JR-2023-LON-001260

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

In the matter of an application for Judicial Review

The King on the application of
Fuk Chuen Ma

Applicant

and

Entry Clearance Officer

Respondent

ORDER

BEFORE Upper Tribunal Judge Stephen Smith

HAVING considered all documents lodged and having heard Mr A. Berry, of counsel, instructed by Freemans Law, for the applicant and Mr T. Yarrow of counsel, instructed by GLD, for the respondent at a hearing on 3 December 2024

IT IS ORDERED THAT:

(1) The application for judicial review is refused for the reasons given in the *extempore* judgment delivered at the hearing, contained in the approved transcript;

(2) The applicant shall pay the respondent's reasonable and proportionate costs, to be assessed on the standard basis if not agreed;

(3) Permission to appeal is refused for the reasons given at the oral hearing, contained in the approved transcript.

Signed: Stephen H Smith

Upper Tribunal Judge Stephen Smith

Dated: **10 December 2024**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 12/12/2024

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

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

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

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

Case No: JR-2023-LON-001260

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

3 December 2024

Before:

UPPER TRIBUNAL JUDGE STEPHEN SMITH

- -

Between:

THE KING
on the application of
Fuk Chuen Ma

Applicant

- and -

Secretary of State for the Home Department

Respondent

- -

Mr A. Berry
(Counsel, instructed by Freemans Law), for the applicant

Mr T. Yarrow
(Counsel, instructed by the Government Legal Department) for the respondent

Hearing date: 3 December 2024

- -

J U D G M E N T

- -

Judge Stephen Smith:

1. The central issue in these proceedings is whether it was unlawful under section 6 of the Human Rights Act 1998 ("the Human Rights Act") for the Entry Clearance Officer to decline to consider human rights-based representations in the course of considering an application for entry clearance under Appendix Hong Kong British National Overseas ("Appendix

HK") of the Immigration Rules. The application for entry clearance was made by the applicant on 20 August 2021.

Factual background

2. The above question arises in the context of the applicant's challenge to a decision of the Entry Clearance Officer dated 12 January 2023, upheld on Administrative Review on 14 March 2023, for leave as a British National (Overseas) citizen ("BN(O)"). The application is said to have made family life-based representations to the Entry Clearance Officer. Neither party has provided me with a copy of the application as originally submitted, but it was common ground that the extracts of the application, and subsequent submissions, pertaining to the applicant's claimed family life as quoted by Mr Berry in his helpful skeleton argument dated 22 November 2024, were accurate. Accordingly it is to those references that regard should be had when considering the terms of this judgment.

3. In the course of post-application, pre-decision submissions to the Entry Clearance Officer, the applicant (and, later, his son) said that the application under Appendix HK was submitted as one of seven linked applications made by the applicant's wider family unit consisting of his wife, son, daughter-in-law and grandchildren. The other six applications were successful and those members of the applicant's family have since been granted entry clearance and are now residing in the United Kingdom. The applicant remains in Hong Kong, living alone.

4. The additional representations made to the Entry Clearance Officer while the application was under consideration were as follows. On 14 March 2022, the applicant said,

> "Please help to consider my BN(O) visa application, so that I could keep living with my family in UK, a country of freedom. Thank you very much for your attention. If any further information would be required, please let me be informed.".

5. On 28 June 2022, applicant's son also wrote to the Entry Clearance Officer stating:

> "We are a family of seven and eager to move to the UK for a new life all together, other six family members have already moved in UK with approved BN(O) visa ..."

6. As part of the entry clearance application the applicant declared that he had a conviction in Hong Kong for an offence equivalent to causing death by dangerous driving. In October 2009 he had been sentenced to nine weeks' imprisonment, disqualified for driving for two years and was required to undertake a road safety course.

7. The offence involved an elderly gentleman stepping out into the path of the applicant's car at a junction. He was hit and sadly sustained fatal injuries. The applicant says that he deeply regrets what he considers to have been a terrible accident. He says that his continued culpability arising from the circumstances of his conviction however is minimal. Prior to that offence he claims to have been a man of good character. He has not committed any

other offences since. He seeks to rely on an expert's report to demonstrate that the sentence was comparatively low by Hong Kong standards for this offence.

8. The Entry Clearance Officer refused the application under the suitability provisions of the Immigration Rules on the basis that the applicant had a conviction for an offence that "caused serious harm". That must have been a reference to paragraph HK.2.1 of Appendix HK which provides that an applicant must not fall for refusal under Part 9 of the Immigration Rules.

