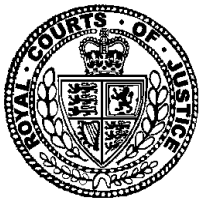

Neutral Citation Number: [2019] EWCA Civ 1670

Case No: C5/2018/2614 and C2/2019/1244

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Upper Tribunal Judge Coker / Upper Tribunal Judge Rimington

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)

LORD JUSTICE NEWEY
and
LORD JUSTICE HADDON-CAVE

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
JS (UGANDA)	**Respondent**

- -
- -

Nicholas Chapman (instructed by **the Treasury Solicitor**) for the **Appellant**
Raza Husain QC, Benjamin Bundock, and Eleanor Mitchell (instructed by **Duncan Lewis**) for the **Respondent**

Hearing dates : 2-3 July 2019

- -

Approved Judgment

Lord Justice Haddon-Cave:

INTRODUCTION

1. This case concerns the 1951 Geneva Convention on Refugees ("the Refugee Convention") and the protection against *refoulement* afforded to foreign criminals subject to deportation orders, who have previously been granted refugee status linked to the refugee status of a family member. The case raises issues of construction as to the definition of "refugee" under Article 1A(2) and the true construction of the "cessation" provision under Article 1C(5) of the Refugee Convention.

2. There are three appeals:

   (A) The Main Appeal: in the Main Appeal (C5/2018/2614), the Secretary of State for the Home Department ("SSHD") appeals against the decision by Upper Tribunal (Immigration and Asylum) Judge ("UTJ") Coker on 5th July 2018 to set aside the decision by First-Tier Tribunal (Immigration and Asylum) Judge ("FtTJ") Sullivan on 22nd May 2017 to dismiss the appeal by JS against his deportation order dated 5th February 2016.

   (B) The Cross-Appeal: in the Cross-Appeal, JS challenges the said decision of UTJ Coker on 5th July 2018 as regards her finding that FtTJ Sullivan did not materially err in refusing the SSHD's appeal on Article 3 grounds.

   (C) The Linked Appeal: In a Linked Appeal arising out of the same facts and involving the same parties (C2/2019/1244), JS appeals against the decision of UTJ Rimington dated 7th May 2019 whereby she refused JS's application for permission to apply for judicial review against what JS contended was the SSHD's change of position in the context of the main appeal (C5/2018/2614) as to whether JS was entitled to the protection of the Refugee Convention and certified the claim as totally without merit.

3. On 28th January 2019, Irwin LJ granted the SSHD permission to appeal (A). On 20th May 2019, Hickinbottom LJ granted JS permission to cross-appeal (B). On 4th June 2019, Hickinbottom LJ ordered JS's separate appeal (C) to be heard on a rolled-up basis with (1) and (2).

4. The Court is grateful for the helpful research and written and oral submissions of counsel on both sides, Nicholas Chapman on behalf of the SSHD and Raza Husain QC, Benjamin Bundock and Eleanor Mitchell on behalf of JS.

Factual Background

5. JS was born on 1st May 1989 and is a Ugandan citizen. He is now aged 30.

JS's mother granted asylum – 2005

6. On 11th April 2005, JS's mother was granted asylum and Indefinite Leave to Remain ("ILR") in the UK. She claimed a well-founded fear of persecution in Uganda by reason of her imputed political opinions. By letter dated 11th April 2005, the Home Office stated that she had been recognised as a "refugee" as defined in the Refugee Convention and had been granted asylum in accordance with the Immigration Rules.

JS granted entry clearance – 2006

7. On 19th December 2005, JS applied for entry clearance as the dependant of a recognised refugee, namely his mother. On 10th May 2006, JS was granted Leave to Enter ("LTE") the UK for family reunion.

8. On 26th May 2006, JS arrived in the UK, aged 17, and was granted entry clearance.

JS's criminal conviction – 2013

9. In November 2013, JS was convicted of attempted rape of a vulnerable woman. He was sentenced to 5 years' imprisonment and required to sign the sex offenders' register for life. On 27th November 2013, the SSHD notified JS that his deportation from the UK was to be considered.

10. On 9th April 2015, the SSHD notified JS of an intention to deport him from the UK and invited representations.

11. On 17th April 2015, the SSHD wrote to JS notifying him that his refugee status would be reviewed in the light of his conviction. The letter commenced with the words "You have been granted refugee status" and went on to state *inter alia* that: (i) Article 33 of the Refugee Convention prohibits the *refoulement* of a refugee, but not where they have committed a particularly serious crime and constitutes a danger to the community; (ii) s.72 of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") applied "for the purpose of the construction and application of Article 33(2) of the Refugee Convention"; and (iii) since JS had committed a particularly serious crime and represented a danger to the community, his refugee status would be reviewed accordingly. JS was given the opportunity to rebut the presumptions under s.72 of the NIAA 2002.

12. On 1st and 13th May 2015 and 17th September 2015, JS made representations as to why he should not be deported. JS asserted that he was a refugee, had been ill-treated in Uganda, and had claims under Articles 3 and 8 of the European Convention on Human Rights ("ECHR").

13. On 4th September 2015, the SSHD wrote to JS notifying him of the intention "to cease his [JS's] refugee status". The SSHD's letter (i) noted that Article 1C of the Refugee Convention "sets out the conditions under which a refugee ceases to be a refugee",

and set out the corresponding provisions in paragraph 339A of the Immigration Rules; (ii) stated, "you were granted refugee status and leave in line with your mother […] not in your own right"; and (iii) concluded that "the Secretary of State is proposing to cease your refugee status because she is satisfied that Article 1C(5) and, therefore, paragraph 339A(v) […] apply".

14. On 2nd October 2015, the SSHD wrote to the Office of the United Nations High Commissioner for Refugees ("the UNHCR"), informing them of her intention to cease JS's refugee status, and enclosing the letter of 4th September 2015 and JS's letter in response.

15. On 23rd October 2015, the UNHCR replied, noting their understanding that the SSHD "proposes to cease [JS's] refugee status by the application of Article 1C(5) of the 1951 Convention". The UNHCR highlighted relevant considerations and evidence and expressed concern that it did not appear that JS had ever been interviewed about his mistreatment by the Ugandan authorities.

16. On 7th December 2015, the SSHD wrote again to JS repeating that JS had been granted refugee status "in line" with his mother and asserting that "it is not accepted that you were granted refugee status other than as a dependant of your mother". The SSHD further stated that (i) JS was "no longer in need of international protection under the terms of the [Refugee Convention] as there has been a significant and enduring change in Uganda", and (ii) since the circumstances in connection with which he had been recognised as a refugee had ceased to exist, he continued to refuse to avail himself of the protection of the country of his nationality pursuant to Article 1C(5) of the Refugee Convention and paragraph 339A(v) of the Immigration Rules. JS did not appeal against that decision.

17. On 5th February 2016, the SSHD refused JS's protection and human rights claims, certified JS's case under s.72 of the NIAA 2002, incorporated and adopted the decision to cease JS's refugee status and decided to deport JS. Subsequently, JS appealed these decisions to the FtT.

18. On 2nd June 2016, JS made further protection and human rights claims, based on a claim to be bisexual. On 5th June, 13th July and 9th August 2016, the SSHD conducted interviews with JS in detention in relation to his individual asylum claim. JS also raised fears based on his past mistreatment in Uganda and his bisexuality.

19. On 12th September 2016, the SSHD took a further decision to refuse JS's protection and human rights claims and disputed both JS's account of his mistreatment in Uganda and his bisexuality.

20. JS appealed that further decision to the FtT. In due course the two appeals, against the SSHD's decisions of 5th February 2016 and 12th September 2016, were joined.

Procedural Background

FtTJ Sullivan's determination – 22nd May 2017

21. JS appealed the SSHD's decisions of 5th February 2016 and 12th September 2016 to the FtT. Both appeals were heard together by FtTJ Sullivan who, by a determination promulgated on 22nd May 2017, dismissed both appeals on all grounds.

22. FtTJ Sullivan held that JS was recognised as a refugee on entry to the UK on 26th May 2006 on the basis of the Family Reunion policy because of his mother's status. JS's mother had been granted refugee status because she was suspected of belonging to an unnamed rebel group. JS was not recognised as a refugee on the basis of his own activity or profile, *i.e.* in his own right. The attitude to former rebels had, however, softened in Uganda since his mother was granted asylum and the conditions for cessation under paragraph 339A(v) of the Immigration Rules were established (see further below).

23. In the course of his detailed judgment, FtTJ Sullivan referred to JS's assertion that his mother had been politically affiliated in Uganda and that "as a consequence he had been tortured by the current Ugandan government; his home in Uganda had been raided and he had scars on his body from physical attacks leading to him being granted asylum" (see [6] of his judgment).

24. FtTJ Sullivan's findings as to the basis of JS's entry to the UK are set out at [29]-[31] of his judgment:

> "Basis of Appellant's entry to the United Kingdom May 2006
>
> 29. The Appellant came to the United Kingdom on 26 May 2006 to join his mother. I am satisfied that he made his application on 19 December 2005 for entry clearance as "recognised refugees and their dependants" and that his application was sponsored by his mother. I am satisfied that on 10 May 2006 the Appellant was granted indefinite leave to enter the United Kingdom for family reunion. The specimen vignette […] makes no mention of refugee status. The Appellant's brother, Hussein Kajja, has been able to provide a copy of the visa which was affixed to his passport; he also travelled to the United Kingdom on 26 May 2006. His visa is endorsed "Multi Visa Family Reunion – sponsor". I am satisfied that the visa in the Appellant's passport would have mirrored that in his brother's passport (bar the entry date).
>
> 30. The various policy documents and emails filed on 1 March 2017 indicated that from July 1998 until 2011 members of the family of a recognised refugee were granted "status in line" with the refugee rather than "leave in line" with him or her. It appears that the policy in place at the dates of the Appellant's application for a UK visa and of the issue of a visa to him was that published in 2003. Paragraph 3.1, section 2, chapter 6 of the Asylum Policy instructions 2003 states: "If a person has been recognised as a refugee in the UK we will normally recognise family members in line with them. If the family are abroad we will normally agree to their admission as refugees."

> 31. In light of that policy and the documentary evidence I am satisfied that on 10 May 2006 the Appellant was granted entry clearance as if he was a refugee and on arrival in the United Kingdom on 26 May 2006 he was granted leave to enter as a refugee. I am satisfied that he was recognised as a refugee because of his mother's history, her status as a refugee and his relationship to her."

25. FtTJ Sullivan concluded as follows regarding the basis upon which JS had been recognised as a refugee (at [39]):

> "39. I am satisfied that the Appellant was recognised as a refugee because of the account his mother had given prior to his arrival in the United Kingdom. I am satisfied that he was not recognised as a refugee on the basis of any activity or profile of his own or due to any suspicion about him, his activities or his views. I am satisfied that the approach to former rebels has softened since the Appellant was granted asylum; there has been insufficient reason for me to depart from [*PN (Lord's Resistance Army) Uganda CG* [2006] UKAIT 00022]. I am satisfied that the conditions for cessation under paragraph 339A(v) [of the Immigration Rules] were established".

26. FtTJ Sullivan also held that JS was not, in any event, entitled to the protection of Article 33 of the Refugee Convention (*i.e.* protection against *refoulement*) because he had been convicted of a particularly serious crime and he constituted a danger to the community of the UK. Due to the gravity of JS's criminal offence, his deportation was conducive to the public good [40]. He was presumed to constitute a danger to the community of the UK pursuant to s.72 of the NIAA 2002 [42]. FtTJ Sullivan concluded that JS continued to represent a significant risk of serious harm to females in the community and thus he continued to constitute a danger to the community for the purposes of s.72 of the NIAA 2002. Accordingly, JS had not rebutted the presumption in s.72 of the NIAA 2002.

27. FtTJ Sullivan accepted the medical evidence that JS suffered from PTSD and depression and posed a suicide risk, but was not satisfied that JS's condition was so serious that it would breach Article 3 of the ECHR if he was returned to Uganda and referred to *Paposhvili v Belgium* (App no. 41738/10) [86].

