Appeal no: SC/72/2009
Hearing Date: 22nd February 2011
Date of Judgment: 4th March 2011

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE LATTER
MR C GLYN-JONES, CBE

(KP)

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellants:	Mr A Berry & Mr R DeMello J M Wilson Solicitors
For the Respondent:	Mr J Glasson & Ms C Owen Instructed by the Treasury Solicitor for the Secretary of State
Special Advocate:	Ms H Malcolm, QC & Mr A Mahmood Instructed by the Special Advocates Support Office

Mr Justice Mitting :

Background

1. Apart from the fact that the appellant is a Kurd whose first language is Sorani, nothing about his background is agreed. He claims to have been born on 27 August 1976 to Kurdish parents in the Iranian city of Marivan. He undoubtedly contracted polio as a young child, which left his left leg shorter than his right and requires him to walk with the aid of crutches. He claims that from 2002 to 2004, he engaged in low-level political activity for the Kurdistan Democratic Party of Iran in Marivan – distributing leaflets which he could not read, because he was illiterate. He claims to have fled Iran to Turkey when the authorities discovered what he was doing. He had undoubtedly arrived in the United Kingdom by 25 May 2004, because on that day he claimed asylum. His claim was refused by the Secretary of State on 20 July 2004. The refusal letter did not dispute his claims about his origin, but did not accept that he had taken part in KDPI activity. The Secretary of State also decided that directions should be set for his removal to Iran. He appealed that decision to an adjudicator. His appeal succeeded. In a determination promulgated on 1 November 2004, the adjudicator accepted that he had told the truth about his political activities and concluded that he had a well-founded fear of persecution for a Refugee Convention reason and that, if returned to Iran, he would be treated in such a way as would violate his ECHR rights. The Secretary of State did not appeal that determination. On 23 November 2004, he recognised the appellant's status as a refugee and granted him indefinite leave to remain.

2. On a date before 5 November 2008 the appellant left the United Kingdom. There is no indication that he intended to do so permanently. On 5 November 2008, the UK Border Agency notified the appellant and the UK Representative of the UNHCR of its intention to cancel his refugee status. Notice was given to the appellant by post to his last known UK address. It stated:

> "**Proposed cancellation of refugee status**
>
> I am writing to inform you of the proposed intention of the UK Border Agency to cancel your refugee status.
>
> The UK Border Agency has received information that indicates you may have gained refugee status by misrepresentation of material facts. Your application for refugee status was based on your claim to be an Iranian citizen and your fear that the Iranian authorities would execute you if you returned there.
>
> The UK Border Agency is proposing to cancel your refugee status in view of paragraph 117 of the UNHCR handbook which permits a protecting state to cancel refugee status if that status was obtained by misrepresentation of material facts/the refugee possesses another nationality.

> The UK Border Agency has information that indicates that you are actually Ari Mohammed Karim, an Iraqi national and therefore not a citizen of Iran from which you claimed asylum…."

He was invited to submit comments and representations by 18 November 2008. He did not do so.

3. On 26 November 2008 the UK Border Agency gave notice to the appellant, by the same means, in the following terms

> "**Cancellation of refugee status**
>
> I am writing concerning your refugee status and indefinite leave to remain in the United Kingdom.
>
> You were informed in writing on 05 November 2008 of the proposed intention of the UK Border Agency to cancel your refugee status and given an opportunity to submit any comments you may have in support of your continued status as a refugee.
>
> However, you have not submitted any reasons as to why it would be inappropriate to cancel your refugee status.
>
> Therefore, it has been decided to cancel your refugee status and this decision has been recorded as determined on 26 November 2008.
>
> You do not have a right of appeal against the decision to cancel your refugee status....
>
> In light of the cancellation of your refugee status, consideration has been given to your immigration status. A decision has been given to cancel your indefinite leave to remain in the United Kingdom under Article 13(7)(b) of the Immigration (Leave to Enter and Remain) Order.
>
> In deciding your application account has been taken of the general grounds on which leave to remain which is in force is cancelled while the holder is outside the United Kingdom as set out in paragraph 321A of the Immigration Rules (HC395). Paragraph 321A(5) provides that leave to remain which is in force is cancelled while the holder is outside the UK, "where from information available to the Secretary of State, it seems right to cancel leave on the ground that exclusion from the United Kingdom is conducive to the public good; if for example, in the light of the character, conduct of associations of the person seeking leave to enter it is undesirable for him to have leave to enter the United Kingdom". It is noted that there is evidence that you have been involved with Islamist extremist