9. Paragraph 9.4.1.(c) of the Immigration Rules provides a mandatory ground for refusal where an applicant has, "committed a criminal offence… which caused serious harm".

10. The refusal decision of 12 January 2023 did not address the family life issues raised by the applicant. In the application for Administrative Review the applicant contended that the circumstances of his conviction were not such as to trigger the relevant suitability provisions, and that the Secretary of State had made a number of public law errors. Those criticisms were the subject of grounds 1 and 2 for judicial review, permission for which was refused by Upper Tribunal Judge Norton-Taylor on the papers and by Upper Tribunal Judge Rimington at a renewal hearing. It is not necessary for me to address those grounds in further depth.

11. The grounds for Administrative Review to the Secretary of State also contended that the decision had failed to take into account the applicant's family life for the purposes of Article 8 ECHR. As to that, the Administrative review said as follows, at page 84 of the bundle:

> "You have referred to your family/private life and the detrimental effect a separation would have on you and your family and how this would impact you all if you were permanently separated from each other. You outline the political unrest in Hong Kong and the UK commitment to the people of Hong Kong with the introduction of the Hong Kong British National Overseas migration route. You claim your family too wishes to make their home in the UK after becoming unsettled in Hong Kong due to the political situation there. In this regard, you claim that a refusal of entry leave [sic] is a breach of Article 8 ECHR and in addition the case worker has failed to consider your human rights under s 6(1) of the Human Rights Act 1998. **However please note, BN(O) visa applications do not consider Family/Private Life, Humanitarian, Protection, Human Rights Article 8 issues. Should you wish to have any of these fully considered, it is open for you to apply using the correct application form along with the appropriate fee**".

Ground 3: Article 8 of the European Convention on Human Rights

12. The sole ground for review on which the applicant enjoys permission pursuant to the order of Judge Norton-Taylor is that the decisions of the Entry Clearance Officer breached Article 8 of the European Convention on Human Rights.

13. The preamble to ground 3 as pleaded relies on (1) the support in ECHR jurisprudence for relying on Article 8 when applying from outside the territory of an ECHR contracting party; (2) on the rationale behind the establishment of the BN(O) visa route, namely to support British citizens prejudiced by the political situation in Hong Kong such that they need to come to the United Kingdom; and (3) the generous and 'light touch' route (as Mr Berry put it) to entry and residence available under the British National (Overseas) route.

14. At its core, ground 3 contends that by making a visa application alongside other family members, and by raising the need for family unity in the UK as part of doing so, the applicant made a "*human rights application for leave*", and that the Entry Clearance Officer erred by refusing to consider it. Mr Berry further submits that had the Entry Clearance Officer adequately addressed his or her mind to that issue, the only outcome would have been for the application to have been granted. The relief sought in these proceedings is for an order quashing the decision of the Entry Clearance Officer and for an order remitting consideration of it back to the decision maker.

Legal framework

15. Section 3 of the Immigration Act 1971 ("the 1971 Act") provides that the Secretary of State may regulate the entry into and stay in the United Kingdom of persons subject to immigration control.

16. Section 50 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") provides that the Immigration Rules made under section 3 of the 1971 Act may require a specified procedure to be followed in making or pursuing an application or claim and that such Rules may in particular require the use of a specified form and the submission of specified information or documents.

17. Section 113(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") defines "human rights claims" in the following terms:

> "In this Part…
>
> > 'human rights claim' means 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.".

18. Paragraphs 24 to 30C of the Immigration Rules regulate in general terms how applications for entry clearance are to be made and decided.

19. Paragraph HK.1.1. of Appendix HK states, "A person applying for entry clearance as a BN(O) Status Holder must apply online on the gov.uk website on the specified form".

Submissions

20. I am grateful to both advocates for their clear and helpful submissions and their clear and concise skeleton arguments. I will only summarise the broad thrust of the submissions here, and will draw on more detailed aspects of them where relevant in the course of my analysis, below.

21. In summary, Mr Berry submitted as follows. First, the legislation surrounding British National (Overseas) citizens creates a new form of British nationality. The individuals who enjoy this status are not 'ordinary' third country nationals. They enjoy a form of British nationality which, albeit falling short of full British citizenship by those who enjoy the right of abode in the United Kingdom, nevertheless meant that the Secretary of State had made provision in almost uniquely generous terms under the Immigration Rules to provide for a 'benign homecoming route' for such persons.

