Easter Term
[2011] UKSC 22
On appeal from: [2010] EWCA Civ 696

JUDGMENT

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

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Brown
Lord Kerr
Lord Dyson

JUDGMENT GIVEN ON

25 May 2011

Heard on 23 and 24 February 2011

Appellant	*Respondent*
Tim Eicke QC Alan Payne (Instructed by Treasury Solicitors)	Raza Husain QC Takis Tridimas Nick Armstrong (Instructed by Immigration Advisory Service)

LORD KERR, DELIVERING THE JUDGMENT OF THE PANEL

Introduction

1. FA is an Iraqi national who was born on 21 October 1991. He arrived in the United Kingdom on 21 August 2007 when he was 15 years old. He was not accompanied. He applied for asylum. On 9 October 2007 the Secretary of State refused the application. The evidence that FA had supplied in support of his claim was deemed not to be credible.

2. Having refused FA asylum, the Secretary of State then considered whether he qualified for humanitarian protection and/or discretionary leave to remain in the United Kingdom. Humanitarian protection in this context is the domestic means of providing the 'subsidiary protection' which Council Directive 2004/83/EC of 29 April 2004 (the Qualification Directive) requires to be given to certain third country nationals or stateless persons. It was decided that FA did not qualify for humanitarian protection. He was granted discretionary leave to remain, however, limited in time until he was seventeen years and six months old.

3. As he was entitled to under section 83(2) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), FA appealed to the Asylum and Immigration Tribunal (AIT) against the refusal of his claim for asylum. Included in the grounds of appeal, however, were claims that FA's rights under articles 2, 3 and 5 of the European Convention on Human Rights and Fundamental Freedoms would be contravened if he was removed from the United Kingdom to Iraq. It was also averred that he might suffer serious harm as defined in the Qualification Directive. FA's appeal was dismissed by Immigration Judge (IJ) Jhirad. The dismissal was said to be on asylum grounds *and* humanitarian protection grounds.

4. FA applied to AIT for a reconsideration of his appeal. Senior Immigration Judge (SIJ) Mather ordered that there should not be reconsideration of his appeal on asylum grounds but that the issue of whether there would be a "serious and individual threat to his life by reason of indiscriminate violence during internal armed conflict" should be reconsidered. SIJ Mather felt that IJ Jhirad may not have considered whether there was a risk of serious harm under the Qualification Directive and para 339 of the Immigration Rules which incorporates into domestic law the subsidiary protection provisions of the Qualification Directive.

5. When the reconsideration application came on for hearing, AIT (IJs Lobo and Cohen) held that the original appeal before IJ Jhirad should have been confined to the refusal of the asylum claim. In their view, no appeal was available to FA in relation to human rights claims or humanitarian protection grounds under section 83 of the 2002 Act. That section provided for an appeal against the refusal of the application for asylum only. On that account, AIT substituted IJ Jhirad's decision with a dismissal of the original appeal on asylum grounds only.

6. The focus of FA's appeal against the decision of AIT to the Court of Appeal was initially on the construction of sections 82 to 84 of the 2002 Act and the question whether the decision of AIT deprived him of an effective judicial remedy against an adverse act of the administration, contrary to general principles of European Union law. Shortly before the hearing of the appeal, a supplementary written submission was presented which developed the argument that the principle of equivalence (a general principle of EU law) required that claims based on EU law must not be subject to rules which are less favourable than those based on claims which have national law as their source. It is this argument that principally preoccupied the Court of Appeal and it held centre stage in the appeal before this court.

7. Section 82 lists a number of immigration decisions from which, by virtue of section 82 (1), an appeal will lie. Among these are a refusal to vary a person's leave to enter or remain (section 82 (2) (d)) and a decision that a person be removed from the United Kingdom pursuant to various directions (section 82 (2) (g)). FA could not have recourse to these because there had not been a relevant refusal to vary the leave to remain that he had been given and there had not been, at the time that the matter came before AIT (or for that matter the Court of Appeal), a decision to remove him. None of the other decisions listed in section 82 (2) was relevant to his situation. (As it happens on 11 January 2011, the Secretary of State rejected FA's application for an extension of his discretionary leave so that he now has a right of appeal under section 82(1) of the 2002 Act.)

