Upper Tribunal
(Immigration and Asylum Chamber)

MY (refusal of human rights claim) Pakistan [2020] UKUT 00089 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 October 2019	
Further written submissions received on 5 December 2019 and 9 January 2020	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MY

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Lucy Mair, Counsel, instructed by the Greater Manchester Immigration Aid Unit

For the Respondent: Mr Christopher Avery, Senior Home Office Presenting Officer

(1) The Secretary of State's assessment of whether a claim by C constitutes a human rights claim, as defined by section 113 of the Nationality, Immigration and Asylum Act 2002, is not legally determinative. The Secretary of State's Guidance is, however, broadly compatible with what the High Court in R (Alighanbari) v Secretary of State for the Home Department [2013] EWHC 1818 (Admin) has found to be the minimum elements of a human rights claim.

(2) The fact that C has made a human rights claim does not mean that any reaction to it by the Secretary of State, which is not an acceptance of C's claim, acknowledged by the grant of leave, is to be treated as the refusal of a human rights claim under section 82(1)(b) of the 2002 Act, generating a

right of appeal to the First-tier Tribunal. The Secretary of State is legally entitled to adopt the position that she may require human rights claims to be made in a particular way, if they are to be substantively considered by her so that, if refused, there will be a right of appeal.

(3) There is, accordingly, no justification for construing section 82(1)(b) otherwise than according to its ordinary meaning, which is that the Secretary of State decides to refuse a human rights claim if she:

(i) engages with the claim; and

(ii) reaches a decision that neither C nor anyone else who may be affected has a human right which is of such a kind as to entitle C to remain in the United Kingdom (or to be given entry to it) by reason of that right.

DECISION AND REASONS

A. INTRODUCTION

1.
Section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 provides that:-

“ (1) A person (‘ P ’) may appeal to the Tribunal where—

…

(b) the Secretary of State has decided to refuse a human rights claim made by P, or

…”

2.
Section 113(1) of the 2002 Act defines a “human rights claim” as:-

... a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to convention…”

3.
In the present case, the appellant submits that the r espondent has decided to refuse the appellant’s human rights claim, with the result that the a ppellant may exercise a right of appeal against that decision to the First-tier Tribunal. Following a hearing in Bradford in June 2019, First-tier Tribunal Judge Kelly decided that the decision which the a ppellant had received from the r espondent was not a refusal of a h uman r ights claim. Judge Kelly, accordingly, dismissed the appeal for want of jurisdiction.

4.
In a postscript to his decision, the judge noted the observations of counsel for the a ppellant , Ms Mai r, that First-tier Tribunal judges were “arriving at different decisions in respect of appeals that were indistinguishable upon their material facts from this appeal and indeed from each other”. Judge Kelly considered that it would be helpful to have the matter resolved by the Upper Tribunal. Following an application by the a ppellant for permission to appeal, R esident J udge of the First-tier Tribunal Zucker granted permission on 11 July 2019.

5.

We wish to record at the outset that we have been much assisted by the oral and written submissions of the parties' representatives.

B. THE APPELLANT AND HIS APPLICATION FOR LEAVE TO REMAIN AS THE VICTIM OF DOMESTIC VIOLENCE

6.
The a ppellant is a citizen of Pakistan, born in 1982, who entered the United Kingdom in 2014 with limited leave to remain as the spouse of a person present and settled in the United Kingdom, whom he had married in Pakistan in November 2012. Before that period of limited leave expired, the a ppellant's marriage had broken down irretrievably. The a ppellant applied under Appendix FM of the Immigration Rules for leave to remain as a "victim of domestic violence".

7.
The a ppellant completed form (SET)(D) which, pursuant to the requirements of paragraph 34 of the R ules, is the form required by the r espondent to be used f or a person seeking leave to remain as a victim of domestic violence. The form was concerned with the provision of information and documentary evidence to satisfy the respondent that the a ppellant was a victim of domestic violence and that there was no reason, such as bad character, why he should not be given leave to remain if he satisfied the requirements of the Rules. Nowhere in the form was the a ppellant invited to say whether there was any other reason why he might be entitled to leave to remain.

8.
With the application form, the a ppellant's advisors, ASR Legal Solicitors, submitted a letter dated 6 November 2017. The letter described how the a ppellant had been ill-treated in the United Kingdom by his wife and in-laws. It was stated that he had suffered psychological, physical, financial and emotional abuse as well as controlling and coerci ve behaviour. A medical report diagnosed the a ppellant as suffering from depression. The writer of the r eport noted that the a ppellant was fearful that if he returned to Pakistan, he would be more vulnerable both mentally and psychologically. This was referable to "direct and implied threats made to him during his domestic abuse. Such fear of imminent mortal danger, having some basis in reality, superimposed on his tendency to be anxious and low, might prove extremely detrimental to his fragile mental health". In his witness statement, also included with the application, the a ppellant said he was fearful that if he returned to Pakistan "I have potential threaten of being murder (sic) in Pakistan by my in-laws".

C. THE RESPONDENT'S DECISION

9.
The a ppellant received from the respondent a letter, dated 9 September 2018 , part of which read as follows:-

"Dear Sirs

You applied for indefinite leave to remain on 14 February 2018 (sic). I am writing to tell you that your application is refused.

What this means for you.

You can apply for administrative review. Instructions on how to apply can be found under "Next steps" section of this letter.

If you do not apply for administrative review and do not have extended leave you must leave the country.

The reasons for this decision are set out on the next page.

Yours sincerely".

10.
Over the page, the "R easons for D ecision " contain ed the following:-

" We have considered your application on behalf of the Secretary of State and your application has been refused. In making the decision to refuse your application, careful consideration has been given to the following:

Appendix FM of the Immigration Rules sets out the criteria that the government would expect a person to fulfil, in order to establish a right to remain in the United Kingdom as a victim of domestic violence.

The requirements to be met for indefinite leave to remain as a victim of domestic violence under Paragraph DVILR.1.1 are that:

(d) the applicant must meet all the requirements of Section E -DVILR.

E-DVILR.1.1 To meet the eligibility requirements for indefinite leave to remain as a victim of domestic violence all of the requirements of paragraphs E-DVILR.1.2. and 1.3 must be met.

E-DVILR.1.2. The applicant's first grant of limited leave under this Appendix must have been as a partner (other than a fiancé (e) or proposed civil partner) of a British Citizen or a person settled in the UK under paragraph E-ECP.1.1, or D-LTRP.1.1. or D-LTRP.1.2. of this Appendix and any subsequent grant of limited leave must have been:

(a)
granted as a partner (other than a fiancé(e) or proposed civil partner of a British Citizen or a person settled in the UK under paragraph D-ECP.1.1.; D-LTRP.1.1 or D-LTRP.1.2. of this Appendix; or

(b)
granted to enable access to public funds pending an application under DVILR and the preceding grant of leave was granted as a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen or a person settled in the UK under paragraph D-ECP.1.1., D-LTRP.1.1 or D-LTRP.1.2. of this Appendix; or

(c)
granted under paragraph D-DVILR.1.2.

E-DVILR.1.3. The applicant must provide evidence that during the last period of limited leave as a partner of a British Citizen or a person settled in the UK under paragraph D-ECP.1.1, or D-LTRP.1.1 or D-LTRP.1.2 of this Appendix the applicant's relationship with their partner broke down permanently as a result of domestic violence. "

11.
The reasons continued by explaining how, in March 2013, the government introduced a new definition of domestic violence to be used across all government departments. The definition was set out and the letter then turned to an examination of whether the a ppellant's "application form, submissions from

representative and your personal statement" satisfie d the requirement to show that the a ppellant had been a victim of domestic violence. The r espondent considered that the information was "insufficient as documentary evidence as the account detail ed upon each of these documents … has been taken entirely from your own personal, verbal testimony and is not considered to be from an independent or impartial source". This criticism extended to the reports submitted by the a ppellant .

12.
The reasons concluded as follows:

"Careful consideration has been given to the documents you have submitted but it is concluded that none of the evidence sub mitted is sufficient to establish that, on the balance of probabilities, your relationship was caused to break down as a result of domestic violence. Your application therefore fails to meet the requirements of Paragraph E-DVILR.1.3 of Appendix FM of the Immigration Rules.

For the reasons outlined above, your application for indefinite leave to remain as a victim of domestic violence is refused as you have failed to meet the requirements of the Immigration Rules under paragraph D- D VILR.1.3 with reference to paragraph D-VILR.1(d) of Appendix FM of HC395 (as amended).

