Neutral Citation Number: [2021] EWCA Civ 1500

Case No: C5/2020/1131

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Upper Tribunal (Immigration and Asylum Chamber)
Lane, P and UT Judge Norton-Taylor
[2020] UKUT 89 (IAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
LADY JUSTICE CARR

- -

Between :

MY (PAKISTAN)	**Claimant/ Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Sonali Naik QC and **Lucy Mair** (instructed by **Greater Manchester Immigration Aid Unit**) for the **Appellant**
Rory Dunlop QC and **William Hansen** (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing dates: 26 & 27 May 2021

- -

Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. This appeal concerns the circumstances in which the refusal of an application for indefinite leave to remain ("ILR") by a victim of domestic violence may attract a right of appeal. In bare outline, the point arises as follows:

   (1) The Immigration Act 2014 effected a radical reduction in the categories of decision in the immigration field against which applicants enjoyed a right of appeal to the First-tier Tribunal ("the FTT"). As amended, the Nationality, Immigration and Asylum Act 2002 no longer provides for any right of appeal against the refusal of an application for leave to remain as such.

   (2) However, section 82 (1) (b) of the Act does provide for such an appeal against three particular classes of decision, as follows:

   > "A person ('P') may appeal to [the FTT] where–
   >
   > (a) the Secretary of State has decided to refuse a protection claim made by P…
   >
   > (b) the Secretary of State has decided to refuse a human rights claim made by P, or
   >
   > (c) the Secretary of State has decided to revoke P's protection status."

   Although I have included heads (a) and (c) for completeness, we are in this appeal concerned only with head (b).

   (3) The term "human rights claim" is defined in section 113 (1) of the Act as:
   > "a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 …".

   A more convenient paraphrase of the final phrase is that the claimant's refusal would be a breach of his or her Convention rights, since that is normally how such a claim is framed. I will also refer to "removal" as a shorthand for both actual removal and a requirement to leave.

   (4) In the present case the Appellant made an application for ILR under section DVILR of Appendix FM of the Immigration Rules as a victim of domestic violence, using the prescribed form. Documents supplied with the form raised a contention that his removal consequent on a refusal of his application would be incompatible with his Convention rights[1].

   (5) The Secretary of State refused his application but said that she had not considered his contention that removal would be a breach of his Convention rights because

[1] There may be a question as to how clearly the point was raised but the point is conceded before us: see para. 22 below.

that was not covered by his application and required to be raised by a separate application using a different form.

(6) The Appellant attempted to appeal to the FTT against the refusal of his application for ILR on the basis that it constituted or entailed a "[decision] to refuse a human rights claim" within the meaning of section 82 (1) (b). The Secretary of State contended that since she had avowedly not considered his human rights claim she had made no such decision.

(7) The FTT accepted the Secretary of State's contention and held that accordingly it had no jurisdiction to entertain the appeal. That decision was upheld by the Upper Tribunal (Immigration and Asylum Chamber) ("the UT"). The Appellant appeals to this Court with the permission of Elisabeth Laing LJ.

In short, therefore, the issue is whether the Secretary of State is to be regarded for the purposes of section 82 (1) (b) as having made a decision to refuse the Appellant's human rights claim notwithstanding that she has purported to decide only his application for leave to remain as a victim of domestic violence.

2. The Appellant was represented before us by Ms Sonali Naik QC, leading Ms Lucy Mair. The Secretary of State was represented by Mr Rory Dunlop QC, leading Mr William Hansen. Ms Mair appeared in both the FTT and the UT: the Secretary of State was represented by Presenting Officers. For convenience I will refer to the skeleton arguments of both parties as if they were the work of leading counsel only, though I am sure that that is far from being the case.

3. In the UT (though not in the FTT) the Appellant was referred to only by his initials. We are satisfied that there is a sufficient basis for continuing that anonymisation in this Court.

THE LEGISLATIVE BACKGROUND

4. Section 3 (2) of the Immigration Act 1971 obliges the Secretary of State to lay down rules "as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter": that is the statutory basis for the Immigration Rules.

Bases for Leave to Remain

5. The Immigration Rules specify a number of bases, or grounds, on which a person may be granted leave to enter/entry clearance or leave to remain. (Since we are concerned in this case with leave to remain I will henceforward refer simply to that.) These are specified under different Parts of the Rules. I need not summarise them all, but I should note Part 6A, which specifies the requirements for ILR in the case of various "routes" under the Points-Based System ("the PBS"); Part 7 ("Other Categories"), which includes the requirements for the grant of ILR on the basis of long residence (paragraph 276B) or "private life" (paragraph 276ADE); and Part 8 ("Family Life"), the substantive provisions of which appear in Appendix FM. As we have seen, one basis included under Appendix FM is that a person is a victim of domestic violence (now, domestic abuse): that is the subject of section DVILR, which I set out below. The bases covered by the other sections are, in short, "partner", "bereaved partner" (section BPILR), "child", "parent" and "adult dependent relative".

6. The Immigration Rules do not recognise a human rights claim as such – that is, that the applicant's removal would breach their Convention rights – as a distinct basis for the grant of leave to remain: there is no part headed "Human Rights". Applications for leave to remain on that basis can be made, but they are "outside the Rules". However, the Secretary of State recognises that some of the bases for leave to remain under the Rules inherently involve a human rights claim: I return to this at para. 15 below.