8. Section 83 of the Act gives a specific right of appeal against a refusal of asylum to a person who, like FA, has been granted leave to enter or remain for a period exceeding one year. It was this right of appeal that FA had exercised in appealing to AIT. Before the Court of Appeal Mr Raza Husain QC, for FA, had argued that, by resort to normal canons of construction, section 83 could and should be interpreted as including a right of appeal against a humanitarian protection decision, particularly in light of the definition of 'asylum claim' in section 113 of the 2002 Act. That argument was rejected by the Court of Appeal and it has not been renewed before this court. The Court of Appeal held that, although a section 83 appeal was a status appeal (i.e. one that depended on the status of the person making the appeal as opposed to the species of decision appealed against) it was nevertheless restricted to a particular class of persons,

namely those who have been given leave to remain for at least twelve months. Moreover, by virtue of section 84 (3) of the 2002 Act, the only grounds on which the appeal could be taken were that removal of the person appealing would breach the United Kingdom's obligation under the Refugee Convention. These considerations meant that section 83 could not be construed on any conventional basis of interpretation as extending to an appeal against a humanitarian protection decision.

9. Mr Husain's alternative submission was accepted, however. In broad terms it was to the effect that the principle of equivalence required that a right of appeal against the humanitarian protection decision be recognised since the lack of an appeal would mean that this claim, based as it was on EU law, was being subjected to rules which were less favourable than those which applied to the asylum claim, such a claim being based on national law. The Court of Appeal held that the definition section (113 (1) of the 2002 Act,) which provides that 'asylum claim' means "a claim made by a person that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention" would have to have the words "and/or the Qualification Directive 2004/83/EC" added to it. A similar addition to section 84 (3) was required so as to enlarge the grounds on which the appeal might be brought.

10. The Secretary of State appeals against this decision on the ground that there is no purely domestic measure against which a comparison of the rules applicable to claims for humanitarian protection can be made. It is argued that such claims have far closer similarities to those that are made under the Human Rights Act 1998. The Secretary of State further contends that the mooted comparators (the asylum claim and the humanitarian protection claims) both have their origin in Chapter VII of the Qualification Directive. Both therefore are rooted in EU law. They do not spring from different sources and since that is the essential requirement for the activation of the equivalence principle, it cannot be prayed in aid in this instance.

The procedural autonomy of member states

11. In the absence of EU law stipulating a particular form of remedy to ensure protection of EU rights, it is for member states to decide which courts or tribunals will have jurisdiction to give effect to those rights and to prescribe the procedural conditions necessary for their enforcement - article 19(1) of the Treaty on European Union (TEU), Case 33/76 *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (*Rewe I)* [1976] ECR 1989, Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043 and *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] UKHL 5, [2001] 2 AC 455. This is known as the procedural autonomy of member states.

12. Procedural autonomy is subject to two qualifications. National rules may not render the exercise of rights conferred by EU law virtually impossible to achieve or excessively difficult to access. This is known as the principle of effectiveness. Nor must national rules be less favourable than those governing comparable domestic actions. This is the principle of equivalence.

The equivalence principle

13. It is no longer suggested in this appeal that FA does not have effective access to his humanitarian protection or subsidiary rights. The effectiveness principle is no longer in issue. The critical question now is whether the equivalence principle requires, as the Court of Appeal decided it did, that a right of appeal must be available against the decision to dismiss FA's application for humanitarian protection. This, in turn, depends on whether FA can demonstrate that there is a comparable domestic right which is subject to more favourable rules than is his humanitarian protection right.

