



UT Neutral Citation Number: [2024] UKUT 323 (IAC)

SM (Article 33(2); Section 72; Essa post-EU exit)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 12 October 2023
Promulgated on 27 August 2024

Before

MR C.M.G. OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE CANAVAN

Between

S M
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:

Mr P. Lewis, instructed by Birnberg Peirce Solicitors

For the Respondent:

Mr D. Clarke, Senior Home Office Presenting Officer

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity because the case involves a protection claim. We make clear that anonymity has not been granted to protect the appellant's reputation following his conviction for a criminal offence. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

1. *The broad principles identified in Essa (Revocation of protection status appeals) [2018] UKUT 00244 (IAC) continue to apply to decisions made post-EU exit. The immigration rules continue to refer to 'revocation' of leave to remain as a refugee in similar terms and the terminology used in sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') currently remain the same.*
2. *Post-EU exit, a grant of leave to remain as a refugee no longer acts as a grant of European Refugee Status, but is an act done under domestic law because a person meets the requirements of paragraph 334 of the immigration rules to be recognised as a refugee.*
3. *Post-EU exit, a decision to 'revoke' leave to remain as a refugee is no longer a decision giving effect to Article 14 of the Qualification Directive, but an act done under domestic law to remove the mechanism by which a person's Convention Refugee Status under international law is recognised under domestic law.*
4. *Where leave to remain as a refugee is revoked solely with reference to section 72 NIAA 2002, and the cessation or exclusion clauses have not been applied, the dismissal of the appeal with reference to section 72(10) is unlikely to be problematic because it is likely that the person continues to have Convention Refugee Status.*
5. *The situation might be different where the decision to revoke a person's leave to remain as a refugee with reference to section 72 NIAA 2002 is made in conjunction with a decision to cease or exclude a person from Convention Refugee Status. The application of section 72(10) NIAA 2002 is a technical mechanism requiring the appeal to be dismissed without affording the person an adequate opportunity to determine whether their Convention Refugee Status continues with reference to the relevant ground of appeal contained in section 84(3).*
6. *In appeals involving decisions to revoke protection status on the ground that the person has ceased to be or is excluded from refugee status, and where a person has failed to rebut the presumption that they are a danger to the community under section 72 NIAA 2002, findings of fact still need to be made to determine whether the person has Convention Refugee Status. This might need to be done to give effect to any rights and benefits still conferred by the Convention to a 'removable refugee' pending their removal from the UK. To this extent, it is material to a proper determination of the relevant ground of appeal relating to the Refugee Convention even if the overall outcome of the appeal is determined by operation of statute.*

DECISION AND REASONS

1. This decision considers the applicability of the principles outlined in *Essa (revocation of protection status appeals)* [2018] UKUT 224 (IAC) post-EU exit.
2. The appellant is a national of Eritrea who was recognised as a refugee by the United Kingdom. He was granted leave to remain as a refugee in 2007. He was granted Indefinite Leave to Remain ('ILR') in 2012. The appellant appealed the respondent's decision dated 3 November 2021 to 'revoke' leave to remain as a refugee in the context of deportation proceedings. The appeal was brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') on the ground that revocation of protection status breaches the United Kingdom's obligations under the Refugee Convention (section 84(3)(a)). First-Tier Tribunal Judge Cameron ('the judge') dismissed the appeal in a decision sent on 19 December 2022. The

appellant was granted permission to appeal to the Upper Tribunal. This decision considers whether the First-tier Tribunal decision involved the making of an error on a point of law.

LEGAL FRAMEWORK

The Refugee Convention – status

3. A fundamental principle of the Refugee Convention is that a person becomes a refugee as soon as they meet the relevant criteria contained in Article 1A(2) i.e. to be outside their country of nationality or former habitual residence owing to a well-founded fear of persecution for one of the five Convention reasons ('Convention Refugee Status').
4. A person who satisfies the criteria is a refugee whether or not they have been formally recognised as such by a Contracting State. If a person has not been recognised as a refugee by a Contracting State, their status comes to an end as soon as they no longer satisfy the criteria of Article 1A(2).
5. A grant of status is a declaratory act. When a Contracting State such as the United Kingdom grants leave to remain as a refugee it is recognising an existing status under international law. As a signatory to the Convention, and in accordance with the rule of law, the United Kingdom undertakes to respect the rights and benefits associated with that status as outlined in the Convention. However, the Convention is silent as to how that status is to be recognised or what mechanism should be used to ensure that the rights and benefits of refugee status are respected.
6. A person is no longer a refugee if one of the specified circumstances set out in the cessation clauses contained in Article 1C apply: see *Hoxha & Anor v SSHD* [2005] UKHL 19; [2005] 1WLR 1063.
7. If information comes to light to show that there are serious reasons for considering that a person should be excluded from the protection of the Convention Article 1F might apply: see *JS (Sri Lanka) v SSHD* [2010] UKSC 15; [2011] AC 184, *Al-Sirri v SSHD* [2012] UKSC 54; [2013] 1 AC 745, and *KM (exclusion; Article 1F(a); Article 1F(b)) DRC* [2002] UKUT 00125 (IAC).
8. As the United Nations High Commissioner for Refugees ('UNHCR') has pointed out in its submissions in this case (see [65] below), the Refugee Convention contains no principle of 'revocation' of refugee status. If a person has been formally recognised as a refugee by a Contracting State, and either the cessation or the exclusion clauses apply, a grant of leave to remain recognising refugee status can be cancelled or withdrawn (the wording generally used by the UNHCR¹). In practical terms, any leave to remain recognising Convention Refugee Status might then be 'revoked' (the wording generally used in domestic immigration law and previously used in the Qualification Directive (2004/83/EC)).
9. Article 33(1) of the Convention sets out another key tenet, the principle of non-refoulement. No contracting state shall expel or return a refugee (whether recognised or not) in any manner to the frontiers of territories where their life or freedom would be threatened for any of the five

