Neutral Citation Number: [2019] EWCA Civ 1665

Case No: C5/2018/0321

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
(Upper Tribunal Judge Blum)
RP/00077/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 October 2019

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE LEGGATT
and
LORD JUSTICE BAKER

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
KN (DRC)	**Respondent**

- -
- -

Zane Malik (instructed by **the Treasury Solicitor**) for the **Appellant**
Shivani Jegarajah (instructed by **Arona St James**) for the **Respondent**

Hearing date : 20 June 2019

- -

Approved Judgment

LORD JUSTICE BAKER :

1. This is an appeal by the Secretary of State against the finding of the Upper Tribunal that his decision to revoke the respondent's refugee status breached the United Kingdom's obligations under the 1951 Refugee Convention.

Background

2. The respondent, who was born on 18 May 1981, is a national of the Democratic Republic of Congo ("DRC"). In 1989, his father left that country and came to the UK where he claimed asylum as a refugee. In his claim, the father stated that he had actively supported the fight for democracy in the DRC in opposition to the regime of President Mobutu and, as a result, had been arrested and tortured, before escaping and fleeing the country. On 6 July 1989, the respondent's father was granted the status of refugee. The respondent, then aged nine, came to this country with his mother and siblings in early 1991 to join his father. On 29 November 1994, the father, mother and their children, including the respondent, were granted indefinite leave to remain in this country. On the same day, the respondent, his mother and siblings were recognised as refugees.

3. Since 2000, the respondent has been in a relationship with a British woman, and together they have two children, aged 16 and 7.

4. Between 2001 to 2012, the respondent was convicted on seven occasions of a variety of criminal offences and received a number of custodial sentences, culminating on 8 June 2012 with a conviction at the Central Criminal Court of an offence of conspiracy to rob, for which he was sentenced to 4 years and six months imprisonment. As a result, he became liable to the automatic deportation provisions of s.32 of the UK Borders Act 2017.

5. On 23 April 2013, the respondent was served with a notice under s.72 of the Nationality, Immigration and Asylum Act 2002. On 23 December 2013, the respondent submitted representations setting out reasons why he should not be deported. Further representations were made on his behalf in a series of letters from his solicitors over the next three years. On 1 August 2014, the appellant served notice of intention to "cease" (i.e. revoke) the respondent's refugee status under Article 1C(5) of the Geneva Convention relating to the Status of Refugees 1951 ("the Convention"). In accordance with policy, on 21 January 2015, the appellant wrote to the UNHCR representative in London informing him of the decision to cease the respondent's refugee status and inviting comments about the decision. On 9 May 2016, the appellant sent a letter to the respondent headed "Cessation of Refugee Status", revoking the respondent's status under Article 1C(5) of the Convention and paragraph 339(v) of the Immigration Rules, and asserting that the circumstances surrounding his initial claim for asylum no longer existed as there had been "a fundamental and durable change" in the situation in the DRC since it was granted. On 31 May 2016, the appellant made a deportation order in respect of the respondent and on 7 June 2016 served notice of a "decision to deport and to refuse a human rights claim", setting out the reasons for the decision to deport him and concluding that the deportation would not breach the UK's obligations under Article 8 of ECHR.

6. On 20 June 2016, the respondent filed a notice of appeal against both decisions. The hearing of his appeal took place before the First-Tier Tribunal (FTT) on 7 July 2017. The issues on the appeal, as agreed between the parties and the tribunal, were:

   (1) whether the respondent could rebut the statutory presumption under s.72 of the 2002 Act that, by reason of his sentence to imprisonment for at least two years, he was presumed to have committed a particularly serious crime and was a danger to the community;

   (2) if he succeeded in rebutting the presumption, whether the respondent was no longer entitled to refugee status by virtue of a change in circumstances;

   (3) whether deporting the respondent was an unlawful infringement of his rights under Article 8.