14. In the particular circumstances of this case, this means that he must show that his asylum claim is a legitimate comparator with his claim for humanitarian protection. If he is able to demonstrate this, it is clear that the humanitarian protection claim is subject to less favourable rules than the asylum claim. The latter brings with it a status appeal. The humanitarian protection claim does not.

15. FA must do more than show that there is a difference between the two claims in terms of the availability of a right of appeal, of course. He must also establish that the proper basis of comparison exists. It is on this particular point that crucial issue is joined between the parties.

16. The issue has a number of aspects. Must the claim to asylum, in order to qualify as an effective comparator, be based exclusively on domestic or national law? Or is it sufficient that it partake partly of a national law and partly of EU law? If it is a measure that is given effect in domestic law in the fulfilment of a member state's obligations under a treaty, does this affect its status as a potential comparator? How similar must the rights under domestic and Community law be? If there is a more marked similarity between the Community right and a human rights claim, how does this affect the application of the principle of equivalence?

Must the comparator with the Community law claim be a purely domestic measure?

17. The nature of the required comparison exercise was described in the judgment of the Court of Justice of the European Union in *Rewe I* in the following passage, [1976] ECR 1989, para 5:

> "Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.
>
> Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature."

18. This formulation recognises the primacy of the role of the domestic legal system in providing the necessary protection for Community rights, with what has become known as the principle of equivalence being a qualification on that autonomy. Its purpose is to ensure that there is no dilution of the adequacy of the protection of the relevant rights and in that sense it is complementary to the principle of effectiveness.

19. The principle of equivalence received somewhat fuller consideration by the Court of Justice in the case of Case C-326/96 *Levez v T. H. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835. One of the questions referred to the Court of Justice by the Employment Appeals Tribunal in that case sought guidance on how the expression "similar domestic actions" should be interpreted in the field of equal pay legislation. Advocate General Léger described the aim of the principle of equivalence in para 26 of his opinion:

> "The aim of this principle is that domestic law remedies should safeguard Community law 'without discrimination' that is to say, exercise of a Community right before the national courts must not be subject to conditions which are more strict (for example, in terms of limitation periods, conditions for recovering undue payment, rules of

evidence) than those governing the exercise of similar rights derived wholly from domestic law."

20. In the present appeal, the Secretary of State draws particular attention to the phrase "similar rights derived wholly from domestic law". It is suggested that this conveys clearly the notion that the proposed comparable right must originate exclusively from a domestic source.

21. Similar expressions can be found in earlier jurisprudence of the Court of Justice. In Joined Cases 205 to 215/82 *Deutsche Milchkontor GmbH v Federal Republic of Germany* [1983] ECR 2633, para 19 the court said that "national legislation must be applied in a manner which is not discriminatory compared to procedures for deciding similar but *purely national* disputes. (emphasis supplied)". The expression "purely internal" in relation to the national measure was also used in the later case of Case C-34/02 *Pasquini v Istituto Nazionale della Previdenza Sociale*, judgment of 19 June 2003.

22. The respondent to the present appeal has drawn attention, however, to the fact that neither "purely domestic" nor "purely internal" are used in the latest decisions of the Court of Justice in cases involving the principle of equivalence. A large number of cases have been cited by the respondent to support this proposition. They include Joined Cases C-222/05 to C-225/05 *Van der Weerd v Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-4233; Case C-268/06 *Impact v Minister for Agriculture and Food* [2009] All ER (EC) 306; Case C-445/06 *Danske Slagterier v Bundesrepublik Deutschland*, 24 March 2009; Case C-118/08, *Transportes Urbanos y Services Generales SAL v Adminisración del Estado*, 26 January 2010; Case C-542/08, *Barth v Bundesministerium für Wissenschaft und Forschung*, 15 April 2010; Joined Cases C-145/08 and C-149/08, *Club Hotel Loutraki AE v Ethniko Simvoulio Radiotileorasis*, 6 May 2010; Case C-246/09 *Bulicke v Deutsche Büro Service GmbH*, 8 July 2010; and Case C-429/09 *Günter Fuß v Stadt Halle*, 25 November 2010*;* Case C-568/08 *Combinatie Spijker Infrabouw/De Jonge Konstruktie, v Provincie Drenthe*, 9 December 2010.

