OUTER HOUSE, COURT OF SESSION

[2022] CSOH 31

P678/21

OPINION OF LORD CLARK

In the Petition of

FAZAL AHAD (AP)

Petitioner

for

Judicial Review of a decision of the Upper Tribunal *et separatim* a decision of the Secretary of State for the Home Department

Petitioner: Caskie; Drummond Miller LLP
Respondent: Olson; Office of the Advocate General

8 April 2022

Introduction

[1] This is an application seeking judicial review of two decisions. The first is the refusal by the Upper Tribunal (UT) to grant permission for the petitioner to appeal against a decision by the First Tier Tribunal (FtT). It is argued that the UT failed to recognise arguable errors of law on the part of the FtT. The second is the decision by the Secretary of State for the Home Department (SSHD), following upon the refusal by the UT of permission to appeal, to remove the petitioner from the United Kingdom and return him to Pakistan. It is argued that the SSHD was obliged to provide reasons for her decision to remove the petitioner to Pakistan, rather than to Italy, and failed to do so.

Background

Chronology of events

[2] The petitioner is a national of Pakistan. He was born on 16 February 1990. He originally lived in what is named the Bajwar Agency in the Federally Administered Tribal Areas in Pakistan. In 2007 he moved to Rawalpindi. He explained in his evidence before the FtT that while living in Rawalpindi he sold clothes and other items. In September or October 2011, he was living in a room with two other people who were also selling goods. He was out one night and when he returned "everything was turned upside-down and there was no sign of the people I stayed with". He thought they must have been taken away by either the police or security services. He was so scared he left immediately, taking a bus to Karachi. He then spent time in Iran and in due course travelled through Turkey and Greece, and arrived in Italy in February 2012. He claimed asylum in Italy in 2013 and was granted subsidiary protection status. He later decided to come to the UK. He arrived in May 2015 and made a claim for asylum in the UK. He was notified by the SSHD by letter of 17 July 2015 that his application would not be considered because he had subsidiary protection in Italy. It was proposed to remove him to Italy and the SSHD wrote to the relevant authorities in Italy to request removal. Confirmation was received from the police in Italy that the petitioner could be removed from the UK to Italy, with a request for information. Directions for removal to Italy were issued, and the date was set for 7 August 2015. However, the petitioner was not removed, with no clear evidence as to why that did not occur. The petitioner had a travel document issued by the Italian authorities which was valid until 29 November 2016. He made no attempt to return to Italy. On 29 November 2018 he contacted the Voluntary Returns Service in the UK saying he wanted to return to Italy. He

was advised that they would contact the Italian Border Police. However, on 2 January 2019 the petitioner was informed that it had been realised this was not a case for the Voluntary Returns Service, and he would need to contact the Third Country Unit (the TCU). Their number was provided to the petitioner. There was no suggestion that he then made contact with the TCU.

[3] On 10 September 2019, the SSHD noted that "Subsidiary protection cases will now be considered substantively in the UK" and re-opened the petitioner's asylum claim. As a consequence of this change of position by the SSHD, the petitioner was given a substantive interview on 8 January 2020 and his asylum claim was considered. It was refused on 24 January and he was given a right of appeal. The petitioner appealed to the FtT but on 19 March 2021 his appeal was refused. He sought permission from the FtT to appeal to the UT and that was also refused. He then sought permission from the UT to appeal to the UT. On 28 June 2021 that application was refused. On 25 August 2021 removal directions were issued by the SSHD, stating that the petitioner was to be removed from the UK to Pakistan on 8 September 2021.

Subsidiary protection and humanitarian protection

[4] Subsidiary protection is dealt with in Directive 2004/83/EC (the Qualification Directive). In essence, subsidiary protection allows a person who does not qualify as a refugee, but who has subsidiary protection status, to reside in the member state which grants it for at least three years, with a renewable permit, and to have rights as a resident. The key provisions in the Qualification Directive for present purposes in relation to subsidiary protection are:

"CHAPTER I

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);

(e) '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;

(f) 'subsidiary protection status' means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection;

CHAPTER V

QUALIFICATION FOR SUBSIDIARY PROTECTION

Article 15

Serious harm

Serious harm consists 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 or internal armed conflict.