7. The FTT's decision was handed down on 28 July 2017. On the first issue, the tribunal concluded that the respondent had rebutted the statutory presumption. The judge accepted the evidence given by the respondent and other witnesses that he had recognised his wrongdoing and was unlikely to revert to criminal behaviour. On the second issue, the tribunal found that the Secretary of State had "not discharged the burden of proof to support the cessation of the [respondent's] refugee status". The judge noted that there was no evidence that, when making the decision, the Secretary of State had taken into account the comments made by UNHCR, or assessed the situation of this particular respondent and the risk to him upon returning to the DRC. On the third issue, the FTT found that the respondent had a strong and established family life with his partner and children but held that he had failed to demonstrate the very compelling circumstances required by statute and case law for his Article 8 claim to succeed.

8. On 25 August 2017, the Secretary of State filed a notice of appeal against the FTT's decision on the second issue. There was no appeal by the Secretary of State against the decision on the first issue, nor by the respondent against the decision on the third issue. Permission to appeal was granted on 11 September 2017 and the appeal was heard by the Upper Tribunal (Judge Blum) on 2 November 2017. In the decision and reasons handed down on 17 November 2017, the Upper Tribunal concluded that the FTT had allowed the respondent's appeal because it believed that the relevant guidance and policy had not been properly applied, but observed that the FTT judge had not identified how the decision to revoke the respondent's refugee status had breached the UK's obligations under the Refugee Convention and that, as a result, the FTT's decision was "unsustainable". Having reached that conclusion, the Upper Tribunal proceeded to consider afresh whether the Secretary of State's decision to revoke the refugee status infringed the Convention. It found that the respondent had not been recognised as a refugee in his own right but "because his parents were recognised as refugees" and that, as a result, any political changes in the DRC had no bearing on the circumstances in connection with which he had been recognised as a refugee. The respondent's appeal against the Secretary of State's decision was "re-made" and allowed "on the basis that the Secretary of State's decision to revoke his refugee status breached the UK's obligations under the Refugee Convention".

9. The Secretary of State's application for permission to appeal was refused by the Upper Tribunal. On 12 February 2018, the Secretary of State filed a notice of appeal to this Court, citing the following two grounds of appeal:

    (1) The Upper Tribunal misconstrued paragraph 339A(v) of the Immigration Rules, which reflects Article 1C(5) of the Refugee Convention, in holding that there had been no change in "the circumstances in connection with which" the respondent was recognised as a refugee.

    (2) The Upper Tribunal erred in law in assuming that the respondent ought to be treated as a refugee in absence of a formal cessation of his refugee status, even in the circumstances where there is no current risk of persecution or ill-treatment on his return to his country of origin.

    On 6 November 2018, Longmore LJ granted permission to appeal on both grounds.

10. The respondent did not file a skeleton argument in accordance with directions. Two days before the appeal hearing, the court received an application by email from solicitors who had just been instructed on his behalf seeking an adjournment on the grounds that there was insufficient time for them to prepare the appeal. It was further contended that another appeal on similar grounds had been listed for hearing in early July 2019 and that it would be appropriate to adjourn this appeal to be heard alongside that case. Having considered the email, and observations in response on behalf of the Secretary of State opposing an adjournment, this Court declined the application, taking the view that there was no good reason for adjourning the hearing and that there was every reason to expect that counsel, who had been re-instructed for the purposes of this appeal having represented the respondent before the FTT and the Upper Tribunal, would be able to prepare the case in two days, given that it involved a pure point of law. We considered that an adjournment was wholly unjustifiable given the inordinate delays that have already occurred in this litigation, the notice under s.72 having been served over six years ago. At the start of the hearing before us, Ms Jegarajah renewed her application for an adjournment, drawing our attention to difficulties that had occurred in the firm of solicitors previously instructed on behalf the respondent. Despite her submissions, we were not persuaded that the circumstances justified adjournment. Having now heard the appeal, I am for my part entirely satisfied that the respondent has not suffered any prejudice by reason of our decision to refuse the adjournment application.

The law

(a) *The Refugee Convention*

11. Article 1A(2) of the Refugee Convention defines the term "refugee" as any person who

> ".. owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or whom, not having a nationality and being outside the country of his former

> habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Article 1C, so far as relevant to this appeal, provides:

> "This Convention shall cease to apply to any person falling under the terms of section A if
>
> …
>
> (5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality …."

Article 32, headed "expulsion", provides:

> "(1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."

