent on a refusal. A right of appeal specifically to challenge the refusal of asylum was granted, subject to conditions, by section 69(3) of the Immigration and Asylum Act 1999 but judicial concern about asylum seekers' access to an independent assessment of their

entitlement to refugee status continued. (Saad, Dirye and Osorio v Secretary of State for the Home Department [2001] EWCA Civ 2008). Benefits flow from achievement of that status.

30. Section 83 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") was enacted against that background. It provided:

> "(1) This section applies where a person has made an asylum claim and—
>
> (a) his claim has been rejected by the Secretary of State, but
>
> (b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate).
>
> (2) The person may appeal to an adjudicator [now the Asylum and Immigration Tribunal] against the rejection of his asylum claim."

The "one year" requirement is presumably to prevent cases going on appeal when the Secretary of State will, in any event, reconsider status in the near future.

31. The interpretation section of the 2002 Act, section 113, provides, in sub-section (1):

> "In this Part, unless a contrary intention appears—
>
> 'asylum 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 would breach the United Kingdom's obligations under the Refugee Convention."

32. Section 82 of the 2002 Act, following the pattern in the earlier statutes, provides a right of appeal to the Tribunal against "an immigration decision". That includes a broad range of decisions. As defined in section 82(2), it includes decisions, for example, refusing entry clearance and decisions ordering removal from the United Kingdom but it does not include a decision refusing asylum.

33. Section 84(1) of the 2002 Act provides that an appeal under section 82(1) against an immigration decision "must be brought on one or more of the following grounds". In relation to an appeal under section 83, the equivalent provision is at section 84(3):

> "An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention."

34. Amongst the points on which Mr Husain relied on the issue of statutory construction was the amendment to the Immigration Rules consequent upon the Qualification Directive. Under Rule 327 an "asylum applicant" under the Rules is now a person

who either makes a request to be recognised as a refugee or otherwise makes a request for international protection. "Application for asylum", the rule provides, shall be construed accordingly. Mr Husain submitted that "asylum claim" in the 2002 Act should now be construed in the same way. I do not accept that submission. A basic definition in the 2002 Act is not to be construed differently because of a change in the Rules.

35. I accept the submission on behalf of the Secretary of State that the purpose of section 83, when enacted, was to provide a specific single-issue asylum appeal. Given the background and purpose of section 83, the definition of "asylum claim", and the form of section 84, the word "must" in section 84(3) should in my view be read as meaning "must only" or "can only". I agree with the conclusion of Longmore LJ. I cannot read a "contrary intention", a term used in section 113(1), where asylum claim is defined, into the 2002 Act. For the Secretary of State, Mr Payne submitted that that is the end of the appeal. He added that the appellant is not without protection because, if and when an order is made for the appellant's removal, he can appeal to the Tribunal under section 84 of the 2002 Act against the refusal of subsidiary protection.

36. For the appellant, Mr Husain QC submitted that, by reason of the Qualification Directive, section 83 must now be read as including a right of appeal against a refusal of "subsidiary protection status" under the Directive. Mr Husain relied on the principle of equivalence which, as defined in *Tridimas, The General Principles of EU Law*, 2nd ed. page 423, requires the legal system of each member state to lay down rules governing actions intended to ensure the protection of rights conferred by Community Law which are not less favourable than the rules governing similar domestic actions. The principle was stated in Peterbroeck & Ors v Belgian State (Case C-312/93, 14 December 1995). Advocate General Jacobs stated, at paragraph 17:

> "It has long been established by this Court's case-law that, in the absence of Community rules, it is for the domestic legal system of each Member State to determine the courts having jurisdiction and the procedural conditions governing actions intended to ensure the protection of directly effective Community rights, provided that those conditions fulfil two requirements: they are not less favourable than the conditions relating to similar actions of a domestic nature; and they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law."

37. In paragraph 12 of its judgment the ECJ stated:

> ". . . the court has consistently held that, under the principle of cooperation laid down in Article 5 of the Treaty, it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community

> law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law."

38. Mr Husain submitted that a claim to subsidiary protection under the Qualification Directive is sufficiently similar to a refugee claim brought in domestic law, which gives effect to the Refugee Convention, to attract the operation of the principle of equivalence. Article 2(g) of the Directive demonstrates the similarity of the two claims:

> "'application for international protection' means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of the Directive, that can be applied for separately."

39. The Qualification Directive of course post-dates the 2002 Act. That Act has been amended. For example, section 85(A) has been inserted and section 86 amended, but these amendments have not been made for the purpose of meeting the requirements of the Directive. By contrast, amendments to the Immigration Rules (HC395) have been made consequent upon the Directive, as already stated. The Directive creates a status known as subsidiary protection status. Article 2(e) provides:

> "'person eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

40. The changes in the Rules consequent upon the Qualification Directive are significant, it was submitted, as demonstrating an intention that the treatment of persons seeking subsidiary protection status under the Directive is in many ways similar to that given to those who seek to achieve refugee status. Claims for the one status are treated as equivalent to these for the other. Under the heading "Consideration of Applications", Rules 339I, 339J, 339L and 339M refer to the Secretary of State considering "a person's asylum claim, eligibility for a grant of humanitarian protection or human rights claim".