28. In summary, FtTJ Sullivan held (at [102]-[114]): (i) The circumstances in connection with which JS was recognised as a refugee in May 2006 had ceased to exist. (ii) JS was not gay/bisexual. (iii) JS could not rely on Article 33(1) of the Refugee Convention. (iv) JS was excluded from protection under paragraph 339D(iii) of the Immigration Rules. (v) JS's removal would not breach Articles 3 or 8 of the ECHR. (vi) JS did not share family life with any of his mother, brothers, his first daughter Aaliyah or her mother. (vii) JS did not have a genuine and subsisting relationship with his daughter Aaliyah. (viii) JS did share a family life with his wife and second daughter Jeyda, but his removal would have no significant impact on Jeyda. (ix) JS has private life in the UK but there would be no significant obstacles to his reintegration in Uganda. (x) The SSHD's refusal was proportionate. (xi) Paragraph 398(a) of the Immigration Rules applied and there were no very compelling circumstances to outweigh the public interest in deportation. And (xii), JS did not fall within the exceptions at s. 33 of the NIAA 2002.

UTJ Coker's determination – 5th July 2018

29. JS appealed FtTJ Sullivan's decision to the UT. By a determination promulgated on 5th July 2018, UTJ Coker allowed his appeal on two main grounds. First, JS was a refugee lawfully within the UK within the meaning of Article 32 of the Refugee Convention and entitled to the enhanced protection from expulsion contained therein. He remained a refugee under Article 1C(5) of the Refugee Convention because the circumstances in connection with which he had been recognised as a refugee, namely that he was the son of a recognised refugee, had not ceased to exist. FtTJ Sullivan had erred in law because he had taken account of the risk to JS himself (see [18]-[24]). Second, UTJ Coker held that the FtTJ had come to perverse conclusions on the evidence and/or failed to give adequate reasons for his factual conclusions (see [43]).

30. UTJ Coker dismissed JS's challenge on FtTJ Sullivan's findings on Article 3. She held that he "did not materially err in law in [his] consideration of the appellant's medical matters such that the decision on Article 3 (medical) should be set aside" [54]. UTJ Coker reached this conclusion on the basis that "in the context of current jurisprudence, taking the medical claims at their highest, an Article 3 medical claim will not succeed. Therefore, any error made by the judge is not material" [50].

UTJ Coker's reasoning

31. It is necessary to explain UTJ Coker's reasoning in relation to the first ground as regards the non-cessation of JS's refugee status under Article 1C(5) of the Refugee Convention in more detail.

32. UTJ Coker held that the SSHD's decision was predicated on the basis that JS was recognised as a refugee under paragraph 344 of the Immigration Rules. The FtTJ reached his decision on the basis that the change in circumstances in Uganda was such that JS was no longer in need of protection in Uganda. She held that this was an incorrect basis upon which to decide whether his refugee status could be lawfully revoked and cited *Mosira v. SSHD* [2017] EWCA Civ 407 (at [21]).

33. The essential rationale for UTJ Coker's decision was that because JS's mother continued to be recognised as a refugee, JS's status could not be ceased under Article 1C(5). She held: "The fact remains that [JS] was recognised as a refugee *because* his mother was a refugee *and* she remains a refugee" (at [22]) and went on to state (at [23]):

> "23. Where a person has been recognised as a refugee under the family reunion policy, it is the circumstances that led to that recognition namely the relationship between the refugee and the individual, that are to be addressed when deciding whether to cease Refugee Status under Article 1C(5) of the Refugee Convention. Where the SSHD has not taken a decision to curtail or revoke the status of the person through whom the individual was recognised as a refugee, the First-Tier Tribunal cannot reach a decision that JS's status has been curtailed or revoked."

34. UTJ Coker held that, on the basis of ss. 78, 79 and 104 of the NIAA 2002, JS was currently lawfully resident in the UK (at [37]). She concluded as follows (at [38]-[40]):

> "38. In accordance with *Mosira,* JS remains a refugee under the Refugee Convention. His mother remains a refugee; he was granted refugee status on the basis of her recognition as a refugee and the circumstances of that recognition have not changed – or at least the SSHD has not established that they have changed. The attempt by the SSHD to utilise a change of circumstances in Uganda to justify the cessation of JS's refugee status in accordance with article 1C(5) under the 1951 Convention cannot succeed because the appellant did not gain his refugee status on that basis. The SSHD's conclusion to that effect is therefore wrong in law.
>
> 39. That JS is a refugee does not preclude his removal from the UK – Article 33(2) Refugee Convention. But JS can invoke the more generous protection of Article 32 Refugee Convention – he is a refugee lawfully on the territory of the UK and can only be expelled "on grounds of national security or public order".
>
> 40. It follows that not only did the First-tier Tribunal approach the issue of cessation incorrectly and conclude that the circumstances in Uganda were such that […] Article 1C(5) was met, but the consequences of that error are material."

35. UTJ Coker held that the FtTJ had made a material error of law. She proceeded to remake the decision. She concluded that JS was a refugee lawfully present in the UK entitled to the protection of Article 32 of the Refugee Convention, and that there were no grounds of national security or public order which would justify his expulsion (see [56]-[60]).

UTJ Rimington's refusal of permission for judicial review – May 2019

36. On 31st October 2018, the SSHD filed grounds of appeal in the Main Appeal arguing, in the alternative, that JS had never been granted refugee status under the Refugee Convention and was not entitled to the protections thereunder (see below).

37. This prompted JS to file the judicial review proceedings underpinning the Linked Appeal seeking to challenge the SSHD's assertion, and right to assert, that JS had never been granted refugee status under the Refugee Convention in the first place.

38. On 7th May 2019, UTJ Rimington (i) refused to refer the matter to the Court of Appeal for consideration, (ii) refused JS permission to proceed with these second judicial review proceedings, and (iii) certified the application as totally without merit. JS sought permission to appeal UTJ Rimington's decision.

39. As mentioned, on 4th June 2019, Hickinbottom LJ ordered that JS's application for permission to appeal from UTJ Rimington's decision be adjourned into open court to be heard on a rolled-up basis with the Main Appeal.

THE LEGAL FRAMEWORK

The Refugee Convention

40. Article 1 of the Refugee Convention (as amended by the 1966 Protocol) provides as follows:

> "Article 1
> DEFINITION OF THE TERM "REFUGEE"
>
> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:
> …
> (2) […] 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 …
>
> …
>
> C. 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 connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of his country of nationality; …
>
> (6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, able to return to his former habitual residence; …"

41. Article 32 provides:

> "Article 32
> EXPULSION
>
> "1. The Contracting State shall not expel a refugee lawfully in their territory save on grounds of national security or public order. …"

42. Article 33 provides:

> "Article 33
> PROHIBITION OF EXPULSION OR RETURN ("REFOULEMENT")

> "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."

Incorporation of the Refugee Convention into UK domestic law

41. There are two principal mechanisms by which the Refugee Convention is incorporated into UK domestic law.

    (1) The Refugee Convention is incorporated in respect of the discharge of executive functions relating to immigration by s. 2 of the Asylum and Immigration Appeals Act 1993 ("the AIAA 1993").

    (2) The Refugee Convention is incorporated into the statutory appeals regime under the NIAA 2002.

42. The Refugee Convention is the "cornerstone" of the common European asylum system, which (pursuant to Article 78 of the Treaty on the Functioning of the European Union) "must be in accordance with" the Refugee Convention. The Qualification Directive (as to which, see below) and other constituent elements of the European asylum system are not coterminous with, but are grounded in and afford primacy to, the Refugee Convention. The Court is grateful to Mr Husain QC and Mr Chapman for the joint analysis of the incorporation position.

The Qualification Directive

43. The Refugee Convention is supplemented by the 2004 Qualification Directive (2004/83/EC).[1]

44. Article 13 of the Directive provides that "Member States shall grant refugee status to a third country national or a stateless person who qualifies as a refugee …" "Refugee" is defined in Article 2C in terms which replicate Article 1A(2) of the Refugee Convention.

45. Article 11(1)(e) of the Directive provides that a person shall cease to be a refugee in circumstances mirroring those in Article 1C(5) of the Refugee Convention.

46. The combined effect of Article 14(1) and (2) of the Directive is that a person's refugee status is to be revoked, ended or not renewed, where he has ceased to be a refugee pursuant to Article 11 of the Directive or has never been a refugee. Article

[1] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

14(6) of the Directive provides for the entitlement to rights equivalent to Article 32 of the Refugee Convention, but not where a person has ceased to be or has never been a refugee.

Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002")

47. Section 72(1) of the NIAA 2002 provides that the section applies "for the purpose of the construction and application of Article 33(2) of the Refugee Convention". Article 33(2) provides for an exception to a refugee's protection against refoulement where *inter alia* he or she, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of [the country of asylum]." Sub-sections 72(2)-(8) create a rebuttable presumption that a person who has been convicted of an offence in the United Kingdom, and received a sentence of at least two years' duration, meets the Article 33(2) criteria, *i.e.* constitutes a danger to the community. Sub-sections 72(9)-(10A) govern the operation of this presumption in the context of Tribunal appeals.

48. Section 82 of the NIAA 2002 provides that a person may appeal to the FtT where the SSHD had decided to refuse a protection claim made by that person and removal would breach the UK's obligations under the Refugee Convention. In essence, where a person appeals under s.82 of the NIAA 2002 on the ground that a decision is contrary to the United Kingdom's obligations under the Refugee Convention, the SSHD may certify that the presumption applies (subject to rebuttal). In such cases, the FtT "must begin substantive deliberation on the appeal by considering the certificate" (s. 72(10)(a)); and if it agrees that the presumption has not been rebutted, "must dismiss the appeal in so far as it relies on" the relevant ground (s. 72(10)(b)). This requirement also applies where the UT sets aside and re-makes a decision of the FtT (s 72(10A)).

49. In the present case, the FtT found that the presumption in s.72 had not been rebutted by JS. Mr Chapman made it clear that it was no part of the SSHD's case that the UT had erred in its treatment of s.72. Moreover, s.72(10) does not apply on substantive appeal to this Court (*Shirazi v SSHD* [2004] 2 All ER 602 at [14]). Accordingly, questions as to the precise scope and operation of s.72(10) do not arise for consideration here (*c.f. Essa (Revocation of protection status appeals)* [2018] UKUT 00244 (IAC)).

Immigration Rules

50. As in force at the time JS was granted refugee status in May 2006, the Immigration Rules provided where relevant:

> "327. Under these Rules an asylum applicant is a person who claims that it would be contrary to the United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees for him to be removed from or required to leave the United Kingdom. All such cases are referred to in these Rules as asylum applications.

328. All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees …

…

334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:
(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and
(ii) he is a refugee, as defined by the Convention of Protocol [sic]; and
(iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.

…

336. An application which does not meet the criteria set out in paragraph 334 will be refused.

…

349. A spouse or minor child accompanying a principal applicant may be included in his application for asylum as his dependant. A spouse or minor child may also claim asylum in his own right. If the principal applicant is granted asylum and leave to enter or remain any spouse or minor child will be granted leave to enter or remain for the same duration. The case of any dependant who claims asylum in his own right will be considered individually in accordance with paragraph 334 above …

…

352D – Requirements for leave to enter or remain as the child of a refugee

The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who has been granted asylum in the United Kingdom are that the applicant:

(i) is the child of a parent who has been granted asylum in the United Kingdom; and
(ii) is under the age of 18; and
(iii) is not leading an independent life, is unmarried, and has not formed an independent family unit; and
(iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum; and
(v) would not be excluded from protection by virtue of article 1F of the [Refugee Convention] if he were to seek asylum in his own right; and
(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity."

51. As in force at the time of the decision to cease to recognise JS as a refugee on 7th December 2015, paragraphs 338A and 339A(v) of the Immigration Rules mimicked those of Article 1C(5) and (6) of the Refugee Convention and provided that a grant of

refugee status under paragraph 334 is to be revoked or not renewed when the SSHD is satisfied that the person recognised as a refugee "can no longer, because the circumstances in connection with which he has been recognised as a refugee heave ceased to exist, continue to avail himself of the protection of the country of nationality".

52. For ease of reference, I set out the relevant terms of paragraph 339A below:

> "339A – Refugee Convention ceases to apply (cessation)
>
> This paragraph applies when the SSHD is satisfied that one or more of the following applies:
>
> […]
>
> (v) they can no longer, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality; or
>
> […]
>
> In considering (v) and (vi), the SSHD shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded."

