



25 May 2011  
[2011] UKSC 22

## PRESS SUMMARY

### **FA (Iraq) (FC) (Respondent) v Secretary of State for the Home Department (Appellant)**

*On appeal from the Court of Appeal (Civil Division) [2010] EWCA Civ 696*

**JUSTICES:** Lord Phillips (President), Lord Hope (Deputy President), Lord Brown, Lord Kerr, Lord Dyson

### **BACKGROUND TO THE APPEALS**

This appeal concerns the relationship between two rights which enable non-nationals to remain in the United Kingdom: humanitarian protection, which derives from European law, and asylum, which derives from a combination of domestic law, European law, and international law. The issue in the appeal is whether, because a right of appeal exists against a refusal of an asylum application, European law requires that a right of appeal also be available against a refusal of an application for humanitarian protection.

FA is an Iraqi national who arrived unaccompanied in the United Kingdom in August 2007 when he was 15 years old. He made an application for asylum which the Secretary of State refused on the grounds that his claim was not credible. The Secretary of State also considered whether FA qualified for humanitarian protection and / or discretionary leave to remain in the United Kingdom. Humanitarian protection is the domestic means of providing the ‘subsidiary protection’ which Directive 2004/83/EC (“the Qualification Directive”), a European legislative instrument, requires to be given to certain third country nationals and stateless persons. The Secretary of State decided that FA did not qualify for humanitarian protection, but granted him discretionary leave to remain until he was 17 and a half years old.

Section 83(2) of the Nationality Immigration and Asylum Act 2002 entitled FA to appeal to the Asylum and Immigration Tribunal against the refusal of his claim to asylum. FA made such an appeal and also appealed against the refusal of his claim for humanitarian protection. The Tribunal dismissed both the asylum and humanitarian protection appeals, deciding in respect of the latter that no appeal was available to FA in relation to humanitarian protection.

On appeal to the Court of Appeal, FA relied upon the European law principle of equivalence. This provides that, although it is for Member States to prescribe the procedural conditions necessary for the protection of European law rights, national rules regarding those procedural conditions must not be less favourable than those governing comparable domestic actions. FA argued that he must be entitled to a right of appeal against the humanitarian protection decision since the lack of an appeal would mean that this claim, based as it was on European law, was being subjected to rules which were less favourable than those which applied to the asylum claim, such a claim being based on national law.

The Court of Appeal acceded to this argument and allowed FA’s appeal. The Secretary of State appealed to the Supreme Court against that decision.

## JUDGMENT

The Supreme Court unanimously decides that a number of issues arise on the appeal which require a reference to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. Lord Kerr delivers the judgment of the panel.

## REASONS FOR THE JUDGMENT

The critical question on the appeal is whether the principle of equivalence requires that a right of appeal must be available against the decision to dismiss FA's application for humanitarian protection. This in turn depends on whether there is a comparable domestic right which is subject to more favourable rules than his humanitarian protection right. It is clear that the humanitarian protection claim is subject to less favourable rules than the asylum claim, given that the latter provides FA with an appeal against the initial refusal. The issue, however, is whether the asylum claim is a legitimate comparator. This issue has a number of aspects, in particular: (i) whether the comparator with the European law claim must be a purely domestic measure; (ii) what is required in order that the compared measures may be regarded as sufficiently similar; and (iii) the source of the procedural rights of the asylum applicant.

As to (i), on the one hand there is a consistent line of authority from the European Court of Justice to the effect that the domestic measure must be a purely domestic provision. If comparison with another European law provision was possible, much of the underlying purpose of the equivalence principle would be subverted, given that the essential reason for the development of the principle was that a European law right should not suffer disadvantageous treatment relative to national law rights. On the other hand, however, it might be inconsistent with the aim of eliminating discrimination and overly technical to preclude comparison with another right on the basis that the right could be branded as deriving partly from a European law source. [24]-[25]

As to (ii), various formulae have been employed in case law to describe the nature of the similarity that is required, including whether the purpose, essential characteristics and / or juristic structures of the two measures are the same. There is much to be said for the view that the question of the required similarity and the criteria necessary to establish it in an individual case will depend on the context in which the application of the principle of equivalence is canvassed. [40]-[42]

As to (iii), the asylum claim is based on provisions that were enacted in pursuance of the United Kingdom's obligations under the Qualification Directive. Yet they mirror requirements set out in the Refugee Convention, an instrument of international and not European law, and this may have been the original source of many of the provisions of the Qualification Directive. Whatever the answer to (iii), however, it does not provide an answer to (i) and (ii). Those essential questions have not been directly addressed by the European Court of Justice and for that reason a reference to the Court for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union is required. [47]

The Supreme Court decides to make such a reference and invites the parties to make submissions on the precise questions to be referred. [48]

*References in square brackets are to paragraph numbers in the judgment.*

## **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at:**

**[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)**