23. It is noteworthy (and, in the context of this particular debate, significant) that in none of these decisions of the Court of Justice has the expression "purely domestic" been expressly disavowed. Notwithstanding this, the respondent confidently asserts that the Court of Justice has not definitively pronounced on the question whether the national measure that is proffered as a comparator must be purely domestic. Moreover, it is claimed that it would be unwieldy and impractical to require the national court, as a condition of applying the principle of equivalence, to inquire in every case whether a particular procedure was designed exclusively for the protection of national rights. It is also argued that an insistence on the compared right being uniquely domestic would give rise to anomalies in

that a right based on national law that would qualify as a comparator might lose that status if subsumed under an EU measure.

24. This issue has not been expressly addressed in any of the decisions of the Court of Justice to which this court has been referred. One can acknowledge the strength of the arguments on either side. On the one hand, there is a consistent line of authority (which has not been renounced) to the effect that the domestic measure must be precisely what the term suggests – a purely domestic provision. If comparison with another Community law provision was possible, much of the underlying purpose of the principle, it is argued, would be diverted. After all, the essential reason for the development of the principle was that a Community law right should not suffer disadvantageous treatment vis-à-vis national rights which lie outside the field of Community law.

25. On the other hand, the aim of the principle is the elimination of discrimination and it would be, it is suggested, anomalous if comparison with another right was precluded because it could be branded as deriving partly form a Community law source. Viewed as a complement to the principle of effectiveness, the principle of equivalence should not be thwarted by the imposition of what might arguably be said to be the artificial or technical requirement of a comparison between a Community law right and one which is distinctively and exclusively domestic.

What is required in order that the compared measures may be regarded as sufficiently similar?

26. On the separate question of what is required in terms of similarity between the Community law right and the domestic law right, at para 43 of its judgment in *Levez* the Court of Justice said:

> "In order to determine whether the principle of equivalence has been complied with in the present case, the national court — which alone has direct knowledge of the procedural rules governing actions in the field of employment law — must consider both the purpose and the essential characteristics of allegedly similar domestic actions (see *Palmisani,* paragraphs 34 to 38)" [*Palmisani v Istituto Nazionale della Previdenza Sociale (Case C-261/95)* [1997] ECR I-4025]

27. The court went on to point out (in para 44) that it was for the national court to examine the part played by the (avowedly similar) domestic measure in the procedure as a whole, and to take account of any special features of that procedure.

28. The theme of the need for close similarity between the Community law right and the domestic law right was taken up again in Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* [1998] ECR I-4951. At para 36 of its judgment the Court of Justice said:

> "Observance of the principle of equivalence implies, for its part, that the procedural rule at issue applies *without distinction* to actions alleging infringements of Community law and to those alleging infringements of national law, with respect to the *same kind* of charges or dues (see, to that effect, Joined Cases 66/79, 127/79 and 128/79 *Amministrazione delle Finanze dello Stato v Salumi* [1980] ECR 1237, para 21). That principle cannot, however, be interpreted as obliging a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law." (emphasis supplied)

29. On the basis of these statements, the Secretary of State argues that simply because there is some similarity between the rights claimed, or because the rights are of the same generic type, it does not follow that the principle of equivalence comes into play. The juristic structure of the two rights under comparison must be the same. In advancing this argument the Secretary of State relies on two domestic authorities. The first of these is *Matra Communications SAS v Home Office* [1999] 1 WLR 1646 where at 1658H Buxton LJ said:

> "… the principle of 'equivalence' really does mean what it says. The domestic court, in applying the principle, must look not merely for a domestic action that is similar to the claim asserting Community rights, but for one that is in juristic structure very close to the Community claim. It does that, in the words of the Court of Justice in *Levez v. T H. Jennings (Harlow Pools) Ltd.* (Case C-326/96) [1999] I.C.R. 521, 545, para. 43, by considering 'the purpose and the essential characteristics, of allegedly similar domestic actions'."

