In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review

In the matter of an application for Judicial Review

The King on the application of
Emilio Branco-Bonfim

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER
(Amending under the slip rule an order on the wrong form sent out on 5 October 2023)

BEFORE Upper Tribunal Judge Perkins

HAVING considered all documents lodged and having heard Mr R Khubber of counsel, instructed by Turpin Miller LLP, for the applicant and Mr C Howells of counsel, instructed by GLD, for the respondent at a hearing on 28 November 2022

IT IS ORDERED THAT:

(1) The Respondent's reliance on paragraph 2 of Schedule 2 of the Immigration (EEA) Regulations 2016 to prevent the Applicant from having (and pursuing) an in-country right of appeal against the adverse Article 8 decision as set out in her decision letter dated 14 July 2020 was unlawful (see paras 46-50 judgment).
(2) However, for the reasons given the Tribunal declines to grant the Applicant any relief (para 51 judgment).
(3) The application for judicial review is refused for the reasons in the attached judgment.
(4) No later than 14 days after this Notification of Decision is sent the parties will either file an agreed order for costs, OR written submissions in support of a suggested costs order which the Tribunal will consider and in default the Tribunal will determine costs on the material before it.
(5) Permission to appeal is refused because, notwithstanding the careful presentation of considered and successful arguments the Applicant's claim on article 8 grounds is essentially hopeless.

Signed: *Jonathan Perkins*

Upper Tribunal Judge Perkins

Dated: 5 October 2023

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 16/10/2023

Solicitors:
Ref No.

Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

1. On 14 July 2020 the respondent decided to refuse the Applicant leave to remain on human rights grounds and that the decision to refuse leave was only appealable from outside the United Kingdom.

2. With permission granted by Heather Williams J on 22 October 2021, the Applicant seeks judicial review of the decision of the Respondent on 14 July 2020 that a decision to refuse him leave to remain on human rights grounds did not carry an in-country right of appeal.

3. Permission to bring other challenges was refused and an appeal to the Court of Appeal against refusal was unsuccessful so the sole ground before me is, in summary, that the Respondent was wrong in law to say that the Applicant's right of appeal against the refusal of his claim on human rights grounds could only be exercised from outside the United Kingdom.

4. The Applicant's immigration history is of limited relevance but I set out in summary
some of the more important events to give context to his claim.

5. The Applicant is a national of Portugal. He was born in 1995 in Africa and did not live in Portugal until 1998. With his mother, he removed to the United Kingdom in 2002 when he was 6 or 7 years old. Apart from a short stay in Portugal after his deportation he has lived in the United Kingdom since then. Presently he is about 28 years old and has lived most of his life in the United Kingdom for the last 21 years.

6. As might be inferred from his being deported, the Applicant has committed criminal offences.

7. In 2017 he was sent to prison for three years for offences including violent disorder. He was told that he was liable for deportation and on 12 June 2018 he signed a disclaimer stating that he did not wish to challenge the decision.

8. On 3 September 2018 he was sentenced to 30 months imprisonment, to be served consecutively to his three years sentence, for possessing class A drugs with intent to supply.

9. On 20 November 2018 the Applicant was sent a "stage 2" decision to make him the subject of a deportation order under the Regulations 23(6)(d) and 27 of the Immigration (European Economic Area) Regulations 2016 and a Deportation Order was made the same day.

10. The decision was explained in a letter also dated 20 November 2018. The decision was subject to appeal to the First-tier Tribunal.

11. The letter said that the Applicant's personal circumstances had been considered but not only was the deportation order made, the Respondent additionally used her powers under Regulation 33 of the Regulations to certify that the Applicant's removal to Portugal pending appeal would not be unlawful under section 6 of the Human Rights Act 1998 even though

the time to bring or determine any appeal had not lapsed.

12. Regulation 33 empowers the Secretary of State, in certain circumstances, to certify that removal an EEA national who is subject to deportation under the Regulations even though the EEA national could otherwise be pursuing an appeal in the United Kingdom.

