



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Number: AA/04386/2014**

**THE IMMIGRATION ACTS**

**Heard at Newport**

**Decision & Reasons**

**Promulgated**

**On 23 July 2015**

**On 04 September 2015**

**Before**

**MR C M G OCKLETON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SRM**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr I Richards, Home Office Presenting Officer

For the Respondent: Mr B Hoshi, instructed by Migrant Legal Project

**REMITTAL AND REASONS**

1. We make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in the light of the sensitive matters raised in this appeal arising out of the appellant's international protection claim. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant. Any disclosure in breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or Court.

**Introduction**

2. The Secretary of State appeals against the decision of the First-tier Tribunal (Judge Archer) promulgated on 26 November 2014 allowing the SRM's appeal against a decision to remove him to Afghanistan or France

by way of directions on the basis that he is a refugee and his removal would breach the Refugee Convention and also Arts 2 and 3 of the ECHR.

3. For convenience, although this is an appeal by the Secretary of State we will refer to the parties as they appeared before the First-tier Tribunal.

### **Background**

4. The appellant is a citizen of Afghanistan who was born on 1 January 1991. The appellant appears to have left Afghanistan in 2009 fearing that he would be killed by the Taliban. The appellant went to France where on 16 October 2009 he was granted refugee status and a temporary residence permit. Thereafter, the appellant came to the United Kingdom in November 2009 and claimed asylum on 30 November 2009.
5. In a decision letter dated 17 June 2014, the Secretary of State refused the appellant's claims for asylum and under Arts 2, 3 and 8 of the ECHR. The Secretary of State did not accept the appellant's account that he had been targeted and approached by the Taliban and that he would, therefore, be at risk on return. The Secretary of State also concluded that, in any event, the Afghan authorities would provide a sufficiency of protection and internal relocation to Kabul was an option for the appellant. On 17 June 2014, the Secretary of State made a decision to remove the appellant by way of directions to "Afghanistan or France."

### **The Appeal to the First-tier Tribunal**

6. The appellant appealed to the First-tier Tribunal. In his determination, Judge Archer accepted the appellant's account and that he would be at risk of persecution for a Convention reason if he returned to Afghanistan. Judge Archer also concluded that there was no basis to deny the appellant's refugee status in the UK simply because he had already been granted refugee status in France. Consequently, he allowed the appellant's appeal under the Refugee Convention and Art 2 and 3 of the ECHR. However, Judge Archer declined to reach a decision in relation to Art 8 given his decision to allow the appeal on international protection grounds.

### **The Appeal to the Upper Tribunal**

7. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the judge was wrong in law to allow the appellant's appeal under the Refugee Convention since the appellant could be removed safely to France in accordance with the proposed removal directions.
8. On 29 December 2014, the First-tier Tribunal (Judge Adio) granted the Secretary of State permission to appeal on that ground.
9. In response to the grant of permission, the appellant served a rule 24 response seeking to uphold Judge Archer's decision to allow the appeal under the Refugee Convention.

10. In addition, on 20 January 2015 the appellant made an application out of time for permission to appeal on the sole ground that the judge had been wrong not to consider the appellant's Art 8 claim.
11. That application for permission was based upon a reading of the Upper Tribunal's decision in EG and NG (UT Rule 17: Withdrawal; Rule 24: Scope) Ethiopia [2013] UKUT 00143 (IAC). In particular, para [3] of the head note which states that:

"A party that seeks to persuade the Upper Tribunal to replace a decision of the First-tier Tribunal with a decision that would make a material difference to one of the parties needs permission to appeal."
12. The appellant's application for permission to appeal has never been determined and, shortly before the UT hearing, an application to adjourn the hearing in order that that application could be determined was refused by the First-tier Tribunal.
13. We need say no more concerning the appellant's application for permission and the premise that such an application was required by EG and NG because, as will become clear shortly, it is plain to us that Judge Archer's decision in respect of the appellant's refugee claim cannot stand and on remitting the appeal to him, the Art 8 issue remains outstanding for determination.

## **Discussion**

14. There is no challenge to Judge Archer's conclusion that the appellant has established he has a well-founded fear of persecution for a Convention reason in Afghanistan. As a consequence, the appellant is a refugee within the meaning of Art 1(A) of the Refugee Convention.
15. The argument before us concerned whether the judge was entitled to allow the appellant's appeal if, in accordance with the proposed removal directions, it was proposed to remove the appellant to "Afghanistan or France" and there was no suggestion that the appellant was at risk in France.
16. It is important to set out the ground of appeal upon which the appellant relies in order to succeed. It is set out in s.84(g) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") as follows:

"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 or would be unlawful under s.6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."
17. As is clear from that provision, the appeal is not properly seen as being on the ground merely of establishing the individual's status as a refugee under the Refugee Convention but that "removal" would be a breach of the Refugee Convention.