Family Reunion Policy

53. The SSHD's Family Reunion policy, as in force in May 2006, was contained in the Asylum Policy Instructions of April 2003 (Chapter 6, Section 2 – Family Reunion) ("the Family Reunion Policy").

54. Paragraph 2 of the Family Reunion Policy ("Eligibility of applicants for family reunion") provides that "Only pre-existing families are eligible for family reunion i.e. the spouse and minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum."

55. Paragraph 3.1 ("Where the sponsor has refugee status") provided as follows:

> "If a person has been recognised as a refugee in the UK we will normally recognise family members in line with them. If the family are abroad we will normally agree to their admission as refugees.

> It may not always be possible to recognise the family abroad as refugees – e.g. they may have a different nationality to the sponsor, or they may not wish to be recognised as refugees. However, if they meet the criteria set out in paragraph 2, they should still be admitted to join the sponsor."

UNHCR Handbook

56. The UNHCR publishes a "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status" (first published in September 1979) which represent the UNHCR's view concerning the application of the Refugee Convention ("the UNHCR Handbook").

57. Part 1 Chapter I sets out the "General Principles" concerning the "Criteria for the Determination of Refugee Status" [internal page 17]. It provides:

> "28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.
>
> 29. Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.
>
> 30. The provisions of the 1951 Convention defining who is a refugee consist of three parts, which have been termed respectively "inclusion", "cessation" and "exclusion" clauses.
>
> 31. The inclusion clauses define the criteria that a person must satisfy in order to be a refugee. They form the positive basis upon which the determination of refugee status is made. The so-called cessation and exclusion clauses have a negative significance; the former indicate the conditions under which a refugee ceases to be a refugee and the latter enumerate the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses."

58. Part 1 Chapter III concerns the "Cessation Clauses" in Article 1C of the Refugee Convention. The following paragraphs are relevant:

> "115. The last two cessation clauses [1C(5) and (6)] are based on the consideration that international protection is no longer justified on account of changes in the country where persecution was feared because the reasons for a person becoming a refugee have ceased to exist."
>
> "116. The cessation clauses are negative in character and exhaustively enumerated. They should therefore be interpreted restrictively, and no other

reason may be adduced by way of analogy to justify the withdrawal of refugee status. … "

"117. Article 1C does not deal with the cancellation of refugee status. Circumstances may, however, come to light that indicate that a person should never have been recognized as a refugee in the first place; e.g. if it subsequently appears that refugee status was obtained by a misrepresentation of material facts, or that the person concerned possesses another nationality, or that one of the exclusion clauses would have applied to him had all the relevant facts been known. In such cases, the decision by which he was determined to be a refugee will normally be cancelled."

"135. "Circumstances" [in Article 1C(5)] refer to fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution. A mere – possibly transitory – change to the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient to make the clause applicable. A refugee's status should not in principle be subject to frequent review to the detriment of his sense of security, which international protection is intended to provide."

(A) THE MAIN APPEAL

SSHD's Grounds

59. On 31st October 2018, the SSHD filed grounds of appeal against UTJ Coker's decision and was granted permission on three grounds:

(1) **Ground 1**: The UTJ materially erred in holding that "the relevant circumstances in connection with which [JS] had been recognised as a refugee", within the meaning of Article 1C(5) Refugee Convention and paragraph 339A(v) Immigration Rules, had not ceased to exist because his mother continued to be recognised as a refugee.

(2) **Ground 2**: The UTJ materially erred in holding that JS had at any time been a refugee within the meaning of the Refugee Convention and consequently that he was in principle entitled to the protection contained in Article 32 thereof.

(3) **Ground 3**: The UTJ materially erred in holding that JS was "a refugee lawfully resident" in the UK at the time the Appellant made the appealed decisions, such that he was entitled to the protection of Article 32 of the Refugee Convention.

60. The SSHD no longer pursues Ground 3. The SSHD accepts that JS was granted ILR and was, thus, lawfully in the UK at the time when the relevant decisions were made.

61. Mr Chapman explained that the SSHD put forward Grounds 1 and 2 to cover two alternative possible hypotheses:

(1) Ground 1: If JS was granted "refugee" status on the basis that he *was* a refugee under the Refugee Convention, the cessation criteria were met and, a consequence, he was not entitled to the protection of Article 32.

(2) Ground 2: Alternatively, if JS was granted refugee status but was *not* a Refugee Convention refugee, the Refugee Convention does not apply and *ergo* JS was not entitled to the protection of Article 32.

62. Mr Chapman explained that the first hypothesis was less likely than the second because the Family Reunion Policy appears to have been applied *de facto* on an operational level irrespective of *de jure* Refugee Convention status. However, the SSHD's essential case was that the basis on which JS was granted refugee status in 2006 was immaterial: either way JS was not now entitled to the protection of Article 32 and, in holding otherwise, UTJ Coker made an error of law.

63. Mr Chapman further explained that he raised Grounds 1 and 2 in the alternative in order to cover both potential factual possibilities, *i.e.* that JS was, or was not, a "refugee" under Article 1A of the Refugee Convention. In other words, in case the basis for JS's permitted entry to the UK was not entirely clear.

GROUND 1

SSHD's submissions on Ground 1

64. The SSHD's case under Ground 1 was that UTJ Coker materially erred in holding that "the relevant circumstances in connection with which [JS] had been recognised as a refugee", within the meaning of Article 1A(2) Refugee Convention and paragraph 339A(v) Immigration Rules, had not ceased to exist because his mother continued to be recognised as a refugee. The logical steps in Mr Chapman's argument can be summarised as follows:

(1) The assumed premise of Ground 1 is that JS was granted refugee status because he was, or was recognised to be, a "refugee" as defined in the Refugee Convention; and, accordingly, it followed *ex hypothesi* that JS had been recognised as a refugee *in his own right* due to the personalised risk to him on return to Uganda.

(2) The risk to JS could properly be inferred from the activities of his mother; and the risk to JS's mother (and inferentially to JS) was evidenced by the unchallenged findings of FtTJ Sullivan at [39].

(3) It followed that, if JS was properly recognised as a refugee in his own right under the Refugee Convention, UTJ Coker was wrong in two respects:

(a) First, UTJ Coker was wrong to conclude that the "circumstances in connection with which [JS] had been recognised as a refugee" were that "his mother was a refugee *and* she remains a refugee".

(b) Second, UTJ Coker was wrong to hold that FtTJ Sullivan had erred in determining the matter on the basis of the (absence of any) continuing *personal* risk to JS himself on his return to Uganda (see UTJ Coker's decision at [22] and [38]).

(4) There was no longer any personal risk to JS on his return to Uganda because the country conditions had ameliorated. Accordingly, *ex hypothesi*, JS was no longer a "refugee" under the Refugee Convention entitled to the protection of Article 32 and UTJ Coker erred in holding otherwise.

(5) The Qualification Directive does not assist JS in arguing entitlement to Article 32 protection because Article 14(6) of the Directive provides for the entitlement to rights equivalent to Article 32 of the Refugee Convention, but not where a person has ceased to be or has never been a refugee (as in the present case).

65. In essence, the SSHD's argument was that UTJ Coker's reasoning stands and falls on the Refugee Convention itself.

JS's submissions on Ground 1

66. JS's case on Ground 1 was straightforward: there was no proper basis for accepting the factual premise upon which Ground 1 depended and Ground 1 fell be dismissed on this basis alone.

67. JS submitted in summary as follows: (i) FtTJ Sullivan found as a fact that JS was not granted refugee status based on any individualised assessment of risk. (ii) His finding was not appealed to the UT. (iii) This finding is not directly challenged now (indeed, the SSHD accepts that it appears 'unlikely' that JS was recognised as a refugee under Article 1A(2)). (v) The SSHD cannot properly invite the Court to proceed on a factual basis that is directly inconsistent with the unchallenged finding of the FtT.

Analysis

68. The starting point of any analysis is the true meaning of the term "refugee" in Article 1 of the Refugee Convention. The term has a single autonomous meaning which cannot vary according to the differing interpretations of the contracting States (*R (Adan) v. SSHD* [2001] 2 AC 477).

Principles of construction - Vienna Convention (1969)

69. The interpretation of international treaties is governed by the Vienna Convention on the Law of Treaties (1969):

"SECTION 3. INTERPRETATION OF TREATIES

> *Article 31*
>
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (*c*) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> *Article 32*
>
> *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (*a*) leaves the meaning ambiguous or obscure; or
>
> (*b*) leads to a result which is manifestly absurd or unreasonable."

Meaning of "refugee" in Article 1 of the Refugee Convention

70. The Refugee Convention is a free-standing instrument and must be read as a whole. Article 1A(2) provides that the term "refugee" applies to a person who "…owing to well-founded fear of being persecuted for reasons of race, religion [*etc*…]" is unable or unwilling to avail himself of the protection of his country of nationality. Article 1C(5) provides that a person shall cease to be a "refugee" under Article 1A if "…the circumstances in connection which he has been recognised as a refugee have ceased to exist" such that he can no longer continue to refuse to avail himself of the protection of his country of nationality. The same formulation "…the circumstances in connection which he has been recognised as a refugee…" is also to be found in Article 1C(6).

71. In my view, the plain ordinary meaning of the words of Article 1A is that the status of a Refugee Convention "refugee" is only accorded to a person who *themselves* have a

"well-founded fear of being persecuted", *i.e.* an individual or personal fear of persecution, not one derived from or dependent upon another person. This is clear both from the language of Article 1A itself and when read together with Article 1C(5). The reference in Article 1C(5) to "…the circumstances in connection which he has been recognised as a refugee…" is a direct reference to the "person" who falls within the definition of "refugee" in Article 1A, namely "… any person who … owing to [his] well-founded fear of persecution…", *i.e.* not someone else's fear of persecution.

72. As Lord Brown held in in *R (Hoxha) v. Special Adjudicator* [2005] 1 WLR 1063 at [86], the Refugee Convention avails only those unable to return to their home country who (themselves) have a present fear of persecution.

73. I note that this construction of the term "refugee" is also consistent with the Comments of the Ad Hoc Committee on the Draft Convention in 1950 (see further below):

> "The expression "well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion" means that a person has been either actually a victim of persecution or can show good reason why he fears persecution." (at p.39) (emphasis added)

74. It should be noted that JS contends for a wider meaning of the term "refugee" in the light of the *travaux* based on the notion of "derivative refugee" status. I turn to the *travaux* later in this judgment under Ground 2.

FtTJ Sullivan's findings

75. I agree with Mr Husain QC that FtTJ Sullivan found as a matter of fact that JS was not granted refugee status on entry on any individualised assessment of risk. FtTJ Sullivan's findings at [31] (that JS derived his refugee status from his mother) are clear and worth setting out again for convenience:

> "31. In light of that [Family Reunion] policy and the documentary evidence I am satisfied that on 10 May 2006 the Appellant was granted entry clearance as if he was a refugee and on arrival in the United Kingdom on 26 May 2006 he was granted leave to enter as a refugee. I am satisfied that he was recognised as a refugee because of his mother's history, her status as a refugee and his relationship to her." (emphasis added)

76. FtTJ Sullivan's findings at paragraphs [32]-[39] are equally clear and can be summarised as follows: (i) At the time of entry into the UK on 26th May 2006, JS was recognised as a "refugee" on entry to the UK on 26th May 2006 under the Family Reunion policy because of his mother's refugee status. (ii) JS's mother had been granted refugee status because of the risk arising from the fact that she was suspected of belonging to an unnamed rebel group. (iii) JS was not recognised as a "refugee" on the basis of his own activity or profile, *i.e.* in his own right. (iv) The approach to former rebels had, however, softened since JS was granted asylum. (v) The

conditions for cessation of JS's refugee status under paragraph 339A(v) of the Immigration Rules were (therefore) established.

77. As Mr Husain QC pointed out, FtTJ Sullivan's findings of fact were not appealed to the UT.

78. As Mr Husain QC further pointed out, the proposition inherent in Ground 1 that JS was recognised as a refugee on the basis of risk to himself rather than to his mother is inconsistent with both (a) the Family Reunion policy under which JS was, in fact, recognised as a refugee and (b) SSHD's own assertions in correspondence (see the SSHD's letters of 5th September 2015, 7th December 2015 and 5th February 2016 which stated *e.g.* that "it is not accepted that you were granted refugee status other than as a dependent of your mother").