7. At the time of the Secretary of State's decision in this case the relevant provisions of Appendix FM covering victims of domestic violence read as follows:

> "**Victim of domestic violence**
>
> *Section DVILR: Indefinite leave to remain (settlement) as a victim of domestic violence*
>
> DVILR.1.1. The requirements to be met for indefinite leave to remain in the UK as a victim of domestic violence are that-
>
> (a) the applicant must be in the UK;
>
> (b) the applicant must have made a valid application for indefinite leave to remain as a victim of domestic violence;
>
> (c) the applicant must not fall for refusal under any of the grounds in Section S-ILR: Suitability-indefinite leave to remain; and
>
> (d) the applicant must meet all of the requirements of Section E-DVILR: Eligibility for indefinite leave to remain as a victim of domestic violence.
>
> *Section E-DVILR: Eligibility for indefinite leave to remain as a victim of domestic violence*
>
> E-DVILR.1.1. To meet the eligibility requirements for indefinite leave to remain as a victim of domestic violence all of the requirements of paragraphs E-DVILR.1.2. and 1.3. must be met.
>
> E-DVILR.1.2. The applicant's first grant of limited leave under this Appendix must have been as a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen or a person settled in the UK under paragraph D-ECP.1.1., D-LTRP.1.1. or D-LTRP.1.2. of this Appendix and any subsequent grant of limited leave must have been:
>
> (a) granted as a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen or a person settled in the UK under paragraph D-ECP.1.1., D-LTRP.1.1. or D-LTRP.1.2. of this Appendix; or
>
> (b) granted to enable access to public funds pending an application under DVILR and the preceding grant of leave was granted as a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen or a person settled in the UK under paragraph D-ECP.1.1., D-LTRP.1.1. or D-LTRP.1.2. of this Appendix; or

(c) granted under paragraph D-DVILR.1.2.

E-DVILR.1.3. The applicant must provide evidence that during the last period of limited leave as a partner of a British Citizen or a person settled in the UK under paragraph D-ECP.1.1., DLTRP.1.1 or D-LTRP.1.2 of this Appendix the applicant's relationship with their partner broke down permanently as a result of domestic violence.

Section D-DVILR: Decision on application for indefinite leave to remain as a victim of domestic violence

D-DVILR.1.1. If the applicant meets all of the requirements for indefinite leave to remain as a victim of domestic violence the applicant will be granted indefinite leave to remain.

D-DVILR.1.2. If the applicant does not meet the requirements for indefinite leave to remain as a victim of domestic violence only because paragraph S-ILR.1.5. or S-ILR.1.6. applies, the applicant will be granted further limited leave to remain for a period not exceeding 30 months.

D-DVILR.1.3. If the applicant does not meet the requirements for indefinite leave to remain as a victim of domestic violence, or further limited leave to remain under paragraph D-DVILR.1.2. the application will be refused."

The language of those provisions has since been changed to refer to "domestic abuse" rather than "domestic violence".

PROCEDURE FOR APPLICATION

8. As regards the procedure for applying for leave to remain on one of those bases, section 50 (1) of the Immigration, Asylum and Nationality Act 2006 provides that:

"Rules under section 3 of the Immigration Act 1971 …

(a) may require a specified procedure to be followed in making or pursuing an application or claim (whether or not under those rules or any other enactment),

(b) may, in particular, require the use of a specified form and the submission of specified information or documents,

(c) may make provision about the manner in which a fee is to be paid, and

(d) may make provision for the consequences of failure to comply with a requirement under paragraph (a), (b) or (c)."

Subsection (2) provides:

"In respect of any application or claim in connection with immigration (whether or not under the rules referred to in subsection (1) or any other enactment) the Secretary of State—

> (a) may require the use of a specified form,
>
> (b) may require the submission of specified information or documents, and
>
> (c) may direct the manner in which a fee is to be paid;
>
> and the rules referred to in subsection (1) may provide for the consequences of failure to comply with a requirement under paragraph (a), (b) or (c)."

I do not fully understand the niceties of the relationship between subsections (1) and (2), but nothing turns on that for our purposes.

9. Pursuant to those provisions the Immigration Rules contain various requirements governing the making of applications. Paragraph 34 ("How to make a valid application for leave to remain in the UK") reads, so far as relevant, as follows:

> "An application for leave to remain must be made in accordance with sub-paragraphs (1) to (10) below.
>
> (1) (a) Subject to paragraph 34(1)(c), the application must be made on an application form which is specified for the immigration category under which the applicant is applying on the date on which the application is made.
>
> (b) An application form is specified when it is posted on the visa and immigration pages of the GOV.UK website.
>
> (c) An application can be made on a previous version of a specified paper application form (and shall be treated as made on a specified form) as long as it is no more than 21 days out of date.
>
> (2)-(10) …"

10. We were shown five application forms that appeared on the specified pages of the GOV.UK website at the date of the Appellant's application. One of those forms, SET (DV), is that specified for victims of domestic violence and is specific to that ground: that is the form used by the Appellant in the present case. The other four were:

- SET (O), which is specified for applications by (broadly) Tier 1 and Tier 2 migrants under the PBS
- FLR (FP), which is specified for applications as a partner, parent or dependent child or on the basis of private life
- FLR (HRO), which is described in its title as "for human rights claims, leave outside the rules and other routes not covered by other forms" (those alternatives are slightly amplified in section 3 of the form but I need not give the details)
- FLR (IR), which is described in its title as "for other routes under the immigration rules" (these "other routes" are specified in more detail on page 2 of the form, but again I need not set them out).

Substantially the same forms remain specified on the website, but since earlier this year they are no longer downloadable as paper forms and can only be completed online.

11. In some cases an applicant may be entitled to leave to remain on more than one basis. Crucially to the issues in this appeal, it is the policy of the Secretary of State to permit applicants for leave to remain to pursue only one basis of application at a time. That means that it is not permissible for an applicant to submit multiple forms in the alternative. This policy is clearly stated in the Home Office Guidance entitled *Applications for Leave to Remain: Validation, Variation and Withdrawal* ("the VVW Guidance"). In the form current at the date of the Appellant's application the section headed "Simultaneous applications" begins with the statement:

> "An applicant cannot submit simultaneous applications, only one form of leave can be granted at any time."