¹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (reissued, February 2019)

Convention reasons: see *R v SSHD, ex parte Bugdaycay* [1986] UKHL 3; [1987] AC 514 and *R (on the application of AAA (Syria) and Ors) v SSHD* [2023] UKSC 42; [2023] 1 WLR 4433.

10. Article 33(2) provides an exception to this fundamental principle in cases where there are reasonable grounds for regarding the person as a danger to the security of the host country, or who, having been convicted of a particularly serious crime, constitutes a danger to the community of the host country. Article 33(2) is not an exclusion clause within the meaning of the Convention. Article 33(2) is more accurately described as an exception to the principle of non-refoulement.
11. In contrast to cessation or exclusion, Article 33(2) is not a mechanism by which Convention Refugee Status is cancelled or withdrawn. It is a mechanism designed to allow a host state to remove a refugee who has committed a particularly serious crime and who poses a current danger to the community. If the criteria contained in Article 33(2) are applied properly according to the intended purpose of the Convention, the person does not lose their status as a Convention refugee but they become a 'removable refugee'.
12. Because of the serious consequences of expelling a person who has a well-founded fear of persecution, the Convention only permits an exception to the principle of non-refoulement if the refugee poses a sufficiently serious danger to the community of the host state.
13. It should become clear from this analysis that the exception to the principle of non-refoulement outlined in Article 33(2) is of a different nature to the cessation and exclusion clauses. The application of Article 33(2) does not involve the loss of Convention Refugee Status within the meaning of Article 1A(2). In contrast, Article 1C involves the cessation of status because a person no longer satisfies the criteria contained in Article 1A(2) and Article 1F involves exclusion from refugee status even if a person still satisfies the criteria contained in Article 1A(2).

The Refugee Convention - rights

14. It is important to remember that the Convention does not only set out the criteria relating to the acquisition, loss, or exclusion of refugee status. It also sets out minimum standards for the treatment of refugees.²
15. Article 2 of the Convention sets out general obligations that a refugee has to the country of refuge. In particular, that they conform to its laws and regulations as well as to measures taken for the maintenance of public order.
16. Article 3 sets out the fundamental principle of non-discrimination: see *SSHD v K* [2006] UKHL 46; [2007] AC 412 at [10].
17. Chapter II of the Convention sets out minimum standards relating to the 'Juridical Status' of refugees. These include provisions relating to Personal Status (Article 12), Property (Article 14), Rights of Association (Article 15), and Access to the Courts (Article 16).

² See also *The Rights of Refugees Under International Law* by James C. Hathaway (2nd ed.) for a detailed analysis.

18. Chapter III of the Convention sets out minimum standards relating to 'Gainful Employment'. These include provisions relating to the right to engage in Wage-earning Employment (Article 17), Self-employment (Article 18), and Liberal Professions (Article 19).
19. Chapter IV of the Convention sets out minimum standards relating to the 'Welfare' of refugees. These include provisions relating to Housing (Article 21), Public Education (Article 22), Public Relief (Article 23), and Labour Legislation and Social Security (Article 24).
20. Chapter V of the Convention sets out minimum standards relating to 'Administrative Measures'. These include provisions relating to Administrative Assistance (Article 25), Freedom of Movement (Article 26), Identity Papers (Article 27), Travel Documents (Article 28), and an undertaking, as far as possible, to 'facilitate the assimilation and naturalization of refugees' (Article 34).
21. It is important to note that many of the rights must be accorded to refugees in the same way as they would to nationals of the Contracting State except, where specified, some of the rights to be accorded to refugees are those 'accorded to aliens generally in the same circumstances'. The content of each right will depend on the wording of the relevant Article.
22. Included in the 'Administrative Measures' are three important principles of the Convention. First, the non-penalisation on account of illegal entry or presence in the Contracting State (Article 31). Second, the prohibition on expulsion of a refugee lawfully in the territory save on grounds of national security or public order, and even then, 'only in pursuance of a decision reached in accordance with due process of law' (Article 32). Third, the principle of non-refoulement and the limited exceptions to that principle (Article 33).