Any submissions you may have made relating to your Human Rights have not been considered, as an application for settlement as a victim of Domestic Violence is not considered to be a Human Rights based application. Therefore, if you wish to apply for leave to remain, based upon your Human Rights or other compassionate practice it is open to you to apply using an appropriate application form. Please see our website for further details".
(our emphasis)

13.
The communication of 9 September 2018 ended by informing the a ppellant of the opportunity to apply for administrative review if he considered that there had been a case working error. The a ppellant applied for and obtained an administrative review of the decision. Amongst other things, the a ppellant argued that the r espondent had failed to consider his h uman r ights claim. The administrative review decision stated:-

"However, you applied for Indefinite Leave to remain as a Victim of Domestic Violence and this is not considered to be a Human Rights based application. Therefore any submissions you may have made in relation to your Human Rights would not have been considered."

D. THE APPELLANT ATTEMPTS TO APPEAL

14.
On 24 September 2018, the a ppellant filed a notice of appeal with the First-tier Tribunal , challenging the r espondent's decision of 9 September 2018.

15.
The grounds of appeal contended that the r espondent's decision "amounts to a refusal of a h uman r ights claim … and the a ppellant appeals on the basis of his proposed removal to Pakistani is unlawful under the HRA 1998". The a ppellant relied upon the judgment of Kerr J in R (on the application of AT) v Secretary of State for the Home Department [2017] EWHC 2589 (Admin). The grounds further submitted that if the a ppellant were correct and he could meet the provisions of the Immigration Rules as a victim of domestic violence, this would be a "weighty factor" in support of his human rights claim.

16.
The grounds ended as follows:-

“ 12. The Appellant avers that the Respondent has failed to consider the evidence in the round or to apply anxious scrutiny. The Appellant avers that he has submitted substantial evidence which, when taken in the round, demonstrates that on the balance of probabilities he was the victim of domestic violence.

13. In addition it would be a breach of the Appellant’s Article 8 ECHR rights to remove him to Pakistan without considering the full scale of the evidence provided with his application.

…

15. The Appellant new partner is provided him with shelter and food and paid for his necessaries of life. The appellant is dependent upon his new partner in UK who also provided emotional and moral support which is most important in the recovery process of his mental health. The removal of the Appellant will also affect the Appellant and his partner family life (sic).

16. The decision of the Respondent is thus unlawful because it is incompatible with the Appellant’s rights under the European Convention on Human Rights and the Human Rights Act 1998.”

17.
The a ppellant’s Notice of Appeal and grounds were examined by the First-tier Tribunal, pursuant to r ule 22 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Rule 22 provides as follows:-

“22. (1) Where a person has provided a notice of appeal to the Tribunal and any of the circumstances in paragraph (2) apply, the Tribunal may not accept the notice of appeal.

(2) The circumstances referred to in paragraph (1) are that—

(a) there is no appealable decision; or

(b) the Lord Chancellor has refused to issue a certificate of fee satisfaction.

(3) Where the Tribunal does not accept a notice of appeal, it must—

(a) notify the person providing the notice of appeal and the respondent ; and

(b) take no further action on that notice of appeal. ”

E. THE DECISION OF FIRST-TIER TRIBUNAL JUDGE KELLY

18.
In the present case, the First-tier Tribunal’s d uty j udge decided that it was inappropriate to issue a notice under r ule 22. Accordingly, the matter preceded to a hearing before First-tier Tribunal Judge Kelly , sitting in Bradford on 18 June 2018 . In his decision he said:-

“ 7. One might have thought… that it was clear what the Secretary of State had decided and what he had not decided. On the face of it, he had decided to refuse the a ppellant’s application for leave to remain as a victim of domestic violence but, rightly or wrongly, had declined to make a decision upon any human rights claim that he may also have made. Given that a right of appeal is only triggered for these purposes under section 82 of the 2002 Act, “where… the Secretary of State has decided to refuse a human rights claim made by [a person]” , i t would seem on the face of it that the Tribunal

had in those circumstances no option but to issue a Notice under Rule 22… informing the parties that it did not “accept” the Notice of Appeal and that, accordingly, no further action would be taken upon it.

8. However, in accordance with the general practice of those charged with the r espon si bility of scrutinising Notices of Appeal upon receipt by the Tribunal, the duty judge in this case instead “directed” the a ppellant within 14 days to submit, “a full copy of the application… including any covering letters submitted with the application”. That direction was issued on the 17 th October 2018 and complied with under cover of a letter dated 25 th October 2018. The duty judge noted her reasons for allowing the appeal to proceed to a hearing on the following terms:

Human Rights issues raised in application – different form required by Resp. but it’s still an HR claim – VALID”.

19.
At paragraph 12, First-tier Tribunal Judge Kelly found as follows:-

“ 12. I … hold for there to be a right of appeal under section 82(1)(b) of the 2002 Act, the Secretary of State must (a) accept the application in question as constituting “a human rights claim” within the meaning of section 113, and (b) refuse it. I f both of those things are present, then there is a statutory right of appeal. If the Secretary of State explicitly declines to treat the application as constituting a human rights claim, then the remedy is to seek Judicial Review . It is not for a First-tier Tribunal judge in such circumstances to exercise that function by calling for and scrutinising the application and/or accompanying representations to decide whether the Secretary of State ought to have treated them as a h uman r ights claim. If it is unclear wh ether the a ppellant has accepted and refused the application as a “human rights claim” then, depending on the circumstances, it may be that documents other than the decision itself (including the original application and/or representations) may cast light up on the issues. It is not however, appropriate routinely to direct the a ppellant to produce s uch documents , especially where the Secretary of State’s decision is unambiguous.”

20.
At paragraph 14, First-tier Tribunal Judge Kelly rejected Ms Mair’s submission that the phrase “any human rights claim you may have made” in the respondent’s letter could be construed to mean “ I accept that you have made a h uman r i ghts claim and, having considered it, I have decided to refuse it” . In his view, the meaning of the decision “could not have be en clearer : the respondent was neither confirming nor denying that the appellant had made ‘a human rights claim’. and is reinforced by the reasons given by the reviewer to maintain that decision.

21.
First-tier Tribunal Judge Kelly was reinforced in that conclusion, as he noted at paragraph 15 by the fact that Ms Mair’s skeleton argument complained about “the very fact that the r espondent had failed to make a decision in respect of what was said to be the a ppellant’s human rights claim”.

22.
First-tier Tribunal Judge Kelly concluded that the First-tier Tribunal did not have jurisdiction to hear the appeal because it was brought in respect of a decision that was not an “appealable decision” with in section 82 of the 2002 Act.

F. R (AT) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2017] EWHC 2589 (ADMIN)

23.
We have already noted the reliance placed by the a ppellant o n the judgment of Kerr J in AT . This was a judicial review challenge, which sought to quash the inclusion of words in paragraph AR3.2(c)(xiii) of Appendix AR of the Immigration Rules. Having noted the changes made by the Immigration Act 2014 to the rights of appeal in the 2002 Act, including the creation of an appeal against the refusal of a h uman r ights claim, as defined in section 113, Kerr J continued:-

1.
Those decisions where the route of challenge is now administrative review are dealt with in Appendix AR to the Immigration Rules. 'AR', indeed, stands for 'Administrative Review'. In that appendix they are called 'eligible' decisions'. From 6 April 2015, the list of 'eligible' decisions was expanded. From that date it included, among other things

'[a] decision … on an application for leave to remain … unless it is an application as a visitor, or where an application or human rights claim is made under … (viii) Appendix FM (family members), but not where an application is made under … section DVILR (domestic violence)'.

2.
That quote is from Appendix AR, paragraph A3.2(c), which goes on to state that in such cases, i.e. where a human rights claim is made in a case falling within Appendix FM that is not a domestic violence case, the remedy remains in appeal under section 82 of the 2002 Act rather than an application for administrative review. So, the provision now made in Appendix AR appears to be that in a domestic violence case, administrative review only is available even if the domestic violence case is a human rights claim.

3.
But that is not the law enacted in primary legislation, since section 82 provides, as I have already noted, that there is a right of appeal, not only administrative review, where the Secretary of State refuses a human rights claim. It might be said, therefore, that the primary legislation is at odds with the latest version of Appendix AR in relation to treatment of domestic violence cases that are also human rights claims. To the extent that this were the case, the inconsistent parts of Appendix AR would appear to be ultra vires .

4.
The claimant says that they are irrational, since domestic violence cases are by their nature also human rights claims, but the Secretary of State begs to differ. She says that most domestic violence cases are not human rights claims.

…

1.
In the present case, there was a specified form on the website which was called SET(DV). That is the form specified for use in an application for indefinite leave to remain as a victim of domestic violence. That is indeed the form that was used by the claimant. There is also a further specified form to be used for any application for leave to remain on the basis of family life as a partner or parent, or on the basis of private life, i.e. in a human rights claim. That form is called FLR(FP). The claimant did not use that form, either instead of or in addition to form SET(DV).

2.