22. Secondly, Mr Berry emphasised that under section 50 of the 2006 Act the Secretary of State had the power to prescribe that a specific form should be used by those applying under the rules. Provision could have been made so to prescribe applications for entry clearance under Appendix HK but that that had not taken place. Paragraphs 24 to 30C of the Immigration Rules are distinct from the paragraphs which address the requirements to which those making in country applications are subject, including paragraphs 34 and 34BB. Whereas paragraph 34BB requires the relevant specified form to be used for in-country applications, there is no corresponding provision for out of country applications, he submits. That in turn has a range of consequences, in particular that (1) there was no required or prescribed form for an out of country human rights claim to be advanced by an applicant in the position of this applicant, and (2) the 'one application at a time' policy which is prescribed by paragraph 34BB of the Rules does not apply to out of country applications. Other routes that would, in principle, be available under the Immigration Rules for a person in an analogous situation to this applicant would not be available to him. Appendix FM would be of no assistance. Under those provisions the general grounds for refusal apply in any event and, moreover, the applicant's wife, who is in this country pursuant to limited leave to remain issued under Appendix HK, is not able to sponsor his application for she does not have settled status and is not a British citizen.

23. Against that background, Mr Berry submitted that not only was it unlawful for the Secretary of State to decline to engage with the applicant's human rights based submissions, but that this Tribunal is also subject to its own duties under section 6 of the Human Rights Act. That provision compelled the Secretary of State expressly to address the human rights based submissions made by the applicant, and it compels this Tribunal to remedy the defect in the Secretary of State's approach by assessing, for itself, the human rights issue (although Mr Berry invited me to remedy the defect by simply quashing the decision and remitting the matter to the Secretary of State). Article 8 was plainly engaged by the circumstances of the applicant's application. The Rules pursuant to which he applied were made not simply for the purposes of family *reunification* but, as he put it, for the purposes of family *relocation*. Read as a whole, the uniquely generous scheme under Appendix HK is aimed at making provision for entire family units to travel in one single unit to the United Kingdom in order to continue the family life that they enjoyed in Hong Kong previously. That being so,

Article 8(1) is engaged, and Article 8(2) of the Convention would be breached if the applicant is not admitted to the United Kingdom. Although, in principle this Tribunal would enjoy the ability to retake the decision for itself, all the applicant sought was for the decision to be quashed and for it to be remitted to the Entry Clearance Officer in order to be retaken compatibly with section 6 of the Human Rights Act.

24. For the Entry Clearance Officer, Mr Yarrow's skeleton argument made the following submissions. First, the Entry Clearance Officer took a procedural decision not to consider Article 8 at this juncture. That was a legitimate approach for her to adopt. Article 8 permits national authorities to require Article 8 considerations to be made in an application submitted in a particular form and manner. This applicant, submitted Mr Yarrow, has always enjoyed the ability to make such a claim which, if refused, could attract a right of appeal under section 82(1)(b) of the 2002 Act. Secondly, and in any event, there was no substantive infringement of Article 8 of the ECHR by this decision. The representations made by the applicant were, at their highest, in muted terms. There were no details pertaining to the claimed Article 8 family life the applicant said that he enjoyed with his UK-based family. He had referred to being married but had provided few additional details. Thirdly, even if the Entry Clearance Officer had unlawfully failed to address Article 8 in the terms that she should have done, the Article 8 claim as pleaded by the applicant was, on any view, bound to fail. That being so, adopting the approach at section 31(2)(a) of the Senior Courts Act 1981, this Tribunal should refuse relief if the conduct complained of would not have resulted in the decision taken being substantially different. The applicant clearly did not meet the suitability provisions by virtue of his conviction for causing the death in a mechanically propelled vehicle. The Article 8 claim that supported the application, to the extent it amounted to such a claim, was assertion-based and lacked weight. There was no lawful basis on which the claim could have succeeded.

Ground (3): no breach of Article 8

25. The essential issue for my consideration is to determine what the requirements of Article 8, whether procedural or substantive, were in the situation in these proceedings.

26. Put another way, the issue which lies at the heart of my analysis is whether Article 8 of the Convention obliged the Secretary of State to engage in substantive consideration of the applicant's family life based submissions as they eventually evolved to be (see the correspondence dated 21 March 2022 and 28 June 2022).