The distinction between 'Convention Refugee Status' and 'European Refugee Status'

23. As the UNHCR has pointed out, there are distinctions between 'Convention Refugee Status' and 'European Refugee Status' granted with reference to the Qualification Directive (2004/83/EC).
24. Under the Convention, a person has refugee status as soon as they meet the definition contained in Article 1A(2), whether it has been recognised or not. A grant of leave to remain as a refugee is a declaratory act recognising an existing Convention Refugee Status under international law.
25. Under the Directive, refugee status was defined by Article 2(d) as recognition of that status by a Member State. European Refugee Status only came into existence if it was granted to a person who qualified as a refugee as defined in the Directive and by operation of Article 13.
26. Under the Convention, refugee status might be cancelled or withdrawn if the cessation or exclusion clauses apply. In contrast, when the exception to the principle of non-refoulement contained in Article 33(2) applies, the person continues to have Convention Refugee Status but can lawfully be expelled or removed from the host state without breaching obligations under the Refugee Convention.
27. Under the Directive, a Member State could 'revoke, end or refuse to renew' European Refugee Status in circumstances where a person ceased to be a refugee (Article 11), was excluded from

being a refugee (Article 12) and if the circumstances contained in Article 14(4) applied (particularly serious crime/ danger to the community). The incorporation of powers to revoke or end European Refugee Status in circumstances where Article 33(2) is likely to apply is where the UNHCR has expressed concern about substantive modifications to the Convention.

28. The Court of Justice of the European Union (CJEU) considered the distinction between the two forms of status in *M & Others (revocation of refugee status)* (C-391/16); [2019] 3 CMLR 30. The CJEU made clear that Article 14(4), which contains the same wording in the recast Directive, is not an exclusion clause. The Court distinguished between 'being a refugee' for the purpose of Article 1A of the Convention and the grant of 'refugee status' under the Directive. Article 14(6) made clear that those whose 'refugee status' is revoked under Article 14(4) or not granted under Article 14(5) of the Directive are still entitled to the rights and benefits set out in the Refugee Convention, which the court described as a 'light-refugee' status in view of the broader rights and benefits associated with status granted under the Directive.
29. The Upper Tribunal in *Essa (Revocation of protection status appeals)* [2018] UKUT 00244 (IAC) referred to an earlier decision in *Dang (Refugee – query revocation – Article 3)* [2013] UKUT 00043 (IAC), which also pointed to the differences between Convention Refugee Status and European Refugee Status. In *Essa*, the respondent asserted that the cessation clause applied. The Upper Tribunal considered the scope of an appeal against 'revocation of protection status' under section 82 NIAA 2002. This was in the context of a finding that the presumptions contained in section 72, that a person had been convicted of a particularly serious crime and posed a danger to the community, had not been rebutted.

The Statutory Framework

30. Section 2 of the Asylum and Immigration Appeals Act 1993 ('AIAA 1993') states:

Primacy of the Convention

2. Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.

31. At the date of the decision to revoke refugee status in this case, the Interpretation section of the immigration rules set out the following definitions:

'Protection Claim' has the same meaning as in section 82(2)(a) of the Nationality, Immigration and Asylum Act 2002

'Refugee' has the same meaning as in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006

'Refugee Status' is the recognition by the UK that a person meets the criteria in paragraph 334

'Refugee leave' means limited leave granted pursuant to paragraph 334 or 335, which has not been revoked pursuant to paragraph 339A to 339AC or 339B

32. The criteria for granting leave to remain as a refugee under the immigration rules were as follows:

334. An asylum applicant will be granted refugee status in the United Kingdom if the Secretary of State is satisfied that:

- (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
- (ii) they are a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iii) there are no reasonable grounds for regarding them as a danger to the security of the United Kingdom;
- (iv) having been convicted by a final judgment of a particularly serious crime, they do not constitute a danger to the community of the United Kingdom; and
- (v) refusing their application would result in them being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Refugee Convention, to a country in which their life or freedom would be threatened on account of their race, religion, nationality, political opinion or membership of a particular social group. [our emphasis]

33. At the date of the decision the immigration rules relating to ‘revocation of refugee status’ were as follows:

Revocation of Refugee Status

338A. A person’s grant of refugee status under paragraph 334 shall be revoked or not renewed if any of paragraphs 339A to 339AB apply. A person’s grant of refugee status under paragraph 334 may be revoked or not renewed if paragraph 339AC applies. [our emphasis]³

Danger to the United Kingdom

339AC. This paragraph applies where the Secretary of State is satisfied that:

- (i) there are reasonable grounds for regarding the person as a danger to the security of the United Kingdom; or
- (ii) having been convicted by a final judgment of a particularly serious crime, the person constitutes a danger to the community of the United Kingdom.

34. We observe that there was a distinction between the mandatory wording of the rules relating to cases involving cessation (paragraph 339A) and exclusion (paragraph 339AA) and the discretionary wording in cases involving refugees who might pose a danger to the community (paragraph 339AC). This reflected the distinction between the relevant Articles of the Convention as explained above. It also provided some flexibility in cases where arrangements could not immediately be made for a refugee to be removed. This would accord with obligations under the Refugee Convention in so far as a grant of leave to remain could still give effect to the rights and benefits accorded to a refugee pending removal pursuant to Article 33(2).