18. Art 33(1) of the Refugee Convention provides, under the heading “Prohibition of Expulsion or Return” (‘Refoulement’) that:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom will be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”
19. Art 33(2) creates an exception to that, not applicable in this appeal, where an individual has been convicted of a particularly serious crime and constitutes a danger to the community.
20. It is the terms of Art 33(1) which prohibits the return of a person to his country of nationality when he is a refugee, namely a person who has a well-founded fear of persecution in that country of nationality. In the usual case, therefore, where the only destination in the proposed removal directions is the individual’s own country of nationality, having established that he is a refugee, Art 33(1) prohibits his removal as his return will contravene Art 33(1). Consequently, when those facts are established on an appeal, the individual is entitled to have his appeal allowed under s.84(1)(g) as his removal in accordance with the removal directions would breach the Refugee Convention.
21. Art 33(1) of the Refugee Convention cannot, however, prevent the appellant’s removal in this appeal as the removal directions contemplate removal to either Afghanistan or France. There was no suggestion that the appellant is at risk in France and hence, although a refugee as accepted by Judge Archer, the appellant’s removal in consequence of the directions (albeit focused on France) would not breach the Refugee Convention.
22. Having raised this point with Mr Hoshi at the hearing, he relied instead upon Art 32 of the Refugee Convention which, he submitted, prevented the appellant’s removal to France.
23. Art 32(1) under the heading “Expulsion” states as follows:

“the Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.” (our emphasis)
24. Arts 32(2) and (3) are not directly relevant to this appeal.
25. Mr Hoshi submitted that the appellant became “lawfully” in the UK when Judge Archer decided that he was a refugee. Consequently, the appellant could not be removed by virtue of Art 32(1) except on grounds of “national security or public order” which it has never been suggested apply to the appellant.
26. Mr Hoshi submitted that the only basis upon which the appellant could be removed to France was pursuant to the Dublin III Regulations certifying the appellant’s claims under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 on the basis that France is a safe third country.

27. Mr Hoshi accepted that he was unable to draw our attention to any authority dealing with the application of Art 32(1) and, in particular, when it could be said that a refugee was “lawfully” in the UK. He indicated that he had been taken by surprise when this issue concerning Art 32 was raised by the Tribunal at the hearing. We are not entirely clear why that was the case as Art 32 is specifically relied upon by Mr Hoshi in the appellant’s rule 24 response at paras 13-15 as the basis for upholding Judge Archer’s determination that the appellant could not be removed to France. In the result, however, in order to give Mr Hoshi a further opportunity to consider the application of Art 32, we allowed him seven days in which to serve any written submissions on the Tribunal and Secretary of State concerning the application of Art 32 to the appellant. A further seven days was allowed to the Secretary of State to respond and a further seven days after that for the appellant to reply.
28. In the result, Mr Hoshi submitted a “Note” dated 26 July 2015 in which he stated at para 2:
- “Having had the opportunity to undertake further research on this point, counsel respectfully agrees with the Panel’s view: **it is accepted on behalf of the appellant that Article 32 Refugee Convention does not inhibit his removal to France.**” (emphasis in original)
29. Mr Hoshi cites no authority for his concession but it is clearly correct based upon the decision of the Supreme Court in R(ST (Eritrea)) v SSHD [2012] UKSC 12; [2012] Imm AR 734.
30. In that case, the claimant, who was a citizen of Eritrea, had successfully established in the appellate system that she was a refugee and had a well-founded fear of persecution in Eritrea and that her removal to Eritrea would be unlawful. The Secretary of State then proposed her removal to Ethiopia where she had not established a well-founded fear of persecution. The claimant sought judicial review seeking a mandatory order that the Secretary of State grant her leave to remain as a refugee in accordance with the Tribunal’s decision and an order to quash the proposed removal directions to Ethiopia.
31. The claimant’s case turned upon whether Art 32 of the Refugee Convention applied to her as a “refugee” who was “lawfully” in the UK and could not, as a consequence, be removed other than on grounds of national security or public order.
32. The unanimous decision of the Supreme Court (Lord Hope, Lady Hale and Lords Brown, Mance, Kerr, Clarke and Dyson) was that the claimant could not rely on Art 32(1). The Supreme Court held that whether an individual was “lawfully” in the UK was a matter of domestic law. Secondly, the Supreme Court held that a person was not “lawfully” in the UK for the purposes of Art 32(1) where he had been granted temporary admission, even if he was a refugee, but had not yet been granted leave to give effect to that status. Only then, could it be said that an individual was “lawfully” in the UK although found by a Tribunal to be a refugee. The Supreme

Court placed reliance upon s.11(1) of the Immigration Act 1971 which, inter alia, provides that:

“... a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act.”

33. In ST, the claimant had successfully appealed a decision to remove her to Eritrea on the basis that she had a well-founded fear of persecution in Eritrea and would, if returned there, be returned in breach of Art 33(1) of the Refugee Convention. Despite that conclusion, the claimant had not yet been granted leave to enter or remain and was only subject to temporary admission.
34. The appellant in this appeal is in no stronger position: indeed the appellate process, unlike that in ST, has yet to be concluded. Within these proceedings, he has been found by Judge Archer to be a refugee but he has not been granted leave to enter or remain and continues to be on temporary admission to the UK. Applying ST, this appellant, like the claimant in ST, is not “lawfully” in the United Kingdom and Art 32(1) does not apply so as to prevent his expulsion other than on grounds of national security or public order.
35. For these reasons, Judge Archer erred in law in allowing the appellant’s appeal on the ground set out in s.84(1)(g) of the NIA Act 2002. His decision to allow the appeal on asylum grounds is set aside. That is also the result in relation to his decision to allow the appeal under Arts 2 and 3 of the ECHR in the absence of evidence that the appellant would be at risk of treatment contrary to those provisions in France.

### **Disposal**

36. We consider that the proper disposal of this appeal is to remit it to Judge Archer. His findings of fact in relation to the appellant’s international protection claim shall stand. We direct:
  1. Judge Archer should re-make his decision in relation to the Refugee Convention and Arts 2 and 3 of the ECHR in the light of our determination and any evidence (if there indeed is any) that the appellant is at risk of prohibited treatment in France.
  2. Judge Archer should, in addition, consider afresh the appellant’s claim under Art 8 of the ECHR which was previously undetermined.
37. Consequently, the appeal is remitted to be heard by Judge Archer in the First-tier Tribunal in accordance with our directions.

Signed

A Grubb  
Judge of the Upper Tribunal