Middle Temple Rosamund Smith Mooting Competition 2024

IN THE SUPREME COURT

CASE NO. 2024/190

The King (On the application of AB) (Appellant)

– v –

Secretary of State for the Home Department (Respondent)

BUNDLE ON BEHALF OF THE APPELANT

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Date: Monday 21st October 2024
Leading Counsel: Erica Barker
Junior Counsel: Lucy Finney

IN THE SUPREME COURT

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The King (On the application of AB) (Appellant)

– v –

Secretary of State for the Home Department (Respondent)

SKELETON ARGUMENT FOR THE APPELANT

BACKGROUND:

1. A new UK government was elected, with a Ms Waxman as Prime Minister. A highly popular leader, Waxman had long campaigned for the reform of what, in her view, was a totally inadequate system for dealing with immigration and, in particular, asylum seekers. Waxman's electoral success (and support within her own party) was based in large part on her pre-election promise to "resolve, once and for all, how this country deals with the problem of asylum seekers." Such promises had, however, never materialised into detailed manifesto pledges, pre-election.
2. Some months after winning the election and coming into power, the Asylum Seeker Control Bill was introduced in the Commons. After prolonged opposition from the House of Lords, the Asylum Seeker Control Act (**'ASCA'**) was eventually enacted via the procedure set out in the Parliament Acts 1911 / 1949.
3. As passed, ASCA created a system whereby the Secretary of State for the Home Department could issue a certificate, the effect of which would be to disapply a decision of the Upper Tribunal in relation to the validity of a decision by government to remove an asylum seeker from the country. ASCA further sought to make the Secretary of State's decision to issue that certificate immune from judicial review. Ms Waxman said at second reading in the Commons that ASCA would, "finally clarify who gets the last word. For too long, decisions have been tied up in the courts. As government, we sometimes know better."

4. In relevant part, ASCA provides that:

Section 1: The purpose of this Act is to streamline the resolution of disputes over decisions to remove illegal asylum seekers from the United Kingdom.

Section 2 — Definitions:

"Asylum seeker" has the same meaning as in the Immigration Acts.

"Immigration Acts" are as defined in section 61(2) of the UK Borders Act 2007.

"Immigration Officers" has the same meaning as in the Immigration Acts.

Section 3: Where the Upper Tribunal delivers a decision on the validity of a decision made under the Immigration Acts to remove an asylum seeker from the United Kingdom, then the Secretary of State for the Home Department, in his or her discretion, may issue a certificate deeming the decision to remove, made under the Immigration Acts, to be effective — regardless of the outcome of the Upper Tribunal's decision.

Section 4: Where a certificate is issued under section 3 of this Act, Immigration Officers are to treat as effective, for the purpose of their enforcement powers, the decision to remove that asylum seeker from the United Kingdom.

Section 5: Where a certificate is issued under section 3 of this Act, the Secretary of State must, as soon as practicable thereafter, lay a copy of the certificate before each House of Parliament.

Section 6: Decisions of the Secretary of State made under this Act shall not be subject to appeal or be liable to be questioned in any court (including any question as to the decision's lawfulness).

Section 7: The provisions of the Human Rights Act 1998 do not apply to decisions made under this Act.

Section 8: It is recognised that—

(a) the Parliament of the United Kingdom is sovereign, and

(b) the validity of this Act is unaffected by international law.

5. Two days after ASCA came into effect, a Syrian national seeking asylum in the UK, 'Mr AB', was intercepted in the English Channel, attempting to enter the UK without permission, by small boat.

THE DECISION TO REMOVE 'AB' TO SYRIA:

6. AB was processed under the Immigration Acts, and a decision was made by Immigration Officers to refuse his asylum application and to remove AB from the UK, returning him to Syria.

THE UPPER TRIBUNAL:

7. AB appealed that decision in the First-tier Tribunal, but his appeal was unsuccessful. AB claimed that he risked persecution if returned to Syria, as he had left the country many years ago to escape forced military conscription.
8. AB received permission to appeal and, on appeal, the Upper Tribunal decided in his favour.
9. Over this time, AB's case had become a high-profile test of the government's resolve to deliver on its election promises, and to be "tough on immigration". Polls showed that Waxman's star had waned since her landslide election victory some years ago. On the day of the Upper
   Tribunal's decision in Mr AB's case, Ms Waxman spoke on the steps of Parliament, and declared to the press that, "even if these judges now say that AB can stay, this tribunal decision is certainly not the final word. It is we, the people, who reserve the final say on who gets to come and go from our country!"
10. Ms Waxman came under increasing pressure in the days after the Upper Tribunal's decision. Already mired in the controversy which led to the enactment of ASCA, a leadership challenge was threatened in the Commons if the matter of AB's removal could not be resolved. In an evening news interview, Ms Waxman described AB's case as a "test of her leadership", and further described AB as a "dangerous criminal" and "a poster child for why ASCA has been so sorely needed."