> activity on or behalf of the Ansar Al Islam group. In view of this your presence in the UK is not considered conducive to the public good and your leave has been cancelled under paragraph 321A(5).
>
> You are entitled to appeal against the decision to cancel your indefinite leave to remain in the United Kingdom under s82(1) of the Nationality, Immigration and Asylum Act 2002…"

The letter went on to explain that the appeal could only be brought from outside the UK on one or more of a number of specified grounds.

4. On 8 December 2008, the Secretary of State personally decided to exclude the appellant from the United Kingdom on the grounds that his presence here would not be conducive to the public good for reasons of national security: he had been assessed to have been involved with Islamist extremist activity on behalf of the Ansar Al Islam group. The decision was taken under prerogative powers. By a letter dated 15 December 2008, addressed to the appellant in both of the names attributed to him, at an address in Sulaymaniyah, in the area of Northern Iraq governed by the Kurdish Regional Government, the UK Border Agency reiterated the appellant's right to bring an out of country appeal against the decision to cancel his indefinite leave to remain and notified him that any appeal would be to SIAC, because the Secretary of State had certified the decision under s97(3) of the Nationality, Immigration and Asylum Act 2002.

5. On 14 January 2009, at the residence of the Department of Security headquarters in Sulaymaniyah, the appellant was served with the letters of 26 November and 15 December 2008, together with relevant appeal forms. He gave notice of appeal, in time, on 6 February 2009. He appealed against the cancellation both of refugee status and of indefinite leave to remain.

6. He has submitted an unsigned witness statement, which we have taken in to account as his evidence in support of his appeal. In it he denies that he is an Iraqi national, that he has ever been a member or associate of Ansar Al Islam and asserts that his claim to asylum was true and well-founded. He denies posing any threat to the national security of the United Kingdom. On 5 February 2009, he retained solicitors to act for him. The spoke to him by telephone and email. Because they were unable to obtain a grant of public funding from the Legal Services Commission, because they did not have a legal aid franchise, they handed over conduct of the appeal, with the appellant's consent, to his current solicitors. They were initially able to communicate with him and obtain from him an application for public funding, signed by him on 22 February 2010. They had a telephone number and residential address for him in Iraq and sent his unsigned draft witness statement to him. However, for an unspecified period of time, they have not been in contact with him. For reasons which are set out in the closed judgment, we are satisfied that if the appellant had wished to maintain contact with his solicitors, he could have done so. They, properly, considered that their instructions had not been withdrawn and that it was their duty to continue to

represent him in this appeal. We have, accordingly, treated it as an effective appeal and determined it on its merits in the usual way.

The cancellation of refugee status

7. Mr de Mello and Mr Berry for the appellant submit that he is entitled to bring an appeal to SIAC against the cancellation of refugee status. Mr Glasson and Miss Owen, for the Secretary of State, submit that he is not.

8. The position under domestic law is clear. SIAC is a creature of statute and has no power to determine any appeal which is not identified in s2 of the Special Immigration Appeals Act 1997. s2 identifies four categories of decision: an immigration decision under s82 of the Nationality, Immigration and Asylum Act 2002; the rejection of an asylum claim in the circumstances identified in s83; a decision to curtail or refuse to extend limited leave in the circumstances identified in s83A; and a deprivation of citizenship order under s40 of the British Nationality Act 1981. A decision to cancel refugee status is not a decision of a kind identified in those provisions. It is not an "immigration decision" as defined in s82, nor a decision to curtail or refuse to extend limited leave under s83A. Nor is it a decision of the kind identified in s83:

> "1. This section applies where a person has made an asylum claim and –
>
> (a) his claim has been rejected by the Secretary of State, but
>
> (b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate)."

An "asylum claim" is defined by s113 as "a claim made by a person that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention". Cancellation of refugee status is self-evidently not the same as rejection of an asylum claim.

9. Accordingly, treated as a matter of straightforward statutory construction, the claim that SIAC has jurisdiction to entertain an appeal against the cancellation of refugee status is unarguable.