13. The Applicant took legal advice. He withdrew his “disclaimer”, which he had previously signed, and on 26 March 2019 he entered an appeal against the decision to deport him in the First-tier Tribunal.

14. On 2 April 2019 a letter before action was sent challenging the decision to issue a certificate under Regulation 33. However on 12 April 2019 the Applicant again signed a disclaimer agreeing to be removed to Portugal and to withdraw his appeal to the First-tier Tribunal, which was withdrawn.

15. On 17 September 2019 he was deported to Portugal. At that time there were no proceedings challenging either the decision to deport him or to the decision to issue a Regulation 33 certificate.

16. It follows that there is no challenge to the lawfulness of the Regulation 33 certificate that was issued in November 2018 but there was considerable argument about its effect.

17. The Applicant did not stay in Portugal. On 18 December 2019, barely 3 months after being deported, he returned and was “encountered” as he tried to enter the United Kingdom at Holyhead. He had benefitted from incentives to leave the United Kingdom under the Early Release/Removal Scheme. On his return he was sent back to prison and completed his sentence before being transferred to immigration detention and, on 1 July 2020, he was given bail by the First-tier Tribunal.

18. The Applicant’s solicitors contacted the Respondent and made various representations. The Applicant maintains that he claimed to be entitled to remain on human rights grounds relying on Article 8 of the European Convention on Human Rights but the Respondent maintains that there was no unequivocal contention that removing the Applicant would be contrary to the Respondent’s obligations under section 6 of the Human Rights Act 1998 until representations made by the Applicant’s solicitors in a letter dated 8 July 2020.

19. By letter dated 2 June 2020 the Respondent decided that by e-mail received on 22 May 2020 the Applicant asked for the Deportation Order made against him to be revoked but the application was not accepted because such an application can only be made from outside the United Kingdom. The letter included the phrase: “we request that his deportation order is revoked and our client is allowed to remain with his family in the United Kingdom.” When this did not receive a response that they found to be satisfactory, the Applicant’s solicitors wrote a letter dated 10 June 2020, described as a “letter before action”, criticising the respondent’s failure to decide the human rights claim. This letter contended that the

removal directions set for 2 July 2020 should have been cancelled.

20. By letter dated 14 July 2020 (that is the Respondent's decision letter subject to challenge in these proceedings) the Respondent acknowledged that, notwithstanding the decision that the (implied) application to revoke the Deportation Order could not be entertained, the Applicant had raised a human rights claim that must be decided before the Applicant could be deported under the EEA Regulations 2016.

21. The letter then considers the human rights claim. It summarised the Applicant's immigration history and criminal record and found that the Applicant's deportation was in the public interest.

22. The letter showed that the Applicant claimed that he just could not cope on his own in Portugal but the Respondent found nothing weighty to put against the public interest in the Applicant's deportation. The Respondent reminded herself of the provisions of part V of the Nationality, Immigration and Asylum Act 2002 but found that there was nothing to support a finding in the Applicant's favour under section 117C(4) (lawful residence for most of life, integration and very significant obstacles in the way of integration into life in Portugal) OR under section 117D (relationship with a partner or child). Neither were there any "very exceptional circumstances".

23. The Respondent outlined the Applicant's case that he had lived in the United Kingdom for most of his life, that he had left Portugal as a child and had no contacts there and that he was destitute when he returned there. The Respondent then noted that there was no independent evidence to support the claim that he was destitute in Portugal and did not accept that the Applicant could not establish himself in his country of nationality, especially as there are non-governmental organisations that could be expected to help him. The letter then informed him that he had a right of appeal against the decision to remove him under the EEA Regulations and a right of appeal against the decision to refuse his human rights claim but in each case the right could only be exercised out of country.

24. The numbering of the paragraphs in the letter is irregular. The second Paragraph 41 relates to the human rights appeal and I set it out below:

> "41 You may also appeal the decision to refuse your human rights claim under section 82(1) of the Nationality, Immigration and Asylum Act 2002. As your(sic) decision to make Deportation Order was certified under Regulation 33, and your human rights claim arises from the consequences of that deportation decision, in accordance with paragraph 2 of Schedule 2 to the EEA Regulations, your section 82(1)(b) NIAA 2002 appeal right in respect of your human rights decision must be brought from outside the UK."