Article 16

Cessation

1. A third-country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

2. In applying paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.

…

CHAPTER VI

SUBSIDIARY PROTECTION STATUS

Article 18

Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.

Article 19

Revocation of, ending of or refusal to renew subsidiary protection 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 subsidiary protection 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 eligible for subsidiary protection in accordance with Article 16.

3. Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person, if:

… (b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of subsidiary protection status.

4. Without prejudice to the duty of the third country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted the subsidiary protection status, shall on an individual basis demonstrate that the person

> concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article."

[5] The terms of the Qualification Directive were revised in Directive 2011/95/EU (the recast Qualification Directive). This was not adopted by the UK and consequently the UK is not bound by it or subject to its application. The recast Qualification Directive largely restates the terms of the Qualification Directive but makes certain changes, including the addition of the following sub-paragraph to Article 16:

> "3. Paragraph 1 shall not apply to a beneficiary of subsidiary protection status who is able to invoke compelling reasons arising out of previous serious harm for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence."

[6] The effect of the Qualification Directive has been incorporated in the UK's Immigration Rules, using the expression "humanitarian protection" rather than "subsidiary protection":

> "Grant of humanitarian protection
>
> 339C A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
>
> …(iii) substantial grounds have been shown for believing that the person concerned, if 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 themselves of the protection of that country;…"

Rule 339CA defines "serious harm", using principally the definition in Article 15 of the Qualification Directive.

Rule 339GA states:

> "Humanitarian protection ceases to apply
> 339GA. This paragraph applies where the Secretary of State is satisfied that the circumstances which led to the grant of humanitarian protection have ceased to exist or have changed to such a degree that such protection is no longer required.

> In applying this paragraph the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person no longer faces a real risk of serious harm."

Refusal of claim for asylum in the UK

[7] In the refusal letter of 24 January 2020, the SSHD rejected the petitioner's claim for asylum. In relation to whether he should be granted humanitarian protection in accordance with Rule 339C, the SSHD said that having carefully considered his claim, taking account of the evidence, she had concluded that there were no substantial grounds for believing that there was a real risk of serious harm should he return to Pakistan. It was said to be obvious from his own account that the petitioner had come to the UK for illegal work rather than to seek international protection. The letter stated that he had also failed to provide an internally consistent account of why he feared return to Pakistan. Further, he had not provided any details of specific threats by the authorities or incidents relating to him directly in Pakistan. He had lived in Rawalpindi for some years without incident and his younger brother was also now living and working there. It was considered there was no direct threat to the petitioner from the authorities in Rawalpindi or his home village. His account was found not to be plausible and the view reached was that he could relocate back to his home area, or Rawalpindi, or Lahore without suffering any ill-treatment.

Appeal to the FtT

[8] The appeal to the FtT was based on several grounds, but the key contention for present purposes is that, on the basis that the petitioner faced a real risk of serious harm, he should be granted humanitarian protection. Reliance was placed upon the fact that he had previously been granted such protection by the Italian authorities.

[9] The FtT judge refused the appeal, finding the evidence given by the petitioner not to be credible. It was accepted on behalf of the respondent that the FtT judge erred in stating that the petitioner may have been granted humanitarian protection in Italy on the basis of his age. It was also accepted that she erred in her arithmetic in calculating that the petitioner would have been treated as a minor, just under 18, according to his false date of birth of 16 February 1994, when he claimed asylum in Italy on 17 February 2013. That was wrongly counted because based on that false date of birth he would have been just over 19 years old at that date. However, it was also accepted on behalf of the petitioner that leaving these errors to one side, the FtT judge reached her findings on credibility on a number of other grounds.