Article 33, headed "prohibition of expulsion or return ('refoulement')", provides

> "(1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

(b) *UK Statutes*

12. S.72 of the Nationality, Immigration and Asylum Act 2002 provides *inter alia*:

> "(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

> (2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is (a) convicted in the United Kingdom of an offence, and (b) sentenced to a period of imprisonment of at least two years.
>
> …
>
> (6) A presumption under subsection (2) … that a person constitutes a danger to the community is rebuttable by that person."

13. S.32 of the UK Borders Act 2007 provides, so far as relevant:

> "(1) In this section 'foreign criminal' means a person (a) who is not a British citizen, (b) who was convicted in the United Kingdom of an offence, and (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> …
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to s.33) …."

S.33 of the 2007 Act provides *inter alia*:

> "(1) Sections 32(4) and (5) … do not apply where an exception in this section applies ….
>
> (2) Exception 1 is where removal of a 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."

(c) *Immigration Rules*

14. Paragraph 334 of the Immigration Rules, in its current form, provides:

> "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."

Paragraph 338A of the Rules provides that:

> "A person's grant of refugee status under paragraph 334 shall be revoked or not renewed if any of paragraphs 339A to 339AB apply …."

Paragraph 339A of the Rules provides *inter alia* that it applies "when the Secretary of State is satisfied that …

> (v) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality."

Paragraph 339BA provides:

> "Where the Secretary of State is considering revoking refugee status in accordance with these Rules, the following procedure will apply. The person concerned shall be informed in writing that the Secretary of State is reconsidering their qualification for refugee status and the reasons for the reconsideration. That person shall be given the opportunities to submit, in a personal interview or in a written statement, reasons as to why their refugee status should not be revoked …."

(d) *Case law*

15. A fundamental principle underpinning the interpretation of the provisions governing revocation of refugee status was identified by Lord Brown of Eaton-under-Heywood in *R (Hoxha) v Special Adjudicator* [2005] UKHL 19 at paragraph 65:

> "Once an asylum application has been formally determined and refugee status officially granted, with all the benefits both under the Convention and under national law which that carries with it, the refugee has the assurance of a secure future in the host country and a legitimate expectation that he will not

> henceforth be stripped of this save for demonstrably good and sufficient reason."

16. In *SSHD v MM (Zimbabwe)* [2017] EWCA Civ 797, this court (Black, Sales and Henderson LJJ) considered an appeal by the Secretary of State in a case involving a man who had been granted indefinite leave to remain as a refugee on the ground that he faced persecution in Zimbabwe, and subsequently developed a serious psychiatric illness, was convicted of rape, and made subject to a hospital order. The Secretary of State made a deportation order and a decision pursuant to Article 1C(5) of the Refugee Convention and paragraph 339A(v) of the Immigration Rules to cease recognition of MM as a refugee on the grounds that circumstances had improved in Zimbabwe so that he no longer faced a real risk of ill-treatment if returned there. The FTT allowed MM's appeal, holding *inter alia* that the Secretary of State had failed to establish that MM would not face a real risk of ill-treatment upon return to Zimbabwe, so she could not cease to treat him as a refugee for the purposes of the Refugee Convention, and that, in addition, his deportation there would violate his rights under Articles 2 and 3 of the ECHR the interpretation of Article 1C(5) of the Convention.

17. The Secretary of State was unsuccessful on appeal to the Upper Tribunal but succeeded before this court. It is unnecessary to consider the factual basis for the decision, but observations as to the interpretation of Article 1C(5) are relevant to this appeal. At paragraph 24 of his judgment, with which the other members of the court agreed, Sales LJ observed that Article 1C(5)

> "requires examination of whether there has been a relevant change in "the circumstances in connection with which [a person] has been recognised as a refugee". The circumstances in connection with which a person has been recognised as a refugee are likely to be a combination of the general political conditions in that person's home country and some aspect of that person's personal characteristics. Accordingly, a relevant change in circumstances for the purposes of Article 1C(5) might in a particular case also arise from a combination of changes in the general political conditions in the home country and in the individual's personal characteristics, or even from a change just in the individual's personal characteristics, if that change means that he now falls outside a group likely to be persecuted by the authorities of the home state. The relevant change must in each case be durable in nature."