25. In short, the Respondent decided that the Applicant's removal, pursuant to the existing deportation order, would not interfere unlawfully with his "private and family life" and that any appeal could only be brought from

outside the United Kingdom because his removal had (already) been certified under Regulation 33.

26. Mr Khubber's skeleton argument gave a detailed account of the events leading to the recognition of the human rights claim but I find that nothing turns on the fact that it took the Respondent some time to accept that such a claim was made. Once it was clear to the Respondent that the Applicant had made a human rights claim she cancelled removal directions and said that the Applicant's article 8 claim would be considered.

27. Section 82(1)(b) of the Act creates a right of appeal where the Secretary of State has decided to refuse a human rights claim. She has and so there is right of appeal. This much is clear.

28. However section 92 determines the place from where the appeal can be brought or continued. Section 92(3) provides that an appeal against a protection claim must be brought from within the United Kingdom subject to certain exceptions. If the appeal has been certified under section 94(1) as clearly unfounded or under section 94(7) because it involves removal to a safe third country the appeal must be brought from outside the United Kingdom.

29. The Secretary of State has not taken any of these options. Rather she relied on Schedule 2 of paragraph 2 of the Regulations. This provides a further category of appeal against a human rights decision that must be brought from outside the United Kingdom. The Applicant maintains that, properly understood, paragraph 2 of schedule 2 of the Regulations does not apply to his case. The Respondent maintains the exact opposite and that, far from not applying, the "schedule 2 route" is intended to apply in the circumstances that exist here.

30. Two conditions are required before the paragraph is engaged. These are "the claim to which that appeal relates arises from an EEA decision or the consequences of an EEA decision" and that the appellant's removal has been certified under Regulation 33.

31. In order to confirm this summary I set out below the full terms of Schedule 2 paragraph 2:

"2.-

(1) Section 92(3) of the 2002 Act has effect as though an additional basis upon which an appeal under section 82(1)(b) of that Act (human rights claim appeal) must be brought from outside the United Kingdom were that-

(a) the claim to which the appeal relates arises from an EEA decision or the consequences of an EEA decision; and

(b) the removal of that person from the United Kingdom has been certified under Regulation 33 (human rights considerations and interim orders to suspend removal).

32. It was the Applicant's contention that the existence of a certificate under

Regulation 33 made in response to an earlier application on EU grounds did not mean that the Applicant's appeal rights against a decision on a later application in human rights grounds could only be exercised from abroad.

33. Mr Khubber put it slightly differently in his skeleton argument when he said:

> "The central problem with SSHDS's reliance on Schedule 2 para 2 in his case is that it is based on a failure to appreciate the different decisions that have been made in the case, which relate to two different proposed removals: in 2018 and 2020."

34. I respectfully agree with Mr Howells for the Respondent that the Applicant's case is put most clearly at paragraph 4.10 of the "Statement of Facts, Grounds Upon Which Relief is Sought and Relief Sought" which asserts that:

> "The problem for the SSHD here is that two decisions have been made, - the decision to remove EB which can only be appealed from outside the UK under the EEA Regs 2016 (per Reg 37, letter dated 2 June 2020, 14 July 2020) and the decision to refuse the Human Rights claim – an immigration decision attracting an in country right of appeal if not certified (letter dated 14 July 2020)."

35. Mr Howells' answer is that the decision in the letter did not generate an in-country right of appeal for two different reasons. First, there was no decision that could be said to interfere with the Applicant's article 8 rights and, second, even if there was an appeal against the decision under section 82(1)(b) of the 2002 Act it could only be brought from outside the United Kingdom because it was certified under Regulation 33 of the 2016 Regulations.