12. That policy is given effect by paragraph 34BB of the Rules, which is headed "Multiple Applications" and reads (so far as material):

> "(1) An applicant may only have one outstanding application for leave to remain at a time.
>
> (2) If an application for leave to remain is submitted in circumstances where a previous application for leave to remain has not been decided, it will be treated as a variation of the previous application.
>
> (3) Where more than one application for leave to remain is submitted on the same day then subject to sub-paragraph (4), each application will be invalid and will not be considered.
>
> (4) The Secretary of State may give the applicant a single opportunity to withdraw all but one of the applications within 10 working days of the date on which the notification was sent. If all but one of the applications are not withdrawn by the specified date each application will be invalid and will not be considered.
>
> (5) …"

13. A consequence of this "one-application-at-a time" policy is that, although the Rules permit an applicant to vary the basis of a pending application, they can only do so on the basis that they abandon the previous basis. That is implicit in paragraph 34BB (2) above but is explicitly stated in the VVW Guidance.

14. Subject to the point explained in the following paragraph, the Secretary of State regards an application for leave to remain on the basis that removal would be contrary to the applicant's Convention rights as a distinct basis of application outside the Rules, which should be made on form FLR (HRO). It is accordingly subject to the one-application-at-a-time policy.

15. There is an important subtlety about the application of that policy in the case of applications based on private life or family life. The provisions of Parts 7 and 8 (which, as noted, incorporates Appendix FM) of the Immigration Rules which govern entitlement to leave to remain on those bases are (subject to the point made in the following paragraph) avowedly intended to give effect to applicants' rights under article

8 of the Convention. Such an application is accordingly regarded by the Secretary of State as necessarily involving a human rights claim within the meaning of section 113 (1) (see para. 1 (3) above)): they are referred to in the Home Office Guidance entitled *Rights of Appeal* ("the Appeals Guidance") as "human rights applications"[2] and refusals of such applications are identified as attracting a right of appeal. That being so, she does not regard any invocation by the applicant of article 8 in such a case as raising a distinct application, and the applicant need not (and should not) make a separate application on form FLR (HO).

16. However, the essential point underlying the Appellant's claim is that the Secretary of State does not regard applications by victims of domestic violence (or bereaved partners) as "human rights applications" in the sense explained in the previous paragraph: that is, she does not regard them as inherently involving a human rights claim in the same way as an application on the other bases covered by Appendix FM. That is apparent from the Appeals Guidance, but it is also explicitly reflected in Appendix FM itself. The relevant provision is paragraph GEN.3.2. Sub-paragraphs (1)-(3) provide (in summary) that in the case of applications under most of the sections of Appendix FM leave will be granted even if the applicant does not satisfy the prescribed requirements if refusal would give rise to a breach of article 8: that is because the Secretary of State recognises that there will be exceptional cases where an applicant who should be granted leave to remain under article 8 (as it relates to family life) will slip through the net of the specific provisions of Appendix FM. However sub-paragraph (4) provides that those sub-paragraphs should not apply to applications from bereaved partners and victims of domestic violence.[3] (The same approach is reflected in the administrative review provisions: see para. 18 below.)

17. I should also mention section 120 of the 2002 Act. This gives the Secretary of State the option in specified circumstances to give notice requiring a person seeking leave to remain to state in a single document all the grounds on which they wish to rely – in the jargon, a "one-stop notice". The effect of the service of such a statement is that where there is an appeal pending any further grounds for leave to remain specified in it are to be treated as grounds in the appeal: see section 85 (2). (There are also other consequences, as specified in section 96, but I need not refer to them here.) But in the absence of a pending appeal the making of such a statement does not relieve an applicant who wishes to raise a particular ground for entitlement to leave to remain of the obligation under paragraph 34 of the Rules to make the appropriate application using the prescribed form: see the judgment of this Court in *R (Shrestha) v Secretary of State for the Home Department* [2018] EWCA Civ 2810.[4] Section 120 is not therefore at odds with the one-application-at-a-time policy.

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2 In the Home Office's correspondence they are sometimes referred to as "human rights based" applications.

3 I should mention for completeness that there is no express provision in similar terms to paragraph GEN 3.2 in relation to applications based on private life, but Mr Dunlop told us that the same approach is enshrined in the Appeals Guidance.

4 *Shrestha* is not formally binding on us because it was a decision on a permission application, albeit that it was made after full argument and the Court directed that it should be reported. Ms Naik submitted that it was in any event limited to a scenario where the applicant had made no formal application for leave to remain at all. I am not sure that I would accept that, but the point does not impinge on the basis on which I would decide the appeal and I need not resolve it.

Administrative Review and Appeals

18. One of the changes introduced by the 2014 Act was that applicants who did not enjoy a statutory appeal against a decision in the immigration field should be entitled to an "administrative review". Under Appendix AR to the Immigration Rules recipients of an "eligible decision" are entitled to seek an administrative review of whether the decision in question is wrong because of a "case working error". The categories of eligible decisions are defined in section AR3. They include, at AR 3.2 (c), decisions made on applications for leave to remain under the Rules. That is subject to an exception where

> "an application or human rights claim is made under:
>
> (i)-(vii) …
>
> (viii) Appendix FM (family members), *but not where an application is made under section BPILR (bereavement) or section DVILR (domestic violence)* [emphasis supplied],
>
> in which case the appropriate remedy is an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 rather than an application for administrative review".

That provision reflects the Secretary of State's position, explained above, that applications under most of the sections of Appendix FM inherently involve the making of a "human rights claim" but that that is not the case as regards bereaved partners or victims of domestic violence.