18. Later in his judgment, Sales LJ considered the relationship between Article 1C(5) of the Refugee Convention and Articles 2 and 3 of ECHR:

> "33. … The FTT assumed that the position under the Refugee Convention and under the ECHR would be the same. In a broad sense, that is understandable, since if MM can show that he would face a real risk of persecution upon return to Zimbabwe then he will also have shown that he would face a real risk of ill-treatment contrary to Articles 2 and 3 of the

ECHR. The representative appearing for the Secretary of State in the Upper Tribunal appears to have accepted this.

34. Nonetheless, it should be noted that where an individual like MM seeks to rely on his rights under Articles 2 and 3 of the ECHR to prevent deportation the onus is on him to show that under current circumstances he would face a real risk of ill-treatment on return. The FTT, however, appears at para. [38] to have applied a presumption that MM would face a real risk upon return to Zimbabwe now, because the Secretary of State had accepted in 2002 that he faced such a risk. In my view, the FTT should have examined the evidence regarding the current risk faced by MM.

35. Strictly, for the purposes of analysis under Articles 2 and 3 it is not incumbent on the Secretary of State to show that the change of circumstances condition in Article 1C(5) has been satisfied. But as a practical matter one can see that the examination of current risk and the examination of whether Article 1C(5) applies in relation to a person previously recognised as a "refugee" for the purposes of the Refugee Convention will tend to run together.

36. In my view, by contrast with the position in relation to Articles 2 and 3 of the ECHR, it is correct to say that for the purposes of Article 1C(5) of the Refugee Convention the onus is on the Secretary of State to show, in relation to a person previously recognised by her as a "refugee" under Article 1A, that there has been a relevant change of circumstances such that the Refugee Convention ceases to apply to them ….

37. However, in practice this difference may again have little impact, since it will usually be appropriate to expect an individual to call attention in his evidence or representations to any aspect of his particular circumstances which would tend to show that he would be subject to a real risk of ill-treatment if deported … and to draw adverse inferences on the facts if he does not.

38. In so far as analysis under Articles 2 and 3 of the ECHR and analysis under Article 1A and 1C of the Refugee Convention give different answers, that may be significant. Where deportation would violate the individual's rights under Article 2 or Article 3 of the ECHR, that operates as an absolute bar to such deportation. This may not be so under the Refugee Convention, since even in the case of someone who has been recognised as a "refugee" and in relation to whom Article 1C(5) does not apply, deportation might still be allowed under that Convention if the test in Article 33(2) is satisfied. It is in that context that section 72 of the 2002 Act is relevant."

19. *MM (Zimbabwe)* was not cited by either party at the hearing before us, but in my view is relevant when considering submissions based on two other cases on which the Secretary of State relied.

20. Much of the focus of argument before the Upper Tribunal, and of submissions on behalf of the Secretary of State to us, was directed at the decision of this court in *SSHD v Mosira* [2017] EWCA Civ 407, decided by the same constitution of this court two weeks before the judgments in *MM (Zimbabwe)* were handed down. In that case, Mr Mosira's mother had been granted asylum in 2001 on the grounds of the lack of medical facilities available in Zimbabwe to treat her HIV medical condition. In other words, she was granted refugee status even though there was no determination that she met the test under Article 1A of the Convention. In 2004, Mr Mosira applied from Zimbabwe under this country's family reunion policy as the minor child of a sponsor in the United Kingdom who had been recognised as a refugee. In due course he was himself granted refugee status without any determination as to whether he met the test under Article 1A. In 2012 he received a three-year prison sentence for sexual offences and later that year was notified by the Secretary of State that he was liable for automatic deportation. In response, he stated that he could not be returned to Zimbabwe because he would be in grave danger in that country. In 2013, the Secretary of State notified him that she intended to cease his refugee status pursuant to Article 1C of the Convention and paragraph 339A of the Immigration Rules. In response, his representatives contended that he would face a real risk of significant ill-treatment if he was returned to Zimbabwe. The Secretary of State was unpersuaded by these representations and duly made a deportation order under s.32(5) of the 2007 Act.