[10] In summary, the FtT judge concluded that the petitioner was not telling the truth for several reasons. These included that while the petitioner claimed that he had worked as an aid worker in his local area (helping with a polio vaccine programme) and this had resulted in him being targeted by the Taliban, he had in fact left that area in 2007, before the programme was stopped in 2008 because it was too dangerous. After he left the area, he then remained in Pakistan for four years or so. Further, in his screening interview when seeking asylum in the UK, the petitioner did not mention events that he now claimed in his witness statement had occurred in Rawalpindi in 2011, which he said caused him to fear the authorities, rather than the Taliban, and leave Pakistan. The FtT judge stated (at para [42]):

> "I find that the appellant has failed to explain satisfactorily or credibly why he had not mentioned his fear of the Pakistan authorities, rather than only the Taliban, in the screening interview."

[11] The FtT judge also concluded that it was seriously damaging to the petitioner's credibility that he introduced a further point at the hearing of his appeal, which he said he had already provided to the Italian authorities, but had not mentioned it before either in the

interview or to his legal representatives when they prepared his statement. The further point he made was that a First Information Report (FIR) had been issued by the police naming the petitioner as one of the accused as a result of whatever took place in Rawalpindi and caused his room-mates to be taken away. He had also given false information, for example having told the Italian authorities that he had been born in 1994. There was also a Pakistan identity document which showed his year of birth as 1998. He had mentioned three different dates of birth. Despite his claim that the place in Pakistan where he was from would result in persecution by state agents, his family had in fact returned to their home area and were not the victims of persecution. One of his brothers lives and works in Rawalpindi without any problems.

[12] The FtT judge (at para [55]) held that

> "…there are significant problems in the appellant's evidence which go to the core of his claims and which he has not satisfactorily explained to the low standard of proof which rests with him. The cumulative effect of these matters which I have discussed above is such that in my view no credence can be given to his claims as to the reasons he left Pakistan.
>
> …I do not believe for reasons I have explained above that the appellant has established that he suffered any particular problems there [Rawalpindi] or that he was or is wanted by the authorities. Rather, I find that the appellant left the country for the sole reason of seeking economic betterment…"

The FtT judge also considered, and set out in some detail, the background country information.

Refusal of permission by the UT

[13] The grounds of appeal submitted to the UT alleged that the FtT judge had materially erred in law in reaching her decision and also had not given adequate reasons for it. The Upper Tribunal judge refused permission to appeal, stating that the FtT judge's reasoning

for concluding that the petitioner was not a witness of truth, found in paras [33] to [51] of the decision, comprised proper, intelligible and adequate reasons for arriving at a conclusion which was properly open to the judge. The UT judge stated that overall, the FtT judge made findings of fact which she was entitled to make on the evidence, for the reasons given, and there was no arguable error of law.

Submissions

[14] The court had the benefit of detailed notes of argument and oral submissions on behalf of each party, including additional submissions about Article 19(4) that I requested while the case was at *avizandum*. The contents have been taken fully into account. At the substantive hearing, counsel for the petitioner adopted a more refined stance than in the detailed petition, although certain additional points were also made.

Submissions for the petitioner

[15] The basis upon which Italy granted subsidiary protection to the petitioner is not known and was not put before the FtT judge. *Bilali* v *Bundesamt für Fremdenwesen und Asyl* [2019] 4 WLR 124 illustrated that even if the kind of evidence given by the petitioner was not credible (which the petitioner does not accept) there may be other reasons as to why the Italian authorities had granted subsidiary protection. That case explained that subsidiary protection can be lost if a member state identifies a change in circumstances. Such a change cannot be identified if the starting point is not known. Neither the FtT judge nor the SSHD made any assessment of whether, for example, the petitioner had been granted subsidiary protection in Italy on the same basis as in *Bilali* and, if so, whether the situation had altered. There could also be domestic protection provisions in Italy outside the

scope of the recast Qualification Directive which could have formed the basis of the decision to grant subsidiary protection.

