Upper Tribunal
(Immigration and Asylum Chamber)

HA (Article 24 QD) Palestinian Territories [2015] UKUT 00465 (IAC)

THE IMMIGRATION ACTS

Heard at Eagle Building, Glasgow

on 28 May 2015

Determination promulgated

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Before

Mr Justice McCloskey, President
Upper Tribunal Judge Macleman

Between

HA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant: Mr J Bryce of Counsel, instructed by McGill and Co., Solicitors

Respondent: Mr J Komorowski, of Counsel, instructed by the Advocate General

(i) Article 24 of the Qualification Directive does not confer a substantive right of residence in the Member State concerned. Rather, its function is to determine the modalities whereby a right of residence otherwise existing is to be documented.

(ii) The Procedures Directive is a truly adjectival instrument of EU legislation. It does not create any substantive rights in the realm of asylum or subsidiary protection.

DECISION AND REASONS

INTRODUCTION

1. The origins of this appeal lie in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*") dated 14 January 2014, whereby it was determined that the further representations made on behalf of the Appellant, who is aged 30 years and originates from the so-called Palestinian National Authority ("PNA") – viz the territory (or territories) of Palestine - did not constitute a fresh claim under paragraph 353 of the Immigration Rules. The First-tier Tribunal (the "*FtT*") dismissed the Appellant's ensuing appeal.

2. Permission to appeal to this Tribunal was refused initially. This was challenged by an application for judicial review which was the subject of formal consensual resolution documented by a joint minute, duly endorsed by the Lord Ordinary on 14 August 2014, agreeing that the application for permission to appeal gives rise to the following important point of principle:

> *Where an asylum seeker was last habitually resident in country A, can he establish an entitlement to a residence permit in the United Kingdom solely by reason of the risk of harm he would face if returned to country A, notwithstanding that the Secretary of State intends not to remove him to country A but to country B instead?*

The Vice President of the Upper Tribunal on 15 September 2014 granted permission to appeal.

FACTUAL MATRIX

3. The facts belonging to the matrix bearing on the question of law to be determined are uncontentious. The Appellant entered the United Kingdom unlawfully in November 2007 and claimed asylum. The Secretary of State refused his claim in March 2010 and the ensuing appeal was dismissed on 20 May 2010. Events thereafter included a petition for judicial review, which was dismissed; further representations to the Secretary of State, which were rejected; an appeal, in the context of which the Secretary of State's decision was withdrawn; further representations on behalf of the Appellant; and a reconsideration of the Appellant's case by the Secretary of State, culminating in the further decision dated 14 January 2014 (hereinafter the "*impugned decision*"). By the impugned decision the Secretary of State determined that this was not a fresh claim under paragraph 353 of the Immigration Rules and that the Appellant did not qualify for leave to remain under paragraph 276 ABE.

4. The PNA is the Appellant's country of origin. Prior to his advent to the United Kingdom he had lived in Syria with his family. There he and his family were granted refugee status and the Appellant had employment. His asylum claim in the United Kingdom was based upon an asserted fear of persecution in the event of compulsory return to Syria. As appears from the determination of the First-tier Tribunal (the "*FtT*"), the directions which the Appellant was challenging proposed to remove him to the PNA. For this reason it was conceded on his behalf that the asserted fear of persecution in Syria was irrelevant. The Judge recorded the Appellant's case in the following terms:

> "*The thrust of the Appellant's claim, as pleaded before me, is that the Appellant has a well founded fear of persecution because of his race, because he will be turned away from the* [PNA] *and refused entry to the Palestinian occupied territories ….*
>
> *The Appellant does not complain that he will be persecuted by his own people, nor by the Israelis within the Palestinian occupied territories. The thrust of the Appellant's claim is that he seeks economic enhancement and a peaceful life, not that he requires protection.*"

The appeal was dismissed on all grounds. This is the only extant judicial decision in the history of the Appellant's case.

THE ISSUES

5. The Appellant challenged the Secretary of State's most recent decision of 14 January 2014 by appeal to the FtT. In [13] of the determination the Judge helpfully reproduces the grounds of appeal:

> "*The Appellant being formerly habitually resident in Syria and stateless is entitled to refugee protection. He faces a real risk of serious harm for a Convention reason, namely imputed opposition to the Syrian state on account of his Palestinian origin.*"

The grounds referred to Articles 2 and 3 of the Refugee Convention and Article 15(c) of the Qualification Directive. The appeal, as presented, is recorded in the Judge's formulation of the submissions of the Appellant's representative:

> "*Mr Stevenson submitted that throughout there had been a critical and fundamental flaw in consideration of the Appellant's claim. He stated that Palestinians could be returned to Palestine but only if they had been habitually resident there. This comes from the Qualification Directive itself ….*

Whilst the Appellant was likely to be outside the Refugee Convention because he could not show he left for reasons out with his control, he did fall within subsidiary protection, Article 15(c) ……

It is the country of habitual residence which was relevant. The Respondent could not deposit the Appellant in Gaza as it is not a country. If this was accepted then the Appellant qualified for subsidiary protection. There may well be credibility issues as noted by the Immigration Judge in the determination of the previous appeal but this did not take away the fact that the Appellant was a habitual resident of Syria."