21. At the hearing of Mr Mosira's appeal before the FTT, it was accepted on behalf of the Secretary of State that it was necessary to show that she had been entitled to decide to cease to recognise him as a refugee by virtue of Article 1C of the Convention and paragraph 339A(v) of the Immigration Rules. The FFT held that the "change in circumstances" required by Article 1C(5) could relate only to the circumstances of Mr Mosira himself, and not his mother; that he had been granted asylum as the dependent child of a person granted refugee status; that there had been a permanent change in that regard because he was now an adult, and that there was no real risk that he would be ill-treated if returned to Zimbabwe. Accordingly, his appeal was dismissed. His further appeal to the Upper Tribunal succeeded, however, on the grounds that he had not been given an opportunity to respond to the case put forward by the Secretary of State in her cessation of status notification. The Upper Tribunal directed that it would re-make the decision, and held that it had not been open to the Secretary of State to proceed by way of cessation of Mr Mosira's refugee status because the change in circumstances in Zimbabwe had nothing to do with the original basis on which he had been granted refugee status as a child of someone who had been granted refugee status. The Upper Tribunal proceeded to find that, on the available evidence, Mr Mosira had rebutted the presumption in s.72(2) that he constituted a danger to the community, concluded that he was a person with refugee status for the purposes of the Convention and that his removal to Zimbabwe could not be justified according to the test set out in Article 33(2).

22. In dismissing the Secretary of State's appeal, this Court rejected a number of arguments advanced on her behalf, including that the Upper Tribunal had erred in law

in holding that the cessation of Mr Mosira's refugee status was unlawful. At paragraph 49, Sales LJ, with whom the other members of the court agreed, observed:

> "Mr Mosira was not granted refugee status by reason of the threat of ill-treatment by the authorities in Zimbabwe. Nor was his mother. Therefore the change in the threat posed by the authorities in Zimbabwe has no bearing upon 'the circumstances in connection with which [Mr Mosira] has been recognised as a refugee'. He was granted refugee status under the 2003 family reunion policy to join someone in the United Kingdom who had (and continues to have) refugee status here: those were the 'circumstances with which he [was] recognised as a refugee'. It cannot be said that the change in the threat posed by the authorities in Zimbabwe means that those 'circumstances' have ceased to exist."

23. A further case cited on behalf of the Secretary of State was the decision of this court (Vos and Simon LJJ) in ***RY (Sri Lanka) v SSHD*** [2016] EWCA Civ 81. In that case, the appellant was given refugee status and indefinite leave to remain in this country on the basis that he had scarring on his body. Subsequently, he was convicted of causing death by dangerous driving and conspiracy to pervert the course of justice and received a prison sentence totalling three years. In the light of his offending, the Secretary of State decided to deport him and certified under s.72 of the 2002 Act on the basis that he had been convicted of a particularly serious crime and was a danger to the community, with the result that his refoulement would not infringe Article 33 of the Refugee Convention. The Secretary of State did not, however, make any formal decision to cease or revoke his refugee status under Article 1C(5) of the Convention or paragraph 339A of the Immigration Rules. The appellant's appeal was unsuccessful before the FTT and Upper Tribunal but he was granted permission to appeal to this court. His primary ground of appeal was that Article 33(2) of the Convention and s.72(1) of the 2002 Act had no effect as a matter of English law unless his refugee status was revoked, that for as long as he had the status of a refugee he was presumed to have a well-founded fear of persecution if he were returned, and that this was determinative of (or at least highly material to) the consideration of his rights under Article 3 of ECHR. In response, it was submitted on behalf of the Secretary of State that the fact that the appellant retained refugee status did not have either the legal or factual consequence that he would be at risk if he were deported. That was clear from the terms of Article 33(2) which envisaged the refoulement of a refugee convicted of a particularly serious crime. In such circumstances the refugee's position is protected by invoking his rights under Article 3 of ECHR, which prevent refoulement where the individual is at risk of inhuman or degrading treatment or punishment.