Summary

79. For these reasons, in my view, I agree with Mr Husain QC that the assumed premise upon which Ground 1 is based - namely, that JS was granted refugee status because he was, or was recognised to be, a "refugee" as defined by Article 1A of the Refugee Convention - is not correct. As explained above, the plain ordinary meaning of the term "refugee" in Article 1A requires an individual or personal well-founded fear of persecution, not one derived from or dependent upon another person. FfTJ Sullivan found the latter not the former. Accordingly (as fairly anticipated by Mr Chapman), the SSHD's Ground 1 must therefore be dismissed.

GROUND 2

80. The SSHD's Ground 2 in the Main Appeal is that the UTJ materially erred in holding that JS had at any time been a refugee within the meaning of the Refugee Convention and consequently that he was in principle entitled to the protection contained in Article 32 thereof. Ground 2 is based on the alternative factual scenario that JS was granted "refugee" status notwithstanding he was not a refugee under the Refugee Convention.

SSHD's submissions on Ground 2

81. The SSHD's principal submissions on Ground 2 can be summarised as follows: (i) The status of "refugee" under the Refugee Convention is accorded by operation of treaty law and cannot be accorded by a determining authority of a State Party. (ii) A person granted "refugee" status under the Family Reunion Policy was not a "refugee" to whom the Refugee Convention applied (see *SSHD v Mosira* [2017] EWCA Civ 407). (iii) In any event, the SSHD granted JS "refugee" status under the Family Reunion Policy and did not purport to do so under the Refugee Convention. (iv) Alternatively, if contrary to (iii), the SSHD's grant of "refugee" status to JS entitled him to the protections of the Refugee Convention, the SSHD was entitled to revoke (or cancel) that status on the basis JS was not a refugee and "should never have been recognised as a refugee in the first place" (see paragraph 117 of the UNHCR Handbook and Guidelines). (v) A person granted "refugee" status to which he had no entitlement has no enduring or free-standing Refugee Convention right to be treated as a refugee or entitled to the Refugee Convention protections. (vi) Thus, JS was not entitled to the protection of Article 32.

JS's submissions on Ground 2

82. JS raised three main heads of argument in relation to Ground 2 which can be summarised as follows:

(1) First, the SSHD should not be permitted to argue before this Court that JS is not a "refugee" having (i) granted JS "refugee" status on entry and (ii) conceded in the proceedings below that JS was a "refugee". It is too late to withdraw the concession.

(2) Second, the SSHD recognised JS as a "refugee" on the grounds of family unity and he was, accordingly, owed obligations under the Refugee Convention.

(3) Third, the SSHD is obliged as a matter of domestic law to continue to treat JS as a "refugee" unless and until he would lose the protection afforded by the Refugee Convention's own framework.

83. I deal with JS's first two submissions (1) and (2) below. The third submission (3) also arises in the Linked Appeal and it is convenient to deal with it under that head.

(1) Should the SSHD be permitted to withdraw any concession?

84. JS submitted that the SSHD's attempt to argue that JS is not, and never was, a "refugee" represented a 180-degree *volte face* from the SSHD's previous stated position - both in correspondence with JS and in the proceedings below - and should not be permitted. The SSHD was, in reality, seeking to do two things. First, withdraw a concession solemnly made that JS was a "refugee" entitled to the protection of the Refugee Convention. Second, to raise a new ground of appeal based on a point of law not argued below. He submitted that this was impermissible and unfair (*c.f. AM (Iran) v. SSHD* [2018] EWCA Civ 2706 at [44]). He emphasised, in particular, the importance of the concession in these proceedings, the deliberate, informed and sustained nature of the concession, the fact that the SSHD was seeking to withdraw the concession 3½ years after the initial correspondence to JS and 1½ years after the FtT hearing and a decade after the Family Reunion Policy was adopted.

85. The SSHD submitted that the SSHD made no concession that JS was a Refugee Convention refugee, but in any event the Court should exercise its discretion to permit the SSHD to raise this ground.

Analysis

86. As FtTJ Sullivan found, and the SSHD accepts, JS was granted LTE on 10th May 2006 as if he was a refugee and on arrival in the UK on 26th May 2006 he was granted leave to enter as a "refugee" ([31]). The SSHD also represented that JS was a Refugee Convention refugee in the letters to JS dated 17th April 2015 and 4th September 2015. Both letters refer to JS's "refugee status" in the context of the Refugee Convention. The letter of 4th September 2015 stated: "The [SSHD] is proposing to cease your refugee status because she is satisfied that Article 1C(5) [of

the Refugee Convention], and therefore Paragraph 339A(v) of the Immigration Rules, apply".

87. The SSHD submitted that the SSHD's officials mistakenly failed to appreciate that JS was not a Refugee Convention refugee. She prayed in aid a statement by Elias LJ in *Koori v. SSHD* [2016] EWCA Civ 552 at [32] "a failure to appreciate a matter in his client's favour is not a concession". Elias J was referring to a concession made by the SSHD's legal representative in the course of a hearing before the UT. In my view, a concession solemnly made by the SSHD's officials in the course of official correspondence with an applicant is arguably different.

88. The SSHD is, however, on firmer ground on his second point, discretion. Where an administrative decision has been made on a mistaken premise, the decision can be revisited so that the law is properly applied, unless it would be unjust to allow this such as where there has been reliance to the detriment of the individual (see Elias LJ in *Koori* at [31] citing Peter Gibson LJ in *Ex parte Begbie* [2000] 1 WLR 1115 at [6] and Laws LJ in *Ex parte Capital Care Services UK Ltd* [2012] EWCA Civ 1151).

89. In my view, this is a case in which the court should exercise its discretion to allow a concession to be withdrawn. First, there is no evidence that particular consideration was given to JS's actual status by the SSHD's officials. The 2015 letters appear to have been written on the assumption that JS was a Refugee Convention refugee (an assumption which, on this hypothesis, was mistaken). Second, the point as to JS's status is a difficult one (as Irwin LJ pointed out when granting permission to appeal) and it is not altogether surprising that the SSHD's Presenting Officer and legal advisers did not appreciate it until a late stage in the proceedings. The point is not '*Robinson* obvious' (*c.f.* Underhill LJ in *GS (India) v. SSHD* [2015] 1 WLR 3312 at [88]-[89]). Third, the point in question is a pure point of law as to the definition of "refugee" under Article 1A(2) of the Refugee Convention and requires no fresh evidence. Fourth, there is no material prejudice to JS in allowing the point to be taken on appeal. The possibility that JS had never been a refugee within the ambit of the Refugee Convention was raised (albeit somewhat Delphically) in the SSHD's skeleton argument dated 22nd February 2018 before the UT; but it is right to say that the point was not pleaded in the SSHD's Rule 24 Respondent's Notice. But there is ample authority that an appellate court has jurisdiction to hear fresh points of law not argued below (*per* Elias LJ in *Miskovic v. SSHD* [2011] 2 CMLR 30 at [69]).

Summary

90. For these reasons, in my view, there is no unfairness in allowing the SSHD to raise the point and I would so exercise the Court's discretion.

(2) Was JS granted "derivative" refugee status under the Refugee Convention?

91. JS's case on the merits of Ground 2 was that the SSHD recognised JS as a refugee on grounds of "family unity", and JS was therefore owed the protection afforded by Article 32 of the Refugee Convention which prohibits the UK from expelling a refugee lawfully in its territory, save on grounds of national security or public order. It

was not disputed that, if JS is entitled to the protection of the Refugee Convention, Article 32 precludes his removal.

92. JS submitted that the UK granted him what is known as "derivative" refugee status under the Refugee Convention, on the basis that he was a family member of a refugee within the meaning of Article 1A(2). In these circumstances, he submitted, Article 32, interpreted in context and in light of the Refugee Convention's object and purpose, imposed the same obligation in respect of him as it would in respect of any refugee.

93. Mr Husain QC's submissions on the approach to the construction of the Refugee Convention were four-fold.

94. First, he submitted that a literal approach to interpretation was 'anathema' to the Refugee Convention. He cited, in support, various examples of what he referred to as 'non-literal' approaches to the Refugee Convention (including in *Januzi v SSHD* [2006] 2 AC 426; *HJ (Iran) v SSHD* [2011] 1 AC 596; and *R v Asfaw* [2008] 1 AC 1061).

95. Second, he submitted the relevant "context" for the purposes of interpretation under Article 31(2)(a) of the Vienna Convention (see above) includes the Final Act of the Conference of Plenipotentiaries (the Conference which completed the drafting of the Convention and signed it on behalf of the signatory governments).

96. Third, he submitted the Court should have regard to "subsequent practice" in the application of the Refugee Convention which establishes the agreement of the parties regarding its interpretation pursuant to Article 31(3)(b).

97. Fourth, he submitted that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion pursuant to Article 32.

Principles of Construction of international treaties

98. The principles of construction of international treaties are well known. I have set out Articles 31 and 32 of the Vienna Convention above. The following particular principles should be emphasised:

    (1) The language itself is the starting point (*per* Lord Lloyd in *Adan v. SSHD* [1999] 1 AC 293, 303D-E).

    (2) Article 31(1) of the Vienna Convention provides that a treaty must be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context, and in light of its object and purpose.

    (3) There is no warrant in Article 31(1) of the Vienna Convention for reading into a treaty words that are not there. It is not open to a court, when it is performing its function, to expand the limits which the language of the treaty has set for it (*per* Lord Steyn in *R (Hoxha) v. Special Adjudicator* [2005] 1 WLR 1063 at [9]).

(4) It is generally to be assumed that the parties included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or were unable to agree (*per* Lord Bingham in *Brown v. Stott* [2003] 1 AC 681, 703E).

99. The Refugee Convention should be given "a generous and purposive interpretation, bearing in mind its humanitarian objects and the broad aims reflected in its Preamble" (as Lord Hope observed in *R(ST) v. SSHD* [2012] 2 AC 135 at [30]). However, as Lord Hope went on to emphasise (at [31]):

> "31. But it must be remembered too that, however generous and purposive its approach to interpretation may be, the court's task remains one of interpreting the document to which the contracting parties have committed themselves by their agreement. As Lord Bingham was at pains to emphasise in the *Roma Rights* case, at para 18, it must interpret what the parties have agreed to. It has no warrant to give effect to what they might, or in an ideal world would, have agreed. One should not overlook the fact that article 31(1) of the Vienna Convention also states that a treaty should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context". So the starting point of the construction exercise should be the text of the Convention itself: *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 , per Lord Lloyd of Berwick at p 305; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 , para 4. A treaty must be interpreted "in good faith". But this is not to be taken to be a source of obligation where none exists, as the International Court of Justice has repeatedly emphasised: *In re Border and Transborder Armed Actions (second phase) (Nicaragua v Honduras)* [1988] ICJ Rep 69 , para 94; *In re Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [1988] ICJ Rep 175 , para 39. As a general principle of law it has only marginal value as a source of rights and duties: see the *Roma Rights* case, para 62. There is no want of good faith if the Convention is interpreted as meaning what it says and the contracting states decline to do something that its language does not require them to do. Everything depends on what the Convention itself provides." (emphasis added)

100. Lord Hope further stressed the importance of the principle of legal certainty in the interpretation of phrases in international conventions "which ought not to be taken to have their meaning changed or expanded unless this is expressly agreed to or is shown to have been recognised generally among the contracting states" (*ibid,* at [48]).

101. In *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport and Another (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1, Lord Bingham said (at [18]):

> "18. … Lord Lester urged that the Convention should be given a generous and purposive interpretation, bearing in mind its humanitarian objects and purpose clearly stated in the preamble…. This is, in my opinion, a correct approach to interpretation of a convention such as this and it gains support, if support be needed, from article 31(1) of the Vienna Convention on the Law of Treaties which, reflecting principles of customary international law, requires a

> treaty to be interpreted in the light of its object and purpose. But I would make an important caveat. However generous and purposive its approach to interpretation, the court's task remains one of interpreting the written document to which the contracting states have committed themselves. It must interpret what they have agreed. It has no warrant to give effect to what they might, or in an ideal world would, have agreed. This would violate the rule, also expressed in article 31(1) of the Vienna Convention , that a treaty should be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context. It is also noteworthy that article 31(4) of the Vienna Convention requires a special meaning to be given to a term if it is established that the parties so intended. That rule is pertinent, first, because the Convention gives a special, defined, meaning to "refugee" and, secondly, because the parties have made plain that "refouler", whatever its wider dictionary definition, is in this context to be understood as meaning "return"."