[16] If a person has an expired residential permit, he still has subsidiary protection. The Italian authorities must have granted subsidiary protection on the basis of Article 15(b) or (c) of the recast Qualification Directive. That Directive also added paragraph 3 to Article 16 of the original Qualification Directive. The UK authorities could not apply that provision. The Italian authorities would require to apply Article 16(3) to address whether there were compelling reasons from what has arisen before for the petitioner not to be able to return to Pakistan. The fact that he had waited for five years for a decision and made a life in the UK might be relevant. Article 19 laid out the procedural requirements to be gone through to cease entitlement to subsidiary protection. The Italian authorities would require to provide the petitioner with the opportunity to make arguments on the matter. The SSHD must be taken to have known about this requirement. The failure to consider Article 16(3) avoided a significant question.

[17] There were attempts by the petitioner to obtain evidence from the Italian authorities as to the basis upon which Italy had granted him subsidiary protection. It would not be normal for the person granted subsidiary protection to be given detailed reasons at the time as to why that had occurred. He sought and was refused a direction from the FtT ordering the SSHD to make inquiries of the Italian authorities. There was an obvious and clear distinction between an individual who has not been in Italy for more than five years, but previously had been granted subsidiary protection there, making an inquiry about his old asylum claim and a state-to-state inquiry on the point.

[18] On an assessment of the petitioner's application for permission to appeal the UT should have recognised that there was at least an arguable error in law in the decision of the

FtT judge, including in light of the dicta in *R* v *Immigration Appeal Tribunal Ex p Shen* [2000] INLR 389, at [27]-[32]. That case indicated that the UT should have had regard to a point that ought to have been clear to the UT, even though not raised in the grounds of appeal. Looking at the FtT decision and the UT decision, it was glaringly obvious that no thought had been given at any stage to the basis upon which the Italian authorities had granted subsidiary protection being a significant matter. In particular, no engagement occurred as to whether or not the basis of the grant might have been Article 15(b) on the same sort of grounds as in the *Bilali* case. As the FtT Judge had considered whether it was appropriate to end the petitioner's humanitarian protection it was or should have been clear that the law placed an obligation on the SSHD to at least attempt to obtain information from the Italian authorities as to the basis upon which humanitarian protection had been granted: see *MJ Afghanistan* [2013] UKUT 00253 (IAC). The FtT judge failed to recognise that there was an obligation on the state and then held the failure to fulfil that obligation against the appellant in terms of his credibility. The UT failed to ask the question "is it material that he was lying?"

[19] There was also a failure by the FtT judge to give appropriate consideration to the five-year gap after leaving Italy. The FtT failed to consider that period and failed to give adequate reasons as to why the delay was not taken into account in assessing credibility. The FtT judge placed reliance upon matters referred to in the preliminary information given by the petitioner and the subsequent interview. These were to provide more information, years after the Italian authorities had made their decision.

[20] As to the second ground, it was made clear in *Bilali* that the ending of a grant of subsidiary protection is not inevitably followed by the ending of a right to reside in the state that granted that protection. That is particularly so where the state in question is obliged by

Article 16(3) of the recast Qualification Directive to not revoke protection in specified circumstances. In those circumstances the SSHD was obliged to provide reasons for her decision to remove the petitioner to Pakistan and not Italy. Reference was made to paragraph 18.53 *et seq* of Clyde and Edwards, *Judicial Review* 2000. For the first time, in its answers to the petition, the respondent indicated there was no obligation on the SSHD to provide reasons because there was no reason to think the petitioner would be admitted to Italy. The respondent may not provide reasons in answers to a petition for judicial review that were not provided with the impugned decision. Reference was made to *Absalom* v *Governor of HM Prison, Kilmarnock* [2010] CSOH 109. There were questions that needed answers from the Italian authorities and simply no reasons given for the decision to send him back to Pakistan. The respondent states that there was no reason to think the Italian authorities would take the petitioner back, but the answer to that point was that Article 16(3) would require to be applied by them.