10. Mr de Mello and Mr Berry advance two grounds for contending that that simple reading of the statutory scheme does not provide the right answer:

(i) Cancellation of refugee status is a practice contrary to the Refugee Convention, so that the consequential decision to cancel indefinite leave to remain is in itself not in accordance with the law, so giving rise to a ground of appeal under s84(1)(e) of the 2002 Act. Accordingly, an appeal against the latter decision permits an appellant to challenge the former in the same proceedings.

(ii) The principle of equivalence in European Union law requires that a person challenging the cancellation of refugee status is entitled to the same rights of appeal against that decision as he would be against a decision to cancel indefinite leave to remain.

11. The foundation for the first argument is s2 of the Asylum and Immigration Appeals Act 1993 which remains in force, despite the repeal of the operative provisions of that Act:

> "2. Primacy of Convention
>
> Nothing in the Immigration Rules (within the meaning of the 1971 Act) shall lay down any practice which shall be contrary to the Convention."

Paragraph 339A of the Immigration Rules provides:

> "A person's grant of asylum under paragraph 334 will be revoked or not renewed if the Secretary of State is satisfied that:…
>
> (viii) his misrepresentation or omission of facts, including the use of false documents, were decisive for the grant of asylum".

This rule is based on paragraph 117 of the UNHCR handbook on procedures and criteria for determining refugee status, which states

> "Article 1C does not deal with the cancellation of refugee status. Circumstances may, however, come to light that indicate that a person should never have been recognised as a refugee in the first place; e.g. if it subsequently appears that refugee status was obtained by a misrepresentation of material facts, or that a person concerned possesses another nationality, or that one of the exclusion clauses would have applied to him had all the relevant facts been known. In such cases, the decision by which he was determined to be a refugee will normally be cancelled".

Similar provision is made in Article 14.3(b) of Council Directive 2004/83/EC (the Qualification Directive)

> "Member States shall revoke, end or refuse to renew the refugee status of a third country national…, if, after he or she has been granted refugee status, it is established by the Member State concerned that:…
>
> (b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status."

12. Mr de Mello and Mr Berry submit that because the Refugee Convention contains no provision which permits a state party to cancel or revoke refugee status on the ground that it was obtained by misrepresentation, the

Immigration Rule which permits cancellation on that ground lays down a practice which would be contrary to the Refugee Convention. Accordingly, the rule and any decision to cancel made under it are unlawful under s2 of the 1993 Act. We do not accept that submission. The fact that the Convention contains no provision for cancellation or misrepresentation is unsurprising. As originally signed and ratified, it applied only to those who were refugees as a result of events occurring before 1 January 1951. That date coincided approximately with the end of a period in which vast numbers of people had been subjected to persecution and displacement by the actions of states in Europe, the Middle East and Asia. It is readily understandable that the states parties were focused upon the needs of genuine refugees and not on the problem which has emerged in more settled times – claims to asylum by those who do not have a well-founded fear of persecution in their own states. The omission has been remedied by the UNHCR and, for Member States of the European Union, by the Qualification Directive. As a ground of appeal, the challenge would be hopeless; but it would still be a ground of appeal. Mr de Mello and Mr Berry contend that, by application of the reasoning of the Court of Appeal in Saad, Diriye and Osorio v Secretary of State for the Home Department (2001) EWCA Civ 2008, it can and should be capable of being advanced in an appeal to SIAC under s82(2)(e). s8 of the 1993 Act, since repealed, provided,

> "2. A person who has limited leave…to enter or remain in the United Kingdom may appeal to a special adjudicator against any variation of, or refusal to vary, the leave on the ground that it would be contrary to the United Kingdom's obligations under the Convention for him to be required to leave the United Kingdom after the time limited by the leave".

The issue in the case was whether or not an appeal against the refusal to grant refugee status could be brought under s8 in circumstances when there was no apprehension of refoulement. A literal reading of the words of s8 suggested that it could not. The Court of Appeal held that it could – because the 1993 Act should be construed, as far as possible, on the basis that the United Kingdom intended to comply with its obligations under the Convention to ensure that refugees were entitled to enjoy their full Convention rights. Having created a right of appeal specifically directed to Convention obligations, it would be illogical and impractical to require challenges to decisions as to refugee status to be brought by Judicial Review when refoulement was not apprehended: paragraph 72.