102. Lord Bingham went on to emphasise what he referred to as "the important backdrop to the Refugee Convention" which he said was well described by the following passage from Hyndman, *"Refugees under International Law with a Reference to the Concept of Asylum"* (1986) 60 ALJ 148, 153 (also cited by McHugh and Gummow JJ in *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14; 210 CLR 1 at [44]) (at [19]):

> "States the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory, and given a right to settle there. They have refused to agree to international instruments which would impose on them duties to make grants of asylum.
> Today, the generally accepted position would appear to be as follows: States consistently refuse to accept binding obligations to grant to persons, not their nationals, any rights to asylum in the sense of a permanent right to settle. Apart from any limitations which might be imposed by specific treaties, States have been adamant in maintaining that the question of whether or not a right of entry should be afforded to an individual, or to a group of individuals, is something which falls to each nation to resolve for itself."

JS's case on construction

103. Mr Husain QC accepted that the literal meaning of the words of Article 1A of the Refugee Convention caused him difficulties. He nevertheless urged a non-literal approach to construction and submitted that a proper application of all the principles enunciated in Articles 31 and 32 of the Vienna Convention (*i.e.* a "purposive" construction, "in context", having regard to "subsequent practice" and the "preparatory work" of the treaty) supported his wider construction of the term "refugee" in Article 1A, namely that there exists under the Refugee Convention the potential for the grant of "derivative" refugee status whereby, whenever a State Party chooses to recognise family members as "refugees", such family members are as a matter of international law thereafter to be treated as Refugee Convention refugees, with all the rights and protections accorded under the Refugee Convention. He referred to this as the 'opt in' mechanism.

104. Mr Husain QC made it clear that he did not contend that a State Party was under an absolute obligation to recognise family members as in this way – this remained a matter of discretion (see *SSHD v Abdi and others* [1996] Imm AR 148). His submission was that whenever the UK chose or opted to grant refugee status to family members, such persons were thereafter entitled to Refugee Convention rights and protection as a matter of international law. In the present case, the SSHD opted to grant JS "derivative" refugee status and, accordingly, JS was entitled to the rights and protections afforded by the Refugee Convention.

105. Mr Husain QC's core submissions in support of JS's case on construction can be summarised in the following propositions.

106. First, the Final Act of the Conference of Plenipotentiaries[2] made it plain that the signatories intended the obligations owed to refugees under the Refugee Convention be extended to their family members wherever individual State Parties agreed to recognise family members in this way. JS placed heavy reliance upon the 'note' in Recommendation B of the Final Act which he submitted extended Refugee Convention rights to family members recognised by State Parties as refugees:

> **"NOTING** with satisfaction that, according to the official commentary of the *ad hoc* Committee on Statelessness and Related Problems (E/1618, p. 40), the rights granted to a refugee are extended to members of his family […]" (emphasis added).

107. Second, the drafting history of the Refugee Convention supported JS's case on construction. He pointed to the deliberations of the Ad Hoc Committee which stated in its official commentary on Article 1 (the refugee definition) that: "Members of the immediate family of a refugee should, in general, be considered as refugees if the head of the family is a refugee as here defined".[3] He further pointed to the preparatory work by the delegates to the Conference of Plenipotentiaries who took a conscious decision to strengthen the original text proposed by the Holy See from the language of 'recommendation' to language 'obligating' governments to recognise family members as refugees.

108. Third, subsequent State practice supported JS's case. He submitted that the UNHCR recognises "derivative" refugee status based on relationship, not risk. It differentiates this from cases where a family member has an individual well-founded fear of persecution. He referred to this as the 'bifurcated' basis for the grant of refugee status to family members. By way of example, JS relied in particular upon UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate (2003), specifying that "Family members […] of a recognized refugee may apply for derivative refugee status in accordance with their right to family unity", but "[f]amily members […] who are determined to fall within the criteria for refugee status in their own right should be granted refugee status rather than derivative status" (paragraph 5.1.1). The UNHCR considers that "derivative" refugees have the "same rights and entitlements" as refugees within the definition of Article 1A (see *e.g.* ExCom

[2] The Final Act of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (1951)
[3] Report of the Ad Hoc Committee on Statelessness and Related Problems, Lake Success, New York, 16 January to 16 February 1950, *Annex II – Comments of the Committee on the draft Convention relating to the Status of Refugees*.

Conclusion No. 24, at paragraph 8 and Conclusion No. 88, paragraph b(iii)). The UNHCR takes this position on the basis of a Statute and Mandate which are based squarely on the Refugee Convention itself. Other States also grant "derivative" refugee status, and at least some expressly recognise that this affords rights under the Refugee Convention, *e.g.* France and Spain.

109. Fourth, Mr Husain QC submitted that JS's case on construction is the 'golden thread' (as he put it) that makes sense of all of this: where a State follows the recommendation to recognise family members as refugees, it takes on obligations to them under the Refugee Convention.

110. Fifth, the absence of clear text to this effect in the Refugee Convention is not determinative; there would be an issue only if there were a collision with the text. The Refugee Convention is to be given a generous and purposive construction, not a narrow and literal one. The text does not have primacy over other interpretive guides, such as context and subsequent practice, under the Vienna Convention. Article 31 of the Vienna Convention is a unitary rule. The UK courts have frequently identified principles in the Refugee Convention which have no basis in its text (see the examples of non-literal interpretation referred to above).

111. Sixth, there is no such (textual) collision in this case. The term "refugee" can be read throughout the Refugee Convention as meaning not only a refugee within the Article 1A(2) definition, but as including (where relevant) a "derivative refugee" in respect of whom a State has undertaken Refugee Convention obligations (or alternatively, Article 1A could be read as including the words "family members of refugees within the above definition, where they are recognised as refugees by the relevant State Party"). This is because (i) the Article 1A definition is not said to be exhaustive, and (ii) the Refugee Convention does not refer to (for example) "a refugee as defined in Article 1A".

112. Seventh, nor is there any broader fallacy in the concept of an "opt-in" obligation: this is a standard concept in public international law.

113. Eighth, JS's construction is, therefore, one to which there is no substantive impediment, and which is the only construction which accords with the interpretive sources considered at the first three propositions above.

Analysis

Ordinary meaning

114. The starting point of any analysis, as required by the Vienna Convention, is the plain ordinary meaning of the words in question. I have already set out above what, in my view, is the plain ordinary meaning of the term "refugee" in Article 1A of Refugee Convention, namely, a Refugee Convention refugee is a person who *themselves* have a "well-founded fear of being persecuted", *i.e.* an individual or personal fear of persecution, not one derived from or dependent upon another person (see above under Ground 1).

115. The Court's task is to interpret the document to which the State Parties committed themselves by agreement (see Lord Hope in *ST (Eritrea)* at [31] referred to above). The issue is whether the (obvious) literal meaning is displaced or altered when consideration is given to the wider tools of construction enunciated in Articles 32 and 33 of the Vienna Convention, *i.e.* context, preparatory materials or State practice as submitted on behalf of JS.

116. I first set out some of the relevant *travaux* below.

Travaux

Ad Hoc Committee -16th January to 16th February 1950

117. The Final Act was based on the Draft Convention prepared by the Ad Hoc Committee on Statelessness and Related Problems, Lake Success, New York, 16th January to 16th February 1950 ("the Ad Hoc Committee") whose Report also provided the basis for the Conference. The Ad Hoc Committee set up a working party charged with the duty of drafting the article defining the term "refugee".

118. Article 1 of the Draft Convention prepared by the Ad Hoc Committee's working party provided as follows:

> "Article 1
> Definition of the term "refugee"
>
> A. For the purposes of the present Convention, the term "refugee" shall apply to
>
> 1. Any person who:
> (a) […] has a well-founded fear of being the victim of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
> (b) Has left, or owing to such fear, is outside the country of his nationality […]; and
> (c) Is unable or, owing to such fear, unwilling to avail himself of the protection of his nationality. …
>
> 2. …
> 3. Any person who in the period between 4 August 1914 and 3 September 1939 was considered to be a refugee.
>
> B. The Contracting States may agree to add to the definition "refugee" contained in this article persons in other categories recommended by the General Assembly. …"

119. It will be seen that Article 1A of the Final Act closely mirrored Article 1A of the Ad Hoc Committee's Draft Convention.

120. The comment of the Ad Hoc Committee relied upon by Mr Husain QC ("Members of the immediate family of a refugee should, in general, be considered as refugees if the head of the family is a refugee as here defined") is not particularly germane: it was

made in relation to sub-paragraph A3 of the Draft Convention, *i.e.* in relation to persons who were "considered to be a refugee" between the two World Wars.

121. More significantly, the Ad Hoc Committee said in relation to Article 1B in the Draft Convention the following:

> "Paragraph B [Draft Convention](*)[4]
> The Committee anticipated the possibility of extending the application of the Convention to categories of refugees other than those defined in this article. Such extension would require the agreement of the Contracting States in order to become binding upon them. The General Assembly may propose the inclusion of new categories." (emphasis added)

34th Conference of Plenipotentiaries – 24th July 1951

122. Recommendation B of the Final Act was initially proposed by the representative of the Holy See (A/CONF.2/103) with a proposed text which included a "Recommendation" that governments extend the rights granted to refugees to members of their family. It was amended to its final form at the 34th Meeting of the Conference of Plenipotentiaries on 24th July 1951 (A/CONF.2/SR.34). The Israeli representative proposed that, in order to reconcile the proposed text with the comments of the Ad Hoc Committee, it should be reworded to read "…making sure that all members of the refugee's family are accorded rights granted to the refugee". The UK representative said he doubted whether the Israeli proposal would achieve the desired effect and stated that, drafted in such terms, the paragraph might undermine "the more categorical view of the Ad hoc Committee that governments were under an obligation to take such action in respect of the refugee's family". The Holy See then proposed revised text which replaced the "Recommendation" wording originally proposed with the "Noting" wording in the final version of Recommendation B of the Final Act which was unanimously adopted by the delegates.

123. In my view, there is little significance to be gleaned from the modest change of wording for the reasons set out below. Moreover, the change of wording by the Conference of Plenipotentiaries did not amount to a "subsequent agreement between the parties" for the purposes of the Vienna Convention as suggested by Mr Husain QC, not least because the Ad Hoc Committee's deliberations *preceded* the Final Act.

Discussion

124. In my view, the plain ordinary meaning of the words of Article 1A is not displaced or altered by the *travaux* or State practice as submitted by JS for the following reasons.

125. First, as I explained above under Ground 1, the meaning of Article 1A(2) of the Refugee Convention is clear and unambiguous: it defines a Refugee Convention "refugee" as a person who *themselves* have a "well-founded fear of being persecuted", *i.e.* an individual or personal fear of persecution, not one derived from or dependent

[4] Not to be confused with Paragraph B of the Final Act.

upon another person. This definition of "refugee" was intended to describe completely the class of people to whom the Refugee Convention applies.

126. Second, JS's reliance on the "Noting" paragraph in Recommendation B of the Final Act is misplaced for three reasons. First, it is merely a "Noting" preambular provision and does not have the status of a "Recommendation". Second, it is conditional: it records the signatories noting "with satisfaction that, according to the official commentary of the *ad hoc* Committee…, the rights granted to a refugee are extended to members of his family", *i.e.* it merely purports to rehearse the views of the Ad Hoc Committee. Third, it does not reflect the official commentary of the Ad Hoc Committee accurately (see below). Fourth, Recommendation B of the Final Act is what it says on the tin, namely a mere *recommendation* for "Governments to take the necessary measures for the protection of the refugee's family…". It is, at best, an exhortation. Moreover, it does not require Governments to treat family members *as refugees*. It merely recommends Governments take "the necessary steps for the protection of the refugee's family". It does not on any view give rise to any binding international law obligation. As Lord Bingham pointed out in *Sepet v. SSHD* [2003] 1 WLR 856 at [11] (cited by Lord Brown in *Hoxha* at [83]):

> "But resolutions and recommendations of this kind, however, sympathetic one may be towards their motivation and purpose, cannot themselves establish a legal rule binding in international law".

