Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00044/2017**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On: 9 February 2018	**On: 27 June 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

AYMEN MOHAMMED BASHIR ESSA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Petterson, Home Office Presenting Officer.
For the Respondent: Mr C Howells, instructed by NLS Solicitors (Cardiff).

DETERMINATION AND REASONS

1. The appellant is the Secretary of State. She appeals against the decision of Judge O'Rourke in the First-tier Tribunal allowing the appeal of the respondent, a national of Sudan whom we shall call 'the claimant', against her decision of 2 March 2017 to revoke his protection status by reference to para 339AC of the Immigration Rules.

2. The claimant came to the United Kingdom in February 2011, and claimed asylum. Following an appeal he was recognised as a refugee and granted refugee status. That he has a well-founded fear of persecution in Sudan as a non-Arab Darfuri is not now in dispute. In May 2013 he was sentenced to a term of nine years imprisonment following his conviction of serious offences. It is those offences that led the Secretary

of State to make the decision under appeal. The Secretary of State took the view that the claimant is a person convicted of a particularly serious crime, and constitutes a danger to the community. Such a person, even if a refugee, can be removed from the territory of a State Party to the Refugee Convention because, as an exception to the general rule, such a person cannot claim the benefit of the prohibition on refoulment: see art 33(2) of the Convention.

3. The Secretary of State certified the present case under s 72(9) of the Nationality, Immigration and Asylum Act 2002 (as amended), with the effect that, on appeal against the revocation decision, Judge O'Rourke was obliged to begin his consideration by determining whether the art 33(2) exclusion applied, as set out in s 72(2) (3) and (4). He did that and found that the presumption in 72(2) applies: having been convicted in the United Kingdom of an offence and sentenced to a term of imprisonment of at least two years, the claimant falls to be presumed to be a person to whom art 33(2) applies. There is now no challenge to that part of his decision either.

4. Following the amendments to the appeal rights by the Immigration Act 2014, the claimant's right of appeal against the revocation decision was under s 82(1)(c) of the 2002 Act against the revocation of his 'protection status'. That phrase is partially defined in subsection 82(2)(c): "a person has 'protection status' if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection"; and 'refugee' is further defined in paragraph (e) as having the same meaning as in the Refugee Convention. The only ground upon which the claimant could appeal to the Tribunal was that set out in s 84(3)(a), that 'the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention'.

5. Section 72(10) of the 2002 Act provides that if the Tribunal considers that the presumptions in s 72(2), (3) or (4) apply, it "must dismiss the appeal insofar as it relies on the ground mentioned in subsection 9(a)", and for present purposes it is sufficient to note that the ground under s 84(3)(a) is mentioned in subsection 9(a).

6. It follows that, that being the only ground of appeal available to the claimant, and the judge having found that the presumption applies, he was obliged to dismiss the appeal. He observed as much in his decision at [29].

7. Judge O'Rourke then went on to consider the implications of a decision to this effect, assisted as he was by written submissions on behalf of the UNHCR. He noted that although the Refugee Convention provides for the cessation of refugee status where a person no longer fulfils the definition in art 1A(2) of the Convention, the Convention itself does not have provisions for the withdrawal of status where a person still falls within art 1, that is to say is outside his country of nationality, at risk of persecution for one of the five 'Convention reasons', and is not excluded by art 1F. Article 33(2) may permit the removal of such a person, but it does not provide for revocation of his status. In other words, a person to whom art 33(2) applies is a removable refugee, but still a refugee.

8. Judge O'Rourke concluded that the withdrawal of the claimant's status as a refugee was not, therefore, permitted by the Refugee Convention, and that withdrawing his

refugee status would put the United Kingdom in breach of its obligations under that Convention. In these circumstances his decision was: "The appeal is allowed under the Refugee Convention".

9. The Secretary of State's grounds of appeal do not mention s 72(10). They cite extensively from Dang [2013] UKUT 00043 (IAC). That was a case decided under the previous appeals provisions, in reference to a person who had been a refugee in the United Kingdom since before the amendments to the Statement of Changes in Immigration Rules, HC 395, made as a result of the Qualification Directive, 2004/83/EC. The principles set out there in relation to the meaning and effect of the Refugee Convention in cases of this sort, however, remain valid. What Dang decides is that the specific leave, permission or status granted to a refugee under national (or EU) law may be revoked in accordance with the terms of the relevant legal regime, but that even a removable refugee remains a refugee, and entitled to the benefits of the Convention, unless and until he is removed.