Submissions for the respondent

[21] In essence the issue before the court had been accurately summarised in the FtT judge's decision. Time had passed and circumstances had changed. The petitioner had subsidiary protection in Italy only for a limited time and reconsideration would have taken place at the necessary time for reconsideration. The focus of the FtT judge was on whether there was a risk of serious harm in returning to Pakistan now and that was the task before her. The petitioner had claimed asylum from the UK, properly treated as a claim for humanitarian protection. So, the FtT judge directed herself to the correct question and there was no error of law in her judgment or the UT's decision.

[22] Article 16(3) in the recast Qualification Directive deals with matters that the beneficiary of subsidiary protection can raise. It is a defence that the beneficiary can use when the host country is of the view that he can return to Pakistan. It is for the beneficiary to explain any compelling reasons. That is not a matter for the member state to embark upon when considering the point in Article 16(1) of the Qualification Directive. It was wrong for the petitioner to contend that the Italian authorities would have let him in to Italy to answer that question. If the petitioner was returned to Italy he would not benefit there because the subsidiary protection has been revoked by the UK. In any event, it was of no relevance to the FtT judge's decision because what she had to do was consider whether or not the petitioner was eligible for humanitarian protection when he appeared in front of her. The UK tribunals are concerned with the UK laws that apply. Further, no compelling reasons were identified. Counsel for the petitioner simply hypothesised that these may exists but did not say what they were.

[23] The case of *Bilali* was of no assistance. It was not authority for the proposition that there is a more general entitlement to subsidiary protection than in the UK. The reason why the person in that case was granted subsidiary protection concerned how he was at risk of being exposed to inhuman treatment. The argument for the petitioner seemed to be that if he was sent to Italy the authorities may have a more favourable interpretation of Articles 15 and 16 than he would get in the UK. There was no evidence or other basis for saying that is in fact the case in Italy.

[24] The reliance by the petitioner on the need for a change of circumstances before subsidiary protection could be ceased did not take full account of Article 16(1). If the circumstances allowing subsidiary protection had not, on the evidence, existed in the first place then that must mean that his entitlement to subsidiary protection ceases when he is

found to have lied. There was no need to look for a change. It did not matter what the Italian authorities thought when granting him subsidiary protection. The question is whether or not as a matter of fact the circumstances were such that he was entitled to subsidiary protection. The findings of the FtT judge on credibility dealt with the issues in Article 15(b) and (c) and there was no other issue left extant.

[25] The position taken by the petitioner's solicitor in front of the FtT judge was that his claim must stand or fall on the issue of credibility. The FtT judge had regard to the evidence in full, including the fact that the screening interview was not done in detail and the period of five years having passed. In relation to how the FtT judge dealt with information regarding Italy, she simply noted that there was no information about it. There was no error of law in her decision or the decision of the UT and no *"Robinson* obvious" point based on *Bilali* and an interpretation of the two Directives.

[26] Turning to ground 2, it was accepted by the petitioner that the SSHD can return a person to the country of his nationality. Where the SSHD has reason to believe another country would accept the person she could direct that he be removed to that country. It was patently obvious from the papers and from the judge's decision that there is no reason to believe that Italy would accept the petitioner. So the only one country to return the petitioner to was Pakistan. The petitioner argues that there is no explanation of why she does not have a reason, but he does not say, for example, that the petitioner has made enquiries and the Italian authorities will take him. On the contrary, he had made no such enquiries and does not know if that is possible. In these circumstances the SSHD was not under any obligation to give any reasons as to why she did not direct that he be removed to Italy.