Mr Lewis, for the Secretary of State, generously accepted in oral argument that use of the wrong form would not of itself defeat an application. I agree that it should not. Less generously, however, he did suggest that a person wishing to apply for indefinite leave to remain in a domestic violence case which is also a human rights claim, should file two separate applications, which means paying two separate fees, one using SET(DV) and the other using form FLR(FP).

3.
Although the point does not arise directly for decision in this case and was not fully argued, I do not agree that to require domestic violence victims to make two separate applications in a case said by the victim to be a human rights claim, is necessary, fair or lawful. Any such requirement would almost certainly discriminate indirectly against women who bear the brunt of most domestic violence. Why should they pay two fees when others pay only one?

4.
It is obvious that in domestic violence claims the form to be used should include an option to assert that the claim is also a human rights claim. I hope the forms will be revised accordingly, as soon as the Secretary of State's busy schedule permits. Meanwhile, I hope she will be advised to treat a single application, whether on form SET(DV) or on form FLR(FP), as a valid application, even if it purports to be both a domestic violence claim and a human rights claim. ”

24.
Kerr J then considered the parties’ submissions on whether all domestic violence claims were necessarily human rights claims. This entailed consideration of what a human rights claim comprises:-

1.
That issue was considered in a different context by Stephen Morris QC sitting as a Deputy High Court Judge (as he then was) in R (Alighanbari) v SSHD [2013] EWHC 1818 (Admin) . The Iranian claimant said he could not be removed to Slovenia, a safe third country, until he had exercised his in-country right of appeal. Whether he had such a right of appeal (under the then law), depended on whether he had made a 'human rights claim' within section 113 of the 2002 Act.

2.
On the facts, the judge found that he had not made such a claim. His assertion that he wanted to come to the UK to be with his family did not measure up to what the judge found to be the minimum elements of a section 113 human rights claim which, he said at paragraph 70, are:

'(a) A claim not to be removed from the UK; (b) an assertion of facts that could constitute an existing or prospective private and/or family life, the interference with which Article 8 ECHR protects; (c) an assertion that removal will interfere with that private and/or family life (i.e. that the, or a, basis upon which the claimant wishes to remain in the UK is the desire to maintain or build a private and/or family life)… .'

3.
The parties agreed, and so do I, that this is a correct statement of what, at the minimum, a section 113 human rights claim is, where article 8 is invoked. It can also be adapted so that it works where other articles of the Convention are invoked, for example, article 2 or 3.

…

1.

At the hearing, we discussed examples of domestic violence cases that might or might not satisfy all three criteria. At one end of the spectrum one can envisage a domestic violence claim where returning the claimant to a third country would expose her to a serious risk, for example, of 'honour killing' or torture at the hands of non-state agents.

2.
Manifestly, such a domestic violence claim would be a human rights claim. The claimant would be saying it would be unlawful under section 6 of the Human Rights Act to return her to the third country, because to do so would be to act in a way incompatible with her rights under article 3 and, perhaps, article 2 also.

3.
Mr Lewis is therefore correct to concede that some domestic violence claims are human rights claims within section 113. He gave the further example of a case where removal is sought of a domestic violence victim while the police or Crown Prosecution Service are considering prosecution of the alleged perpetrator, which would be frustrated by the victim's removal.

4.
At the other end of the spectrum, it is not difficult to envisage a domestic violence claim which does not include element (b) of the three criteria articulated in Alighanbari . Suppose that the claimant came to this country from Pakistan to marry a British citizen, intending to take him back to live with her in Pakistan. On arrival here, he beats her up and she changes her mind. As a result of that domestic violence inflicted by him, the marriage breaks down.

5.
The claimant then, let it be supposed, moves away to live with an aunt in Leicester and decides that she wants to settle alone in the UK, instead of returning to Pakistan where she has a loving and supportive family and would be in no danger. In such a case, it would not in my judgment be arguable that the claimant had asserted facts that could constitute an existing or prospective private and/or family life, the interference with which article 8 protects.

6.
I therefore reject Ms Mair's submission, eloquently though it was made, that all domestic violence claims are necessarily also human rights claims. Some are, others are not. Mr Lewis submitted that the facts asserted in this case do not raise a human rights claim. I am inclined to agree; the Article 8 case made in the claimant's covering letter was wafer thin, though perhaps I do not need to decide the issue, as will become apparent.

7.
In light of the above, I come to the rest of my reasoning and conclusions on ground 2. First, the claimant is correct that the Secretary of State's position appears to be irregular: on a literal reading of Appendix AR, the provision attacked by the claimant wrongly assumes that all domestic violence claims are not human rights claims, a position which the Secretary of State, through Mr Lewis, now rightly concedes is wrong.

8.
On the other hand, the Secretary of State is correct in her submission that not all domestic violence claims are human rights claims. It follows that she is perfectly entitled to enact delegated legislation removing the right of appeal from victims of domestic violence whose claims are not human rights claims, and replacing that right with one of administrative review. What she cannot do without

primary legislation is remove the right of appeal for domestic violence claims that are also human rights claims. That would be contrary to Section 82(1)(b) of the 2002 Act.

9.
In those circumstances, I agree with the claimant that Appendix AR is wrongly drafted. I do not, however, consider that it would be appropriate to quash it. I think the right course is to give effect to its application to domestic violence claims that are not also human rights claims, while recognising that it cannot be read as overriding the provision in section 82 which confers a right of appeal in a domestic violence case that is also a human rights claim.

10.
This can be done by adopting a purposive and strained construction of sub-paragraph (viii) of AR3.2(c) so that the provision may rather survive than perish (or if you prefer, ut res magis valeat quam pereat), reading that sub-paragraph as if it included the words below which I have added in brackets and italicised:

'(viii) Appendix FM (family members) but not where an application (not being a human rights claim) is made under… Section DVILR (domestic violence)'.

11.
By way of postscript, the amendment to Appendix AR was not irrational. There is nothing irrational about deciding to remove appeal rights from domestic violence victims. The rationale is to stop appeals: once the right is removed, they cannot appeal anymore. The challenge should have been a vires challenge. Treated as such, it comes close to succeeding, but I have managed – just - to interpret the operative provisions of Appendix AR in a manner consistent with the primary legislation they so nearly contradict.”

G. R (SHRESTHA) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2018] EWCA CIV 2810

25.
R (Shrestha) v Secretary of State for the Home Department [2018] EWCA Civ 2810 is a permission decision, given a neutral citation so that it could be reported as raising an issue of importance , described by Hickinbottom LJ as follows:-

“ 1. This application raises the following issue: if an applicant for leave to remain raises a human rights ground for the first time after the refusal of his application on other grounds and in response to a request by the Secretary of State under section 120 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), does the Secretary of State have an obligation to treat and determine that response as an application for leave to remain on human rights grounds even absent any further form of application? The Applicants submit that he does. The Secretary of State denies any such obligation . ”

26.
Hickinbottom LJ then set out the power of the r espondent to require applicants for leave to use the particular application form specified for the purpose;-

“ 4. Section 50(1) of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") provides:

"Rules under section 3 of the Immigration Act 1971–

(a) may require a specified procedure to be followed in making or pursuing an application or claim (whether or not under those rules or any other enactment),

(b) may, in particular, require the use of a specified form and the submission of specified information or documents,

(c) may make provision about the manner in which a fee is to be paid, and

(d) may make provision for the consequences of failure to comply with a requirement under paragraph (a), (b) or (c)."

1.
The relevant rules made under that section are the Immigration Rules (HC 395) as amended from time-to-time ("the Rules"). Paragraph 34 of the Rules sets out the procedure for applications for leave to remain, so far as relevant to this application, as follows (emphasis added):

"An application for leave to remain **must** be made in accordance with sub-paragraphs (1) to (9) below.

(1) (a) …[T]he application **must** be made on an application form which is specified for the immigration category under which the applicant is applying on the date on which the application is made.

(b) An application form is specified when it is posted on the visa and immigration pages of the gov.uk website.

(c) An application can be made on a previous version of a specified paper application form (and shall be treated as made on a specified form) as long as it is no more than 21 days out of date.

(2) All mandatory sections of the application form **must** be completed.

(3) Where the applicant is required to pay a fee, this fee **must** be paid in full in accordance with the process set out in the application form…".

2.
The gov.uk website provides that, in order to make an application for leave to remain on the basis of family and private life, the form that must be used is Form FLR(FP) or Form FLR(HRO) (but, at the relevant time, Form FLR(O)).”

27.
For our purposes, the relevant part of the discussion section of the judgment is as follows:-

1.
As I have described, to promote consistency and administrative efficacy, section 50 of the 2006 Act and paragraph 34 of the Rules mandate a particular form for an application for leave to remain on human rights grounds. No doubt the Secretary of State has a discretion to waive those requirements – and, in certain circumstances, may be obliged to do so (see Ahsan , referred to at paragraphs 31 and following below) – but there are no such circumstances here. The Secretary of State was unarguably at least entitled to require the Applicant to make such an application in respect of his human rights claim.