10. The difficulties in this area, explored in Dang, arise from the use of terms in the Immigration Rules themselves. It is clear from para 334 that 'refugee status' in the Rules is not the same as the entitlement to status under the Refugee Convention: para 334(iv) specifically excludes the removable refugee (in the sense used above) from entitlement to 'refugee status'. Paragraph 335 provides for the grant of leave to enter or remain to a person whose right to 'refugee status' is established; and paras 338A and 339AC permit the revocation or non-renewal of 'refugee status' when a person falls within the art 33(2) exception. In the present case, as we have said, the decision under appeal was made by reference to para 339AC.

11. As Dang recognises, provided that the concern is solely with the self-contained national elements of these provisions, there is no objection to the revocation of the status to which the Rules refer, and to the termination or withdrawal of the leave granted as a result. It has to be recognised, however, that that vocabulary, that regime and that mechanism do not relate exactly to the provisions of the Convention, under which, as we have said, there are no provisions for the revocation of status on the ground that a person falls within art 33(2). The 'refugee status' as defined and implemented by the Rules may cease, but the individual's status as a refugee under the Convention is not affected. Indeed, it could not be affected by anything in the Rules, because s 2 of the Asylum and Immigration Appeals Act 1993 prevents the Rules from laying down "any practice which would be contrary to the [Refugee] Convention".

12. Sections 82 and 84 of the 2002 Act use a different vocabulary again. We have already set out the provision offering a definition of a person who has "protection status". There is no suggestion that the status is the grant of leave. It is, presumably, the reason for the grant of leave. But what is defined as the decision under appeal is not the termination of the leave but the decision "to revoke P's protection status". Looked at through the lens of the Immigration Rules, a person who has been granted leave under para 335 has 'protection status'; if he no longer meets the requirements of para 334 (whether through para 339AC or otherwise) that reason for the grant of leave will have disappeared; and one might suppose that such a person should therefore be

unsuccessful in an appeal against the decision. If, on the other hand, the person is able to show that he still falls within para 334, one might expect that his appeal would be allowed.

13. This, however, is not the case. The amendments made in 2014 removed grounds of appeal based on the Immigration Rules and their application, and the ground of appeal against a decision to revoke protection status is not an exception. The ground, as we have seen, is set out not by reference to the Rules, but by reference directly to the Refugee Convention. This immediately poses a difficulty. Is an appeal to be determined on the basis that the decision is effectively the loss of the leave that flowed, under the Rules, from the "protection status", as s 82 would suggest? If so, the appeal would be determined by reference to the Rules, and with the caveat that the Refugee Convention has nothing specific to say about the granting of leave to enter or remain under the law of the United Kingdom, but requires only that certain benefits, as set out in arts 2-30 of the Convention, are attributed to those who under the Convention have the status of refugees. Or is the appeal to be determined in accordance with s 84 on grounds solely relating to the Convention, in which case it is the status, rather than the leave which flows from it, that is under examination, and an appeal would fall to be allowed if the withdrawal of status would breach the terms of the Convention? In the latter case a person who fell within the cessation provisions would lose an appeal, but a person who merely fell within art 33(2) would succeed.

14. It seems to us that the reference to the Refugee Convention rather than the Rules in s 84, and the lack of definition of status itself as well as the lack of reference to the Rules in s 82, tend to lead to the conclusion that the second alternative is the correct one. If that is right, an appeal under s 82(1)(c) against the revocation of protection status is, where the appellant is a refugee, to be determined by reference to the Refugee Convention, as the only available ground provides, and not by reference to the Rules.

15. The question then is whether this interpretation can stand with s 72(10) of the 2002 Act. The effect of that provision is that despite the only ground of appeal being by reference to the Refugee Convention, the Tribunal 'must' dismiss the appeal against revocation of protection status solely on the ground that art 33(2) applies to the appellant. The result has to be either that the Tribunal is required to reach a result contrary to that demanded by the application of Convention, or that the subject-matter of such an appeal is not the rights under the Convention but something else – which, in the context, can only be the rights under the Rules.