The FtT rejected these arguments, in the following terms:

"*… There is the fundamental difficulty that this appeal is against a decision to remove* [the Appellant] *to Palestine, not to Syria…..*

I do not think I can find that the Appellant's hypothetical situation if removed to Syria entitles him to humanitarian or subsidiary protection when there is no proposal to remove him there ….

His protection case is to be measured against removal to Palestine, not against removal to Syria, which is not proposed. He has not shown that he qualifies for protection against that outcome."

The Appellant's appeal against the refusal of asylum and Article 15(c) subsidiary protection was dismissed. The FtT also dismissed his appeal under paragraph 276ADE of the Rules and Article 8 of the ECHR. We interpose at this juncture the observation that it is not in dispute that the Appellant falls within the definition in Article 2(e) of the Qualification Directive, having regard to the evidence pertaining to the conditions prevailing in Syria.

CONSIDERATION AND CONCLUSIONS

6. On behalf of the Appellant, Mr Bryce formulated the central argument in concise and focused terms. The Appellant's case rests on two provisions of the Qualification Directive. The first is Article 2(e), which provides:

"*For the purposes of this Directive …..*

(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 or 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."

By Article 2(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.*"

The second limb of the Appellant's case is founded on Article 24(2) of the Directive which under the rubric "residence permits" provides:

"*As soon as possible after the status has been granted, Member States shall issue to beneficiaries of subsidiary protection status a residence permit which must be valid for at least one year and renewable, unless compelling reasons of national security or public order otherwise require.*"

The Appellant's case, in a nutshell, is that he qualifies for subsidiary protection under Article 2(e) and, accordingly, is entitled to a residence permit under Article 24(2).

7. In support of his argument Mr Bryce prayed in aid a passage in the opinion of Lord Hope in Regina (ST) v Secretary of State for the Home Department [2012] UKSC 12. The appeal turned mainly on the interpretation of the word "*lawfully*" in Article 32 of the Refugee Convention, which prohibits the expulsion by contracting states of a "*refugee lawfully in their territory*", save on grounds of national security or public order. The Supreme Court held that lawful presence, in this context, had to be determined in accordance with the municipal law of the contracting state. As a result, the consideration that the Appellant had not been given leave to enter or remain in the United Kingdom and, indeed, was deemed not to have entered the country at all, was determinative. As a result, the Appellant could not claim the protection of Article 32. The argument of Mr Bryce invoked the following passage in the opinion of Lord Hope, at [45]:

"*This case is not subject to the provisions of the* [Qualification Directive] *... [which] ... goes further in some respects that the Refugee Convention because, for example, it requires a residence permit to be issued as soon as possible where an applicant qualifies as a refugee: Article 24(2) ....*

Its provisions are of interest, because they show that the principle which [the Appellant] *was urging upon this Court is undergoing a process of development among the Member States of the European Union.*"

As Lord Hope further made clear, the argument that Article 32 of the Refugee Convention should be construed by reference to the provisions of the Qualification Directive was rejected.

8. The Appellant's case also draws attention to certain provisions in Chapter III of the Procedures Directive [2005/85/EC] and, in particular, the language in Article 23 ("*the basic principles and guarantees of Chapter II*"); the specific procedures identified in Article 24; the provisions in Article 25 relating to declaring asylum applications inadmissible; and, in particular, the "*safe third country concept*" enshrined in Article 27, which provides:

> "*(1) Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:*
>
> *(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;*
> *(b) the principle of non-refoulement in accordance with the Geneva Convention is respected;*
> *(c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and*
> *(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*
>
> *(2) The application of the safe third country concept shall be subject to rules laid down in national legislation, including*:
>
> *(a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;*
> *(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;*
> *(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.*

(3) When implementing a decision solely based on this Article, Member States shall:

(a) inform the applicant accordingly; and
(b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

(4) Where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

The argument developed by Mr Bryce also touched on Articles 1 and 18 of the Charter of Fundamental Rights of the European Union (the "*Lisbon Charter*"). Article 1 provides:

"*Human dignity is inviolable. It must be respected and protected.*"

Article 18 provides:

"*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.*"