36. I consider the second point first.

37. Certainly there are two proposed removals here, one in 2018 and one in 2020. Mr Khubber's argument has a pragmatic attraction. There was an EEA decision to remove the Applicant. His removal was certified under Regulation 33. He has returned. If he is to be removed again there should be a fresh decision and, if thought appropriate, a fresh decision to certify. There is no doubt that the Applicant is entitled to raise human rights grounds and to have them determined before his removal. This much is expressly recognised by the Respondent. The Applicant has the benefit of EEA and ECHR protection. This is supported, if support is necessary, by the decision in **R (Hafeez) v SSHD** [2020] EWCH 437.

38. Regulation 33 applies where the Secretary of State intends to give directions for removal and has made an EEA decision that could be appealed. The Respondent is empowered to certify under Regulation 33 if satisfied that an out of country right of appeal would be human rights compliant. This power only arises after an EEA decision has been made and must therefore me made with regard to the facts that existed when the EEA decision was made and these facts must be things that might be though to impact on a human rights claim. If satisfied that there are no

known facts that could impact on a human rights claim the Respondent can certify the removal under Regulation 33. Mr Khubber's submits that it makes no sense to divorce the certificate from a set of facts. However vexing it might be, if, as is the case here, the Applicant returns and makes a fresh human rights claim the already existing Regulation 33 certificate cannot be assumed to be relevant. Here the Applicant asserts that, based on his experience, he cannot cope in Portugal. Regardless of whether that argument is sound on its facts, it is an argument that the Applicant is entitled to raise and if the Respondent is so minded it is one that can be certified but that has not happened here.

39. Mr Khubber urged a "purposive construction" and I agree that helps his case but schedule 2(2)(1)(b) uses the definite article. It refers to "the removal" not simply "removal" which confirms my construction that Regulation 33 applies when a particular removal is contemplated.

40. The Applicant supported this argument with reference to the decision of the High Court in **Hafeez** and published policy before and then amended as a consequence of **Hafeez**. I say immediately that I do not find the decision in Hafeez helpful to this case. The decision in **Hafeez** is clearly very important in the context of the proper application of certificates under Regulation 33 and the Respondent altered her policy as a result of the decision. The core issue in **Hafeez** was the test to apply when certifying under Regulation 33 and particularly if a person subject to a Regulation 33 certificate was entitled to the "full extent of EU law protection" (see paragraphs 2 and 3) which question was answered firmly in the affirmative. However, the instant application is about whether an existing Regulation 33 certificate continues to prevent an in-country right of appeal when the applicant is in the United Kingdom and has made (in this case) a subsequent human rights based claim. I am not empowered to determine the lawfulness of the Regulation 33 certificate. It is too late to take points on the lawfulness of the Regulation 33 certificate.

41. I appreciate that it is the Applicant's case that, following the change in policy consequent on **Hafeez**, the Regulation 33 certificate should, at least, have been reconsidered but that does not entitle me to ignore the fact that a Regulation 33 certificate has been issued and the Applicant left the United Kingdom without challenging it, or at least without pursuing any challenge because he signed a disclaimer. I cannot ignore it simply because it might not have been issued again under similar circumstances.

42. The Respondent's case is clear. The decision to make the Applicant the subject of a deportation order is an EEA decision and the claim that removing him would breach his article 8 rights is consequent on the EEA decision. For the avoidance of doubt, it is not contended that the decision to refuse to entertain the application to set aside the deportation order is an EEA decision. The decision to refuse to entertain the application is not a decision on the Applicant's removal from or entry to the United Kingdom and so is not within the definition of "EEA decision" in Regulation 2 of the

Regulations. The deportation order has been made and the Applicant's rights to be in the United Kingdom have come to an end. He can apply, and has tried to apply, for the order to be set aside but he has not made the application because he can only make it from outside the United Kingdom. It follows that there can be no question of certifying again under Regulation 33 on the present facts.

43. However, the parties agree that the Applicant has made a human rights claim and it was unsuccessful. He can appeal that decision but the parties do not agree about where he must be when he lodges his appeal. In summary, the Applicant maintains that he can lodge the appeal while he is in the United Kingdom because such appeals are brought from within the United Kingdom unless an exception applies and no exception does apply. The claim is not certified under section 94 or 97, it has not been and cannot be certified under Regulation 33 because there is no EEA decision and the existing Regulation 33 certificate does not apply.