30. The second domestic case on which the Secretary of State relies is *Preston v Wolverhampton Healthcare NHS Trust (No 2)*[2001] UKHL 5, [2001] 2 AC 455. In that case the majority expressed doubts about the view favoured by Lord Slynn of Hadley in his speech that a broad view of the exercise of comparing the

domestic right with the Community law claim was permissible. Lord Slynn had accepted that one should be careful not to accept superficial similarity as being sufficient. He also accepted that it was not enough to say that both sets of claims arose (as they did in that case) in the field of employment law. Nevertheless, he considered that claims under the Equal Pay Act 1970 (which by virtue of article 119 of the Treaty and Council Directive (75/117/EEC) were Community law claims) bore a sufficient resemblance to claims for breach of contract against an employer so as to permit the possible application of the principle of equivalence.

31. Lord Clyde, with whom Lord Goff of Chieveley and Lord Nolan agreed, thought that this conclusion was difficult to sustain. The appellants' claim under Community law was "concerned not with arrears of pay or other remuneration but with retroactive membership for the applicants of an occupational pension scheme" (para 43). In effect this required something to be added to the contract, rather than being a claim for breach of contract. Lord Clyde thought that it was extremely difficult to conclude that as between these two actions one would be comparing like with like.

32. The Secretary of State relies on the *Matra* and *Preston* decisions as authority for what is described as a "cautious approach" to the question of the recognition of one form of action as a true comparator of a Community law claim. It is argued that where there is a far more readily comparable action to the Community law claim such as a human rights claim, the "allegedly domestic law" refugee claim had even less to commend it as a proper comparator. There are, says the Secretary of State, significant structural and substantive reasons why section 83 is not sufficiently close in its "juristic structure" to serve as an appropriate comparator. The purpose and the essential characteristics of the alleged domestic action are quite different. The Preamble to the Qualification Directive ([14]) and the 1951 Refugee Convention make clear that the "recognition of refugee status is a declaratory act" of a pre-existing right and, as a result, there is no discretion on the part of the decision maker in the Member State. By contrast, "subsidiary protection status" is a status which has been created by the Qualification Directive and only arises upon a decision to grant such status. Furthermore, subsidiary protection is only intended to be "complementary and additional to the refugee protection enshrined in the Geneva Convention" (preamble [24]) and is only available to those who do not qualify as a refugee. As a result, the Secretary of State argues, the two are mutually exclusive.

33. The respondent disputes the claim that there is any significant or relevant difference between the claim to refugee status and the claim for subsidiary protection. It is argued that recognition as a person eligible for subsidiary protection carries with it an entitlement to "subsidiary protection status" akin to the refugee status that an applicant for asylum acquires. Moreover, the grant of that status carries with it certain benefits while the human rights claim (which the

Secretary of State suggests is a more suitable comparator) does no more than prevent removal. At a fundamental level, both refugee status and subsidiary protection exist to protect individuals from return to serious harm.

34. As to the effect of *Matra* and *Preston* the respondent counters the Secretary of State's claims by reference to more recent authority, particularly *Byrne v Motor Insurers' Bureau* [2009] QB 66 and *Revenue and Customs Comrs v Stringer & Ors* [2009] ICR 985. In *Byrne,* the respondent claims, the Court of Appeal rejected the narrow approach advanced by the defendant and found a sufficient similarity between a claim for compensation against the Motor Insurers Bureau and an action in tort. Mr Husain relied particularly on an observation by Carnwath LJ in para 27 of his judgment alluding to Buxton LJ's statement in *Matra* that there should be a close relationship between the juristic structures of the Community law right and the domestic measure. Carnwath LJ said that he did not find it "helpful to argue in the present case that the claim against the MIB has a different 'juristic structure' to a claim in tort".