THE SECRETARY OF STATE'S DECISION UNDER ASCA, s 3:

11. Three days after the Upper Tribunal's decision, the Secretary of State for the Home Department, Mr Keating, issued a certificate under ASCA section 3 in respect of the decision to remove AB to Syria; and placed copies of the certificate before both Houses of Parliament under ASCA section 5.

12. No reasons were given for why the certificate was issued, and AB was given no advance notice of Mr Keating's intention to issue the certificate, nor offered a hearing.

13. Pursuant to ASCA section 4, Immigration Officers (in execution of their enforcement powers) prepared to remove AB from the country later that day.

THE DIVISIONAL COURT:

14. An interim injunction was sought immediately from the High Court by AB's lawyers, preventing

    AB's removal. That injunction was granted. AB's lawyers also initiated judicial review proceedings — which were narrowly focused. **The only challenge was to the legality of the Secretary of State's decision made under ASCA section 3 (described at paragraphs [11][12] of the facts, above).**

15. At the final hearing, the High Court (sitting as a Divisional Court) found that the ouster clause in

    ASCA section 6 was effective to bar review of the Secretary of State's decision under ASCA section 3, and distinguished *R (on the application of Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22.

16. Having found that the ouster clause was effective, the Divisional Court did not engage with the substantive issue of whether the Secretary of State's decision was lawfully made, or the merits of AB's case. It was nonetheless observed, in obiter remarks, that Parliament had made clear that the power in ASCA section 3, while not unlimited, was very broad and might be exercised lawfully in furtherance of an extensive range of purposes, political or otherwise.

17. In doing so, the Divisional Court rejected AB's submissions that the section 3 power, as a matter of the rule of law and the separation of powers, ought to be construed as narrowly as possible, and that, before the section 3 power might be exercised, it was necessary to

read into ASCA the requirement that the Secretary of State be furnished with 'compelling evidence' justifying removal from the UK.

APPEAL TO THE SUPREME COURT:

18. AB now appeals the decision of the Divisional Court via a 'leapfrog appeal'[1] to the Supreme Court.

19. The issues for determination on this appeal are confined to:

    (a) Whether ASCA section 6 is effective to prevent judicial review of the Secretary of State's decision under ASCA section 3.

    (b) Whether ASCA section 3 should be construed narrowly, requiring that: (i) before the power is exercised, there must be produced before the Secretary of State 'compelling evidence' justifying removal from the UK; (ii) a hearing ought to be afforded before the exercise of the section 3 power; and (iii) the power cannot be exercised for political purposes alone.

Dr Matthew Psycharis

On behalf of the first ground, Counsel for the Appellant respectfully submits:

1. Immigration and Asylum Law is an integrated system; therefore, notwithstanding the Asylum Seeker Control Act, the Secretary of State for the Home Department operates under a framework of various legislation and regulations pertaining to removal.

   It states that the decisions of the Secretary of State made under 'this Act' are not liable to be questioned, however, the 'decision' to remove is made under the Immigration Acts. If there were to be any erroneous application of the latter, the Secretary of State would not escape accountability. No one is above the law. Accordingly, the words are not clear and explicit. R *(on the application of Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22.

2. Although it pertains to the finality of decisions by the Upper Tribunal, regarding permission to appeal, the partial ouster clause, under 11A of the Tribunals, Courts and Enforcement Act 2007, introduced by section 2 of the Judicial Review and Courts Act 2022, was held to be clear and unambiguous. Dissimilar to the present case, the words, 'judicial review', are contained. Pursuant to the Asylum Seeker Control Act – to only assert that it is 'not to be questioned in any court' is insufficient. *R (Oceana v Upper Tribunal* [2023] EWHC 791 (Admin).

3. Section 1 provides that the purpose of the Act is to streamline the resolution of disputes over decisions to remove illegal asylum seekers from the United Kingdom. In contemplation of statutory interpretation, 'resolution of disputes' is equivocal.