[27] A member state is obliged under EU law, if a person is not entitled to subsidiary protection, to remove him. An order on the SSHD to make further enquiries would have discovered whether he had told two different stories or the same, not credible, story, so such an order was pointless. It was for the petitioner to establish his claim for asylum or humanitarian protection. It is not for the state to make investigations other than in special circumstances identified in *MJ Afghanistan.* That case involved very specific circumstances where there were documents in dispute. The law as explained in *Tanveer Ahmed* [2002] Imm AR 318 (starred) applied here.

Decision and reasons

Ground 1

[28] The petitioner made an asylum claim in the UK in 2015, having been granted subsidiary protection in Italy two years earlier. That opened up the possibilities of either the SSHD not dealing with the matter and directing that he be returned to Italy, or the SSHD considering his application in the UK. The former course was initially taken, but the petitioner did not go to Italy. The latter course was then followed. It was not suggested that the SSHD's decision to consider the petitioner's asylum application in the UK was in any way wrong in law.

[29] The FtT judge was dealing with an appeal against the decision by the SSHD. The key contention made by the petitioner was that he suffered a real risk of serious harm if he returned to Pakistan. This was the central issue to be determined by the FtT judge. It was for the petitioner to identify why he had that real risk of serious harm. He was given a full opportunity to state his case and to put forward the evidence he relied upon. In reaching her conclusions on credibility, the FtT judge properly assessed all of the relevant evidence.

[30] The FtT judge was not made aware of the basis upon which subsidiary protection in Italy had been granted, apart from the general point that the petitioner feared serious harm if he were to be returned to Pakistan. The petitioner argues that in those circumstances grounds such as those in *Bilali* v *Bundesamt für Fremdenwesen und Asyl* might have been the reason for subsidiary protection being granted. In my opinion, the case of *Bilali* provides no assistance to the petitioner. In that decision, humanitarian protection was granted "on account of the high level of unemployment, lack of infrastructure and continuing instability in Algeria". As a result, the person was described as being exposed to "inhuman treatment". A person making an application in the UK for asylum on the basis of a risk of serious harm requires to satisfy the test in the Immigration Rules (defined in very similar terms to those in Article 15). As quoted above, Article 15(b) refers to "inhuman or degrading treatment". The person is given a full opportunity to explain his position. In effect, the suggestion for the petitioner is that there can be reasons why Italy granted subsidiary protection which are not affected by the FtT judge's credibility finding, albeit the petitioner did not know what they were and had not expressed any evidence about them. It is not, in my view, open to speculation that some other basis for subsidiary protection existed than that put forward in the evidence. Accordingly, the absence of information about the basis upon which subsidiary protection was granted did not, in my view, create the possibility that the Italian authorities had made their decision based upon matters that were not affected by the decision of the FtT judge on credibility.

[31] It is also incorrect to say that the UT erred in failing to pick up this point, if it did have substance, on the ground that it was "*Robinson* obvious" (see *R* v *Secretary of State for the Home Department, ex parte Robinson* [1998] QB 929, discussed and applied in *R* v *Immigration Appeal Tribunal Ex p Shen*). It was not *Robinson* obvious that some other ground,

not affected by the findings on credibility, might have been the case for Italy granting subsidiary protection. The suggestion that there was a failure by the FtT judge, in assessing credibility, to give appropriate consideration to the period of more than five-years having elapsed after the petitioner left Italy also carries no weight. The petitioner could not reasonably be expected to have forgotten why he had a real risk of serious harm.

[32] In relation to whether subsidiary protection status previously granted by the Italian authorities remained in place, the FtT judge was not able, on the information provided, to reach a view on that matter. She noted that the petitioner's representative submitted that the petitioner had lost his opportunity to return to Italy because of the alleged delay by the SSHD in deciding his asylum claim. While that was the submission on his behalf, the petitioner himself stated that he still had subsidiary protection in Italy. His representative acknowledged this claim but submitted that the petitioner's Italian documents which he brought with him to the UK had expired and said it may be that the status itself had also expired. The petitioner's solicitors had made contact with certain Italian authorities stating that the petitioner had been granted subsidiary protection in Italy and requesting information on, among other things, his current status, whether and if so when it had expired, whether he had any rights to return to Italy, and the basis upon which his subsidiary protection status was granted. No reply was obtained.