35. I do not construe this as a rejection of the juristic structure approach to the question, however. Carnwath LJ's comment must be seen in its context. In *Byrne* the court was dealing with a claim that the scheme for compensation for victims of uninsured drivers should not be any less favourable than the system whereby victims of drivers who were insured could claim compensation. It was also, incidentally, confronted by a decision of the Court of Justice to the effect that the protection provided by the national scheme must be equivalent to and as effective as the protection available under the national legal system to victims of insured drivers - *Evans v Secretary of State for the Environment, Transport and the Regions* (Case C-63/01) [2005] All ER (EC) 763; [2004] RTR 534; [2003] ECR I-14447, ECJ. Against that background a technical argument that the juristic structure of a claim in tort differed from that of a claim whose purpose was to require the MIB to meet its contractual obligations (and that, on that account, the principle of equivalence did not apply) was unlikely to prevail. It does not necessarily follow that the comparison of the juristic structures of mooted comparators in other, more appropriate, contexts will not be a relevant means of assessing their claimed similarity.

36. In *Revenue and Customs Comrs v Stringer & Ors* the comparison was between the statutory right to paid annual leave (based on the EC Working Time Directive 93/104/EC) and a contractual right to holidays with pay. The House of Lords concluded both that the two claims were sufficiently similar for equivalence purposes, and that the different limitation periods applicable to each amounted to less favourable treatment of the Community law right. The respondent in this appeal argued that this betokened a broader approach than had hitherto been taken to the question of similarity between rights for the purposes of equivalence. For reasons that I will shortly state, I question that claim.

37. The Working Time Directive has as its foundation concern for health and welfare. The House of Lords did not consider that this feature made it dissimilar to a contractual right to paid leave. After commenting in not unfavourable terms to Lord Slynn's admonition in *Preston* that one should be careful not to accept superficial similarity as sufficient, Lord Walker of Gestingthorpe, who delivered the principal speech said, at para 62:

> "In these appeals, however, the parallel between the statutory right to paid annual leave and a contractual right to holidays with pay is to my mind much clearer and closer. It is not less close because of the Working Time Directive's emphasis on health and safety at work. Similar thinking has for many years informed the approach of responsible employers in framing contractual terms of employment. Moreover in each case the remedy would be an order for payment of the liquidated sum due."

38. Lord Walker did not propound a different approach from that of the majority in *Preston*. He merely commented that the two rights in the *Stringer* case had a much more obvious connection than did the rights that were involved in the earlier case. Indeed, his reference to health and safety considerations informing contractual terms of employment illustrates Lord Walker's acceptance that something more than mere superficial similarity was required.

39. A similar stance can be detected from the opinion of Lord Neuberger of Abbotsbury. At para 71 he said that the "purpose of a 'holiday' from work is, at least in part, the psychological and social well being of the employee". But of perhaps greater consequence is the interesting and, in relation to the issues that arise in this case, highly pertinent observation that Lord Neuberger made in para 88 to the effect that "the question of similarity, in the context of the principle of equivalence, has to be considered by reference to the context in which the principle is being invoked".

40. Various formulae have been employed to describe the nature of the similarity that is required. For instance, whether the purpose and essential characteristics of the two measures are the same - *Palmisani,* paras 34 to 38. Or whether the role played by the provision in the procedure as a whole, as well as the operation and any special features of that procedure before different national courts, sustain or detract from the claim to equivalence – *Levez* para 44. Another criterion suggested is that the purpose and cause of action should be similar – para 41 of *Levez*. The latter part of this formulation prompted the statement by Buxton LJ that the juristic structure of the two measures should be closely related.