Decision consistent with the Strasbourg authorities

27. The starting point for my analysis is the Convention jurisprudence itself. Mr Berry accepted that there were no Strasbourg authorities addressing this issue in express terms. He submitted, however, that the requirements of section 6 of the Human Rights Act were clear: all public authorities are to act compatibly with the Convention; acting compatibly with the Convention meant considering the human rights representations that had been raised. Very fairly, Mr Berry also accepted that the procedural approach to be taken

by the High Contracting Parties to the Convention to such procedural issues is likely to fall within the margin of appreciation enjoyed by national authorities for the effective and fair determination of Convention rights.

28. On one view, that is a complete answer to the applicant's case. There is no Strasbourg authority supporting it. More specifically, there is no Strasbourg authority which demonstrates that the Secretary of State adopted an unlawful approach. Moreover, if the Secretary of State's approach falls within the margin of appreciation enjoyed by national authorities, it follows that no unlawfulness could possibly result.

29. However, I accept that, in principle, the Convention is not limited in its scope to those scenarios that have previously been determined by the Strasbourg Court. The approach I should adopt in these circumstances, therefore, is to look both to the requirements of the Convention itself and to the approach of the domestic courts in situations analogous to those arising in these proceedings, even if they are not entirely on point factually.

30. As to the requirements of the Convention itself, Article 8 imposes both procedural and substantive requirements. The procedural requirements entail an obligation on national authorities to engage with the requirements of the Convention and to ensure that the processes and framework within which Convention rights may be accessed by those who enjoy rights pursuant to it do not deprive the Convention of its effect. The substantive obligations under Article 8 are to determine, first, whether the Convention is engaged for the purposes of Article 8(1), and, secondly, to determine whether any derogations from the requirements of Article 8(1) are permissible within the terms of Article 8(2).

31. Returning to the facts of these proceedings, Mr Berry submitted that there is no other route by which someone in the position of this applicant may make human rights based representations in support of being granted entry clearance. He submitted that the authorities to which I was taken, in particular *MY (Pakistan) v Secretary of State for the Home Department* [2021] EWCA Civ 1500, sat within the broader context of immigration control governing in-country applications. Such applications could be submitted using the FLR(HRO) form. That form provides an in-country remedy that is simply inaccessible to out of country applicants. That being so, Mr Berry submitted that the only appropriate forum for this applicant to make a "*human rights application for leave*" (as it was put in the applicant's skeleton argument, see, e.g., para. 39) was in the course of making an BN(O) application for entry clearance under Appendix HK. The applicant made a human rights based application in that forum and, on Mr Berry's submission, the Entry Clearance Officer was therefore required to consider those representations.

32. Pausing here, I have emphasised Mr Berry's use of the term "a human rights application for leave" intentionally since Mr Berry expressly disavowed the concept of the appellant having made a "human rights claim" as defined in section 113(1) of the 2002 Act. In his submission, that is a term that was apt to mislead in this context. It is a remedies-focused concept. It features in the appellate regime presently contained in Part 5 of the 2002 Act. The authorities pertaining to the refusal of a "human rights claim", including *MY (Pakistan)*, were focused on jurisdictional questions

relating to whether the refusal of the human rights claim generated a right of appeal to the First-tier Tribunal under section 82(1)(b) of the 2002 Act. The statutory definition of "human rights claim" sheds no light on what section 6 of the Human Rights Act required of the Secretary of State in these circumstances, Mr Berry submitted. The applicant had not made a formal human rights claim; rather, he had raised human rights issues which the Secretary of State had unlawfully failed to address.

33. I respectfully reject Mr Berry's attempt to distinguish the concept of a "human rights claim" from another form of human rights-based application for leave in the circumstances of these proceedings. Contrary to his submissions, a human rights claim is not solely a remedies-focused concept. The ability of an individual to make a human rights claim, and the consequential statutory definition, of the term is not solely focused on providing effective remedies following the refusal of such claim. That submission is based on the footing that all the Secretary of State or the Entry Clearance Officer does in response to human rights claims is to refuse them. That is plainly not the case. I have certainly been taken to no evidence to that effect, and Mr Berry accepted that human rights claims can be and are successful.