13. The difficulty with their argument is that, since that decision, Parliament has revisited the issue of the circumstances in which decisions affecting refugee status may be appealed to an Immigration Judge or SIAC. Those provisions definitively exclude a right of appeal by this appellant on the grounds raised by Mr de Mello and Mr Berry. There are only two circumstances in which a decision made by the Secretary of State in respect of a person's refugee status can be the subject of an appeal to the Tribunal or to SIAC: (i) the rejection of an "asylum claim" by the Secretary of State when the person concerned has been granted leave to enter or remain in the United Kingdom for a period

exceeding one year under s83; and a decision to remove a person from the United Kingdom under a variety of statutory provisions identified in s82(2)(g)-(i). In the latter circumstance, s84(1)(g) expressly provides that an appeal may be brought on the ground that "removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention…". That right of appeal is, however, circumscribed by s95: "A person who is outside the United Kingdom may not appeal under s82(1) on the grounds specified in s84(1)(g) (except in a case to which s94(9) applies)" (ie when the claim is certified by the Secretary of State as clearly unfounded, in which case no in country appeal may be brought). The meaning of these provisions is clear. It cannot be stretched to accommodate an appeal by a person such as the appellant, from abroad, against the cancellation or revocation of his refugee status.

14. Mr de Mello and Mr Berry raise a further argument based on statutory construction which must fail for the same reasons. S82(2)(f) identifies as an immigration decision the "revocation under s76 of this Act of indefinite leave to enter or remain in the United Kingdom". S76(3) provides:

> "The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if the person, or someone of whom he is a dependent, ceases to be a refugee as a result of –
>
> (a) voluntarily availing himself of the protection of his country of nationality,
>
> (b) voluntarily reacquiring a lost nationality,
>
> (c) acquiring the nationality of a country other than the United Kingdom and availing himself of its protection, or
>
> (d) voluntarily establishing himself in a country in respect of which he was a refugee".

Cancellation for misrepresentation is, self-evidently, not included in that list.

15. The argument based on the principle of equivalence is founded on Article 39 of Council Directive 2005/85/EC, which sets out minimum standards on procedures in Member States for granting and withdrawing refugee status. Articles 37 and 38 set out minimum procedural requirements to be observed by Member States when there are reasons to reconsider the validity of the refugee status of a particular person. Article 39 provides for appeals procedures against a variety of decisions about refugee status. Article 39.1(e) is relevant to this case:

> "The right to an effective remedy

> Member states shall ensure that applicants for asylum have the right to an effective remedy before a Court or Tribunal, against the following:…
>
> (e) a decision to withdraw refugee status pursuant to Article 38".

It is common ground that Article 39.1(e) creates a directly enforceable Community right. FA (Iraq) v Secretary of State for the Home Department (2010) EWCA Civ 696, a decision binding upon us, until and unless overturned or qualified by the Supreme Court in the pending appeal, decides that the principle of equivalence requires s83 to be construed so as to give a right of appeal against the refusal of humanitarian or subsidiary protection as well as against the rejection of an asylum claim. In paragraph 36 of Pill LJ's judgment he cites the opinion of Advocate General Jacobs in Peterbroeck and Others v Belgium Case C-312/93 14 December 1995, paragraph 17:

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

16. Mr Glasson and Miss Owen contend that the only means by which a decision to cancel refugee status for misrepresentation can be challenged is by Judicial Review. We do not understand Mr de Mello and Mr Berry to submit that the exercise of the right conferred by Article 39.1(e) could not effectively be achieved by Judicial Review. The appellant could have challenged the Secretary of State's decision on Wednesbury grounds: that there was no, or no sufficient, basis for the decision; that it was irrational; or, as they suggested, it was unlawful or impermissible in the light of the adjudicator's decision. The Secretary of State might have had difficulty in defending her decision if, as may be the case, it is not possible to deploy closed material to support the decision in the absence of a statutory framework – but that is a disadvantage for her, not for the appellant.