127. Third, contrary to JS's submissions, the official commentary of the Ad Hoc Committee tends, if anything, to support the SSHD's construction rather than JS's construction for the following reasons:

(1) First, the Ad Hoc Committee emphasised at the outset of its commentary on the wording of the draft Convention:

> "Article 1
> Definition of the term "Refugee"
> The Committee believed the draft Convention should contain a definition of the term "refugee" in order to state unambiguously to whom the Convention would apply… [and] … the categories of individuals to be covered should be specified…" (p.38) (emphasis added)

(2) Second, the Ad Hoc Committee's commentary on the draft of Article 1 (the wording of which is reflected in the final text of Article 1A(2)) is fully consonant with the SSHD's construction, *i.e.* personal not derivative fear:

> "The first category
> …The expression "well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion" means that a person has been either actually a victim of persecution or can show good reason why he fears persecution." (at p.39) (emphasis added)

(3) Third, the Ad Hoc Committee's official commentary does not state "the rights granted to a refugee are extended to members of his family" as recorded in the "Noting" paragraph of Paragraph B of the Final Act. The official commentary uses language which is merely exhortatory:

> "Members of the immediate family of a refugee should, in general, be considered as refugees if the head of the family is a refugee" (p.40) (emphasis added)

(4) Fourth, the Ad Hoc Committee's commentary on Paragraph B of the draft Convention (see above) makes it clear that any further categories of refugee require proposal by the General Assembly and formal agreement of the Contracting Parties:

> "Paragraph B
> …The Committee anticipated the possibility of extending the application of the Convention to categories of refugees other than those defined in this article. Such extension would require the agreement of the Contracting States in order to become binding upon them. The General Assembly may propose the inclusion of new categories." (p. 40) (emphasis added)

128. Fourth, the test in relation to "subsequent practice" is a high one. Only the most compelling case founded on "subsequent practice" could properly give rise to a different and apparently contradictory interpretation from that obviously first intended (*per* Lord Brown in *Hoxha* at [76], [82]-[83]). JS's case comes nowhere close to meeting this criterion. JS is unable to point any evidence even approaching sufficiently universal State Party adoption of his construction. I agree with Mr Chapman that JS's reliance on the practice of France and Spain to recognise or treat as refugees under the Refugee Convention the family members of Refugee Convention refugees falls tellingly short of demonstrating sufficient universality in this interpretation.

129. Fifth, JS's reliance upon the UNHCR's utterances is misplaced. First, the UNHCR is a creature of statute (under the Statute of the Office of the United Nations High Commissioner for Refugees adopted through General Assembly Resolution 428 (V) of 14 December 1950). The Statute extends the competence of the UNHCR to refugees defined in materially identical terms to Article 1A(2) of the Refugee Convention (see Article 6 of the Statute). The UNHCR's mandate has been extended over time by the General Assembly, but, as JS accepts, not as regards "derivative" refugees (see the Mandate of the High Commissioner for Refugees and His Office). Second, the UNHCR is not a State Party to the Refugee Convention, nor subject to the interpretative provisions of the Vienna Convention. Third, the UNHCR's views as to the meaning of Article 1 of the Refugee Convention are, of course, entitled to respect, but this does not supplant or otherwise affect the Court's interpretative function in the light of the rules of construction laid down by the Vienna Convention. Fourth, absent

evidence that the UNHCR's position reflects a construction sufficiently universally adopted by State Parties (of which there is no such evidence), its views do not advance JS's case. Fifth, in any event, the main tenor of the UNHCR's commentaries is not (to paraphrase Lord Brown in *Hoxha*) compellingly inconsistent with the obvious literal construction. The UNHCR Handbook makes clear, for instance, that: (i) refugee status is dependent upon individual fear of persecution; (ii) for practical reasons, groups of individuals may be regarded, *prima facie*, as refugees without determination on an individual basis (since, as Lord Clarke pointed out in *ZN (Afghanistan) v. Entry Clearance Officer* [2010] UKSC 21 at [35], family members will often have similar protection needs as the sponsor); and (iii) a family member of a refugee will "normally" be granted refugee status, but this normal rule will not apply where "incompatible with his personal legal status", *i.e.* where he does not meet the definition of "refugee". (See *e.g.* pp.20, 29, 32, 41, 101, 102 and 203).

130. Sixth, the UNHCR Handbook confirms in terms: "The 1951 Refugee Convention does not incorporate the principle of family unity in the definition of the term refugee". (Chapter VI, paragraph 183). The Handbook goes on to state that Recommendation B in the Final Act of the Conference is observed "by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol". This does not take JS's argument any further. There are many useful steps which States can and do take to protect refugees' families short of treating them as *de jure* Refugee Convention refugees (and JS was only able to point to France and Spain as taking this latter step).

131. Seventh, JS's reliance upon the UNHCR Guidance Note on Refugee Claims relating to Female Genital Mutilation ("FGM") does not take the matter any further. Whilst the FGM Guidance Note is inconsistent with the paradigm of "reflected risk" and refers to "derivative" refugee status, it is neither adopted in the UNHCR Handbook nor the product of the UNHCR Executive Committee, nor evidence of sufficiently universal subsequent practice.

132. Finally, I respectfully agree with the observation of Sales LJ in *SSHD v. Mosira* [2017] EWCA Civ 407 at [13]:

> "13. The Refugee Convention does not impose an obligation on Contracting States to grant leave to enter or leave to remain in order to achieve family reunion with a sponsor who has been granted refugee status in the host state, but the UN Human Rights Committee exhorts Contracting States to do this."

SSHD v. Mosira [2017] EWCA Civ 407

133. The decision of this Court in *SSHD v. Mosira* [2017] EWCA Civ 407 featured significantly during argument. Both sides relied upon it. The leading judgment was given by Sales LJ (with whom with Black LJ and Henderson LJ agreed). Sales LJ's judgment touched on the two major points raised in this appeal. First, whether a family member granted "refugee status" under the Family Reunion policy could be said to be a Refugee Convention refugee as defined by Article 1A(2) with the full panoply of rights and protections thereunder ("the Article 1A(2) point"). Second, whether the refugee status of a family member granted Refugee Convention refugee status on a "derivative" basis could be "ceased" under Article 1C(5) notwithstanding that the principal's refugee status remained extant ("the Article 1C(5) point"). The

SSHD relied on Sales LJ's observations on the Article 1A(2) point. JS relied upon Sales LJ's holding on the Article 1C(5) point.

134. The decision also featured heavily in UTJ Coker's judgment. She held, in effect, that *Mosira* was determinative of the appeal before her because as she put it (at [38] and see also [21]):

> "38. In accordance with *Mosira,* JS remains a refugee under the Refugee Convention. His mother remains a refugee; he was granted refugee status on the basis of her recognition as a refugee; the circumstances of that recognition have not changed – or at least the SSHD has not established that they have changed."

135. Mr Husain QC submitted that UTJ Coker was right to do so and that, on any reading of *Mosira*, it was not open to this Court to dispose of the Main Appeal or the Linked Appeal on the basis that – irrespective of the precise basis upon which JS was granted refugee status, and whatever the nature of the obligations he was owed – JS's status can lawfully be ceased under Article 1C(5) or some domestic equivalent by reference to objective changes in Uganda.

The Facts

136. Given its importance, we asked for and were supplied with copies of both the FtT and UT decisions in *Mosira.* The facts in *Mosira* as found by the FtT can be summarised as follows. On 3rd September 2004, Mr Mosira, aged 17, a national of Zimbabwe, was granted entry to the UK and refugee status pursuant to the 2003 Family Reunion Policy (subsequently subsumed into the Immigration Rules at paragraph 352D). His grants were on the basis of his mother's refugee status. On 14th September 2012, Mr Mosira pleaded guilty to two offences of sexual activity with a child and was thereafter sentenced to three years' imprisonment. In March 2014, the SSHD wrote to Mr Mosira informing him that his refugee status had been ceased under Article 1C(5) of the Refugee Convention and paragraph 339A of the Immigration Rules. On 11th April 2014, the SSHD made an order for deportation against Mr Mosira. Mr Mosira appealed these decisions to the FtT.

FtT decision

137. The issue before the FtT was whether the SSHD could show he was entitled to cease Mr Mosira's refugee status by virtue of Article 1C(5) of the Refugee Convention and paragraph 339A(v) of the Immigration Rules. The FtT held that the "change in circumstances" required by Article 1C(5) could relate only to the circumstances of Mr Mosira himself. The FtT stated (at [8]):

> "8. Both the Convention and the Immigration Rules are concerned with a permanent change of the circumstances "in connection with which [the appellant] was recognised as a refugee". We find this can only relate to his circumstances and not that of any other party; including his mother. The circumstances pertaining at the time he was granted asylum are that he was the dependant child of a person granted refugee status. By reason of age alone, there has been a permanent change as the appellant is now an adult."

138. After reviewing the evidence and the country guidance in relation to Zimbabwe, the FtT held that there was no reasonable degree of likelihood that Mr Mosira was at risk of being persecuted if he was returned to Zimbabwe now. Accordingly, the FtT dismissed his appeal.

UT decision

139. Mr Mosira appealed the FtT's decision to the UT. The UT held that Mr Mosira had not had sufficient opportunity to respond to the SSHD's cessation notification and directed that it would re-make the decision. The UT went on to hold that it was not open to the SSHD to cease Mr Mosira's refugee status because the "change in circumstances" in Zimbabwe was unrelated to the original basis upon which he had been granted refugee status. The UT stated (at [8]-[9]):

> "8. The Secretary of State's position before us was that the appellant has ceased to be a refugee because of the changed country conditions in Zimbabwe. She does not seek to rely on any issue regarding his age. The first point that we address is the question whether the Secretary of State is in a position to cease the treatment of Mr Mosira as a refugee for reasons that are not connected to the reasons for the original grant. The Secretary of State points to the very changed political environment in Zimbabwe and makes the comment that Mr Mosira could safely return to Zimbabwe. This would amount to the Secretary of State having begun the path of recognising him as a refugee by reference to family reunion reasons, ending that path by reference to a matter that in the circumstances of the present case is unrelated or cannot be demonstrated to be related to the original basis of recognition, namely the changed political situation in Zimbabwe.
>
> 9. With the advantage of the submissions that we have had, which admittedly in the present case proceed from the unusual and not altogether clear sight available to any of the parties or ourselves of the exact situation in 2004, we are not satisfied that it is open to the Secretary of State to proceed by way of cessation."

140. The UT also found that Mr Mosira had rebutted the presumption in s.72(2) of the NIAA 2002 that he constituted a danger to the community, and that there was insufficient public interest in his deportation to justify his removal to Zimbabwe for the purposes of Article 33(2) of the Refugee Convention.

Court of Appeal

141. The SSHD appealed the UT's decision to this Court. On appeal, the SSHD argued, *inter alia,* that the UT had erred in (i) holding that the cessation of Mr Mosira's refugee status was unlawful and (ii) assuming that Mr Mosira should be treated as a refugee in the absence of a lawful cessation of his refugee status, even where there was no current risk of persecution or ill-treatment on return to Zimbabwe. The Court of Appeal dismissed the SSHD's appeal.