³ Rules 338A and 339AC were subsequently amended by way of Statement of Changes HC 17 (11 May 2022). The changes were intended to give effect to provisions contained in the Nationality and Borders Act 2022 (‘NABA 2022’) relating to the interpretation of the Refugee Convention. Paragraph 338A was changed to mandate revocation of refugee status rather than it being a discretionary decision if 339AC applied. Paragraph 339AC was amended to add the wording ‘...if the Secretary of State is satisfied that: *Article 33(2) of the Refugee Convention applies in that...*’ and ‘(see section 72 of the Nationality, Immigration and Asylum Act 2002)’ at the end of 339AC(ii). These changes to the immigration rules only apply to asylum applications made on or after 28 June 2022. The changes to section 72 NIAA 2002 introduced by section 37 NABA 2022 only apply if the conviction is on or after 28 June 2022. The changes do not apply on the facts of this case.

35. The notice of a decision to make a deportation order did not attract a right of appeal, but the decision to revoke protection status did give rise to a right of appeal under section 82 NIAA 2002. The relevant wording of section 82 was:

(1) A person ("P") may appeal to the Tribunal where-

.....

(c) the Secretary of State has decided to revoke P's protection status.

(2) For the purposes of this Part-

.....

(c) a person has "protection status" if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection; [our emphasis]

.....

(e) "*refugee*" has the same meaning as in the Refugee Convention.

36. We have emphasised the relevant phrase in section 82(2)(c), it is that phrase that has the effect that the revocation of leave to remain is the revocation of 'protection status'.

37. The relevant ground of appeal under section 84 NIAA 2002 was:

84. Grounds of appeal

.....

(3) An appeal under section 82(1)(c) (revocation of protection status) must be brought on one or more of the following grounds –

(a) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention [our emphasis]

.....

38. The Tribunal must determine an appeal brought under section 82 with reference to section 86 NIAA 2002:

86. Determination of appeal

(1) This section applies on an appeal under section 82(1).

(2) The Tribunal must determine -

(a) any matter raised as a ground of appeal, and

(b) any matter which section 85 requires it to consider. [our emphasis]

39. In *Essa* the Upper Tribunal highlighted the varying terminology used in the statutory scheme. It was not always consistent with the Refugee Convention, which contains no principle of 'revocation' of status. A grant of leave to remain at that time would have been giving effect to the Directive as a grant of European Refugee Status in accordance with Article 13 of the Directive. Broadly speaking, the immigration rules used the terminology contained in Article 14(4) of the Directive i.e. refusing to grant or deciding to revoke status where a person constitutes a danger to the community [10]. In principle, there was no objection to the term

being use as a mechanism under domestic law to revoke a person's leave to remain, but that did not necessarily affect an individual's status under the Refugee Convention [11].

40. Although the term 'refugee status' was used in the immigration rules, the term 'protection status' was used in the context of statutory appeals. The term 'protection status' was defined by reference to a grant of leave to remain as a refugee under the immigration rules. The Upper Tribunal noted that there was some tension between that and the wording of the relevant ground of appeal under section 84(3)(a), which required a court or tribunal to consider whether revocation of leave to remain as a refugee granted under the rules ('protection status') would amount to a breach of the United Kingdom's obligations under the Refugee Convention.
41. The Upper Tribunal considered whether the relevant ground of appeal was focussed on (i) the loss of leave to remain as a refugee as granted under the immigration rules; or (ii) with direct reference to status under the Refugee Convention [13]. The Upper Tribunal initially considered that there might be some force to the second proposition [14]. However, it went on to consider how the wording of section 84(3)(a) NIAA 2002 interacted with section 72(10) NIAA 2002 and concluded that the first of the two propositions was applicable [17].
42. The Upper Tribunal in *Essa* concluded that the requirement contained in section 72(10) NIAA 2002 to dismiss an appeal if a person had failed to rebut the presumption that they constitute a danger to the community amounted to a 'national gloss' on the meaning of Article 33(2). Section 72 was intended to remove from decision makers any evaluation with direct reference to the Convention and to replace it 'with a rule-based national interpretation.' [17]. Sometimes the result might be a decision that does not accord with the meaning of Article 33(2) under international law.
43. For these reasons, the Upper Tribunal concluded that an appeal brought against the revocation of 'protection status' under section 82(1)(c) NIAA 2002 focussed on the effect of the revocation of leave to remain as a refugee as granted under the immigration rules albeit the ground of appeal under section 84(3) had to be determined by reference to the Refugee Convention. However, if section 72(10) applied, the statutory scheme mandated that the appeal must be dismissed even if the decision, as a matter of fact, might lead to a breach the United Kingdom's obligations under the Refugee Convention [18].
44. In *Essa*, the Upper Tribunal emphasised that, even if the appeal must be dismissed because of the 'national gloss' on Article 33(2) contained in the statutory scheme, section 86 NIAA 2002 still required the Tribunal to determine whether the ground of appeal with reference to the Refugee Convention was made out. This is important because if a person still has Convention Refugee Status, despite the appeal being dismissed by operation of statute, they continue to be entitled to the rights and benefits of the Refugee Convention pending removal according to international law [21].