24. Simon LJ, with whom Vos LJ agreed, rejected the appellant's submission, holding that there was no proper basis for the assertion that past refugee status (of itself) raises a presumption of ill-treatment on return contrary to Article 3. The terms of Article 33(3) of the Refugee Convention make clear that refugee status will not (of itself) prevent refoulement in the specified circumstances. Relying on observations made by Stanley Burnton LJ in ***EN (Serbia) v SSHD*** [2009] EWCA Civ 630, Simon LJ concluded that it was clear that the State *may* revoke refugee status on the grounds that an individual constitutes a danger to the community having been convicted of

particularly serious crime, but is not *obliged* to do so. He agreed with observations made by the Upper Tribunal that a person may be granted refugee status many years before a decision is made to refoul on the grounds of serious criminality and it was difficult to see why there should be a continuing presumption of indefinite duration. The fact that a State has not taken steps to revoke a person's refugee status is relevant when considering whether there is a violation of Article 3 but only when deciding whether there are good reasons for considering whether, looking forward, there is a real risk of persecution or ill-treatment.

Home Office policy

25. At the hearing before this court, Ms Jegarajah on behalf of the respondent cited a Home Office policy document entitled "Asylum policy instruction: Revocation refugee status", published in January 2016, and drew attention in particular to the following paragraph:

> "3.7.1 In the case of dependants granted under the family reunion provisions, caseworkers must check and establish if the dependant was granted refugee status as well as leave in line. The previous policy on family reunion was to grant refugee status and leave in line as a matter of course. A dependant granted refugee status on this basis may be unable to provide details about the reasons why the principal applicant was granted asylum. Caseworkers must review the reasons for the grant of asylum to the principal applicant and take this into account when reviewing the case. However, the required test is whether the individual can continue to refuse the protection of the country or nationality. This means that there must be a continuing need for protection at the date of the decision rather than continue to benefit from refugee status on the basis of historical facts."

26. In her oral submissions, Ms Jegarajah also drew attention to the origins of the family reunion policy as identified in *MK (Somalia) and others v Entry Clearance Officer* [2008] EWCA Civ 1453 where counsel cited a ministerial statement in the House of Commons on 17 March 1995 in which it was explained:

> "Although family reunion does not form part of the [Refugee] Convention itself, the United Kingdom will normally permit the reunion of the immediate family, as a concession outside the immigration rules. Under that policy people recognised as refugees immediately became eligible to be joined by their spouse and minor children, provided that they had lived together as a family before the sponsor travelled to seek asylum."

At a later date, the family reunion policy was incorporated by amendment into the Immigration Rules.

The reasons for the Upper Tribunal's decision

27. At paragraph 17 of the Upper Tribunal's decision and reasons, the judge said:

> "The burden of proving that Article 1C(5) of the Refugee Convention applies rests on the Secretary of State (*RD (Cessation – burden of proof – procedure) Algeria* [2007] UKAIT 00066). She must demonstrate that the respondent can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the DRC. The appellant must therefore demonstrate the circumstances 'in connection with which' the respondent was 'recognised as a refugee'. There was no evidence produced to the judge that the respondent was recognised as a refugee on the basis that he would be the subject of an imputed political opinion. Given that the respondent was only nine years old when he left the DRC (entirely lawfully, on an application of entry clearance), it is highly unlikely that the DRC authorities would have imputed any political opinion to him, or that the British authorities would have reasonably considered that the respondent was a real risk of being the subject of an imputed political opinion. It is much more likely that the respondent was granted refugee status because his parents had been granted refugee status, which would have been consistent with the Secretary of State's policy at the time. This appears to have been the view of the judge who stated … that the appellant's refugee status 'was as the dependent of his father'. The grounds of appeal settled by the appellant state that the respondent was not granted refugee status in his own right and [the Home Office's presenting officer] did not seek to go behind this assertion. The appellant has consequently not discharged the burden of proving that the respondent was recognised as a refugee on the basis that he would be the subject of an imputed political opinion. I find he was not recognised as a refugee in his own right but was granted refugee status because his parents were recognised as refugees."