The Article 1A(2) point

142. The proceedings in *Mosira* took an unusual course as a result of the SSHD's unfortunate failure to present the case on appeal properly. As Sales LJ explained (at [32]):

> "32. I pause here to observe that at this point it was open to the Secretary of State to seek to respond to the appeal by arguing (a) Mr Mosira was not a "refugee" as defined in Article 1A of the Refugee Convention and never had been (nor had he been recognised under para. 334 of the Immigration Rules as having refugee status), so there was no impediment arising from the Refugee Convention to his deportation to Zimbabwe and it was simply unnecessary to consider or apply Article 1C(5) of the Convention and para. 339A(v) of the Rules to remove that status; (b) alternatively, if Mr Mosira was entitled to maintain that he had refugee status attracting protection under or equivalent to that under the Refugee Convention (e.g. on the grounds that he had a legitimate expectation in domestic law to equivalent protection by reason of the grant of refugee status to him pursuant to the 2003 policy, which could entitle him to rely on the ground of appeal in section 84(1)(e) of the 2002 Act, if not on the ground in section 84(1)(g)), he could still lawfully be deported in accordance with the Refugee Convention on the grounds of "public order" as set out in Article 32(1); and (c) there was no impediment to his deportation arising from the ECHR and the Human Rights Act 1998 . On the Secretary of State's case that Mr Mosira did not face a real risk of ill-treatment if returned to Zimbabwe, Article 33 of the Refugee Convention and section 72 of the 2002 Act were irrelevant." (emphasis added)

143. Sales LJ went on to explain that, whilst he regarded the new point was "arguable" and "potentially attractive", it was too late and unfair for the SSHD to raise it at the eleventh hour (at [46]-[47]):

> "46. I regard the new point, in the form it took when explained to us at the hearing, as constituting an arguable issue of law. It might have the potentially attractive consequence of meaning that it would be unnecessary to apply Article 1C(5) in circumstances where it makes little or no sense to do so, precisely because one is dealing with an individual who has never been a refugee as defined in the Refugee Convention.
>
> 47. However, I am satisfied that justice requires that we refuse permission for the Secretary of State to raise it at the eleventh hour on this appeal. It is not fair to Mr Mosira to do so. Also, in large part because of the way in which Mr Drabble was taken by surprise, we have not had the benefit of full, informed and properly researched argument on the point. Mr Drabble did his best to touch on some of the further issues which would have to be addressed if the point were introduced on the appeal but had not had a fair chance to complete his research or develop his submissions in response. Mr Malik himself made no attempt in his submissions to examine what the effect of the 2003 policy might be if this new argument were correct as a matter of interpretation of the Refugee Convention, e.g. by referring us to the domestic principles and case-law on legitimate expectations. It is neither just nor appropriate for this court

> to give permission for this new point to be taken by the Secretary of State. ….” (emphasis added)

144. Mr Chapman submitted that Sales LJ’s observations in paragraphs [32] and [46] above provide powerful support for his argument that JS was never a “refugee” properly so called under the Refugee Convention. Indeed, it was publication of the decision in *Mosira* which alerted the SSHD to the point (albeit belatedly).

145. In my view, the above passage in Sales LJ’s judgment does provide support for the SSHD’s argument on Ground 2, that family members such as JS granted “derived refugee” status on a Family Reunion basis are not "refugees" as defined in Article 1A(2) of the Refugee Convention.

The Article 1C(5) point

146. Sales LJ held as follows (at [49]) (in a passage cited by UT Coker at [21]):

> “49. 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 in connection 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.” (emphasis added)

147. Mr Husain QC relied in particular on the words underlined and submitted that this Court was bound to make a similar finding in the present case as regards the Article 1C(5) point.

148. Critical to a proper understanding of Sales LJ’s reasoning, however, is an appreciation of the highly unusual basis upon which M’s mother and M had been granted refugee status. As Sales LJ explained (at [20] and [21]):

> “20. Mr Mosira's mother was granted asylum (refugee status) in 2001 purely because of the lack of medical facilities available in Zimbabwe to treat her medical condition as HIV+: FTT decision, paras. [5(i)] and [6]; UT decision of August 2015, para. [3]. As the FTT found as a fact on the available evidence, "There was no political element to the asylum granted to [her]" ([6]). Accordingly, it was found that she was granted refugee status even though there was no determination that she met the test for a refugee under Article 1A of the Refugee Convention.
>
> 21. In September 2004 Mr Mosira applied from Zimbabwe under the 2003 policy for leave to enter as the minor child of a sponsor in the United Kingdom who had been recognised as a refugee. His application was successful, and he arrived in the United Kingdom on 27 November 2004 and

> was himself granted refugee status with indefinite leave to enter in accordance with para. 3.1 of the 2003 policy. As with his mother, this happened even though there was no determination that he met the test for a refugee under Article 1A of the Refugee Convention.

149. The FtT judge findings of fact (at [6]) (adverted to by Sales LJ) are illuminating:

> "6. The appellant's grant of refugee status was, in our judgement, out of the ordinary. There was no political element to the asylum granted to his mother; it turned entirely on the lack of medical facilities to treat her medical condition (HIV+) in Zimbabwe. This claim would not succeed today nor indeed would have succeeded since the decision in *N v United Kingdom*. The appellant himself is not HIV+ nor, so far as we are aware, does he suffer any other related medical condition. There is no evidence to suggest the family of a person diagnosed as HIV+ would be persecuted as a result. We find no underlying features in the grant of asylum to this appellant, which relate to any persecution he has suffered or might be at risk of. …" (emphasis added)

150. It is clear, therefore, that: (i) Mr Mosira's mother had been granted refugee status simply because of her HIV+ status; and Mr Mosira was in turn granted refugee status simply because of his mother's medical condition. (ii) Neither appears to have undergone a proper determination that they met the test for a "refugee" under Article 1A(2) of the Refugee Convention. (iii) There was no political element to the grants of asylum. (iv) There was no risk of persecution to either.

151. In the light of these facts, Sales LJ's reasoning in [49] is entirely understandable and, with respect, unimpeachable. The change and amelioration in the political situation in Zimbabwe relied upon by SSHD was irrelevant to, and could have no bearing upon, whether "the circumstances in connection with which [Mr Mosira] has been recognised as a refugee" had ceased to exist (Article 1C(5)). These relevant "circumstances" were narrowly confined to his mother's medical condition *simpliciter*. There was no evidence that her HIV condition had ceased to exist.

152. In my view, therefore, read against this background, Sales LJ's observations provide no comfort for JS on the Article 1C(5) point. Further, UTJ Coker's reliance on *Mosira* to justify her decision on the Article 1C(5) point was misplaced (at [38]). The facts in *Mosira* are in stark contrast to the present case and, in my view, make it clearly distinguishable.

153. In the present case, as FtTJ Sullivan found, JS's mother's grant of Refugee Convention refugee status was very much tied up with her previous political affiliations in Uganda and, accordingly, subject to the question of construction (which I turn to below) it may be properly arguable by the SSHD that the change in circumstances and amelioration of the political circumstances in Uganda by 2017 had a distinct bearing upon whether "the circumstances in connection with which [JS] has been recognised as a refugee" had ceased to exist (Article 1C(5)).

Construction of Article 1C(5)

154. The primary focus of Counsel's argument during the present hearing was on the construction of Article 1A(2) of the Refugee Convention. I turn, however, to the important issue in relation to the construction of Article 1C(5) of the Refugee Convention which merits careful examination (on the hypothesis that JS was a Refugee Convention refugee or a "derivative refugee" and therefore Article 1C(5) or its equivalent under the Immigration Rules is in play).

155. The question is whether the words "the circumstances in connexion with which he has been recognised as a refugee have ceased to exist" in Article 1C(5) have a wide or a narrow meaning.

156. UTJ Coker rejected the SSHD's reliance on the change of circumstances in Uganda to justify the cessation of JS's refugee status under Article 1C(5) on the grounds that "the circumstances in connexion with which he has been recognised as a refugee" had not ceased to exist. She so held on the basis of a necessarily narrow construction of Article 1C(5), *viz.*: the relevant "circumstances" which gave rise to JS being recognised as a refugee were simply that his mother had been granted refugee status under the Refugee Convention. Her approach involved looking no further than JS's filial relationship with his mother. UTJ Coker took no account of the circumstances in connection with which JS's mother had been granted refugee status, *i.e.* her political affiliations in Uganda.

157. In my view, UTJ Coker's approach is too myopic and a wider construction of Article 1C(5) is appropriate simply as a matter of language. The word "circumstances" is broad and general. It is apposite to cover both relationship and risk. The "circumstances" in connection with which JS was recognised as a refugee were clearly not simply that JS was his mother's son or that his mother had been granted refugee status; the "circumstances" necessarily included, the risks to which JS's mother was subject arising from her political affiliations in Uganda which led to her being recognised a refugee.

158. A narrow construction of Article 1C(5) such as contended for by JS would have the strange result of a person with "derivative refugee" status being in a potentially better position than the principal refugee, by reason of the fact that the former could not lose his status so long as the latter retained his (but not vice-versa). This is unlikely to have been the intention of the State Parties to the Refugee Convention.

SSHD v MM (Zimbabwe) [2017] EWCA Civ 797

159. I am fortified in this view by having my attention drawn to the decision of this Court in *SSHD v MM (Zimbabwe)* [2017] EWCA Civ 797 (Black LJ, Sales LJ and Henderson LJ), which was not cited by either side before us, but in my view is relevant to the present question. (It will be noted that the Court comprised the same constitution as in *Mosira* which was decided two weeks earlier.)

160. In *MM (Zimbabwe)*, the SSHD appealed against a decision of the UT to uphold the FtT's decision that MM should not be deported. MM was a citizen of Zimbabwe who had arrived in the UK in 2002. He had been granted ILR as a refugee on the ground that he faced persecution in Zimbabwe as a result of his political activities. In 2004 he

was convicted of attempted rape and sexual assault in the UK. He was sentenced to a hospital order on account of his schizophrenia. In 2012, he was granted a conditional discharge on the grounds that his condition has responded to medication. In 2015, the SSHD decided to cease his status as a refugee and to deport him. The FtT allowed MM's appeal against the SSHD's decision on the grounds that the SSHD had failed to establish that MM would not face a real risk of ill-treatment upon return to Zimbabwe. The FtT found that MM had rebutted the presumption in s.72 of the NIAA 2002 because of evidence that his condition could be controlled by medication. The FtT also held deportation would violate MM's Article 8 rights but not his Article 3 rights. The UT found that the FtT had not erred in its approach.

161. The Court of Appeal allowed the SSHD's appeal. It held that there had been some changes (a) in the general political situation in Zimbabwe since MM left and (b) in his personal circumstances because he had not engaged in political activities for years. Both changes appeared to be durable in nature. There was a serious question whether Article 1C(5) had applied. However, the FtT had not properly addressed that question or made relevant findings. That was an inappropriate abdication of responsibility by the FtT and the matter would be remitted.

162. Sales LJ made a number of observations which, in my view, are pertinent to the present appeal. Sales LJ observed (at [24]):

> "24. [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."

163. Later in his judgment, Sales LJ considered the relationship between Article 1C(5) of the Refugee Convention and Articles 2 and 3 of the ECHR (at [33]-[38]):

> "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.''

164. It is clear from Sales LJ's above observations, that the Court in *MM (Zimbabwe)* took a similar view that the word "circumstances" in Article 1C(5) required a wide construction, embracing circumstances which included (a) the general political

conditions in the individual's home country and (b) relevant aspect of his personal characteristics.

Other authorities

165. It is clear from other references in the authorities that Article 1C(5) is directed towards actual well-founded fears. As Lord Steyn in *Hoxha* said (at [13]):

> "13. … As Lord Lloyd of Berwick observed in *Adan v.* [*SSHD*] [1999] 1 AC 293, 306G, the cessation provision in article 1C(5) takes effect naturally when the refugee ceases to have a current well-founded fear. This is in symmetry with the definition in article 1A(2). The words "no longer"… support that interpretation."

166. I have had the benefit of reading in draft the decision of this court in *SSHD v. KN (DRC)* [2019] EWCA Civ 1665 (McCombe LJ, Leggatt LJ and Baker LJ) and am fortified to see that it comes to a similar conclusion on the construction of Article 1C(5) of the Refugee Convention.

UNHCR's position

167. It is striking that, in its response dated 23rd October 2015 to the SSHD's notification of intention to cease JS's refugee status under Article 1C(5) of 2nd October 2015, the UNHCR did not suggest that JS's refugee status could not be ceased because "the circumstances in connexion with which he has been recognised as a refugee" continued to exist, namely his mother's status as a refugee; or that JS's refugee status could not be ceased whilst JS's mother's refugee status remained extant On the contrary, having noted that JS was recognised as a refugee "in line with his mother's claim", the UNHCR explained that the matter turned on whether the UK Home Office could discharge the burden of establishing that JS was no longer entitled to refugee status "by virtue of a change of circumstances in his country of origin, Uganda". The UNHCR stated:

> "UNHCR notes that as [JS] was recognised as a refugee in line with his mother's claim, who feared persecution by the Ugandan authorities for her imputed political opinion, resulting from her relationship with a member of a rebel group. …. In order to discharge their burden of proof, therefore, the [Home Office] must show that the circumstances in Uganda have changed in such a way that individuals associated with rebel groups would no longer fear persecution for their imputed political opinions."