41. The expression "subsidiary protection" is used in the Directive and the expression "humanitarian protection" in the amended Rules but the parties agree that, for present purposes, the terms are inter-changeable. A claim under the Human Rights Act 1998 ("the 1998 Act") appears to be what is contemplated by the expression "human rights claim". Mr Payne relied on the absence of a right of appeal under section 84(3) of the 2002 Act for someone making a "human rights claim" but that is a claim arising from

the 1998 Act and not from the Directive. It has not been argued that someone who applies for protection under the 1998 Act as well as the Directive is deprived of the protection of the Directive by reason of the closing words of Article 2(g) cited above.

42. Under Rule 339Q, the Secretary of State is obliged to issue to a person granted humanitarian protection in the United Kingdom a United Kingdom Residence Permit ("UKRP") as soon as possible after the grant of humanitarian protection just as she is under a duty to a person granted asylum to issue a UKRP as soon as possible after the grant of asylum. Under Rule 344B, the Secretary of State must not impose conditions restricting the employment or occupation in the United Kingdom of a person granted humanitarian protection just as in the case of a person granted asylum. In the various parts of Rule 352, provisions for the requirements to be met by a person seeking entry as the spouse or civil partner of a person who has been granted humanitarian protection are spelt out, as they also are in the case of asylum.

43. This similarity of treatment reflects that in the Qualification Directive. Recital 6 to the Directive provides that its main objective is to ensure that a minimum level of benefits is available in all Member States for persons genuinely in need of international protection. Recital 24 provides that "minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention".

44. Under chapter VII of the Qualification Directive, the content of international protection required for refugees is not identical to that for persons eligible for subsidiary protection, for example, with respect to healthcare (article 29) and residence permits (initially 3 years for refugees and 1 year for beneficiaries of subsidiary protection status (article 24)). Under the several headings in chapter VII, different sub-paragraphs deal with "beneficiaries of refugee status" and "beneficiaries of subsidiary protection status" but there are many similarities (article 25 travel document, article 26 access to employment, article 27 access to education and article 28 social welfare). Recipients of subsidiary protection have a "status" just as do refugees and it brings significant rights with it.

45. It is now established, as Longmore LJ has stated at paragraph 18, that Article 15(c) of the Directive (mentioned in Article 2(e)) is wider in its application than Article 3 of the European Convention on Human Rights (Elgafaji ECJ Case C-465/07) [2009] 1 WLR 2100, at paragraphs 28 and 43, applied in QD and AH (Iraq) v Secretary of State [2009] EWCA Civ 620).

46. It is primarily for the national court to determine what national claims may be considered to be comparable to the claim based on community law in issue in the proceedings (*Tridimas*, page 425). Mr Payne submitted that a claim under the Directive is dissimilar from the domestic claim under the Refugee Convention and the different approach to the two which follows from the construction of section 83 of the 2002 Act is justified. Mr Husain stressed the importance to a beneficiary of protection under the Directive of the status and bundle of rights that goes with it. These are similar to the rights granted to refugees. The law of England and Wales cannot, he submitted, deprive a person, who may be entitled to subsidiary international protection status, of the right to have the determination of that status decided by an independent tribunal. The exercise of that right cannot be deferred

compulsorily until a decision which comes within the scope of section 82 of the 2002 Act has been made.

47. The rights of a refugee, as now provided in national law, and the rights of a person with subsidiary protection status, as provided by the Directive are in many respects similar. They are sufficiently similar, in my judgment, to require national law to provide the person seeking international protection of that kind to have the same remedy of recourse to an independent tribunal against an adverse decision of the Secretary of State as has a person seeking international protection as a refugee. That requires section 83 to be read as applying to a person who has sought subsidiary international protection under the Directive as it applies to a person who has sought asylum. I add that the similarity in status has also been recognised by the amendments to the Immigration Rules made consequent upon the Directive. I accept the above submission of Mr Husain on this issue.

48. It follows that, in agreement with Longmore LJ, I would allow the appeal and direct the Tribunal to consider the appellant's appeal against what the Tribunal described, following the term used in the amended Rules, as refusal of humanitarian protection. By that is meant the claim to subsidiary protection status under the Directive.

IT IS ORDERED THAT

1) The appeal is allowed

2) The first-Tier Tribunal (Immigration and Asylum Chamber) is directed to hear the appellant's appeal against the refusal of his claim to humanitarian protection

3) The defendant shall pay 60% of the appellant's reasonable costs, to be subject to a detailed assessment on the standard basis if not agreed

4) There shall be a detailed assessment of the appellant's publicly funded costs.

5) Any application for permission to appeal to be made by 11 a.m. Monday 21st June 2010.