28. The Upper Tribunal judge proceeded to consider the decision in *Mosira*, citing paragraph 49 of Sales LJ's judgment, and reached the following conclusion (at paragraph 23 to 25 of the decision):

> "23. As in the case of *Mosira*, the respondent was not granted refugee status by reason of the threat of ill-treatment by the authorities in the DRC. Although his father was granted refugee status on this basis, any change in the DRC still has no bearing on the circumstances in connection with which the respondent was recognised as a refugee.
>
> 24. While there are differences between the position of Mr Mosira and the respondent, I do not consider that the reasoning of the Court of Appeal, when applied to the facts, can lead to a conclusion that the circumstances in which he came to be

> recognised as a refugee have ceased to exist. Although Mr Mosira was granted leave to enter the UK pursuant to a 2003 family reunion policy, and was granted refugee status under the terms of that policy, there is nothing of the evidence before me to indicate that the grant of entry clearance to the respondent in 1992 to enable him to join his parents in the UK was, in principle, any different ….
>
> 25. Given that the political changes in the DRC have not altered the basis upon which the respondent was granted refugee status, I am not persuaded that the circumstances in connection with which he was recognised as a refugee have ceased to exist. I therefore find that the CRS decision did breach the UK's obligations under Article 1C(5) of the Refugee Convention."

The Secretary of State submissions

29. In support of his first ground of appeal, Mr Malik on behalf of the Secretary of State contended that the Upper Tribunal read the phrase "the circumstances in connection with which" in Article 1C(5) and paragraph 339A(v) of the Immigration Rules too narrowly and thereby erred in law. The circumstances in which the respondent was granted refugee status included his father's persecution by President Mobuto's regime. At that time, the respondent was a child and part of his father's family and therefore not leading an independent life. Mr Malik submitted that it is therefore difficult to see why political change in DRC is immaterial. Given the change in circumstances, the respondent can no longer "refuse to avail himself of the protection" of his home country. The reasons why he was given refugee status were clearly related to the then situation in DRC. Mr Malik further submitted that the approach adopted by the Upper Tribunal, if correct, would bar the Secretary of State from ever revoking the refugee status of someone who had been awarded that status as a dependent. He submitted that it makes no sense to suggest that a change in the circumstances of home country may result in cessation of a parent's refugee status but that there is no power to cease the status of his or her dependents.

30. Mr Malik submitted that the circumstances of this case are materially different from those in ***Mosira***. As is clear from paragraph 20 of the judgment in that case, Mr Mosira's mother had been granted asylum on the basis of lack of medical facilities in Zimbabwe without any "political element". In contrast, the father of the respondent in this case was granted refugee status on political grounds.

31. In support of the second ground of appeal, Mr Malik points out that, after concluding that it was not open to the Secretary of State to cease the respondent's refugee status, the Upper Tribunal simply proceeded to allow the appeal on asylum grounds. Judge Blum apparently took the view that, if a person was given refugee status, then, irrespective of whether he is able to return safely to his home country, he ought to be treated as a refugee in the absence of unlawful cessation of that status. Mr Malik submitted that this approach was wrong in law. A person is a refugee if he satisfies the definition of a refugee in the Refugee Convention. This is so even if his status has not been recognised by the contracting state in question. Mr Malik submitted that the Upper Tribunal, irrespective of whether or not his status had been formally ceased,

was obliged to consider whether the respondent is still a person at risk "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". He submitted that the Upper Tribunal ought to have accepted the Secretary of State's contention that the respondent was not in fact a refugee and therefore should have concluded that his return to DRC would not breach the obligation under articles 32 or 33 of the Refugee Convention. He cited the decision of this court in ***RY (Sri Lanka)***, *supra*, in support of the submission. It was conceded that this argument had not been advanced before the Upper Tribunal.

32. Mr Malik accepted that, if the appeal succeeded on either ground, the matter would have to be remitted to the Upper Tribunal for a further determination on the facts.

Discussion and conclusions

33. I accept the submission on behalf of the Secretary of State in support of the first ground of appeal that the Upper Tribunal interpreted of Article 1C(5) and paragraph 339A(v) too narrowly. Those provisions in the Refugee Convention and Immigration Rules do not authorise the revocation of a refugee's status merely if the grounds on which the respondent was granted that status have changed but, rather, where "the circumstances in connection with which he has been recognised as a refugee have ceased to exist". As acknowledged by this court in ***MM (Zimbabwe)***, this involves a wider examination.

34. In this case, the respondent was granted refugee status 25 years ago in 1994 at a time when, under the policy then in place, a member of a family of a person granted refugee status was himself automatically recognised as a refugee. It is unclear from the information provided to this court whether or not the respondent would himself have a well-founded fear of ill-treatment so to satisfy Article 1A(2). It is clear, however, that his father passed that test. His father's persecution by the regime in DRC, and well-founded fear of further prosecution were he to be returned to that country, were manifestly part of the circumstances in connection with which the respondent himself was recognised as a refugee.