[33] If the petitioner still had subsidiary protection in Italy, that was a matter for the petitioner to put before the FtT judge. As that did not happen, the existence of any such subsidiary protection was not made out. In relation to whether the SSHD should have enquired of the Italian authorities, the decision in *MJ Afghanistan* (at [47]-[51]) relied upon by the petitioner discusses the earlier case law. One of these decisions is *Tanveer Ahmed*, a starred decision of the Immigration Appeal Tribunal, where it was held that in asylum and

human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on. That case did not entirely preclude the existence of an obligation on the Home Office to make enquiries about documents and in *Singh* v *Belgium* (ECtHR Application no 33210/11) such an obligation arose because the documentation was clearly of a nature where verification would be easy and it would come from an unimpeachable source. However, the cases make clear that where evidence is verifiable that of itself does not impose an obligation on the decision-maker to seek to have it verified. In *AS (Cameroon)* v *The Advocate General for Scotland* [2022] CSIH 16, Lord Turnbull, giving the Opinion of the Court (at paras [31]-[38]) considered these cases and the discussion of them in *PJ (Sri Lanka)* v *Secretary of State for the Home Department* [2015] 1 WLR 1322. The Court concluded that the duty to verify documents produced and relied upon by an appellant was not engaged. That is also the position in the present case where there was no document presented by the petitioner to the SSHD supporting subsidiary protection still existing and which the SSHD was asked to verify. The case law referred to does not support there being an obligation on the SSHD to contact the Italian authorities to inquire about a matter which the petitioner was unable to give information about (the existence of subsidiary protection). It was for the petitioner to vouch his claim. The FtT judge properly noted that it was not the SSHD's responsibility to ascertain the petitioner's status in Italy, when he has claimed asylum in the UK based upon a fear of return to Pakistan. That reasoning does not give rise to an arguable error in law.

[34] However, in any event, it was the clear position of each party that, even if the petitioner still had subsidiary protection, it was open to the FtT judge to cease or revoke that protection. They expressly agreed in the pleadings that the SSHD and FtT were obliged under Article 19 of the Qualification Directive to revoke, end or refuse to renew the

petitioner's subsidiary protection status if he ceased to be eligible for subsidiary protection in accordance with Article 16. The respondent admitted in its answers to the petition that the Qualification Directive remained in force in the UK despite Brexit. However, in response to a point I raised while the case was at *avizandum*, discussed below, the respondent altered its position and submitted that as a result of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, section 1 and Schedule 1, the Qualification Directive ceased to be recognised and applicable in domestic law. The petitioner did not demur but argued that the SSHD and FtT had to apply Rule 339GA which had transposed Article 19 into UK law. It is not at all clear to me that Rule 339GA applies to subsidiary protection granted by another state. But if cessation or revocation of subsidiary protection was indeed required and, as parties submitted, it was open to the FtT judge to do so, in substance that occurred.

[35] The FtT judge said:

> "86. The bottom line in this case is this. Whether or not the appellant has lost the subsidiary protection he was given in Italy when the evidence is he claimed to be 4 years younger than he was, the fact is that time has passed and circumstances changed. The appellant would only have had subsidiary protection for a limited time and reconsideration would take into account the circumstances in Pakistan at the time of reconsideration. That has been the task for me, i.e. to ascertain whether it is safe for the appellant to return to Pakistan now, without a real risk and wellfounded fear of persecution. I have found that he can."