19. As regards appeals, I have set out at para. 1 above the relevant provisions of sections 82 and 113 of the 2002 Act (as amended). I need only add two points:

(1) Section 84 specifies the grounds on which each of the classes of appeal permitted by section 82 must be based. Subsection (2) provides that:

> "An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998."

(2) Section 113 (1) does not specify any particular form in which a human rights claim must be made[5]. In *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009 the Secretary of State conceded (see para. 14):

> "… that in order to fall within the terms of section 113 a 'claim' does not require to be made in the form of a fee-paid application under the Immigration Rules. [Counsel] made it clear that it is still the Secretary of State's position that a human rights claim ought to be made by a formal application, in the interests of orderly decision-making, and that priority may be given to claims so made; but she acknowledged that that was not a

[5] It does specify that it should be made "at a place designated by the Secretary of State". No such place has ever been designated, and it appears that the Secretary of State treats as valid any claim that is effectively communicated to her.

> statutory requirement and she said that even if a claim was made in some other form a claimant would not be removed from the UK until it had been considered."

There is a certain amount of case-law on the requirements of a valid human rights claim, as regards content, but nothing turns on that for our purposes.

PROCEDURAL HISTORY

The Application

20. The Appellant is a Pakistani national, now aged 39. He married a British citizen in Pakistan in 2012. She returned to the UK. On 6 June 2014 he entered the UK on a spouse visa valid to 15 February 2017 and went to live with his wife and her parents. He says that over the following months he was the victim of repeated domestic violence from them. He separated from his wife in March 2015 and was divorced from her later that year. On that basis his leave to remain was curtailed with effect from 22 March 2016, though he says that he did not receive notice of this at the time. Later in 2016 he made applications for leave to remain on a variety of bases which were either withdrawn or rejected: I need not give the details.

21. On 6 November 2017 the Appellant submitted an application for ILR using form SET (DV). It was accompanied by a covering letter of the same date from his solicitors. This was initially rejected but was re-submitted on 14 February 2018.

22. Form SET (DV) gives applicants no specific opportunity to raise a human rights claim as such, and the Appellant's responses on the form itself contain nothing that could be construed as seeking to do so. However, in a witness statement referred to in his response to section 4 of the form ("Evidence of Domestic Violence") he makes various statements which are said sufficiently to indicate a claim that his removal from the UK would breach his Convention rights. Specifically, he says:

    (a) that he is suffering from a mental illness as a result of "the verbal, emotional, physical and financial abuse that I suffered in my marital life" (para. 20) – this is said to engage article 8;

    (b) that if he returns to Pakistan he is at risk of being killed at the instigation of his in-laws (para. 21) – this is said to engage article 2 or 3.

    No detail is given of (a); but the form does also attach a psychiatric report, which gives a little more detail. The Secretary of State is prepared to accept that the witness statement does raise a human rights claim, although Mr Dunlop said that this was on the basis of (b) rather than (a). That might be regarded as quite a generous concession, but it is the basis on which the UT proceeded and we should take the same course.

The Decision

23. The Secretary of State's decision refusing the application is dated 9 September 2018. The "Reasons for Decision" document includes a "Decision Summary", which reads:

> "Your application for indefinite leave to remain as a Victim of Domestic Violence has been refused under paragraph D-DVILR.1.3 of Appendix FM of the Immigration Rules."

I need not go into the details of the reasons given for the decision: in short, the Secretary of State did not accept that the Appellant's marriage had been caused to break down by domestic violence. The document concludes:

> "Any submissions you may have made relating to your Human Rights have not been considered, as an application for settlement as a victim of Domestic Violence is not considered to be a Human Rights based application. Therefore, if you wish to apply for leave to remain, based upon your human rights or other compassionate factors it is open to you to apply using an appropriate application form. Please see our website for further details."

It is apparent, and Mr Dunlop confirmed, that that passage is in standard form: it does not constitute an acknowledgment that the caseworker had in fact recognised the passages in the witness statement as raising a human right claim. However, that does not ultimately matter for the purposes of the issue before us.

24. Ms Naik referred to the first sentence of the second of the passages quoted above as "the most important sentence in the case". On the face of it the Secretary of State is not refusing the Appellant's human rights claim – or rather, any human rights claim that he might have made; on the contrary, she is saying that she has not considered any such claim and that she will do so if and when he makes an application specifically on that basis. But it is the Appellant's primary case that that statement does not reflect the reality: it was inherent in her rejection of the application that the Secretary of State had refused the human rights claim. I return to this below.

25. The Appellant made an application for an administrative review under Appendix AR to the Rules. That application was, on the face of the Rules, properly entertained because applications under section DVILR are exceptions to the general rule that refusals of applications under Appendix FM should be challenged by way of appeal rather than administrative review: see para. 18 above.

26. By letter dated 19 October 2018 the Secretary of State affirmed her original decision. That letter was accompanied by an "Enforcement Notice". This notified the Appellant that he was liable for removal within the meaning of section 10 of the Immigration and Asylum Act 1999 and identified the consequences of staying in the UK illegally (as to which see para. 47 below). It also contained a section 120 notice, part of which, under the heading "what you must do now", read:

> "- You must **now** tell us about any reasons or grounds you have for wishing to remain in the United Kingdom. You do not need to tell us about any reasons or grounds which you have already told us in your claim or application.
>
> - Where you have something new to raise now, you should do so straight away or at the latest within 14 days of the date of this letter.
>
> - Where you do have reasonable grounds for wishing to stay in the United Kingdom you should submit an application using the relevant form. You can find the application form on our website: gov.uk/ukvi."
>
> - …"

27. Notwithstanding what is said in the third bullet, which is of course consistent with her position as discussed above, the Secretary of State has since said that she would now consider the Appellant's human rights claim without requiring a formal application, because he had not been informed, in accordance with her practice, of his right to vary his original application. That concession does not, however, affect the issues before us.