44. What exactly the Applicant maintains has happened to the existing rule 33 certificate is unclear. Mr Khubber maintains that the certificate relates to a particular removal and so a subsequent removal is not "automatically" certified, or, more accurately, the existence of a certificate in contemplation of a particular removal does not transfer to any subsequent, not hitherto contemplated, removal.

45. I find that the words or Regulation 33 give considerable support to this contention. It applies were "the Secretary of State intends to give directions for the removal" of a person. The schedule 2 certificate cannot be divorced from a particular removal. That might mean, as could be the case here, that the certificate achieves little because the Applicant left voluntarily. It might be that he left voluntarily because he new that he could not appeal. Be that as it may, he left and returned and if the Respondent is to give effect to the deportation order that clearly exists, and the Applicant is disinclined to go voluntarily, the Respondent will have to make a further order and if that leads to a further application then the Respondent can, if so minded, refuse it and certify it, under schedule 2 if the decision follows from an EEA decision and under section 94 if it follows a human rights decision.

46. It follows that on this point I find for the Applicant. The Respondent was wrong. She cannot rely on an existing Regulation 33 certificate issued in contemplation of a particular removal to make the Applicant go "out of country" to appeal against a subsequent decision leading to the Applicant's later removal. Such an application could easily depend on an entirely different set of facts from those that existed when the application was first certificated. Such an application could itself be certified as "clearly unfounded" and therefore only appealable from outside the United Kingdom, if the Respondent thought that right but it clearly might not be and that discourages me from favouring an interpretation that permits the restrictive nature of a Regulation 33 certificate lasting for

ever.

47. Mr Howells argued that conclusion undermines the function of the Regulation 33 certificate but I do not agree. The certificate bites when someone who, prima facie, is not entitled to be in the United Kingdom can be removed to somewhere safe. Country conditions and personal circumstances often change, sometimes very significantly. It is easy to imagine how an unlawfully returned deported person could raise an entirely different human rights claim and I see nothing unconscionable or even questionable in ruling that an earlier certificate in contemplation of a removal in potentially different circumstance is not relevant in the event of a later application.

48. As indicated above, it is the Applicant's case that there are two decisions here; a decision not to refuse to revoke the deportation order and, additionally, a decision to refuse leave on human rights grounds.

49. I consider now Mr Howell's "first point" that the human rights decision subsequent to the deportation decision was not concerned with removal. The human rights decision is premised on what would happen in the event of removal and the permissible ground of appeal is "that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights act. Any post deportation order decision on human rights grounds is likely to be *concerned* with the Applicant's removal.

50. Neither do I agree that the decision that I have made renders a schedule 2 certificate otiose, it does not. It deals with a particular removal and a further removal can be looked at again.

51. However, notwithstanding contrary assertions from the Applicant's representatives in correspondence I do agree with Mr Howells that it is very likely that any new decision on the available evidence will be certified under section 94. The Applicant is right to say that he is raising a new matter. His application is informed by his allegedly very unhappy experiences in Portugal. However he is not relying on strong family life in the United Kingdom as might exist between life partners or parent and minor child so there is very little known "pull" factor in his article 8 claim. Although he has asserted that he was destitute and could not cope the papers do not give flesh to that assertion. He is a healthy adult, still a young man and he is a national of a safe and prosperous modern European country. He is not ill. He has made out no case that he cannot be expected to live there. His account of his disagreeable experiences may well be fresh evidence, (indeed it is hard to see how it could not be) but it is not new evidence capable of leading to a different outcome. Mindful of my powers under section 31 of the Senior Cout Act 1981 as applied to the Upper Tribunal in Judicial Review claims by section 15 of the Tribunal, Courts and Enforcement Act 2007, I grant no relief because the new route required by my decision is unlikely to make any difference. -----