The reference to claiming to be 4 years younger than he was, while correct, appears to be somewhat peripheral. The actual basis for the references to subsidiary protection granted by the Italian authorities being for a limited time and subject to reconsideration was not spelled-out. That said, there is support in the case law (see eg *AME* v *The Netherlands* 51428/10 and *Mohammed Hussein and Others* v *the Netherlands and Italy* 27725/10) for a limitation of the Italian residence permit for subsidiary protection, in those cases being

for three years. However, the simple and central point is that the FtT judge was deciding on humanitarian protection under UK law, the petitioner having applied for asylum here based upon a real risk of serious harm in Pakistan.

[36] It was also argued on behalf of the petitioner that whether the requirements in Articles 16 and 19, as transposed in the Immigration Rules, were met could not be determined without having sufficient information of the basis upon which the Italian authorities granted subsidiary protection. That information is said to be needed in order to establish a change in circumstances. As noted above, no basis in law was given for the SSHD or FtT having a duty to obtain such information. It was a matter for the petitioner to provide it. In my view, an account given by the petitioner of the reason for a risk of serious harm in Pakistan which is found by the FtT judge to be wholly non-credible properly demonstrates a change in circumstances, again having regard to the fact that the petitioner had the full opportunity to explain his position. The FtT judge, as quoted above, expressly referred to the circumstances having changed.

[37] Another issue is whether Article 16(3) in the recast Qualification Directive, which does not apply to the UK, has any relevance. While parties jointly submitted that the FtT judge was able to cease or revoke subsidiary protection, the question is whether the UK can do so even where the member state that granted subsidiary protection is bound by Article 16(3). The FtT judge made no specific reference to Article 16(3), but there was nothing in the evidence supporting the existence of compelling circumstances under Article 16(3). In the absence of any such material, the FtT judge did not, in my view, require to consider whether the Italian authorities should deal with that point and there was no arguable error of law on that matter.

[38] While the case was at *avizandum,* I raised with parties the reference in Article 19(4) of the Qualification Directive to "the Member State, which has granted the subsidiary protection status" having to demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection. As noted above, the respondent submitted, and the petitioner accepted, that the Qualification Directive did not apply in the UK as a result of Brexit and the legislation cited. I have already dealt with the points made on behalf of the petitioner about the SSHD and the FtT judge not knowing the basis upon which subsidiary protection was granted by the Italian authorities and whether circumstances had changed. The petitioner founded upon Rule 339GA in that regard. I was given no reason for concluding that Article 19(4) had any relevance to the decisions made by the SSHD and the FtT.

[39] Finally, it was submitted on behalf of the petitioner that it was relevant to note that the Lord Ordinary who granted permission for this petition to proceed was satisfied that the test in *Eba* v *Advocate General for Scotland* 2012 SC (UKSC) 1 was met, in particular that the matters raised were strongly arguable. That test only applies at the permission stage and, while I respectfully note the Lord Ordinary's decision, it was reached only on the basis of the unadjusted pleadings and of course without full and detailed submissions on the merits.

[40] For the reasons given, there was no failure by the UT to recognise any arguable errors of law on the part of the FtT. I therefore reject the petitioner's position on ground 1.

Ground 2

[41] Ground 2 focuses on the absence of reasons for returning the petitioner to Pakistan rather than Italy. It was accepted by both parties that, where the SSHD has reason to believe that another country would accept the person, she could direct that the person be removed

to that country. In the present case, there was no material giving rise to a reason to believe that Italy would accept the petitioner. Nothing to that effect was put before the SSHD or the FtT judge. No proper legal basis for any obligation upon the SSHD to return the petitioner to Italy was identified. The asylum claim concerned a real risk of serious harm on return to Pakistan, and that was rejected. The decision of the FtT judge, followed by the SSHD in its direction to return, was about the petitioner being returned to Pakistan. It is therefore clear that there was only one option open to the SSHD, that is, returning the petitioner to Pakistan. In such circumstances, there were no further reasons why that decision was reached.

Disposal

[42] I shall sustain the respondent's pleas-in-law, repel the petitioner's pleas-in-law and refuse the petition, reserving in the meantime all questions of expenses.