THE DECISIONS OF THE FTT AND THE UT

28. The Appellant appealed to the FTT against the Secretary of State's decision on the basis that it constituted a refusal of a human rights claim. The decision of FTTJ Kelly holding, "reluctantly", that he had no jurisdiction to entertain the appeal was promulgated on 21 June 2019. Without any disrespect to his careful reasoning, I need not summarise it here. I should, however, note that he drew attention to the fact that the issue was a controversial one among FTT Judges.

29. The Appellant's further appeal to the UT, with permission granted by the FTT, was heard by the President, Lane J, and UTJ Norton-Taylor, on 22 October 2019, and further submissions were made in writing in December 2019 and January 2020. The Tribunal's decision upholding the decision of the FTT was promulgated on 17 February 2020. Again without any disrespect, I will not set out its careful reasoning in any detail. It is sufficiently summarised for our purposes in the second two paragraphs of the (judicially-drafted) headnote, which read:

> "(2) The fact that C has made a human rights claim does not mean that any reaction to it by the Secretary of State, which is not an acceptance of C's claim, acknowledged by the grant of leave, is to be treated as the refusal of a human rights claim under section 82(1)(b) of the 2002 Act, generating a right of appeal to the First-tier Tribunal. The Secretary of State is legally entitled to adopt the position that she may require human rights claims to be made in a particular way, if they are to be substantively considered by her so that, if refused, there will be a right of appeal.
>
> (3) There is, accordingly, no justification for construing section 82(1)(b) otherwise than according to its ordinary meaning, which is that the Secretary of State decides to refuse a human rights claim if she:
>
> (i) engages with the claim; and
>
> (ii) reaches a decision that neither C nor anyone else who may be affected has a human right which is of such a kind as to entitle C to remain in the United Kingdom (or to be given entry to it) by reason of that right."

THE APPEAL TO THIS COURT

The Issue

30. Ground 1 of the grounds of appeal begins with the following summary:

> "A refusal of an application/claim which *is* or which *includes* a human rights claim *is* a refusal of a human rights claim for the purposes of s.82

> NIAA 2002 [emphases in original]. There is no prerequisite for the respondent to 'engage' with human rights submissions."

That is developed in some short further text which I need not reproduce. The ground turns on the application of section 82 (1) (b) in a case of the present kind. To paraphrase, the Appellant's case is that where an applicant applies for leave to remain on a specified ground and, in connection with that application, advances a human rights claim, then if the Secretary of State refuses the application she is necessarily also refusing the associated human rights claim: the applicant has made "an application/claim which *is* or … *includes* a human rights claim" and the refusal of that application/claim is a refusal of the claim, whatever the Secretary of State might say to the contrary. (The reference to there being no requirement that she "engage with" the human rights claim appears to be directed to the element in the UT's reasoning encapsulated in para. 3 (i) of its headnote, but I do not believe it adds anything to the argument: see para. 51 below.)

31. Ground 2 contends that it is "unlawful" for the Secretary of State to "'decline to consider'" a human rights claim raised as part of an application for leave to remain under the Rules. This needs a little unpacking. If ground 1 is correct, then it obviously follows that a statement by the Secretary of State that she has not considered the associated human rights claim is of no effect: whether she has considered it or not, she has necessarily refused it, which is all that matters. If ground 2 is intended to add anything, it must be as an alternative to ground 1, i.e. on the basis that the application and the claim are indeed conceptually distinct: the contention then is that it was unlawful, in the sense of a breach of her public law obligations, for the Secretary of State to decline to make the latter decision. In effect, therefore, ground 2 is a challenge to the "one-application-at-a-time" approach required by paragraphs 34 and 34BB of the Immigration Rules.

32. Ground 3 is that it was "unlawful to require two separate application forms – one for human rights and one for an application under the immigration rules". The gist of this point does not concern the two forms as such: it is clearly aimed at the Secretary of State's position that the decisions on the domestic violence application and on the human rights claim are to be treated as distinct and taken consecutively. The same analysis applies as in relation to ground 2: indeed arguably the two grounds are simply aspects of the same point. If ground 1 is correct, then it obviously follows that there is no need for a separate (and subsequent) application in relation to the human rights claim because that claim has already been decided. Again, therefore, if ground 3 is to add anything, it can only be that if (contrary to ground 1) the two decisions are distinct it was unlawful for the Secretary of State to require them to be taken consecutively.

33. In short, while ground 1 is concerned with whether there had in the circumstances of the present case been a decision to refuse a human rights claim within the meaning of section 82 (1) (b) of the 2002 Act, grounds 2 and 3 are concerned with a challenge to the lawfulness of the Rules in so far as they provide for the Secretary of State to deal separately with an application for leave to remain under section DVILR and with any associated human rights claim.

34. That analysis has an important consequence. These are not proceedings by way of judicial review. What the Appellant is seeking to pursue is a statutory appeal. The only issue is whether on the true construction of section 82 (1) (b) the FTT had jurisdiction to entertain such an appeal, which is the subject of ground 1. As Mr Dunlop submitted, it was not open to the FTT, and it is not open to us, to hold that the way in which the

Rules are framed is unlawful, which is the nature of the challenge under grounds 2 and 3. The UT made the same point at para. 84 of its judgment, observing that "any challenge to this system (or to any specific refusal to engage with a human rights claim) has to be by judicial review".