17. The live issue is equivalence. If the procedural conditions governing actions intended to ensure the protection of directly effective Community rights are less favourable than "the conditions relating to similar actions of a domestic nature", the principle will be breached, The analysis of the Court of Appeal in FA (Iraq) suggests that what must first be considered is the nature of the underlying right sought to be protected: hence, the comparison by Pill LJ in paragraph 47 of the rights of a refugee and the rights of a person entitled to subsidiary protection. There are two possible comparators: the rights of a person granted leave to enter or remain (s81(2)(e)); and the rights of a person whose asylum claim has been rejected (s83). As to the first, the underlying

rights are very different. A person can be granted leave to enter or remain for a wide variety of purposes: settlement, marriage, family reunion, work, study and visits – and because they have been granted refugee status, humanitarian or subsidiary protection and/or cannot safely be removed to their home state. The grounds upon which leave to enter or remain can be refused are manifold. The grounds upon which leave to enter or remain can be cancelled or curtailed as well as refused are set out in Part 9 of the Immigration Rules and are also manifold. By contrast, the grounds upon which asylum can be claimed are limited to those set out in Article 1A of the Refugee Convention, as are the grounds upon which a person is excluded from the provisions of the Convention (1D, E and F); as are the grounds upon which the Convention ceases to apply to a person (Article 1C). The conditions which attach to and the benefits derived from the grant of leave to enter or remain and of asylum are different. The purposes, contents and effects of the two rights are quite different. There is no, or at least no sufficient, similarity between them to require the principle of equivalence to be applied.

18. The second comparator is closer. Self-evidently, both concern the rights of a person who claims to be entitled to the protection of the Refugee Convention. The consequences of refusal and cancellation are the same: the person is not entitled to the protection of the Convention. It is, accordingly, at least arguable that the principle of equivalence requires that the procedural conditions attached to an appeal against cancellation should be no less favourable than those which attach to an appeal against refusal. This requires an analysis of the procedural rights available to a person whose asylum claim has been rejected. Unless he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year, he has no right of appeal to the First-Tier Tribunal or to SIAC under s83. He would only enjoy a right of appeal if, as happened in this appellant's case, a decision was also made by the Secretary of State to set directions for his removal. The reason why the appeal of a person who is entitled to protection under the Refugee Convention succeeds in such a case is because removal – refoulement – would be unlawful in such a case: Article 33(1) of the Refugee Convention. Further, an appeal against rejection of "an asylum claim" is an appeal against a decision to remove a person or to require him to leave the United Kingdom: see the definition of "asylum claim" in s113. An appeal under s83 can only be brought on the grounds that removal would breach the United Kingdom's obligations under the Refugee Convention: s84(3) and paragraph 14 of the judgment of Longmore LJ in FA (Iraq). Accordingly, the right of appeal granted by domestic law against the rejection of an asylum claim is not a right of appeal against the Secretary of State's refusal to recognise a person as a refugee as such, but against a decision to remove such a person from the United Kingdom. It follows that there are no more favourable domestic procedural conditions conferring a right of appeal upon a person claiming asylum by reference to which the claim of a person whose refugee status has been cancelled can be adversely compared. The equivalence argument therefore fails.

19. If it did not, and if the Secretary of State's belief about the falsity of his claim is justifiable, the appellant would have gained a procedural advantage by virtue of his own lies. There is nothing odd in requiring him to put the

Secretary of State's belief to the test by traditional administrative law means – by a Judicial Review challenge.

The appeal

20. As the decision letter of 26 November 2008 makes clear, the ground on which the Secretary of State's decision to cancel the appellant's indefinite leave to remain was made was that it was conducive to the public good that he should be excluded from the United Kingdom because he had been involved in Islamist extremist activity on behalf of the Ansar Al Islam group, not that he had lied about his asylum claim. For reasons which are entirely set out in the closed judgment, we are satisfied that the Secretary of State's belief was well founded in fact and that the judgment that it was conducive to the public good that he should be excluded from the United Kingdom was justified.

21. We were invited, really as a matter of form, to consider the appellant's Article 8 rights. We acknowledge that he has established a private life in the United Kingdom, but are satisfied that he has not established a family life here. We have no reason to believe that he is not at least as well able to enjoy private and family life in Sulaymaniyah as in the United Kingdom. Further, even if that were not so, his exclusion from the United Kingdom would be justified by the need to protect the national security of the United Kingdom from his activities. Exclusion from the United Kingdom does not, therefore, infringe his right to respect for private and family life under Article 8.

22. For those reasons, this appeal is dismissed.