34. The effect of the definition of a "human rights claim" in section 113(1) is that, where an applicant contends that his non-admission to the United Kingdom would be unlawful under section 6 of the Human Rights Act, a human rights claim has been made (provided the claim has been made in the correct form and manner). As a matter of substance, that is precisely what the applicant contends in these proceedings, namely that (1) he made human rights-based representations to the Secretary of State; (2) those representations were advanced in support of his application for admission to the United Kingdom; and (3) that it would be a breach of section 6 of the Human Rights Act for him not to be granted entry to the United Kingdom in light of those representations. The substantive content of the applicant's "human rights based application for leave" was, therefore, on all-fours with the definition of a human rights claim.

35. The fact that the refusal of such a claim, if properly made, gives rise to a right of appeal to the First-tier Tribunal under section 84(1) of the 2002 Act is nothing to the point. The availability of an onward appeal is the *consequence* of the refusal of a human rights claim, not a factor that affects its *definition* and *scope* in the first place.

36. I also consider that Mr Berry's submission disavowing the concept of the applicant having made a human rights claim are contradictory. The premise of Mr Berry's submission is that the applicant has not made a human rights claim and does not seek to pursue a remedy before the First-tier Tribunal. Rather he says that the appropriate remedy is by means of an application for judicial review. Yet if the applicant *has* made a human rights claim (as defined in section 113(1)) and it is refused then, by definition, the applicant enjoys an alternative remedy before the First-tier Tribunal, and judicial review proceedings in this Tribunal would be inapposite. If the application was *not* a human rights claim, then the result for which Mr Berry contends is that there must be some lesser category of human rights-based representations that the applicant made to the Entry Clearance Officer that did not amount to a claim that not to admit him would breach the UK's

Convention obligations. If a human rights-based claim is not a claim concerning prospective removal or non-admission, it is not only *not* a human rights claim as defined, but it is also difficult to see how such a claim could have any purchase under Article 8 in relation to an application for entry clearance or leave to remain.

37. Contrary to the submissions of Mr Berry, that the authorities pertaining to human rights claims primarily concern the jurisdictional impact of such a claim being refused is irrelevant. That is a matter that is ancillary to the definition of the term. The existence of appellate remedies to rectify a breach of the Convention following a wrongly refused human rights claim cannot affect the character of a claim that an applicant has made or seeks to make in the first place.

38. It is important to note that the substantive content of human rights representations is not the sole factor in determining whether those representations amount to a "human rights claim" as defined. There is a form and manner for such claims to be made. That is the submission of Mr Yarrow and I accept it. The Secretary of State's position is that she is entitled, compatibly with Article 8 of the Convention, to expect a human rights claim to be made on a standalone basis, rather than as part of a non-human rights informed immigration application. The exception to that would be as explained in *MY (Pakistan),* where an application for leave to remain is made under the provisions of the Rules that have been made expressly to cater for the United Kingdom's Article 8 and other human rights obligations, such as under Appendix FM. In those circumstances, the making of such an application under the Rules is, by definition, a human rights claim; the making of one amounts to the making of another. In those limited circumstances a parallel application to the Secretary of State is permitted and envisaged by the Rules.

39. Mr Berry's answer to this concern raised by the Secretary of State is to point to the context of Appendix HK and the BN(O) visa regime. As I have outlined above, he submitted that this is a benign regime to allow British nationals to relocate to the United Kingdom. It is almost uniquely favourable in comparison to other provisions of the Rules. Appendix HK is part of a regime that was adopted as part of His Majesty's government's response to China's national security law and its breach of UK-China treaty arrangements relating to Hong Kong. Mr Berry took me to a House of Commons library publication and submitted that British nationals were at risk of an oppressive regime in breach of international law. The UK government stepped in to assist its nationals in those circumstances, and it is against that background that provision has been made for the relocation of entire family units to the United Kingdom pursuant to Appendix HK.

40. While Mr Yarrow did not take issue with Mr Berry's characterisation of the broader policy context within which Appendix HK sits, he submitted that those factors did not bring Appendix HK within a human rights paradigm. I agree. Appendix HK was adopted for reasons of diplomatic, foreign and domestic policy. It may be motivated to assist a certain class of British nationals (in the broad, BN(O) sense) avoid abuses of humanitarian norms by a foreign power, but that does not mean that Appendix HK is a regime informed by considerations of Article 8 private and family life. While many of the abuses of power by the Hong Kong authorities may well engage

considerations that, if they were taking place within the territory of the United Kingdom, would (at least) violate Article 8 private life rights, in the present context the relevant conduct has taken place well outside the UK's territorial jurisdiction under the ECHR. Moreover, while Appendix HK includes generous provision for entire households to relocate to the United Kingdom, that does not mean that it is any more of an Article 8 family life-informed regime than any other provision of the Rules that allows for dependants to be admitted.