35. Ms Naik recognised this difficulty. At paras. 6-7 of her skeleton argument she invited the Court, if it held that there was no statutory right of appeal in the Appellant's case (i.e. if ground 1 failed), to "consider what proper remedy is available to the Appellant from this Court (including whether it should sit as a Divisional Court to consider the lawfulness of the Respondent's decision under challenge ...)".

36. Mr Dunlop's response, at para. 4 of his skeleton argument, was:

> "… the Court could only [reconstitute itself as a Divisional Court] if MY were to file a judicial review application (see *Patel v SSHD* [2015] EWCA Civ 175 at [58]). No such application has been filed. If it is filed, the SSHD will respond to it. Any such application would be a very long way out of time. Further, for the reasons given by Lewis LJ in his order of 25 March 2021, it would be unfair to the SSHD to introduce wider issues, to which the SSHD may need to respond, so close to the hearing."

(The reference to an order of Lewis LJ is to his refusal of a late application by the charity Rights of Women to intervene in the appeal.)

37. We indicated to the parties that we would defer consideration of Ms Naik's invitation until our decision on ground 1. She did, however, also submit that grounds 2 and 3 were "before the Court" and were necessary in order to determine ground 1. What I understood her to mean by that was that the principal matters on which she relied in support of grounds 2 and 3 were relevant also to the construction of section 82 (1) (b). I will return later to whether that is in fact the case.

38. It follows that the only issue which is before us at this stage is whether the Secretary of State's decision of 9 September 2018 constituted a decision to refuse a human rights claim within the meaning of section 82 (1) (b) of the 2002 Act, on which the Appellant's case is as summarised at para. 30 above.

Discussion and Conclusion

39. The starting-point of the discussion must be that under the statutory scheme as structured an application for leave to remain and a "human rights claim" are conceptually different kinds of thing, serving different purposes. The former is the mechanism by which the Secretary of State may be required to grant leave to remain. The latter is a claim that (in short) the claimant's removal would be contrary to their Convention rights, the refusal of which will generate a right of appeal. In principle an application for leave to remain may be made without the applicant making a human rights claim.

40. It is of course nevertheless the case that an application for leave to remain may constitute a human rights claim. That is obviously so where an applicant seeks leave outside the Rules (using form FLR (HRO)) on the basis that liability to removal, which is a corollary of the absence of leave, would be a breach of their Convention rights: such an application precisely fits the definition in section 113 (1). But we have also seen that

the Secretary of State accepts that some of the bases of application under the Rules inherently involve a claim that a removal would be a breach of article 8.

41. It does not, however, follow that every application for leave to remain necessarily involves a claim that removal would be a breach of the applicant's Convention rights. Whether it does so depends on the basis on which the application is made. An application based on the claim that in the absence of leave to remain there would be a disproportionate interference with the applicant's relationship with their partner or child inherently involves a claim that removal would interfere with their Convention rights. But an application based on the claim, for example, that the applicant satisfies the requirements for the grant of leave under the PBS does not do so: no doubt he or she may also claim that if leave to remain on that basis is refused their consequent liability to removal is a breach of their article 8 rights, but that is not necessarily inherent in the basis on which a PBS application is made (as to this example, see further paras. 58-60 below).

42. That analysis informs the question of whether it is possible for the Secretary of State, in a case where an applicant for leave to remain has made a human rights claim, to decide to refuse the application without also refusing the claim. Where the application necessarily involves a human rights claim, in the sense discussed above, a refusal of the one must necessarily entail a refusal of the other. But where that is not the case there is nothing illogical in the Secretary of State choosing to refuse the application but to defer a decision on the human rights claim. That choice may in principle be challengeable on public law grounds, but that is another matter.

43. Thus the dispositive question as regards ground 1 is whether in the circumstances of the present case the Appellant's application for leave to remain under section DVILR of Appendix FM necessarily involved a human rights claim, as defined in section 113 (1) of the 2002 Act. I repeat that definition for ease of reference:

> "a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 …".

It is important to bear in mind that the breach of Convention rights referred to consists in removing the claimant from the UK, or requiring them to leave. That point has recently been correctly recognised by the UT in *R (Mujahid) v First-tier Tribunal* [2020] UKUT 85 (IAC), a decision of the President, Lane J, which was upheld by this Court ([2021] EWCA Civ 4490); and in *Yerokun v Secretary of State for the Home Department* [2020] UKUT 377 (IAC), a decision of the Vice-President, Mr Ockelton.

44. In my view it is clear that the Appellant's application under section DVILR did not inherently involve a human rights claim within the meaning of section 113 (1), and accordingly the refusal of that application did not necessarily involve a refusal of the human rights claim which he in fact made. The essential element of entitlement under that section is, as provided by paragraph E-DVILR.1.3, that "the applicant's relationship with their partner broke down permanently as a result of domestic violence". Establishing that element is not the same as establishing that the applicant's removal would give rise to a breach of his or her Convention rights. Ms Naik submitted that every victim of domestic violence has suffered an impairment of their moral and

physical integrity and thus engages article 8. That may be so, but that is the result of the violence, not of their being removed from the UK.

45. The position is thus wholly different from the case under most of the other sections of Appendix FM, where it is the removal itself which would interfere with the relevant family relationship. That is why the Secretary of State has treated them differently in paragraph GEN 3.2 and in Appendix AR. Ms Naik submitted that the fact that section DVILR (and section BPILR) were included under Appendix FM showed that the claims must be of the same character, but it is not difficult to see why the Secretary of State regarded these grounds as falling under the general heading of "Family Life", and it does not follow that all grounds falling under that heading are human rights claims.

46. Of course the fact that the application and the human rights claim are distinct does not mean that the Secretary of State could not in principle have made a decision simultaneously to refuse both, albeit that that would have involved a departure from her one-application-at-a-time policy. But the terms of decision make it quite clear that she did not do so: rather, consistently with that policy, she refused the domestic violence application and said that she would deal with any human rights claim if a separate application were made. Ms Naik did not suggest otherwise: her case, as we have seen, is that the purported splitting of the decisions in that way was ineffective.