168. The UNHCR stated that it had reviewed the country information provided in support of the conclusion "that there had been fundamental and durable changes in Uganda to obviate the circumstances under which [JS] and his mother were recognised as a refugees [sic]" and attached a guidance note which emphasised the need to

demonstrate "fundamental and durable change" in the country of origin for Article 1C(5) to be applicable. Indeed, the entire focus of the letter was directed to this issue.

169. As far as the UNHCR were concerned, therefore, the application of Article 1C(5) to JS's case turned on the substantive question - namely proof as the extent and durability of the regarding the changes in the political situation in Uganda - not on the formal relationship between JS and his mother. At no stage did it suggest otherwise.

170. I note that the UNHCR Handbook states that cessation clauses should be interpreted "restrictively"; but this is in the context of not widening the categories of cessation (see p.116 cited above).

Summary on construction of Article 1C(5)

171. FtTJ Sullivan held the reason why JS was recognised as a "refugee" under the Family Reunion policy on entry to the UK in 2006 was derivative, *i.e.* because of his mother's refugee status. In the language of the SSHD's letter to JS dated 4th September 2015, he had been granted refugee status and leave "in line" with his mother because of her rebel affiliations. Her refugee status arose in turn from her well-founded fear arising from the risks to her by reason of the fact that she had been suspected of belonging to an unnamed rebel group in Uganda (at [31]*ff.*). As FtTJ Sullivan further held, the approach to former rebels in Uganda had, however, improved such that by 2017 the conditions for cessation under paragraph 339A(v) of the Immigration Rules were established (at [39]).

172. As explained above, in my view, on its true construction, Article 1C(5) requires consideration of *relationship* and *risk*. It follows from FtT Sullivan's unchallenged findings of fact that, in the language of Article 1C(5) of the Refugee Convention, "the circumstances in connexion with which [JS] has been recognised as a refugee… have ceased to exist", since his mother can no longer have a well-founded fear of persecution in Uganda. Accordingly, even if (contrary to the above) JS was somehow to be regarded as a Refugee Convention refugee (on a "derivative" basis or otherwise), the SSHD was entitled to decide that, by operation of Article 1C(5) (or paragraph 339A(v) of the Immigration Rules), JS's status as a Refugee Convention refugee could and should be treated as having "ceased". In other words, even if JS is correct in submitting under Ground 2 that JS was a Refugee Convention refugee, this would not avail JS because the SSHD was entitled to invoke Article 1C(5) and/or paragraph 339A(v) of the Immigration Rules in any event and withdraw his refugee status.

Conclusion on Ground 2 and the Main Appeal

173. In summary, for the above reasons, I reject JS's submissions on Article 1A(2) and Article 1C(5) and hold that the Main Appeal should be allowed.

174. My conclusion on the true construction of Article 1C(5) provides a further complete answer to JS's case on the Main Appeal. Furthermore, it renders JS's Linked Appeal academic (see below).

(B) THE CROSS-APPEAL

175. On 27th February 2019, JS filed the following Ground by way of Cross-Appeal: the UT concluded that the FtT's errors of law regarding JS's claim under Article 3 ECHR, relating to the risk of him committing suicide or self-harm if removed, were immaterial. In doing so, the UT erred in law.

176. The SSHD does not oppose JS's Cross-Appeal whilst preserving his position on the substance of the JS's Article 3 claim. The SSHD accepts that UTJ Coker gave legally inadequate reasons for concluding that JS's Article 3 claim could not succeed, and thus that the errors of law in the FtTJ's determination in that respect were immaterial (see [50] and [54]).

177. It is accepted by both parties that, should the Court allow the SSHD's appeal in the Main Appeal, the matter ought to be remitted to the FtT for re-consideration of JS's Article 3 claim.

(C) THE LINKED APPEAL

JS's judicial review proceedings

178. JS issued protective judicial review proceedings (C2/2019/1244) in order to protect his position in the event that the SSHD succeeded in the Main Appeal (C5/2018/2614). The underlying rationale for JS issuing judicial review proceedings mirrors that of the SSHD in running alternative Grounds 1 and 2 in the Main Appeal, namely, to cover both alternative arguments on the basis that JS was and was not a Refugee Convention refugee.

179. JS's immediate challenge in the judicial review proceedings is to UTJ Rimington's order of 7th May 2019 dismissing his application for permission as totally without merit. JS's substantive grounds in its application for judicial review can be summarised as follows:

(1) **Ground 1**: The SSHD unlawfully failed to follow his published Family Reunion policy which included a policy to grant benefits and protections which are in form identical to those contained in the Refugee Convention.

(2) **Ground 2**: The SSHD has unlawfully breached the Appellant's substantive legitimate expectation that he was entitled to benefits and protections which are in form identical to those contained in the Refugee Convention.

180. In the Main Appeal proceedings, UTJ Coker allowed JS's appeal on a Refugee Convention basis. There were two elements to her decision. First, JS was a Refugee Convention refugee within Article 1A(2) and, as such, entitled to the protections contained in the Refugee Convention as of right. Second, the circumstances leading

to JS's grant of refugee status (*i.e.* his mother's refugee status) remained the same and, therefore, his refugee status could not be ceased under Article 1C(5) (see [38]-[39] of UTJ Coker's determination).

181. As I have explained in Main Appeal, in my view, UTJ Coker's decision was wrong on both counts. First, on the true construction of Article 1A(2), JS was not a Refugee Convention refugee, on a derivative or any other basis. Second, on the true construction of Article 1C(5), JS's refugee status could be ceased because the SSHD was entitled to take into account the improvement in political conditions in Uganda. The case of *Mosira* is distinguishable.

182. JS issued protective judicial review proceedings to enable him to argue in the alternative - in the event that he lost the Main Appeal and the Court held that SSHD did not owe JS *international* law obligations under the Refugee Convention - that, by operation of *domestic* public law principles, JS was nevertheless entitled to rights and protections identical *in form* to those contained in the Refugee Convention, and therefore entitled to precisely the same rights and protections. The thrust of JS's argument in the Linked Appeal therefore echoed JS's third submission under Ground 2 in the Main Appeal (see paragraph 82 above), namely that the SSHD was obliged as a matter of domestic law to continue to treat JS as a "refugee" unless and until he would lose the protection afforded by the Refugee Convention's own framework.

183. However, whilst the judicial review proceedings might assist JS in overcoming the first point on Article 1A(2), they cannot assist him on overcoming the second point on Article 1C(5). In summary, even if JS was successful in demonstrating that the SSHD had breached his published policy or JS's legitimate expectation to Refugee Convention rights, JS would be in no better position: he would still have no answer to the true construction of Article 1C(5) and his claim would be bound to fail.

184. For these reasons, in my view, the Linked Appeal is academic and must be dismissed.

SUMMARY

185. In the result, for the reasons set out in this judgment, in my view:

(A) **The Main Appeal** should be allowed.

(B) **The Cross-Appeal** should be allowed.

(C) **The Linked Appeal** should be dismissed.

Lord Justice Newey:

186. Like Underhill LJ, I agree with Haddon-Cave LJ that the Main Appeal and Cross-Appeal should be allowed, and the Linked Appeal dismissed, for essentially the reasons he gives. I agree, too, with Underhill LJ's judgment; in common with him, I do not feel that *MM (Zimbabwe)* takes matters further.

Lord Justice Underhill:

187. I agree with Haddon-Cave LJ's conclusion on each of these appeals. Although my reasoning is also essentially the same as his, it may be of value, given the complex way in which the issues have arisen before us, if I gave a brief overview of how I see the position.

188. The starting-point is that JS was not granted refugee status in his own right – that is, because of any risk of persecution to which he personally was subject. He was admitted, under the Family Reunion Policy, because his mother had previously been admitted as a refugee. That is clear from the unchallenged findings of the FTT set out by Haddon-Cave LJ at para. 24.

189. Admission on that basis did not mean that JS was himself entitled to any rights under the Convention. The Convention only confers rights on persons who themselves satisfy the definition in article 1A (2). I respectfully agree with Haddon-Cave LJ's analysis and reasoning both at paras. 70-73, which address the construction of article 1A (2) read in the context of the Convention itself, and at paras. 124-130, which explain why that meaning is not displaced by the other materials on which Mr Husain sought to rely. I agree that his conclusion is supported by the passages from the judgment of Sales LJ in *Mosira* which he discusses at paras. 142-145.

190. I should like to observe, at the risk of spelling out the obvious, that this issue only arises in cases where the risk of persecution which leads to the grant of protection to the "primary" refugee does not also extend to his or her family members: very often of course it will, either because they share the same characteristic as gives rise to the risk or because the persecutor will extend his persecution of, say, a political activist to his or her family members irrespective of their own conduct or opinions. I do not wish to be understood as saying that there may not be very strong reasons for the admission of family members even where they personally are not at risk: I say only that those reasons do not derive from the Convention itself.

191. Mr Husain argues that, even if JS was not entitled to any rights under the Convention, the basis on which he was admitted entitled him as a matter of domestic law to be treated *as if* he had Convention rights, so that he was entitled to the substance of the protections under articles 32 and 33. That could be either because the Secretary of State's published policy is to be regarded as having that effect or because the description of JS as being himself a "refugee" gave rise (as floated by Sales LJ in *Mosira*) to a legitimate expectation, from which she cannot now be permitted to resile, that he would be accorded all the protections of a Convention refugee (in fact those two ways of putting it may overlap). That issue is raised by the Linked Appeal. Haddon-Cave LJ does not seek to resolve it because his conclusion about the application of article 1C (5) – with which (see below) I agree – means that it is academic. I respectfully agree with that course, not least because we do not have the benefit of relevant findings from either tribunal below. I wish to say, however, that I am not convinced that the statement in the Family Reunion Policy that beneficiaries of it would be admitted "as refugees" can reasonably be read as entitling them to the

full protections of the Convention in circumstances where some at least of its provisions are not easy to apply to persons who are not themselves at risk – a point made by Sales LJ in relation to article 1C (5) itself at para. 46 of his judgment in *Mosira*.

192. Assuming in JS's favour that he was entitled as a matter of domestic law to be treated as if he were a Convention refugee, I believe that the Secretary of State was entitled to "cease" that protection under article 1C (5) on the basis that, as the FTT found, the circumstances in Uganda that had led to his mother being granted refugee status no longer apply. Those seem to me to be the relevant circumstances in a case where, as we are assuming for present purposes, a person has acquired refugee status on a derivative basis, because they are the circumstances which led to protection being granted to the person from whom his own status derives. As I understand it, this is substantially the same as Haddon-Cave LJ's reasoning at paras. 157-158. I agree that *Mosira* does not compel a different conclusion, for the reasons which he gives at paras. 142-152. (I am not myself sure that *MM (Zimbabwe)*, to which he refers at paras. 159-164, advances the argument because the issue there was different.)

Order

UPON hearing Nicholas Chapman for the Secretary of State and Raza Husain QC, Benjamin Bundock and Eleanor Mitchell for JS

IT IS ORDERED THAT

1. The Secretary of State's appeal in C5/2018/2614 be allowed.
2. JS's cross-appeal in C5/2018/2614 be allowed and remitted to the First-tier Tribunal for redetermination according to law.
3. Permission to appeal from the decision of the Upper Tribunal in C2/2019/1244 be granted.
4. The appeal in C2/2019/1244 be dismissed.
5. On the issue of costs in respect of the Secretary of State's appeal in C5/2018/2614 and JS's appeal in C2/2019/1244, the parties file and serve written submissions within 7 days of the date of this order (following which the Court shall determine the appropriate order on the papers).
6. The Secretary of State do pay JS's costs of the cross-appeal in C5/2018/2614, to be subject to detailed assessment if not agreed.
7. There be a detailed assessment of JS's publicly funded costs.
8. Permission to appeal to the Supreme Court in C5/2018/2614 be refused.
9. Permission to appeal to the Supreme Court in C2/2019/1244 be refused.

Dated: 10/10/2019