2.
Section 120 of the 2002 Act does not suggest that the requirements of section 50 of the 2006 Act and paragraph 34 of the Rules are waived where an applicant make a statement in response to a section 120 request. The section does no more than require an applicant to provide a statement setting out

his reasons for wishing to remain, and any grounds upon which he considers he should be permitted to remain, in the United Kingdom. It does not require, or in itself even enable, an applicant to make an application for leave to remain on human rights grounds. The relevant provisions for such an application are found elsewhere. Those provisions, of course, include section 50 and paragraph 34.

3.
Ahsan does not assist the Applicant. The applicants in Ahsan were in the United Kingdom and, under the appeal regime in operation at that time, they were entitled to an out-of-country appeal against a decision to remove them in the face of submissions that removal would breach their article 8 rights. The court concluded that they were entitled to an effective appeal; and such an appeal could not be afforded from their home country.

4.
In those circumstances, the Secretary of State made this concession, summarised in [14] of Ahsan :

"Although it appeared from her initial correspondence that the Secretary of State's position might be something different, Ms Giovannetti [Leading Counsel for the Secretary of State] accepted before us that in order to fall within the terms of section 113 a 'claim' does not require to be made in the form of a fee-paid application under the Immigration Rules. She made it clear that it is still the Secretary of State's position that a human rights claim ought to be made by a formal application, in the interests of orderly decision- making, and that priority may be given to claims so made; but she acknowledged that that was not a statutory requirement and she said that even if a claim was made in some other form a claimant would not be removed from the UK until it had been considered. "

5.
In this case, Mr Thomann accepts that the Secretary of State cannot remove the Applicant without considering his claim that to do so would breach article 8 of the ECHR. But, as he submits, the use of removal powers is a last resort. On the basis that the Applicant needs leave to remain and does not have it, he would be expected to leave the United Kingdom voluntarily. It is, of course, open to him to make an application for leave to remain on human rights grounds, in the required form and on payment of the required fee. If he considers that he has such a claim, that is the course required by the statutory scheme. If, in the meantime, the Secretary of State issues removal directions, then, at that stage, the Applicant will be able to rely on any human rights claim that he and/or his daughter have; and, reflecting the passage from Ahsan which I have quoted, subject to certification, he will be entitled to a right of appeal to the First-tier Tribunal to assess the merits of that claim whether or not a formal claim for leave to remain has been made because, otherwise, his removal would breach article 8. Therefore, the Applicant will suffer no possible unfairness or injustice as a result of the Secretary of State refusing to consider his human rights claim at this stage."

H. BALAJAGIGARI AND OTHERS v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2019] EWCA CIV 673

28.
Balajigari & Ors v Secretary of State for the Home Department [2019] EWCA Civ 673 concerned persons who had been given leave to enter or remain as Tier 1 (general migrants) and who subsequently applied, pursuant to the R ules as then in force , for indefinite leave to remain after 5 years. In the cases under consideration in Balajigari , the r espondent had refused to grant indefinite leave to remain , citing discrepancies in financial returns submitted by the c laimants to, respectively, the r espondent and Her Majesty's Revenue & Customs. Underhill LJ, giv ing the judgment of the Co urt, examined the circumstances in which the c laimants might challenge the refusal of indefinite

leave to remain on the basis of Article 8 of the ECHR. For our purposes, the following paragraphs of the judgment are relevant:-

1.
Having concluded that article 8 is (generally) engaged by the refusal of ILR in these cases, where does that leave the procedural position with regard to a challenge to that refusal ? In principle it seems to us, as it did to the Court considering an analogous issue in Ahsan (see para. 115 of the judgment of Underhill LJ), that the appropriate route of challenge is by way of appeal to the FTT rather than by way of a claim for judicial review in the UT. Although the UT can, if it has to, determine disputed issues of primary fact, that is not its usual role, and doing so is not a good use of its limited resources. But the procedural route to an appeal is not straightforward.

2.
The starting-point is that a refusal of ILR is not in itself an appealable decision under section 82 (1) of the Nationality, Immigration and Asylum Act 2002. However, by section 82 (1) (b), a right of appeal is provided in these terms:

"A person ('P') may appeal to the [First-tier] Tribunal where… the Secretary of State has decided to refuse a human rights claim made by P…".

3.
For these purposes, "human rights claim" is defined in section 113 (1) of the 2002 Act (as amended by paragraph 53 (2) (a) of Schedule 9 (4) to the Immigration Act 2014) as follows:

"… a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the [ECHR])".

4.
The procedural requirements for making such a claim were recently reviewed by this Court in R (Shrestha) v Secretary of State for the Home Department [2018] EWCA Civ 2810. In short, section 50 of the Immigration, Asylum and Nationality Act 2006 enables the Secretary of State to require a particular procedure to be followed, including the form to be used and the fee to be paid; and paragraph 34 of the Immigration Rules, made under that provision, sets out mandatory requirements for an application for leave to remain (which includes an application made on human rights grounds). Where an application fails to comply with those requirements (including by not referring to a claim for leave on human rights grounds at all), there is no "human rights claim" refusal of which would give rise to a right of appeal. The Secretary of State has, however, conceded that in the context of an imminent removal an appeal will lie to the FTT against a refusal of a human rights claim even if not made in proper form: see paras. 31-33 of the judgment of Hickinbottom LJ in Shrestha . The basis of the concession (which originated in Ahsan : see para. 14 of the judgment of Underhill LJ) is not articulated, but it would appear to be justified on the basis that the Secretary of State can waive the formal requirements in the Rules.

5.
Against that background, the most straightforward situation will be where the applicant has included a human rights claim in his or her original T1GM ILR application. The relevant form includes a box in which an applicant can rely on matters other than the relevant Part 6A grounds, and (although this was not a matter on which we were addressed) we can see no reason in principle why an applicant

should not complete that box in the alternative so as to raise a human rights claim; the point may also be capable of being raised in the covering letter. If they have done so the refusal of the application will constitute a refusal of that claim and can be appealed as such. Having said that, it is in the nature of things unlikely that an applicant for T1GM ILR will have thought it necessary to make an alternative article 8 claim of this kind: typically they will regard their application as standing or falling on whether they satisfy the requirements of the relevant PBS category. We would thus assume that cases of this kind are uncommon.

6.
In the usual case where the applicant has not included a human rights claim in their original ILR application it follows from Shrestha that if they wish to generate a right to an appeal on human rights grounds following its refusal they will need to make a fresh application, using the proper form (again, we were not addressed on which that would be), the gist of which will be that they have been rendered liable to removal, in breach of their article 8 rights and in circumstances where they were otherwise entitled to ILR, on the basis only of a wrong and/or unfair finding of dishonesty. Such an application might be prompted by the Secretary of State serving a "one-stop" notice under section 120 of the 2002 Act. If, as presumably would be the case except in rare circumstances , the Secretary of State maintained his original decision and refused the application, the applicant would then be entitled to an in-country appeal, subject to the possibility of it being certified as "clearly unfounded" under section 94 (1) of the 2002 Act.

7.
The alternative course to secure an appeal would be for the applicant to wait until steps are taken to enforce removal. It appears from the concession referred to at para. 98 above that if at that stage he or she makes a human rights claim in order to resist removal the Secretary of State will not insist on a formal application being made and will proceed to a decision against which they can appeal (subject, again, to certification under section 94 (1)).

8.
Neither of those routes to an appeal is very satisfactory. The first requires the applicant to go through the formality of making, and paying for, a further application in order to decide substantially the same question, with no certainty as to how soon the decision will be made. The second requires him or her to wait for an indefinite and possibly lengthy period before being able to obtain an appealable decision. It would be open to the Secretary of State to waive the formal requirements, treat the initial claim as including a human rights claim which he had refused and thus, subject to the applicant having an appropriate opportunity to put that human rights claim in order, afford the applicant a right of appeal to the FTT. Ms Anderson made it clear, however, that the Secretary of State was not minded to waive the formal requirements generally so as to facilitate appeals (as opposed to applications for judicial review) in all cases. As the legislation now stands, that appears to be a stance that he is entitled to take. ”

I. HOME OFFICE GUIDANCE TO CASEWORKERS

(a) Rights of Appeal

29.
It is also necessary to consider two sets of Home Office G uidance to the respondent’s caseworkers . In Ri ghts of A ppeal (version 7.0 – 30 July 2018 [1]), caseworkers are guided “about appeal rights following implementation of the Immigration Act 2014”. Under the heading “What is a human rights

claim?", case workers are told how to identify a human rights claim. So far as concerns applications made under the Immigration Rules, the G uidance states:-

"the applications listed in this section and made under the Immigration Rules are human rights application s and the starting position is that there is a right of appeal against refusal

…

The relevant applications are those made under:-

- Paragraph 276B (long residence)
- Paragraphs 276ADE(1) or 276DE (private life)
- Paragraphs 276U and 276AA (partner or child of a member of HM Forces)
- Par a graphs 276AD and 276AG (partner or child of a member of HM Forces), where:
  - the sponsor is a foreign or Commonwealth member of HM Forces and has at least 4 years' reckonable service in HM Forces at the date of application
- Part 8 of these Rules (family members) where:
  - the sponsor is present and settled in the UK or has refugee or humanitarian protection in the UK, **not** paragraphs 319AA to 319J (points-based system (PBS) dependents), paragraphs 284, 287, 295D or 295G (sponsor granted settlement as a PBS Migrant)
- Part 11 (asylum)
- Part 4 or Part 7 of Appendix Armed Forces (partner or child of a member of HM Forces) where:
  - The sponsor is a British Citizen or has at least 4 years' reckonable service in HM Forces at the date of application
- Appendix FM (family members), **not:** section BPILR (bereavement) or section DVILR (domestic violence) ."