47. Ms Naik sought to support her case by reference to the consequences if the Secretary of State was entitled to take the approach that she does. If two applications are required the applicant will have to pay two fees (unless they are entitled to a waiver). Further, dealing with one application at a time carries the risk that applicants will have to wait longer for a final resolution of their entitlement to leave to remain. However, the most significant consequence arises from the fact that, if a person in the position of the Appellant is entitled to make an application raising their (*ex hypothesi*) separate human rights claim only after the refusal of their application based on section DVILR, he or she will be an overstayer for however long it takes for the Secretary of State to determine that application. That is because, although section 3C of the Immigration Act 1971 extends leave to remain pending the determination of an application for further leave (and of any administrative review or appeal), it does not, as Mr Dunlop accepted, apply to any subsequent application. Ms Naik points out that the position of overstayers is particularly vulnerable as a result of the intensification by the 2014 Act of what is commonly described as the "hostile environment" regime. We were referred to the summary of the components of that regime in para. 82 of the judgment of this Court in *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 which reads:

> "It is, in the first place, a criminal offence to be in the UK without leave to remain: see section 24 of the Immigration Act 1971. As regards practical consequences, a person without leave faces severe restrictions on their right to work (see section 24B of the 1971 Act), to rent accommodation (section 22 of the 2014 Act), to have a bank account (section 40 of the 2014 Act) and to hold a driving licence (sections 97, 97A and 99 of the Road Traffic Act 1988); nor will they be entitled to free treatment from the NHS (section 175 of the National Health Service Act 2006)."

48. As to that, I confess to some concern about a situation where someone who has (let it be assumed) pursued an application on a ground which is reasonable but ultimately

unsuccessful can only pursue a second application on a (let it be assumed) valid second ground at the cost of being subjected to the various restrictions itemised above – though I am not to be taken to be expressing any view about its lawfulness. However, I do not see how that has any bearing on the issue before us. For the reasons given, I have no doubt that the Secretary of State has not decided to refuse the Appellant's human rights claim. If that produces unfair results of the kind relied on by Ms Naik that is a consequence of the application of her one-application-at-a-time policy: it cannot be deployed to justify treating her as having made a decision which she plainly has not made. For the reasons given at paras. 31-38 above, and subject to Ms Naik's invitation referred to at para. 35, it is not open to us in this Court to consider a challenge to the lawfulness of that policy, or its application in this case.

49. Ms Naik submitted that the consequences identified in para. 47 above were liable in themselves to give rise to a breach of the Convention rights of persons affected by them, with the result that the strong interpretative requirement under section 3 of the Human Rights Act 1998 was engaged. No such case was advanced in the FTT or the UT, and we should not entertain it here. Quite apart from anything else, there are no factual findings which would enable us to conclude that the Convention rights of the Appellant have been disproportionately interfered with, whether as a result of his being subject to the hostile environment or otherwise. But even if there were a basis for such a case I do not see how the foregoing analysis could be undermined by any process of interpretation of section 82 (1) (b).

50. I would accordingly dismiss ground 1. For the reasons given I do not believe that it is right to describe the Secretary of State as having refused "an application/claim" or that this was a case where the application for leave to remain "is or ... includes" a human rights claim.

51. I should say that the question, raised by the second sentence of ground 1, whether it was necessary for the Secretary of State to "engage with" the Appellant's human rights claim is for these purposes a red herring. If his case were otherwise well-founded, the decision to refuse the application would necessarily be a decision to refuse the human rights claim even if she had purported not to have considered it as a separate claim.

52. Subject (perhaps) to the point made in the previous paragraph, I believe that my reasoning is to substantially the same effect as that of the UT, although its thorough decision covered some issues (such as what constitutes a valid human rights claim) which I have not found it necessary to address.

Two Authorities

53. Although that is the basis on which I would decide the appeal, there are two authorities relied on by Ms Naik to which I should refer.

AT

54. The first is the decision of Kerr J in *R (AT) v Secretary of State for the Home Department* [2017] EWHC 2589 (Admin) (in which, as it happens, Ms Mair appeared for the claimant). In that case the claimant applied for leave to remain under Appendix FM on the basis that she was a victim of domestic violence, but her application was refused. She does not appear to have sought to appeal, regarding herself as precluded from doing so by the provisions of Appendix AR which I have quoted at para. 18 above. She brought proceedings for judicial review, in which her primary ground was a challenge

to those provisions. A central plank of Ms Mair's argument was, as Kerr J records at para. 51 of his judgment, "that all domestic violence claims are, inherently and necessarily, also human rights claims within section 113 of the 2002 Act". Counsel for the Secretary of State disagreed, contending that "while there is an overlap, many, indeed most, domestic violence claims are not human rights claims within the statutory definition". After a full discussion Kerr J rejected Ms Mair's submission, concluding that while some applications based on domestic violence would be human rights claims others would not be: see para. 65. However, he accepted that paragraph AR 3.2 (c) (viii) was wrongly drafted in as much as it purported to "remove the right of appeal for domestic violence claims that are also human rights claims", which would be contrary to section 82 (1) (b) of the 2002 Act: see para. 67. He held that it was unnecessary to quash head (viii) because it was possible to construe it as if the relevant words read "but not where an application *(not being a human rights claim)* is made under … section DVILR …": see para 69. That, as he put it at para. 68, gave effect to the exclusion of "domestic violence claims that are not also human rights claims, while recognising that [head (viii)] cannot be read as overriding the provision in section 82 which confers a right of appeal in a domestic violence case that is also a human rights claim".