Essa principles post-EU exit

45. After 31 December 2020 the Qualification Directive no longer had effect in the United Kingdom.

46. We can see no reason why the broad principles identified in *Essa* should not continue to apply to decisions made post-EU exit. The immigration rules continue to refer to 'revocation' of leave to remain as a refugee in similar terms and the terminology used in sections 82 and 84 NIAA 2002 currently are the same.
47. However, post-EU exit, a grant of leave to remain as a refugee no longer acts as a grant of European Refugee Status, but is an act done under domestic law because a person meets the requirements of paragraph 334 of the immigration rules to be recognised as a refugee.
48. Post-EU exit, a decision to 'revoke' leave to remain as a refugee is no longer a decision giving effect to Article 14 of the Qualification Directive, but an act done under domestic law to remove the mechanism by which a person's Convention Refugee Status under international law normally is recognised under domestic law.
49. The immigration rules continue to provide a 'national gloss' on the Refugee Convention by providing for revocation of leave to remain as a refugee in the following circumstances:
 - (i) The person ceases to be a refugee (cessation);
 - (ii) The person is excluded from the Refugee Convention (exclusion);
 - (iii) Misrepresentation (cancellation);
 - (iv) Danger to the United Kingdom (Article 33(2)).
50. There continues to be a right of appeal against a decision to revoke 'protection status' under section 82 NIAA 2002. The appealable decision relates to revocation of leave to remain as a refugee granted under the immigration rules. However, the disconnect in the wording used in the relevant ground of appeal as highlighted in *Essa* remains. The relevant ground of appeal is whether the decision to revoke leave to remain breaches the United Kingdom's obligations under the Refugee Convention.
51. If the Secretary of State's ground for revocation is cessation or exclusion, it will be necessary for the Tribunal to consider whether the person comes within the cessation or exclusion clauses of the Refugee Convention. If they do, then the decision to revoke leave to remain is unlikely to breach obligations under the Refugee Convention because the person does not have Convention Refugee Status or any of the rights and benefits associated with it.
52. If the ground for revocation is that the person is a danger to the community, the Tribunal is required to consider the statutory scheme contained in section 72 NIAA 2002, which is said to apply for the 'construction and application of Article 33(2) of the Refugee Convention'. If the Tribunal concludes that the person has not rebutted the presumption that he is a danger to the community it is required by operation of section 72(10) to dismiss the appeal in so far as it relies on Refugee Convention grounds.
53. Where leave to remain as a refugee is revoked solely with reference to section 72 NIAA 2002, and the cessation or exclusion clauses have not been applied, the dismissal of the appeal with reference to section 72(10) is unlikely to be problematic because it is likely that the person continues to have Convention Refugee Status.

54. The situation might be different where the decision to revoke a person's leave to remain as a refugee is made in conjunction with a decision to cease or exclude a person from Convention Refugee Status. The application of section 72(10) NIAA 2002 is a technical mechanism requiring the appeal to be dismissed without affording the person an adequate opportunity to determine whether their Convention Refugee Status continues with reference to the relevant ground of appeal contained in section 84(3).
55. In appeals involving decisions to revoke protection status on the ground that the person has ceased to be or is excluded from refugee status, and where a person has failed to rebut the presumption that they are a danger to the community under section 72 NIAA 2002, findings of fact still need to be made to determine whether the person has Convention Refugee Status. This might need to be done to give effect to any rights and benefits still conferred by the Convention to a 'removable refugee' pending their removal from the UK. To this extent, it is material to a proper determination of the relevant ground of appeal relating to the Refugee Convention even if the overall outcome of the appeal is determined by operation of statute.

FACTUAL BACKGROUND

Grant of protection status

56. The appellant was recognised as a refugee and granted leave to remain on 15 May 2007. He was granted ILR on 11 October 2012. It is not necessary to set out the details of his protection claim for the purpose of this decision.

Criminal conviction

57. On 31 October 2019 the appellant was convicted of wounding/inflicting grievous bodily harm without intent and was sentenced to two years eight months' imprisonment.

Notice of intention to deport

58. As a result of the criminal conviction, the appellant was liable to automatic deportation by operation of section 32(5) of the UK Borders Act 2007 ('UKBA 2007'), subject to the exceptions set out in section 33. Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach (a) a person's Convention rights; or (b) the United Kingdom's obligations under the Refugee Convention.
59. On 22 November 2019 the respondent made a decision to deport but there is no evidence to suggest that a deportation order was made as required by section 32(5) UKBA 2007. The only circumstance in which an automatic deportation order is not required to be made is when one of the exceptions contained in section 33 apply.
60. The respondent's decision stated: 'You have not demonstrated that any of the exceptions apply to you' but went on to record that the appellant had been granted asylum and then ILR. It was noted that if a deportation order was made it would invalidate his ILR (section 5(1) Immigration Act 1971 ('IA 1971')). The respondent went on to say that: 'if, despite your liability to deportation, there are legal reasons why you cannot be deported from the United Kingdom,

consideration may be given to revoking your indefinite leave to remain in the United Kingdom under section 76 of the Nationality, Immigration and Asylum Act 2002'. If ILR was revoked, 'a period of limited leave will be granted appropriate to your case.'