30.
Application outside the Immigration Rules made in the United Kingdom are dealt with by the Guidance as follows:-

"Applications for leave to remain outside the rules on human rights grounds are made on forms FLR(O) for further leave to remain (LTR) and SET(O) for indefinite leave to remain (ILR).

It is important to note that these forms are only to be used for human rights applications where there is no specific form available. For example, neither the FLR(O) nor the SET(O) should be used for applications under Appendix FM or on the private life route under paragraphs 276ADE and 276DE. Where the application uses the wrong form, you must reject the application as invalid under paragraph 34 Immigration Rules.

These forms are multi-purpose and not all applications made on these forms are human rights claims.

The FLR(O) and SET(O) forms require the applicant to tick a box indicating which application they are using the form for. Only one box may be ticked.

It is only where the applicant ticks the box 'Other purposes or reasons not covered by other application forms' that it should be treated as a human rights claim. Though even if this box is ticked, the application may not be a human rights claim.

In order to decide whether the application is one for a human rights claim, you should consider the following questions:

•
does the application say that it is a human rights claim?

•
does the application raise issues that may amount to a human rights claim even though it does not expressly refer to human rights or a human rights claim?

•
a re the matters raised capable of engaging human rights? ”

31.
Under the heading “Determining if a human rights claim has been made” there is the following:-

“For the purposes of Part 5 of the Nationality, Immigration and Asylum Act 2002 (appeals in respect of protection and human rights claims), a human rights claim is defined as a claim made by a person that to remove them from or require them to leave the UK or to refuse him entry into the UK would be unlawful under section 6 of the Human Rights Act 1998.

The form does not ask the applicant to indicate whether the claim being made is a human rights claim. You will need to identify whether a human rights claim is being made so that you know whether to serve a section 120 notice on receipt of the application and whether a refusal will attract a right of appeal.

…

You should ask yourself whether, having regard to the human rights protected by the European Convention on Human Rights (ECHR), it is obvious that the application relates to one of those rights. If it is obvious that the application relates to one of these rights, a human rights claim may have been made. ”

32.
Under the heading “Determining if human rights are engaged” , t he G uidance states:-

“ If the claim raises human rights, consider whether the claim made is capable of engaging the human right relied on. This will involve examination of the merits of the claim.

You should refer to considering human rights guidance which sets out how to undertake a substantive examination of the merits of human rights claims.

If no human rights claim has been made, the application should be refused with no right of appeal and no right to seek administrative review. You should serve notice ICD.4985.

It is not generally possible to make a human rights claim as part of an application made under the Immigration Rules except where the application is deemed to be a human rights claim, or the claim is made in section of the application seeking further grounds to enter or remain in UK. See the section on how to identify a human rights claim for more information.

Notices to be served

If the claim made does engage the human right relied upon, a human rights claim has been made. If the claim is refused, the appropriate notice from the following list should be served (except in deportation cases):

•
ICD.3050.IA (refusal with a right of appeal)

•
ICD.1182.IA (refusal with section 94 certification

•
ICD.3051.IA (refusal with no right of appeal because not a fresh claim under paragraph 353)

•
ICD.3052.IA (refusal with no right of appeal because of section 96 certification) . ”

33.
Where, in the United Kingdom, an applicant is detained, a human rights claim must be made directly to a prison officer, prison custody officer, detainee custody officer or a member of a Home Office staff at the migrant’s place of detention;-

“There is no requirement to complete a specific form or follow a specific process. Where removal is imminent, it is more likely that the applicant will not be required to follow a formal process to make a claim.

The individual to whom the claim is made should pass the submissions to a member of Home Office staff to consider the questions in D etermining if a human rights claim has been made to establish whether the human rights claim has been made.

…

If a human rights claim has been made, its refusal will attract an appeal right…”

34.
The final passage to note in this G uidance is that relating to “N ew human rights claims”:-

“ There will be applicants who have immigration leave on human rights grounds who make a new and different human rights claim which if refused will have a right of appeal. For example, an applicant who has extant leave as a partner, which they no longer qualify for, seeks a variation of that leave on

the basis that they are the parent of a child. That constitutes a new human rights claim . T he refusal of such a claim will give rise to a right of appeal.

Where the applicant has extant immigration leave on a non human rights basis and is seeking to vary that leave on a human rights basis that will normally be a human rights claim and they will have a right of appeal from any refusal of that claim.

The section What is a human rights claim? gives guidance on this. An example of this would be where an applicant has extant immigration leave as a student and makes an application for leave to remain as partner which is refused. The applicant would have a right of appeal against that refusal as it has not been accepted that they have a right to remain on human rights grounds . At the end of their student leave they will be required to leave the UK and be removable and their argument is that that removal will be unlawful under the Human Rights Act 1998. ”

(b) Applications for leave to remain: validation, variation and withdrawal

35.
The second set of G uidance is “ A pplications for leave to remain: validation, variation and withdrawal (version 2.0) – (30 November 2018). This G uidance observes that paragraph 34(1) of the Immigration Rules “sets out that the application must be made on a specified application form. There is a specified form for all types of application for leave to remain ” . Under the main heading “How an application is made” there is the following:-

Simultaneous applications

An applicant cannot submit simultaneous applications, only one form of leave can be granted at any time. If an applicant attempts to submit more than one paper application on the same day, you must normally explain to them, in writing or in person at a Service and Support Centre, that only one application can be made at a time. You must ask them to indicate within 10 working days which application they would like to be considered and which application or applications they would like to withdraw. If they do not clarify within this timescale you must reject all applications as invalid using the approved notice of invalidity template: ICD 4946 on Doc Gen or the Invalid Application template on Atlas.

…

Varying an application for leave to remain

An applicant can vary the purpose of an application at any time before a decision on the application is made. Any application submitted where a previous application has not yet been decided is a variation of that previous application. An applicant can only have one application outstanding at any one time. See Variation of an application for leave: example scenarios. ”

36.
Under “Variation of an application for leave: example scenarios” there is this :-

“ An application can only have one application outstanding at a time, except for one very specific exception as set out in example scenario 4 below, and where one application is a human rights or protection claim. See: Varying an application for leave to remain . When an applicant submits an application for leave followed by another application for leave, the second application will either be a variation of the first application, or a new application. The examples below explain how this work s

…

Example scenario 4

An applicant submits application A in time. They transition to 3C leave and application A is refused, and the decision is served with a right of appeal. T he applicant then submits application B, whilst still on 3C leave (for example, before the time limit to appeal has ended)

In this scenario, if application B is a human rights claim, or protection claim, application B must be decided. If application B is any other type of application, then it must be returned as void as there is no longer an application to vary. For further information on 3C leave, see: Leave extended by section 3C (and leave extended by section 3D in transitional cases) . ”

37.
Finally for our purposes, guidance is given regarding “ A ttempts to make multiple applications in a single form:-

“ **An application form can only be used for its specified purpose. Sometimes applicants try to make multiple applications as part of a single form, for example, they may raise human rights claim s as part of an application for leave to remain as a student. This is not allowed unless the form is designed to include a human rights claim. Almost all of the application forms on GOV.UK and the paper forms include a message reminding applicants of this. This message is not included on specified forms for human rights routes. If you are unsure of whether the applicant would have seen this message, you can check with the Guidance, rules and forms team.**

Where multiple applications are raised in an application form or an accompanying letter, you must write out to the person using the multiple applications template ICD 5187 on Doc Gen or the relevant template on Atlas. This template explains again to the applicant that they have raised issues that cannot be considered as part of that specified application. The template explains that the applicant can make a variation application to raise those issues.
(our emphasis)

Where a further application is submitted before a decision is made on the existing application, it has the effect of varying the existing application. Where a further application is made after a decision has been made on the existing application, this must be treated as a new application. If no further application is submitted, consider the current application only in relation to those issues which can be raised on that specified form.”