16. The more palatable result is obviously the latter, because it is only with the greatest of hesitation that we would conclude that a statute provided for a result contrary to the Refugee Convention. On the other hand, if the latter is correct, the reference to the Convention as the basis of the ground of appeal in relation to a revocation decision is of no effect at all. No provisions in the Rules can affect the application of the Convention, so if the substance of the appeal is the rights under the Rules, the Convention could never be engaged by the appeal at all. Besides, if the intention was that the appeal against a revocation decision was to be governed by whether the appellant was entitled to 'refugee status' under the Rules, one would have expected that the ground of appeal would be by reference to the application of those very Rules.

17. For these reasons we have concluded that the first result of the two set out in para [13] above is correct. In the circumstances in which it applies, s 72(10) requires an appeal to be dismissed even though the ground of appeal is based on the Refugee Convention alone, and even though the provisions of the Refugee Convention would require the appeal to be allowed. This perhaps surprising result is in fact consistent with the structure of s 72 itself. Although the section relates, as subsection (1) provides, to the "construction and application of Article 33(2) of the Refugee Convention" (which is then immediately and incorrectly summarised as "exclusion from protection"), what it does is to lay down, for the purposes of certain decisions, a national gloss on the meaning of certain phrases within art 33. In fact the section of the Act in which s 72 occurs is headed "Removal", but as we have seen, the section also governs the outcome of appeals. (At the time of the original enactment of the section, appeals would have been on various grounds, including refugee grounds, against removal decisions; but since the 2104 Act amendments are not appeals against removal decisions.) An officer of the Secretary of State is entitled by s 72 to presume that art 33(2) applies to persons within the categories set out, and therefore to make a decision removing him; and, likewise, a Tribunal considering the same question is required to come to a specific conclusion. Despite subsection (1), these are not assessments made by reference to the Refugee Convention in its single autonomous meaning in international law as the decision of the House of Lords in SSHD v R (Adan) [2000] UKHL 67 would require: they are assessments made solely by reference to national law. The purpose of the section is to remove from decision-makers *a priori* evaluation by reference to the Convention, and replace it with a rule-based national interpretation. In these circumstances it is to be expected that the result may sometimes be a decision that is not in accord with the meaning of the Convention as an international instrument.

18. That interpretation of s 72(10) allows it to stand with our preferred interpretation of ss 82 and 84. To sum up: (1) an appeal under s 82(1)(c) is an appeal against revocation of the basis upon which the leave referred to in s 82(2)(c) was granted; (2) the appeal is to be determined by reference to the provisions of the Refugee Convention, as that is the only ground allowable under s 84(3)(a); but (3) where s 72(10) applies, it requires the appeal to be dismissed even though the ground is made out.

19. We note in closing this discussion that even the last of the above propositions does not constitute a contradiction. The amendments under the 2014 Act also deleted those parts of s 86 of the 2002 Act that required a Tribunal to allow or dismiss an appeal: the only requirement now is (usually) to "determine any matter raised as a ground of appeal" (s 86(2)(a)). Thus the way is open for a determination that the ground in s 84 is made out but a decision dismissing the appeal because of the mandatory requirement in s 72.

20. In these circumstances the Judge was in a sense both wholly right and wholly wrong. The Secretary of State's grounds are not of any real assistance: they fail to understand and engage with the Judge's notion that he ought to allow the appeal under the Refugee Convention despite being required by s 72 to dismiss it. On the other hand, the mandatory force of s 72 cannot, and should not have been ignored. The judge erred by ignoring it, but that does not mean that he was wrong to consider factors under the Convention as he did.

21. We set aside the Judge's decision allowing the appeal under the Refugee Convention. We substitute a decision dismissing the appeal as required by s 72(10) but determining, as required by s 86(1)(a), that the ground of appeal is made out. The effect of that is that although the appeal is formally dismissed, the Secretary of State is on notice that the provisions of the Refugee Convention continue to apply to the claimant, and (whether or not he is granted leave) he is entitled to them, as set out in arts 2-30 of the Convention and including access to the labour market and welfare. Although his appeal is formally dismissed his status under the Convention is not affected and can, if required, no doubt be enforced elsewhere.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 19 June 2018.