41. By analogy, in *MY (Pakistan)* the issue was whether the provisions of the Immigration Rules adopted to provide those who are victims of domestic abuse and violence with the entitlement to indefinite leave to remain was not held to be a regime that was established in order to give effect to any human rights obligations. It was a regime established pursuant to the domestic policy objectives of the Secretary of State in relation to those needing protection from domestic abuse. Many of the considerations at play in those circumstances engage the private life rights of individuals concerned. Similarly, in *MY (Pakistan)*, while Underhill LJ agreed with the submission that every victim of domestic violence has suffered and impairment of their moral and physical integrity thus engaging Article 8 (see para. 44), he observed that that was as a result of the violence they had been subjected to, not their proposed removal. That certain provisions of the Immigration Rules have been adopted to reflect human rights-based policy considerations cannot, without more, render the refusal of such an application the "refusal of a human rights claim".

42. It follows that I reject the submission that Appendix HK is a regime that has been established to give effect to the UK's ECHR obligations. Applications made pursuant to Appendix HK do not intrinsically and without more amount to a human rights claim in the way that an application under Appendix FM would.

43. It follows that the applicant in these proceedings sought to make human rights-based representations under the auspices of a regime that had not been established to enable such representations to be made.

44. That leads to the next question: whether the Secretary of State was lawfully entitled to respond to the evolving human rights representations advanced by the applicant in the way that she did? Put another way, was it lawful for the Administrative Review to state that it was open to the applicant to make a human rights claim using the appropriate route?

45. Mr Berry's position in relation to this issue is that there was no other route that was available. There is, I am told, no form for BN(O) applicants under Appendix HK to make broader human rights claims in support of an application for entry clearance outside the Rules.

46. I accept that, in principle, if the only way for a person in the position of this applicant to make human rights based representations in support of an application for entry clearance was within the confines of a BN(O) application under Appendix HK, then it would not now be open to the Secretary of State to point to another route as being the appropriate vehicle by which to make such a claim.

47. However, I accept Mr Yarrow's submission that there are answers to this objection.

48. First, in the case of *Ahsan v Secretary of State for the Home Department* [2018] Imm AR 531 the Secretary of State conceded that:

> "It is 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 [Counsel for the Secretary of State] acknowledged that that was not a 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 unless it had been considered".

49. While that quote was in the context of an in-country application, I see no in principle reason why the same approach should not apply by analogy in relation to out of country entry clearance applications. After all, section 113(1) defines a human rights claim by reference either to the human rights implications arising from a requirement to leave the United Kingdom or from a decision not to admit an individual to the United Kingdom.

50. Secondly, and in any event, there was nothing to prevent the applicant from making an application under Appendix FM. His wife has been granted entry to the United Kingdom. Although she does not have settled status, Appendix FM contains the closest provisions under the Immigration Rules that apply to the present situation, and would therefore provide the most appropriate vehicle for an out of country human rights claim. As set out above, the rules under Appendix FM have been made specifically to cater for the United Kingdom's Article 8 and related obligations. For the purposes of making an out of country human rights claim, it does not matter that the applicant does not meet the eligibility criteria on account of his wife having limited rather than indefinite leave to remain. There is sufficient flexibility within Appendix FM paragraph GEN.3.2. to cater for such situations where the requirements of the Convention are such that it is necessary to do so. GEN.3.2. states as follows:

> "(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.
>
> (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application".

Accordingly that paragraph is designed to cater specifically for situations such as the present, namely where (1) an applicant seeks to rely on broader human rights based considerations; (2) in circumstances where the Rules are incapable of being met, but (3) where there are broader circumstances pursuant to which the applicant contends that entry clearance should be granted pursuant to Article 8 in any event. Accordingly the availability of Appendix FM addresses Mr Berry's point that there was no other route available to the applicant; there was.