J. THE APPELLANT’S CASE

38.
For the appellant , Ms Mair submits that the scheme of the legislation does not permit the respondent to make an evaluative judgment as to whether there has been the refusal of a human rights claim. Significantly, Parliament has chosen not to define what is meant by the refusal of a human rights claim. In section 85 of the 2002 Act, Parliament ha s given the respondent sufficient protection, in the appeal context, to ensure that the First-tier Tribunal d oes not become the primary decision maker. If, faced with a human rights claim, the respondent cho o se s not to respond to it, that i s her choice, (and her problem), as sh e ha s to be treated as having ref used the human rights claim.

39.

There is nothing in the respondent's guidance documents , Ms Ma ir submits , to tell the respondent's case worker s that they can "refuse to refuse" a human rights claim. This i s for the simple reason that such power does not exist.

40.
Ms Mair further submits that, in the present case, the "covering letter" received by the appellant stated : "your application is refused". This letter, not the accompanying reasons, is the respondent's decision and it is, plainly on its face, a refusal. Since the applicant had made a human rights claim, by reference to the covering letter, witness statement and reports (see paragraph 8 above) , this refusal of "your application" was the refusal of his human rights claim. The refusal decision always ha s to be the refusal of the human rights claim and there i s no third category. The refusal of a human rights claim d oes not have to involve any substantive consideration of that claim. It i s not satisfactory, Ms Mair submits, for the respondent to point to the fact that the appellant could judicially review the respondent's reaction to his human rights claim. The judicial review would be limited, in general terms, to the situation as it was at the date of the respondent's decision. This contrast s with the position in an appeal to the First-tier Tribunal against the refusal of a human rights claim.

41.
Ms Mair contends that it c an not be right for the respondent to respond to a human rights claim by stating that it d oes not suit her to consider that claim. The position would be different if an invalid application had been submitted ; but that i s not the position here.

K. THE RESPONDENT'S CASE

42.
The respondent point s to the fact that human rights claims must be made in the appropriate form and supported by the requisite fee. The lawfulness of the respondent's position in this regard has been "endorsed by the a ppellate courts, and serves both consistency of treatment and orderly decision making". Those formal requirements f all to be viewed in the context of the fact that the G uidance indicate s that specified forms of applications under the Immigration Rules are treated as raising human rights claims. These include applications under Appendix FM, other than in relation to domestic violence. The specific guidance for the handling of applications provide s for an applicant to be notified and/or to be given an opportunity to vary a " rules- based " application , where a human rights claim ha s been sought to be made. The insistence on fees for applications fa lls to be read in the light of the provisions for fee waiver in respect of impecunious applicants. Finally, the respondent ha s an obligation, recognised in Shrest ha , in any event to consider a human rights claim, whether made in a particular form or not, prior to actual removal of an individual from the United Kingdom.

43.
The respondent submit s that the judgment of Kerr J in AT recognised that not all domestic violence claims a re necessarily also hu man rights claims. Kerr J's observations at paragraphs 48 and 49 of his judgment must be considered with caution. The point there at issue was not, as Kerr J observed, fully argued before him. Furthermore, his judgment now f alls to be read in the light of Court of Appeal judgments in Ah s an [2017] EWCA Civ 2009 and Shrestha . Had the court in A T been able to review the respondent's G uid ance: Applications for l eave to r emain: v alidation, v ariation and w ithdrawal, this would have a lleviated Kerr J's concerns.

44.
The respondent accept s that, in the case of the appellant, the caseworker who examined his application for leave to remain as a victim of domestic violence had not informed the appellant that he

could “make a variation application to raise” the human rights issues contained in the accompanying materials. The respondent i s, accordingly, “prepared now to consider the human rights claim” of the appellant. However, although the respondent accept s that a person relying upon episodes of domestic violence c an re ly upon this in order to make Article 8 claim, that ha s to be “advanced in the appropriate form, and by way of a variation t o the application, and would need to be supported by the requisite fee (subject to a fee waiver application)”.

L. THE APPELLANT’S REPLY

45.
In her written reply, Ms Mair submit s that Shrestha and Balajigari addressed “a different issue entirely” from that of the present case. They were concerned with what the position would be regarding a human rights claim “raised only after an initial application for ILR was made. In other words, those were all cases where no human rights claim was raised in the original ILR application ” (original emphases).

46.
In Shrestha , the Court of Appeal was “simply ruling as to what whether a s . 120 n otice c ould constitute an application for leave to remain on human rights ground s in a case wher e the original application for ILR contained no such submissions/cla i ms/application with regard to human rights ” . T hat ratio was, she sa ys , reiterated in Balajigari at paragraph 100.

47.
Ms Mair relie s , in particular, on the passage in Underhill LJ’s judgment at paragraph 99 that :

“Where the applicant has included a human rights claim in his or her original T1GM… ILR application… we can see no reason in principle why an applicant should not complete that box in that alternative so as to raise a human rights claim; the point may also be capable of being raised in the covering letter. If they have done so, the refusal of the application will constitu t e a refusal of that claim and can be appealed as such”.

48.
Ms Mair challenges the lawfulness of the passage s in the respondent’s G uidance that state an application form can only be used for its specified purpose ; and that applicants who try to make multiple applications as part of a single form , such as raising human rights claims as part of an application for leave to remain as a student, are not allowed to do so unless the form is designed to include a human rights cla im. The se passages of the G uidance conflict with the Court of Appeal’s judgment in Balajigari and Kerr J ’s findings in AT.

49.
Ms Mair’s reply continue s as follows:-

26.
Firstly, there must be a refusal decision of the application being made (which there is in this case – see the Respondent’s clear language in this case “ I am writing to tell you that your application is refused ”; and secondly, that refusal must be against an application/claim that includes a human rights claim. Thus, where either the Respondent or the Tribunal has accepted/ determined that a human rights claim has been raised as part of an application, then it follows inexorably that the refusal of that application amounts to the refusal of a human rights claim and thus generates an appeal under s. 82. Just as there are no two separate applications being made there are no two separate decisions to

be made; there is only one decision/ refusal. Where an application is refused and where, as here, both the Respondent (now, as part of these proceedings) and the tribunal (through its case worker in the first instance, and FtTJ Kelly in the second instance), agrees that the application being refused included a human rights [claim] , then the decision is both a refusal of DV-ILR under the immigration rules and a refusal of a human rights claim.

27.
This approach concurs with the Court of Appeal's reasoning in Balajigari and the comments of Mr Justice Kerr in AT as set out above . It was thus an error of law for FtTJ Kelly to find the tribunal had no jurisdiction .

28.
The Appellant continues to submit that t o find otherwise would be demonstrably unfair. It would allow one party (i.e. the Respondent) to single-handedly deny the other party (i.e. the Appellant) a statutory right of appeal which was intended by Parliament to adhere to any refusal where the application raised human rights. The Respondent would be provided a mechanism for doing so by being permitted to ignore entirely any human rights claim or, as in this appeal, simply acknowledge the existence of human rights submissions but then purport to refuse to consider those submissions as part of the application.

…

31.
Nowhere in the guidance does the Respondent suggest there is a second question which she has to ask herself – i.e. determining whether a human rights claim has been refused or determining what amounts to a refusal of a human rights claim. There is also clearly no option in the guidance for the Respondent to identify that a human rights claim has been made as part of an immigration application but then go on to refuse to consider that claim. Had the Respondent understood the statutory scheme to include such an option, she would have directed her caseworkers to this.

32.
If the Appellant is correct, as per the Court of Appeal in Balajigari, and if an applicant raises human rights as part of an application, then a refusal of that application is a refusal of a human rights claim and will generate a statutory right of appeal. For that reason it was simply otiose for the Respondent in this case to say that she had not considered any human rights submissions that may have been made. From the moment the Respondent refused the application, she had refused a human rights claim."

M. DISCUSSION

50.
In Baihinga (R.22; Human Rights appeals; requirements) [2018] UKUT 00090 , the Upper Tribunal considered, in genera l terms, the requirements for establishing that a human rights claim has been made. The Tribunal doubted the correctness of the proposition, still found in the Ri ghts of A ppeal G uidance, that an unsubstantiated claim is not a human rights claim within the meaning of section 113. The Tribunal considered that the appropriate course, in such a case, was to certify the claim, under section 94 of the 2002 Act, as clearly unfounded. The same view was expressed by Kerr J in AT at paragraph 59, where he held that "section 94(1) is drafted on the premise that a clearly unfounded human rights claim is still a human rights claim, albeit one without foundation".