55. Pausing there, Kerr J's rejection of the submission that "all domestic violence claims are, inherently and necessarily, also human rights claims within section 113 of the 2002 Act" is in line with my own reasoning. I also agree with him that, where a victim of domestic violence makes both an application under section DVILR and a human rights claim arising out of the same factual background and the Secretary of State refuses both, the applicant enjoys a right of appeal against the decision to refuse the latter. But his detailed analysis is not wholly consistent with my own. Although, he rejected, as I have, the submission that "all domestic violence claims are, inherently and necessarily, also human rights claims", he appears to accept that there will be some "that are also human rights claims". The example that he gives (at para. 60) is "a domestic violence claim where returning the claimant to a third country would expose her to a serious risk, for example, of 'honour killing' or torture at the hands of non-state agents", observing (para. 61) that "manifestly, such a domestic violence claim would be a human rights claim" because the claimant would be saying that to return her to face that risk would be incompatible with her rights under articles 2 and/or 3. That is essentially the same as (part of) the basis of the Appellant's human rights claim here see para. 22 (b) above); but I have held that that does not mean that his DVILR application *was* a human rights claim. To that extent I must respectfully disagree with Kerr J. However, I note that the case that he was addressing was that the effect of paragraph AR 3.2 (c) (viii) was to preclude a right of appeal altogether. For that purpose it made no difference whether the human rights claim in question was inherent in the DVILR application or was a distinct application made at the same time, and I do not think that he can be taken to have been addressing that question.

56. Those were not in fact the passages on which Ms Naik relied: as appears, they arguably assist Mr Dunlop as much as her. Instead, she referred us to an earlier part of the judgment, where Kerr J was setting out the relevant law. After referring to the prescribed forms he noted, at para. 47 of his judgment, that counsel for the Secretary of State had suggested "that a person wishing to apply for indefinite leave to remain in a domestic violence case which is also a human rights claim should file two separate applications, which means paying two separate fees, one using SET(DV) and the other using form FLR(FP)". He continued:

> "48. Although the point does not arise directly for decision in this case and was not fully argued, I do not agree that to require domestic violence victims to make two separate applications in a case said by the victim to be a human rights claim, is necessary, fair or lawful. Any such requirement would almost certainly discriminate indirectly against women who bear the brunt of most domestic violence. Why should they pay two fees when others pay only one?
>
> 49. It is obvious that in domestic violence claims the form to be used should include an option to assert that the claim is also a human rights claim. I hope the forms will be revised accordingly, as soon as the Secretary of State's busy schedule permits. Meanwhile, I hope she will be advised to treat a single application, whether on form SET(DV) or on form FLR(FP), as a valid application, even if it purports to be both a domestic violence claim and a human rights claim."

Ms Naik acknowledges that those are only dicta, but she points out that they are trenchantly expressed and submits that they are supportive of her case that it is wrong that an applicant under section DVILR who has an associated human rights claim should have to make two distinct applications.

57. I find it easy to understand why Kerr J made the observations that he did, which at first sight seems like common sense. But, as he says, the question was not fully argued before him. If it had been, the Secretary of State would no doubt have explained that the requirement for two forms was a reflection of her one-application-at-a-time policy and the distinction between applications which are and are not "human rights based". If the point had required decision, he would have had to decide whether the one-application-at-a-time policy could be challenged on public law grounds. But that was not the issue before him any more than it is before us.

Balajigari

58. Ms Naik also referred us to a passage in the judgment of the Court (delivered by me) in *Balajigari*, to which I have already referred in a different context. At paras. 95-106 we discussed the procedural routes by which an applicant for ILR whose application under the PBS had been unfairly refused might raise an appealable human rights claim. As we made clear at para. 18, that entire section of the judgment was obiter and was intended simply to raise possibilities for the future handling of such cases; and, as we also made clear, we were not fully addressed on this aspect. However, at para. 99 we observed that the relevant application form (which would appear to be form SET (O), though that is not specified) contained a box which allowed applicants to raise "other matters" and we said that it appeared that an applicant would be entitled in principle to include a human rights claim in that box or in any event in their covering letter, in which case "refusal of the application will constitute a refusal of that claim and can be appealed as such".

59. It will be clear from what I have said earlier in this judgment that the reference in para. 99 to the refusal of the application constituting a refusal of the human rights claim goes too far. It would certainly not necessarily constitute such a refusal, since, as already noted, an application under the PBS does not inherently depend on the applicant

demonstrating that removal would breach his or her Convention rights: the application and the claim are distinct. It would only do so if the Secretary of State made it clear, either explicitly or by implication, that she was refusing both: that would be contrary to the one-application-at-a-time policy (to which we were not referred), but she could of course depart from that policy (in the applicant's favour) if she chose. To the extent that the passage in question is incomplete or inaccurate it is plainly both obiter and not based on full submissions and it cannot be relied on by the Appellant.

60. In *Mujahid*, to which I have already referred, the President had to grapple with this part of the decision in *Balajigari*. I would commend him for taking a properly analytical approach to what was and was not decided in the passages in question, which need to be read subject to the caveats noted at para. 58 above.

DISPOSAL

61. I would dismiss this appeal. The Secretary of State made no decision to refuse the Appellant's human rights claim, and the FTT accordingly had no jurisdiction to entertain an appeal. As the UT observed, any challenge to the Secretary of State's one-application-at-a-time policy, either generally or as applied in particular circumstances such as those of the present case, could only be advanced by way of judicial review. We will consider separately whether to accede to Ms Naik's invitation that we reconstitute ourselves as a Divisional Court in order to determine such an application

Baker LJ:

62. I agree.

Carr LJ:

63. I also agree.