51. The next question is whether the Entry Clearance Officer was lawfully entitled, for the purposes of section 6 of the Human Rights Act, to require the applicant to make a human rights claim by the appropriate route. This issue returns to the question I posited at the outset of this judgment: does the Convention entitle a person in the applicant's position to eschew the Article 8 informed Rules and the broader human rights claims process in favour of making human rights representations within the auspices of a non-Article 8 informed application? In my judgment the Secretary of State and the Entry Clearance Officer are, in principle, entitled to expect applicants seeking to rely on human rights based representations to do so under the express auspices of making a human rights claim.

52. It is against that background that the authorities concerning what amounts to a human rights claim are relevant. They identify the threshold which a claim must pass in order to amount to a human rights claim, the consequences of such a claim being made and, if relevant, refused. I accept that the authorities to which I have been referred are all in-country authorities (with the exception of *Entry Clearance Officer, Sierra Leone v Kopoi* [2017] EWCA Civ 1511). I accept Mr Yarrow's submission that although the facts of the in-country cases are not entirely on point with those in these proceedings, the central propositions which may be ascertained from those authorities are nevertheless of relevance.

53. The first authority to which I turn is *R (on the application of Shrestha) v Secretary of State for the Home Department* [2018] EWCA Civ 2810. The issue in *Shrestha* was whether, where human rights grounds are raised in response to a notice issued under section 120 of the 2002 Act, the Secretary of State had an obligation to determine those human rights based grounds as a human rights claim. The answer given by the Court of Appeal was no. Para. 35 of the judgment of Lord Justice Hickinbottom put it in these terms:

> "If an applicant for leave to remain raises a human rights ground for the first time after the refusal of his application on other grounds and in response to a request by the Secretary of State under section 120 of the 2002 Act, the Secretary of State has no obligation to treat and determine that response as an application for leave to remain on human rights grounds in the absence of the required form of application and payment. Indeed, I do not consider the contrary to be arguable".

54. While those proceedings concerned an in-country notice under section 120 of the 2002 Act, the underlying point is apposite. The Secretary of State may legitimately require human rights based claims to be advanced using the correct prescribed route. Simply mentioning human rights based

representations to the Secretary of State, in circumstances where those representations have not been advanced under the auspices of a human rights claim, and are not made in the form and manner required by the Secretary of State, does not amount to a human rights claim being made and does not therefore require a response of the Secretary of State to the substance of the claim as purportedly made.

55. Similarly, in *R (on the application of Mujahid) v First-tier Tribunal* [2020] UKUT 85 (IAC), the then president, Lane J, said as follows, at para. 28:

> "The Secretary of State's ability to regulate the way in which a human rights claim can be made was recognised by the Supreme Court in *Robinson v Secretary of State for the Home Department* [2019] UKSC 11. Although dealing with paragraph 353 of the Immigration Rules, which concerns how and when new submissions can constitute a human rights claim, following an earlier unsuccessful human rights/protection claim, the Supreme Court's judgment is a recognition of the Secretary of State's ability to regulate the gateway to the appellate system".

56. *MY (Pakistan)* was an appeal against a differently constituted panel of this Tribunal. The Court of Appeal quoted the judicial headnote of the Upper Tribunal judgment, at para. 2:

> "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".

57. While I note that the proceedings in *MY (Pakistan)* primarily concerned the availability of a statutory appeal against the refusal of a human rights claim, as I have already explained the consequences of a claim being defined in that way cannot affect the scope of the definition in the first place. As held in *Mujahid*, the Secretary of State is legitimately entitled to regulate the way in which such claims are made by applicants and considered by her.

58. In my judgment that is what the Rules in these proceedings have done. Drawing this analysis together, it follows that, properly understood, the Secretary of State did not decline to engage with the representations made by the applicant. She pointed out (in the Administrative Review) that the representations should have been made, and may still be made, in the appropriate form and manner. That is an option that remains open to this applicant. The Secretary of State did not err therefore in the course of requiring the applicant to make a human rights claim in order expressly and substantively to consider the contents of the human rights based submissions that he included as part of his non-human rights informed application under Appendix HK. The option of making a human rights claim remains open to this applicant. While the human situation of the wider family has not escaped my attention (and it is difficult not to have sympathy for the applicant and his family) it remains the case that provision has been made by the Secretary of State to allow proper consideration of those factors which the applicant has not pursued.