51.
As also noted in Ba i hinga , the G uidance is on stronger ground in telling the respondent's ca s eworkers that "in order for an application to raise human rights, it is not necessary for the application form to say so". Examples given are a person who seeks leave to remain on medical grounds, fearing an undignified death if returned to his or her home country, owing to the unavailability of medical facilities there. The G uidance tells caseworkers that "you should ask yourself whether, having regard to the human rights protected by the European Convention on Human Rights… it is obvious that the application relates to one of those rights. If it is obvious that the application relates to one of these rights, a human rights claim may have been made".

52.
These passages indicate that the respondent is aware of the need to scrutinise, with some care, the substance of a person's application for leave, in order to determine whether it falls within the statutory definition of a human rights claim. Subject to what we have said in paragraph 50 above, the G uidance is , we find, broadly compatible with the "minimum elements" of a human rights claim, as identified by Stephen Morris QC, sitting as a deputy High Court Judge (as he then was) in Alighanbar i (see paragraph 24 above). The se minimum requirements now require to be read in the light of the fact that the definition of "human rights claim" includes a claim that to refuse a person entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998.

53.
In the present case, the appellant's witness statement, read with his solicitor's covering letter and reports, contended that there would be problems for the appellant's mental health, if he were returned to Pakistan ; and that he might face physical dangers there from his wife's family. The respondent accepts that these contentions amount to a human rights claim, within the meaning of section 113.

54.
The respondent's case is that her refusal of leave to remain by reference to the rules on domestic violence was not a refusal of a human rights claim. The starting point is the wording of the statute. In the absence of a statutory definition of a refusal of a human rights claim, one needs to apply ordinary principles of statutory interpretation to the words used in section 82(1)(b).

55.
The f irst requirement is for there to be a human rights claim, in the sense we have d iscussed. Even though an appellant, if legally unrepresented, may be unsure of the position, the respondent and her caseworkers know that their task is to decide whether, on the facts advanced by the person concerned, it would be a breach of that person's human rights (or of some other person or persons) , if he or she were removed from the United Kingdom or required to leave it, or denied entry. In the case of a qualified right, such as A rticle 8, the decision will usually turn on whether any of those things would constitute a disproportionate interference with protected family or private life.

56.
Section 82(1)(b) requires there to have been a decision on the claim. T hat, in turn, at least strongly suggests there must have been engagement with the claim. T he outcome of that engagement must have been to "refuse" the claim. In the light of paragraph 55 above, a decision to refuse a human rights claim require s the respondent to reach a decision that the person concerned does not have a case for remaining in the United Kingdom by reference to his or her, or anyone else's, human rights.

57.

The use of the word “refuse” indicates that the legislature did not intend to cover the case where the respondent’s position is that she will not consider the claim. This point was forcefully made by First-tier Tribunal Judge Kelly.

58.
In the light of th is analysis of the statutory language , the appellant’s case faces serious difficulties at its outset. It may be thought that the respondent’s statement of September 2018 could not have been any clearer :

“Any submissions you may have made relating to your Human Rights have not been considered, as an application for settlement as victim of Domestic Violence is not considered to be a Human Rights based application. Therefore, if you wish to apply for leave to remain, based on your human rights or other compassionate factors it is open to you to apply using an appropriate application form”.

59.
Even if the respondent’s reason for not considering the human rights claim wa s legally erroneous , it would still be the case that the human rights claim had not been considered by her. Any such error would be judicially reviewable, on public law grounds ; but that would need to be by application to the Upper Tribunal , not by way of appeal to the First-tier Tribunal.

60.
Ms Mair’s case, however, on behalf of the appellant is that, even though the respondent may have thought she was not refusing a human rights claim, the refusal of leave to remain as a victim of domestic violence was the refusal of the appellant’s human rights claim.

61.
As we see it, Ms Mair’s argument can be construed as containing two propositions . First, if the respondent’s current practice, as articulated in the Guidance, is fundamentally misconceived and unlawful, the language of section 82 should not be construed in the way just described, but more broadly ; so that a refusal of leave to remain by reference to the Rules should also be treated as a decision to refuse a human rights claim that has been made alongside the Rules-based application, whether or not the respondent has chosen to engage with the human rights claim in the manner we have just described.

62.
Second, if one analyses the communication that the appellant received from the respondent in September 2018, it is in two entirely separate parts. The part that says “you applied for indefinite leave to remain . .. your application is refused” is the decision. The reasons for that decision are, for present purposes , immaterial. That includes the paragraph which says any human rights submissions have not been considered. The decision to refuse has, therefore, to be treated as a decision to refuse the human rights claim, which the appellant had made, compatibly with section 113, along with his application under the Rules.

63.
The implications for the respondent and the appellate process, if Ms Mair is right, are potentially serious. It is therefore necessary to examine the appellant’s case by going back to first principles.

64.
The respondent has been given the function by Parliament, through the Immigration Acts, of deciding applications from those who require leave to enter or remain in the United Kingdom. As a general

matter, the respondent is the primary decision maker, with her decisions being subject to a right of appeal to the First-tier Tribunal under the 2002 Act or to judicial review, whe re a right of appeal does not exist .

65.
In the appellate context, the position of the Secretary of State as primary decision - maker is necessarily subject to the requirements of the ECHR and the R efugee C onvention , which focus attention on the present position, as it is at the date of an appeal hearing. Nevertheless, section 85(5) contains a mechanism for the respondent to co nsent to the consideration of " a new matter" by the First-tier Tribunal .

66.
If the appellant is correct as to the proposition we have articulated in paragraph 61 above , the respondent would find herself in the following position. If she maintain s her current stance of engaging with human rights claims only if made by way of particular forms and in particular circumstances, the respondent face s the prospect of the First-tier Tribunal becoming the primary decision - maker in what may be a significant number of human rights cases. The alternative is for the respondent to abandon her current practice.

67.
We find t he appellant's first proposition involves a n impermissible "reading-down" of section 50 of the 2006 Act and the Rules made under it ; and of the relevant case law . The respondent's ability, pursuant to section 50 of the 2006 Act, to require a specified procedure to be followed in making or pursuing an application or claim, and, in particular, in requiring the use of a specified form (along with the payment of a fee) has been endorsed by the Court of Appeal in Shrestha . Although that case was concerned with a section 120 Notice, paragraphs 29-33 of the judgment of Hickinbottom LJ acknowledged the power of the respondent to regulate the way in which applications and claims fall for consideration under the Immigration Acts. The way in which the respondent does so may, of course, be subject to public law challenge. However, there is no suggestion in Shrestha that the C ourt had difficulties with the respondent's stance (which differed from that in Ahsan) , whereby the respondent will, as a general matter, engage with an application or claim only if made in the specified manner, until the point at which the individual concerned is subject to removal directions, when no formality will be necessary. We reject Ms Mair's attempt to distinguish Shrestha ; although concerned with section 120, it contains an endorsement of the respondent's practice that has relevance to the present case.

68.
Importantly, at paragraph 102 of Balajigari , the Court of Appeal, in discussing the formal requirements , noted counsel for the Secretary of State as making it clear:

" …t hat the Secretary of State was not minded to waive the formal requirements generally so as to facilitate appeals (as opposed to applications for judicial review) in all cases. As the legislation now stands, that appears to be a stance that he is entitled to take".

We are, accordingly, satisfied that the respondent is entitled, as a general matter and subject to her overriding public law dut ies , to adopt the position whereby, even if a communication is given to her which satisfies the definition of a "human rights claim" in section 113, she is not for that reason alone necessarily obliged to engage substantively with the claim in order to decide whether it should be granted or refused. The respondent can, therefore, as a general matter lawfully respond to a human rights claim by declining to consider it.

69.
In creating paragraph 34 of the Immigration Rules , pursuant to section 50 of the 2006 Act, it is clear that the respondent was not seeking to remove the right of appeal afforded by Parliament in section 82 of the 2002 Act to someone whose human rights claim has been refused by the respondent. She cannot preclude a claim, however made, from being a human rights claim under section 113. What the respondent can do, however, is determine the circumstances in which she will make a decision on whether to refuse that claim.

70.
In AT , the C ourt held that the respondent:-

“ … i s perfectly entitled to enact delegated legislation removing the right of appeal for victims of domestic violence whose claims are not human rights claims, and replacing that right with one of administrative review. What she cannot do without primary legislation is remove the right of appeal for domestic violence claims that are also human rights claims”.

In AT , the C ourt was considering the provisions of Appendix AR; in particular th ose which provided there would be no administrative review of decisions taken under Appendix FM (family members), except where an application was made under section DVILR (domestic violence). Assuming one accepts, for the moment, the categorisation of the Immigration Rules as delegated legislation, we do not consider that delegated legislation of any kind can remove the right of appeal in section 82(1)(b). In fact , the pro vision in question in A ppendix AR was not purporting to remove the right of appeal which would otherwise exist under the 2002 Act. It was, instead, enabling refusals of applications under the domestic violence provisions of the Rules to be subject to administrative review, because such refusals were not considered by the respondent to be refusal s of human rights claim s .