35. In contrast, the circumstances in which Mr Mosira was granted refugee status did not include any history or fear of persecution of either his mother or himself. Thus, as stated by Sales LJ at paragraph 49 of his judgment in ***Mosira***, any change in the threat posed by the authorities in Zimbabwe had no bearing on the circumstances in connection with which he was recognised as a refugee. The decision of this court in ***Mosira*** does not apply to all dependents of refugees, but rather is confined to cases where the basis for granting the refugee status to the parent and/or the child was not covered by the Refugee Convention. I therefore disagree with the Upper Tribunal's analysis of this issue at paragraph 23 of its judgment on which its decision in this case was based.

36. As this court made clear in ***MM (Zimbabwe)***, given that the respondent has been granted refugee status, the onus of proving that the circumstances in connection with which he was recognised as refugee have ceased to exist lies on the Secretary of State. He must show that, if there were any circumstances which in 1994 would have justified the respondent fearing persecution in DRC, those circumstances have now ceased to exist and that there are no other circumstances which would now give rise to

a fear of persecution for reasons covered by the Refugee Convention. As stated by Sales LJ in *MM (Zimbabwe)*, the circumstances under consideration are likely to be a combination of the general political conditions in the individual's home country and some aspect of his personal characteristics. What is clear from that decision, and the Home Office policy document to which we were referred by the respondent's counsel, is that the focus of the investigation must be on the current circumstances of the individual and conditions in his home country.

37. It follows that, in my judgment, the Secretary of State must succeed on the first ground of his appeal. I am not, however, persuaded by Mr Malik's submissions in support of the second ground. It is right, as this court pointed out in *RY (Sri Lanka)*, that the Secretary of State *may* revoke refugee status on the grounds that the individual has been convicted of a particularly serious crime and constitutes a danger to the community but is not *obliged* to do so. It is correct that, subject to arguments concerning his rights under Articles 2 or 3 of ECHR, a refugee can be refouled under Article 33(2) of the Refugee Convention without his refugee status being revoked. This course was available in *RY (Sri Lanka)* because the appellant had failed to rebut the presumption under s.72(2) that, having been convicted of a particularly serious crime, he constituted a danger to the community. In the present case, however, the FTT held that the respondent had rebutted the statutory presumption under s.72(2) and the Secretary of State chose not to appeal against that decision. It follows that there is no finding that the respondent constituted a danger to the community of this country. He is therefore entitled to protection against refoulement in Article 33.

38. It is true, as Mr Malik pointed out, that a person is a refugee if he satisfies the definition of a refugee in article 1A(2) of the Convention, even if his status has not or not yet been recognised by a contracting state. As stated in paragraph 28 of the UNHCR Handbook, a person "does not become a refugee because of recognition, but is recognised because he is a refugee". It does not follow, however, nor is it correct that, as Mr Malik appeared to suggest, once a person has been recognised as a refugee the question whether the Convention continues to apply to him at any given time is determined by considering simply whether at that time he falls within the definition of a refugee in article 1A(2). Such an approach would be wholly contrary to Article 1C(5) and to the principle underpinning it identified by Lord Brown in the *Hoxha* case cited above that, once refugee status has been officially granted, with the consequential benefits that follow under the Convention and national law, the refugee has a legitimate expectation that he will not be stripped of the status save for demonstrably good and sufficient reason. Any individual who has been recognised as a refugee under Article 1A(2), and who is not liable to refoulement under Article 33(2), can only be deported if the Convention ceases to apply to him for one of the reasons set out in article 1C. In the present case the only potentially relevant reason is that specified in article 1C(5) and the relevant question is whether the test there set out, which is also reflected in rule 339A(v), is met.

39. In my judgement, therefore, this appeal fails on ground two but succeeds on ground one. If my Lords agree, I would remit the case to the Upper Tribunal for a full investigation as required by Article 1C(5) as to whether the circumstances in connection with which KN was recognised as a refugee have ceased to exist.

LORD JUSTICE LEGGATT

40. I agree.

LORD JUSTICE McCOMBE

41. I also agree.