41. It is not clear, however, whether any or all of these criteria are indispensable requirements. As Lord Clyde observed in *Preston* the requirement of similarity or comparability is an inexact one (para 41). It is unlikely that juristic structures of exactly similar type are required if by that term it is implied that the means of securing the right should be the same or directly analogous. If the essential characteristics of the rights claimed are identical or closely similar, it would be a curious result that equivalence should be denied simply because the legal means of obtaining vindication of the right asserted differed. On the other hand, if the juristic structures *are* the same, this might well be a good indicator that the principle of equivalence applies.

42. On the whole therefore there is much to be said for Lord Neuberger's view that the question of the required similarity and the criteria necessary to establish it in an individual case will depend on the context in which the application of the principle of equivalence is canvassed. It does not appear, however, that this issue has been directly considered by the Court of Justice and on that account alone a reference is required.

The source of procedural rights of the asylum applicant

43. At para 47 of the Court of Appeal's judgment, Pill LJ stated that "the rights of a refugee, as now provided in national law, and the rights of a person with subsidiary protection status, as provided by the Directive are in many respects similar". The Secretary of State contends that this clearly implied that the court had concluded that the source of FA's rights in relation to his asylum application was exclusively national law. It is submitted that such a conclusion was plainly incorrect.

44. It is common case between the parties that by virtue of article 4 of the Treaty on the Functioning of the European Union (TFEU) the area of freedom, security and justice in Community law is one of shared competence between the EU and member states. It is also agreed that EU's competence in this area is defined by article 78 of TFEU. And both parties have referred to the requirement in article 2 (2) of TFEU that member states shall exercise their competence to the extent that the EU has not exercised its competence or to the extent that the Union has decided to cease exercising its competence.

45. Mr Eicke for the Secretary of State submits that the EU has exercised its competence under article 78 to define, among other things, the requirements for qualification as a refugee; the grant and content of refugee status; and the procedures, including the appeals procedure in relation to the grant and withdrawal of refugee status. The last of these found expression in domestic law through

sections 82, 83 and 83A of the 2002 Act. In consequence, it is argued, the purported comparators (sections 82-83A) are not domestic measures at all. Since, it is said, they are not eligible for that role, the principle of equivalence cannot be invoked. Indeed, the appellant argues, the substantive content of both rights (*i.e.* the right to refugee status and the right to humanitarian protection) is derived from the same EU law instrument and, in fact, the same chapter within that EU law instrument: namely Chapter VII of the Qualification Directive. It is claimed, therefore, that there can be no question of comparison with a domestic law right.

46. For the respondent Mr Husain emphasises that the United Kingdom is not prevented by the Qualification Directive from adopting and maintaining purely domestic legislation in the field of refugee law. He points out that the Qualification Directive is a minimum standards instrument. In stark contrast to Art 1A of the Refugee Convention, which applies the term refugee to any person who comes within the definition set out in Art 1A(1) and 1A(2), the Qualification Directive applies only to third country nationals. Moreover, domestic legislation – even transposing instruments – has continued to define a claim to asylum by reference to the Refugee Convention rather than the Qualification Directive.

47. While these arguments are indisputable at a theoretical level, it is questionable that they have any relevance to the issues joined between the parties. It is not a matter of dispute that the asylum claim is based on provisions that were enacted on foot of the United Kingdom's obligations under the Qualification Directive. True it is that they mirror requirements set out in the Refugee Convention and that this may have been the original source of many of the provisions of the Qualification Directive. But this does not answer the essential question of whether the claim to refugee status can qualify as a valid comparator either because it can be described as having a "mixed" source i.e. it is based on both EU and domestic law or because the Refugee Convention is the original source of the relevant claim to refugee status and its provisions shaped those contained in the Qualification Directive. Again, it does not appear that these questions have been addressed directly in the case law of the Court of Justice and for that reason also a reference is required.

Conclusions

48. For the reasons given in this judgment a number of issues have arisen on this appeal which, in the opinion of this court, require a preliminary ruling by the Court of Justice of the European Union under article 267 of the Treaty on the Functioning of the European Union. The parties are therefore invited to make submissions in writing within 28 days on the questions to be referred to the Court of Justice.