9. On behalf of the Secretary of State, Mr Komorowski submitted that although a person's status as a refugee depends on whether he would be at risk in his country of origin, whether he can be lawfully expelled will normally depend on the proposed country of destination. It was submitted that this principle operates under both the Refugee Convention and the ECHR and that it has not been altered by the Qualification Directive. It is not in dispute that if the proposed country of destination were Syria the Appellant would fall within the definition in Article 2(e) of the Directive, having regard to the evidence pertaining to the conditions prevailing there. Mr Komorowski also submitted that the only express prohibition is that which forbids *non-refoulement* and contended that what is not expressly prohibited is permitted. Article 21 does not enlarge Article 33 of the Refugee Convention, which enshrines the prohibition against *non-refoulement*. This prohibition relates to "*the frontiers of territories where his life or freedom would be threatened on account of* [a Convention Reason]." Article 33, it was argued, does not preclude certain types of expulsion. Mr Komorowski further drew attention to other measures of EU Legislation in highlighting the suggested limitations of Article 24 of the Qualification Directive.

10. In resolving these issues we consider it important to identify the overarching purposes of the Qualification Directive. These are identifiable in certain of its recitals. First, per recital (1):

> "*A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Unions objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.*"

Next, recital (6) provides:

> "*The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of* ***persons genuinely in need of international protection*** *and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.*"
>
> [Our emphasis.]

By recital (10), the Directive respects the provisions of the Charter generally and, "*in particular*", Articles 1 and 18.

Finally, by recital (25):

> "*It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.*"

We consider that this recital contemplates in particular the Refugee Convention and the ECHR.

11. We consider that a guarantee against *refoulement* only, rather than expulsion generally, is consistent with other EU legislation, in particular the Procedures Directive. We are satisfied that these various measures of European law co-exist harmoniously, We further hold that Article 24 of the Qualification Directive does not establish an independent right of residence in the Member State concerned. Rather, it is confined to the formalities of confirming a right of residence to those who qualify for such right. Its function is to determine the modalities whereby a right of residence otherwise existing is to be documented. Its real purpose is to ensure the practical exercise of a right where such right already exists. This is achieved by providing that a residence permit must be issued "*as soon as possible*", by prescribing its minimum duration (one year) and by stipulating that it be renewable.

12. As regards the Procedures Directive,[1] we draw attention to, firstly, its full title:

[1] There is now a recast Procedures Directive (Directive 2013/32/EU) but the United Kingdom has not opted into that Directive.

"*Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withholding refugee status.*"

Recital (4) states:

"*The minimum standards laid down in this Directive on* ***procedures in Member States for granting or withdrawing refugee status*** *are therefore a first measure on asylum procedures.*"

[Emphasis added.]

By recital (5):

"***The main objective of this Directive is to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status.***"

[Our emphasis.]

We consider it unnecessary to elaborate by reference to the substantive provisions of the Directive. It may be said that the stand out word in this instrument, consistent with its full title, is "*procedures*". In our judgment this is a truly adjectival instrument of European legislation. It is concerned fundamentally with the processes and mechanisms to be applied in the determination of asylum applications. It is, in a sense, the handmaiden of the substantive measures which it serves and facilitates. We are satisfied that it does not create any substantive rights in the realm of asylum or subsidiary protection. The Appellant's case focuses on substantive rights only. Thus the Procedures Directive does not advance the Appellant's case in any way.

13. We further conclude that the relatively open textured provisions of Articles 1 and 8 of the Lisbon Charter add nothing to the Appellant's case. As regards Article 1, the issue in this appeal is not whether the Appellant is entitled to have his human dignity respected and protected. There is no evidential basis for finding that this right, enshrined in Article 1, will be infringed in the event of the Appellant's return to the PNA. As regards Article 18, the issue in this appeal is <u>not</u> whether the Appellant is entitled to asylum. Rather, as appears from [5] above, the case which he made on appeal to the FtT was that he qualifies for subsidiary protection under Article 15(c) of the Qualification Directive. We would add, in any event, that in our judgment Article 18 of the Charter does not extend the substantive provisions of the Refugee Convention and its Protocol.

14. There is no issue in this appeal relating to the treatment which the Appellant can expect to receive in the event of being returned to PNA. For this reason we consider that the various decisions relating to the Palestinian territories, the most recent whereof is <u>HS (Palestinian – Return to Gaza) Palestinian Territories CG</u> [2011] UKUT 124 [IAC], do not bear on the issues. While we are conscious that the effect of some of the decisions

belonging to this field is that the occupied Palestinian territories do not have the status in international law of a state and do not control their own borders, we fail to see how this promotes the Appellant's case, which encompasses a concession that he will not be at risk of proscribed treatment in the event of being repatriated to the PNA.

CONCLUSION

15. We refer to the question of law formulated by the Lord Ordinary, set out in [2] of this decision. For the reasons elaborated above we would answer this question in the negative. We find no error of law in the decision of the FtT and dismiss this appeal accordingly.

Postscript

We note from the further information provided post-hearing that there have been approximately 200 enforced repatriations to the PNA from the United Kingdom during the past ten years.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE
UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

10 July 2015