61. Under the heading 'Protection Status' the decision to deport went on to say that the appellant's status 'has not been considered within this decision', but the Home Office would now consider whether it should continue in light of his liability to deportation. The appellant was invited to make representations as to why he continued to qualify for protection status and 'why your protection status should not be revoked, cancelled or ceased.'
62. Under the heading 'Section 72' the decision to deport outlined the provisions of Article 33(2) of the Refugee Convention. The decision stated that section 72 NIAA 2002 applied 'for the purpose of the construction and application of Article 33(2) of the Refugee Convention'. The appellant was invited to make submissions to rebut the presumption contained in section 72 that he had committed a particularly serious crime and constituted a danger to the community.
63. After 31 December 2020 the Qualification Directive no longer had effect in the United Kingdom.

Notice of intention to 'revoke refugee status'

64. Even though the respondent considered that the appellant constituted a danger to the community, no further action appears to have been taken until 04 May 2021, when he was issued with a notice of intention to 'revoke refugee status' with reference to paragraphs 338A and 339AC of the immigration rules. The appellant and the UNHCR were invited to make further submissions.
65. In a letter dated 20 October 2021 the UNHCR outlined its understanding of the term 'revocation of refugee status' as follows:

'UNHCR wishes to emphasise that its view differs from the guidance set out in section 6 of the HO's asylum policy instruction on the revocation of refugee status in that it considers revocation of refugee status to refer only to circumstances set out in paragraph 339AC(ii) of the Immigration rules where a refugee's subsequent conduct is so serious as to give rise to exclusion under either Article 1F(a) or 1F(c) of the 1951 Convention. UNHCR does not consider the grounds set out in subsections (i) and (ii) of paragraph 339AC (which repeat the relevant grounds in Article 33(2) of the 1951 Convention) to be pertinent to revocation proceedings. We wish to emphasise that Article 33(2) does not provide for the withdrawal of refugee status.

In making this comment, UNHCR appreciates that Article 14(4)(b) of the European Council Qualification Directive 2004/83/EC repeats the provisions of the second paragraph of Article 33(2) as a ground for States to "*revoke, end or refuse to renew the status granted to a refugee*". UNHCR continues to reiterate that Article 14(4) of this Directive runs the risk of introducing substantive modifications to the exclusion and cessation clauses of the 1951 Convention, by adding the provision of Article 33(2) of the 1951 Convention as a basis for exclusion, revocation, or termination of refugee status. Assimilating the exceptions to the *non-refoulement* principle permitted under Article 33(2) to the exclusions clauses of Article 1F or Article 1C would therefore be incompatible with the 1951 Convention. To avoid such an outcome, "*status granted to a refugee*"

in Article 14(4) of the Directive is therefore understood to refer to the asylum ('status') granted by a State rather than refugee status in the sense of Article 1A(2) of the 1951 Convention.

.....

UNHCR reiterates that Article 33(2) does not provide for the withdrawal of refugee status and that the exception to *non-refoulement* under section 72 of the NIA Act 2002 sets thresholds that differ from those intended under the 1951 Convention. Additionally, UNHCR remains concerned that the application of section 72 of the NIA Act 2002 can set the basis for the designations of persons for Special Immigration Status pursuant to Part 10 of the Criminal Justice and Immigration Act 2008. This could occur in cases where Article 33(2) standards are not being met in applying section 72 of the NIA Act 2002 and would result in the protection owed under the 1951 Convention to affected refugees being undermined. UNHCR notes that under section 130(5) of the Criminal Justice and Immigration Act 2008 "the Secretary of State may not designate a person if the secretary of state (sic) thinks that an effect of designation would breach (a) the United Kingdom's obligations under the Refugee Convention....." UNHCR urges the HO to take this safeguard into account when considering the designation of persons for Special Immigration Status based on the application of section 72 of the NIA Act 2002.'

Decision to 'revoke refugee status'

66. On 3 November 2021 the respondent made a decision to revoke leave to remain recognising the appellant as a refugee, which was first granted on 15 May 2007. The respondent considered what was said by the UNHCR, but concluded that 'the criteria for consideration of revocation of refugee status is whether paragraph 339AC(ii) of the Immigration Rule is met' [18].
67. The respondent considered that the 'substantial custodial sentence' of two years and eight months' imprisonment 'significantly exceeds' the period of two years as defined in section 72(2) NIAA 2002 for a crime to be regarded as 'particularly serious' [18]. The letter went on to outline the nature of the appellant's assault on his partner and concluded that the offence showed that the appellant was a danger to the community [22]. For these reasons, the respondent decided that refugee status should be 'revoked' with reference to paragraph 339AC(ii) of the immigration rules and certified that the presumptions contained in section 72 applied in this case.
68. It is important to note that the decision to 'revoke' refugee status did not assert that the applicant came within the cessation or exclusion clauses or that he no longer met the criteria for Convention Refugee Status under Article 1A(2). The decision to revoke leave to remain was made solely with reference to paragraph 339AC(ii) of the immigration rules and without reference to the principles of international law contained in the Refugee Convention.
69. Indeed, the respondent recognised that the appellant continued to be at risk if returned to Eritrea, but with reference to Article 3 of the European Convention of Human Rights (ECHR).
 - '31. Although your refugee status has been revoked, consideration of your particular circumstances identifies that at this point in time there is a potential breach of your rights under Article 3 of the ECHR, therefore your removal to Eritrea will not be enforced at this time. However, your circumstances and the situation in Eritrea, will remain under review with a view to enforcing your removal as soon as possible.'