71.
As AT found, some victims of domestic violence may have a h uman r ights claim that arises out of, or otherwise involves, the domestic violence. At paragraphs 47 to 49 of his judgment, Kerr J considered that, in such cases, the respondent could not lawfully compel a person to make two separate applications: one under the Rules and another in the form of a human rights claim. Those paragraphs are, however, obiter . They need to be read in the light of Shrestha and Balajigari . Moreover, there is no suggestion that Kerr J was of the view that a refusal by the respondent to engage with an application for leave in a domestic violence case with a human rights element must fall to be considered as the refusal of a human rights claim. On the contrary, he was going no further than to suggest that the respondent’s stance might well be unlawful in public law terms. These paragraphs do not, therefore, afford the present appellant’s case any material support. We should add that the fact a person may be required to pay a fee for two applications is not a general reason to doubt the lawfulness of the system, particularly given the respondent’s policy for fee waiver.

72.
Ms Mair submitted that provisions of the Guidance set out at paragraphs 35 and 36 above are unlawful. In the light of what we have just said, they are not. Furthermore, any practical difficulty is alleviated, at least to a significant extent, by the paragraph s of the Guidance set out in bold in paragraph 37 above that tell caseworkers they must write to a person who has used multiple applications, explaining they have raised issues that cannot be considered as part of the specified application but that they can make a variation application in order to raise those issues. This is what the respondent accepts in the present case was not done, but should have been done.

73.

We have seen in th e Guidance on rights of appeal h ow , under the heading “ What is a Human Rights claim? ”, a number of applications under the Rul e s are described as being “human rights applications” where “the starting position is that there is a right of appeal against refusal”. Am ongst the listed applications are paragraph 276 B (long residence) and paragraphs 27 6 AD E (1) or 276D E (private life).

74.
The important point to bear in mind about these applications is that, although they may be made solely by refence to provisions of the Immigration Rules, th e provisions in question are ones where human rights matters are necessarily in play. For example, in the case of paragraph 276 B , a person who has spent ten years continuous ly lawfully resident in the United Kingdom can be expected to have formed a private life here, which is entitled to respect, such that their removal may be a dispr oportionate interference with Article 8 R ights. Accordingly, a caseworker determining whether a person satisfies the requirements of 276 B is necessarily engaged with human rights issues. This is to be contrasted with applications made under the provisions of the domestic violence rules.

75.
I n deciding whether to refuse any human rights claim, whether made by reference to provisions of the R ules listed in the G uidance or otherwise, the caseworker is required to consider whether, even though the person in question fails to satisfy the requirements of the R ules, there may be “exceptional circumstances” that nevertheless mean removing them or requiring them to leave the United Kingdom would be contrary to section 6 of the 1998 Act: Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60; paragraphs 51-53 (Lord Reed) . It seems to us that t he hallmark of a decision by the respondent to refuse a human rights claim will be a consideration outside the I mmigration R ules, by re ference to Article 8 or such other article of the ECHR as may be engaged.

76.
We therefore do not consider the appellant can draw any support from the fact that, in these instances of applications made under the Rules, the respondent acknowledges that the application is a human rights claim, which needs to be determined alongside the R ules-based application, whether or not the applicant has raised human rights as a discrete issue.

77.
For these reasons, the appellant’s first proposition does not require the adoption of the kind of broad interpretation of the phrase “has decided to refuse a human rights claim” that he needs, if he is to persuade a court of construction to displace the interpretation set out in paragraphs 54 to 57 above.

78.
We turn to the second proposition. Ms Mair submits that the mere refusal of leave to the appellant , as a person who ha s made an application under the rules and a human rights claim, amounts to the refusal of that claim. She seeks to draw support from paragraph 99 of the judgment in Balajigari w here, discussing a TIGM ILR application, which included a box in which the applicant could rely on matters other than the P art 6 A grounds, the C ourt said that it could see no reason in principle why :

“an applicant should not complete that box in the alternative so as to raise a human rights claim; the point may also be capable of being raised in the covering letter. If they have done so, the refusal of the application will constitute a refusal of that claim and can be appealed as such”.

79.

We do not consider that this passage constitutes support for the appellant's second proposition. The C ourt made it clear that, in saying what it did in paragraph 99, it was opining on a matter on which it had not been addressed by the parties. Furthermore, it is evident that the C ourt did not have in mind the precise issue with which we are concerned. When it said that the refusal of the application , in the circumstances described, will constitute a refusal of that claim , the C ourt was, we consider, envisaging a refusal by the respondent o f indefinite leave to remain , by reference both to the TIGM Rules and to the applicant's asserted human rights.

80.
We also reject Ms Mair's submission that the only relevant part of the respondent's communication to the appellant of 9 September 2018 was the page which stated that his application for indefinite leave to remain "is refused". That cannot be right . T he document needs to be read as a whole. As we have seen , the reasons for the decision make it pellucid that the appellant's human rights submissions "have not been considered".

81.
In summary:

(a) a human rights claim is defined by section 113 of the 2002 Act;

(b) the respondent's assessment of whether a claim satisfies that definition is not legally determinative;

(c) the respondent's Guidance is, however, broadly compatible with what the High Court has found to be the minimum elements of a human rights claim;

(d) the fact a human rights claim has been made does not mean that any reaction to it by the respondent, which is not an acceptance of the claim, acknowledged by the grant of leave, is to be treated as the refusal of a human rights claim, generating a right of appeal to the First-tier Tribunal;

(e) the respondent is legally entitled to adopt the position that she may require human rights claims to be made in a particular way, if they are to be substantively considered by her so that, if refused, there will be a right of appeal ;

(f) in view of (d) and (e) above, there is no justification for construing section 82(1)(b) of the 2002 Act otherwise than according to its ordinary meaning, which is that the respondent decides to refuse a human rights claim if she :

(i) engages with the claim ; and

(ii) reaches a decision that neither the claimant (C) nor anyone else who may be affected has a human right which is of such a kind as to entitle C to remain in the United Kingdom (or to be given entry to it) by reason of that right.

82.
It is apparent from the decision of First-tier Tribunal Judge Kelly and the grant of permission by Resident Judge of the First-tier Tribunal Zucker that a practice appears to have arisen in the First-tier Tribunal, whereby applications for leave are requested by caseworkers or duty judges to be filed with that Tribunal and then scrutinised, in order to see whether a human rights claim has been made. If it has , then , merely because the application for leave to remain has been refused, regardless of the nature of the application and regardless of whether the respondent has said that she has not considered any human rights claim that may have been made, the caseworker or duty judge will

nevertheless determine that the respondent has decided to refuse a human rights claim ; and that there is therefore a valid appeal to the First-tier Tri bunal.

83.
For the reasons we have given, the mere fact that leave to remain is refused, in circumstances where a person has submitted what satisfies the statutory definition of a human rights claim, is not sufficient to create a right of appeal. As a general matter, the respondent is entitled to operate a system whereby she can withhold substantive consideration of a human rights claim that has not been made in a particular manner. There is nothing inherently unlawful in such a system. In particular, one can understand the respondent's need to maintain orderly decision making by requiring separate applications in the case of certain human rights claims.

84.
In any event, any challenge to th is system (or to any specific refusal to engage with a human rights claim) has to be by judicial review. There is no justification for the present practice in the First-tier Tribunal, which involves an impermissible reading of section 82(1)(b). We respectfully endorse what First-tier Tribunal Judge Kelly said at paragraph 12 of his decision in the present case. The practice should cease.

85.
In most cases, it should not be difficult for a caseworker or duty judge to see whether a human rights claim has been refused by the respondent. The starting point will be whether the decision says it is the refusal of a human rights claim and what, if anything, the decision and reasons say about a right of appeal. The reasons for a refusal of a human rights claim will necessarily involve a consideration of the human rights of the applicant or other relevant person. Even if the decision is made by reference to a provision of the Immigration Rules which of its nature involves human rights matters , there should be a consideration of the position outside the R ules, compatibly with Hesham Ali (see paragraph 7 5 above).

86.
If the reasons for the decision reveal no such consideration by the respondent , the caseworker or duty judge will need to look to see what the explanation might be. If, as in the present case, the reasons stat e in terms that "any submissions you may have made relating to your human rights have not been considered", then, barring something extremely unusual, that statement should be accepted at face value. No purpose will be served by asking to see the application and covering letter since, even if these disclose the making of a human rights claim, the respondent has not decided to refuse it.

DECISION

87.
The decision of the First-tier Tribunal Judge Kelly does not contain the making of an error on a point of law. The appeal is, accordingly, dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Mr Justice Lane

President

17 February 2020

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[1] Version 8.0 appeared on 31 January 2020. For present purposes, there is no difference in the relevant provisions.