59. In light of my primary conclusion on ground 3, I can deal with the remaining issues briefly.

60. I find that Article 8(1) was not engaged by the decision of the Secretary of State. The decision did not reach the threshold for Article 8 engagement. The decision itself appropriately required the applicant to channel any human rights based representations to the Secretary of State or Entry Clearance Officer by the designated route. That is yet to take place. There is no Convention-based entitlement which permits an applicant to require the Secretary of State to waive the requirements to which such an application would otherwise be subject. The effect of the Entry Clearance Officer's decision in these proceedings is not the cause of any Article 8 interference that the applicant and his wider family perceive as having arisen from their continued separation.

61. It follows in those circumstances that it is not necessary for me to address whether or not there was a breach of Article 8 for the purposes of Article 8(2) in any depth.

62. I simply observe that I accept Mr Yarrow's submissions that section 31(2)(a) and the equivalent provision applicable to this Tribunal pursuant to section 16 of the Tribunals, Courts and Enforcement Act 2007 looks back to whether or not the conduct complained of would have been any different had any breach not occurred. Of course, I have held that no breach has occurred. But on the hypothesis that such breach had taken place, looking at the material that was before the Secretary of State, the representations made in the course of the application both by the applicant himself and by his son provided very minimal information about the broader family unit. Those representations were assertion-based propositions contending that the broader family sought to relocate to the United Kingdom. There is nothing pertaining to the engagement of Article 8 between the applicant and his broader family such as his adult daughter, son-in-law, other children and grandchildren.

63. I accept that, in principle, an individual's spouse may fall within the category where it is not necessary to demonstrate that such an enhanced threshold for the existence of family life is met. However, ordinarily in order to demonstrate that Article 8 would be breached the Secretary of State would legitimately be entitled to be satisfied that there was a genuine and subsisting relationship between the applicant and his wife. Nothing I say is to be taken as concluding that there is not such a relationship, but that the material going to that issue before the Secretary of State in this application was limited. The applicant continues to enjoy the ability to make a human rights claim relying on all aspects of his case, relying expressly on the reasons why he says that he should be admitted to the United Kingdom. He has not made such an application or claim. The material before the Secretary of State did not get remotely close to demonstrating that Article 8(1) was engaged, or that if it was, the decision breached Article 8(2). Therefore on the basis of the material that was before the Secretary of State at the time of the decision no other approach would have been likely or expected.

64. I stress that nothing in this judgment is to be taken as concluding that on a substantive, contemporary assessment of the applicant's circumstances

and those of his UK based family that Article 8 would not be engaged or that his non-admission would be a proportionate response to the tragic events of 2009. What it is to say, however, is that the Secretary of State has not yet been given the proper opportunity to consider all matters arising from such an assertion.

65. It follows therefore that this application for judicial review is dismissed.

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REFUSAL OF APPLICATION FOR PERMISSION TO APPEAL

66. In this application for permission to appeal I am invited to consider two grounds. First, that the definition of "human rights claim" features nowhere in the Immigration Rules and section 113(1) of the 2002 Act restricts the definition to "in this Part" of the legislation. I was therefore wrong to read that definition into the definition or into the Immigration Rules more broadly.

67. I am not satisfied that this ground has a realistic prospect of success. The Immigration Rules and the 2002 Act are to be read as part of a broader regime. The Supreme Court in *Robinson* adopted that approach and in order to support the conclusion that the Secretary of State's role to act as a gateway to the appellate regime is one which she enjoys pursuant to the way in which the Immigration Rules dovetail with the primary legislation. While I accept that these proceedings do not, on Mr Berry's submission, concern an application or a human rights claim which the applicant seeks to give rise to a right of appeal to the First-tier Tribunal, I nevertheless conclude that the same overall approach applies by analogy. I therefore refuse permission on this ground.

68. The second ground is in relation to *Ahsan*. Those proceedings did not concern an application for entry clearance. It was wrong for me to have applied the overall approach adopted in those proceedings by analogy to entry clearance applications. In *Ahsan* the Secretary of State conceded that a human rights claim should be, but need not, be made in a particular form. In my judgment that principle must be of equal application to entry clearance decisions. I also note that this ground does not challenge my consequential reasoning in relation to the availability of Appendix FM as the closest proxy route for the applicant to make a human rights claim to the Secretary of State. My judgment's reliance on *Ahsan*, even if wrong, therefore falls away in relation to the unchallenged approach that I adopted in relation to Appendix FM. I therefore refuse permission on this ground.
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