70. In summary, the respondent found that the appellant was a removable refugee with reference to Article 33(2) of the Refugee Convention, who could not be removed. In light of that contradiction, one might question the purpose of making such a decision.

First-tier Tribunal decision

71. First-tier Tribunal Judge Cameron dismissed the appeal in a decision sent on 19 December 2022. When summarising the issues, the judge noted that the respondent's representative said that the only issue was revocation of protection status. The appellant would not be removed because it was accepted that it would breach his human rights [6]. The judge considered whether the appellant had rebutted the presumptions that he had been convicted of a particularly serious crime and posed a danger to the community [21]-[50]. He considered the evidence relating to the appellant's offending behaviour and any potential rehabilitation. He noted the appellant's claim to be ashamed of his offending and the harm that it had caused. The appellant said that he had taken steps to address alcohol misuse, which was an underlying factor to the offence. The appellant had attended a substance misuse course and had also worked as a peer mentor. He had also studied mechanics in prison and said that he wanted to progress.
72. The judge noted that the appellant had previous convictions in 2008 and 2017. The Parole Board report recorded that these were for similar offences against women he was in a relationship with, and again, with an element of alcohol misuse. The appellant was recalled to prison when he fell into difficulties with his housing (the Parole Board later found this to be inappropriate). The appellant accepted that he had drunk alcohol since he was released from prison 'but only sensibly.' [36]. The appellant was proud of the fact that he had obtained a job and wanted to provide a good example and to be a role model [36].
73. The judge went on to consider the terms of the Parole Board report dated 21 March 2022 [40]-[45]. The report noted that his attitude had been consistently positive and that his alcohol consumption had not been problematic. He had worked on conflict management and communicating in relationships and had engaged in substance misuse work. The judge recorded that the risk scores indicated a medium risk of serious recidivism. They also indicated a high risk of serious harm to a known adult, previous or current partners, with a medium risk to a child who might witness or be caught in the cross-fire of domestic abuse. The report concluded that he did not present an imminent risk of causing serious harm provided risk factors were managed properly.
74. The judge went on to consider a letter from a probation officer dated 12 July 2022 [46]. She confirmed that the appellant had been fully compliant with the conditions and had completed his licence. The appellant would benefit from structure in his life, which was now being provided by employment. He had sought and been granted permission to be in contact with his family and was keen to maintain his relationship with them. There seemed to be no issue about contact with his daughter [47].
75. The judge also considered a letter of support from a friend of the appellant [48] and additional documents relating to his employment and educational certificates [49]-[50].

76. In conclusion, the judge focussed on the test contained in section 72 NIAA 2002 and referred to relevant case law [51]-[54]. He considered the serious nature of the offence as disclosed by the sentencing remarks, which showed that the appellant's partner collapsed following the assault and required emergency surgery to stem life-threatening bleeding on her brain. The sentencing judge also considered aggravating factors, including the fact that the assault took place in the victim's home and while he was on bail for another assault on her [56]-[58].
77. The judge accepted that there was evidence to show that the appellant had undertaken a number of courses to address the causes of his offending behaviour, that he had complied with the licence conditions, and had not been convicted of any further offences since [59].
78. Nevertheless, the judge was satisfied that the appellant had not rebutted the presumption that he had been convicted of a particularly serious crime in view of the aggravating factors identified by the sentencing judge [62]. For the following reasons, the judge also concluded that the appellant had not rebutted the presumption that he posed a danger to the community:
- '63. Although I do take account of the current position with regard to the appellant in particular that he has now obtained employment and stable accommodation and has had contact with his daughter, he has however confirmed during his oral evidence that he continues to consume alcohol albeit he states that it is sensibly. There are clear risk factors set out in the parole board report linking the appellant to alcohol use and although he has been offence free since his release, he has for the most part been under licence conditions.
64. The Parole Board report indicated that he presented a medium risk of violence which would increase if he [misused] alcohol and a high risk of causing serious harm to known adults.
65. Notwithstanding the appellant's own evidence, I am not satisfied at this stage that the risk has been reduced sufficiently that the appellant would not be at risk of misusing alcohol in the future.
66. I am not satisfied that the appellant has been able to rebut the presumption that he is a danger to the community given the current report from the parole board and the short time that the appellant has not been under licence conditions. Throughout the period the appellant has of course [been] aware the respondent was seeking to revoke his refugee status and any misbehaviour on his part would have an adverse effect on his appeal.'
79. The judge considered that the conviction and the presumptions under section 72 NIAA 2002 were the only issues for determination. Having found that the appellant had failed to rebut the presumptions, the judge was obliged by operation of section 72(10) to dismiss the appeal against the decision to 'revoke protection status' (section 82(1)(c)) brought on the ground that the decision breached the United Kingdom's obligations under the Refugee Convention (section 84(3)(a)).

Appeal to the Upper Tribunal

80. The appellant applied for permission to appeal to the Upper Tribunal on the following grounds:

- (i) The First-tier Tribunal failed to take into account, or failed to give adequate weight to, relevant evidence contained in the Parole Board's report showing that any risk the appellant posed could be managed in the community.
- (ii) The First-tier Tribunal failed to follow the approach outlined in *Essa* in which the Upper Tribunal found that even if a judge was obliged to dismiss the appeal with reference to section 72 NIAA 2002, it was still necessary to determine the relevant ground of appeal under section 84 NIAA 2002 as to whether the decision amounted to a breach of the United Kingdom's obligations under the Refugee Convention in the case of a removable refugee.

In this case the respondent accepted that removal would breach Article 3 ECHR. At the date of the hearing, the appellant could not be removed with reference to Article 33(2) of the Refugee Convention and continued to be entitled to the rights and benefits outlined in the Convention.

- 81. The Upper Tribunal granted permission to appeal in an order dated 26 July 2023 noting that the decision to revoke protection status was made after the United Kingdom's exit from the EU. The Upper Tribunal found that the case may be suitable to consider the wider issue of the applicability of the principles outlined in *Essa* as they might apply post-EU exit.
- 82. We have considered the First-tier Tribunal decision, the evidence before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but we will refer to any relevant arguments in our decision.

DECISION AND REASONS

- 83. We find that the first ground of appeal does not disclose any material error in the First-tier Tribunal decision. It is argued that the judge failed to give adequate weight to the fact that the Parole Board was aware that the appellant continued to drink alcohol when it made its assessment. The Parole Board did not make it a condition that he abstain from alcohol in order for the risk to be managed in the community. The grounds accept that the judge was not bound by the Parole Board's assessment of risk and that his task was different.
- 84. The fact that the Parole Board was aware of this fact is not particularly persuasive. It is clear that the judge considered relevant evidence from the Parole Board and the probation officer. It was open to the judge to place what weight he considered was appropriate to the fact that the appellant continued to drink alcohol in assessing the risk he posed in a different context to the assessment made by the Parole Board. For these reasons, we find that there is no error of law in the judge's findings relating to section 72 NIAA 2002.
- 85. Turning to the second ground. In the decision to revoke refugee status dated 3 November 2021, the respondent found that the appellant constituted a danger to the community for the purpose of section 72 NIAA 2002. The respondent decided to revoke leave to remain as a refugee because paragraph 339AC of the immigration rules applied. It is a notable feature of this case that the decision letter did not suggest that the cessation or exclusion clauses applied or that

the appellant no longer had a well-founded fear of persecution. In fact, the respondent went on to find that removal was likely to breach Article 3 ECHR.

86. The respondent accepts that the appellant continues to have Convention Refugee Status, but has revoked leave to remain as a refugee ('protection status') with reference to paragraph 339AC of the immigration rules because it is considered that he poses a danger to the community.
87. The First-tier Tribunal found that the presumptions contained in section 72 NIAA 2002 applied. As such, the appellant is a removable refugee who continues to be entitled to the rights and benefits of the Refugee Convention pending his removal. The rights and benefits of Convention Refugee Status are normally given effect by way of a grant of leave to remain as a refugee. In this case, the difficulty is the contradictory finding in the same decision, that the appellant is not in fact removable. In the circumstances, one might question the utility of the act of revoking leave to remain as a refugee.
88. We have already outlined that, in contrast to the Qualification Directive, the Refugee Convention does not mandate how Convention Refugee Status should be recognised or how the rights and benefits associated with that status should be given effect by a Contracting State.
89. Mr Clarke said that it is proposed to give the appellant Restricted Leave pending a time when he can lawfully be removed. It was beyond the scope of this hearing to examine the full details of the Restricted Leave policy and whether such status would breach the United Kingdom's obligations under the Refugee Convention. Some aspects of the policy that were touched on briefly at the hearing might not be compatible. It becomes clear from the analysis above that any grant of leave to remain following the revocation of the appellant's ILR would need to permit the appellant to access all the rights and benefits that he is entitled to as a person with Convention Refugee Status pending his removal.
90. In terms of deciding the relevant ground of appeal under section 84(3) NIAA 2002, as section 86 required, the question was whether the situation in which the appellant found himself as a result of the revocation of leave to remain as a refugee amounted to a breach of the United Kingdom's obligations under the Refugee Convention. The answer must be that the ground of appeal is not made out, because (whatever his new leave is called) the appellant is not able to show that his present situation is one in which he is not afforded the rights and benefits to which he is entitled as a refugee.
91. For the above reasons, we conclude that the judge's failure to make any specific finding in relation to the relevant ground of appeal under section 84(3) NIAA 2002 amounted to an error. However, the error did not make any difference to the outcome of the appeal because, having found that the presumptions in section 72 applied, the judge was required by operation of statute to dismiss the appeal, which he did. As such, we decline to set aside the decision.
92. For the reasons given above, we conclude that the First-tier Tribunal decision did not involve the making of an error of law that would have made any difference to the outcome of the appeal. The decision shall stand.

Notice of Decision

The First-tier Tribunal decision involved the making of an error of law, but the error did not make any difference to the outcome of the appeal.

The Upper Tribunal does not set aside the decision.

The decision shall stand.

M.Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 August 2024