4. Not all actions or omissions will meet the threshold of unlawfulness, but where it has caused severe prejudice to an individual, departs from rationality or reasonableness, substantively, in breach of any common law principle, to exclude judicial review renders scrutiny a nullity, blurring the distinction between the separation of powers.

   The wording of sections 3 and 6 of the Asylum Seeker Control Act is not effective to prevent judicial review, distinctly in this context. *R (Oceana v Upper Tribunal* [2023] EWHC 791 (Admin).

5. If the judiciary is unable to review the lawfulness of a certificate deeming the decision to remove, there is a real risk of refoulement (Upper Tribunal decided in AB's favour). In addition, where the court finds that the evidence supports leave to remain, to then remove on a discretionary basis, decisions at common law, in practicality, become obsolete. It may dissuade people from appealing any decision in the first instance.

6. Under the Immigration Acts, the Secretary of State is under a duty to provide notice of intention to remove and give reasons. Curtailing this prevents access to justice. *R (FB (Afghanistan) and Medical Justice) v The Secretary of State for the Home Department* [2020] EWCA Civ [1338].

7. In accordance with parliamentary sovereignty, there is the freedom to 'make any law'. However, the Asylum Seeker Control Act does not disapply one section of the Human Rights Act 1998 - it expressly provides that its 'provisions' do not apply. Removing *all* fundamental protections and safeguards is unprecedented.

On behalf of the second ground, Counsel for the Appellant respectfully submits:

<u>First Submission:</u>

8. A hearing ought to be afforded before the exercise of the Asylum Seeker Control Act, Section 3.

    i. This guarantees an applicant's ability to be heard before a decision is taken on their livelihood and future. Without the possibility of a hearing, decisions on asylum will become a bureaucratic and administrative process, lacking human input.

    ii. The importance of a hearing was recognised by Judge Fordham in *R (Karim) v Upper Tribunal (IAC) and SSHD* [2024] EWCH 438 (Admin).

    iii. The Supreme Court in *R (on the application of Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42 found that the Government's policy to 'deport first, appeal later' was unlawful as it derived the applicant of the right to a hearing in the UK before deportation.

iv. This will be relied on to submit that Section 3 cannot be lawful as it derives the applicant of the possibility of a hearing whatsoever.

v. The importance of a right to a hearing has also been recognised by European domestic courts, such as in Germany.

<u>Second Submission:</u>

9. The power in the Asylum Seeker Control Act section 3 cannot be exercised for political purposes alone.

    i. It is submitted that the rejection of AB's asylum was solely for a political purpose given the mounting pressure on Prime Minister to be decisive surrounding a leadership challenge.

    ii. If repeated, it is submitted that decisions on asylum will become part of politician's weaponry, to be utilised to gain popularity or win votes, rather than looking at the actual individual circumstances of the applicant.

    iii. This cannot be allowed to happen again, and the Supreme Court's decision in *R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department* [2023] UKSC 42 will be relied on to demonstrate this.

<u>Final Submission:</u>

10. Before the power in Section 3 is exercised, there must be produced before the Secretary of State 'compelling evidence' justifying removal from the UK.

    i. In exercising the power in Section 3, the Secretary of State is ignoring the decision made by the Upper Tribunal. This decision was likely made based upon fact and evidence.

    ii. Therefore, to undermine that decision, and remove an individual from the UK, there must be compelling evidence to do so. Otherwise, there will be no check on the power of the Secretary of State to remove.

    iii. The Supreme Court's confirmation of the 'very compelling circumstances' test in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 will be citied in support of this submission.

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LIST OF AUTHORITIES CITIED ON BEHALF OF THE APPELLANT

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Date: 21st October 2024
Leading Counsel: Erica Barker
Junior Counsel: Lucy Finney

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R (on the application of Privacy International) v Investigatory Powers Tribunal and others

Positive/Neutral Judicial Consideration

Court
Supreme Court

Judgment Date
15 May 2019

On appeal from: [2017] EWCA Civ 1868

SC

[2019] UKSC 22, 2019 WL 02107214

before Lady Hale , President Lord Reed , Deputy President Lord Kerr Lord Wilson Lord Sumption Lord Carnwath Lord Lloyd-Jones

Judgment Given on 15 May 2019

Heard on 3 and 4 December 2018

Representation

Appellant Sir Jeffrey Jowell QC Dinah Rose QC Ben Jaffey QC Tom Cleaver Gayatri Sarathy (Instructed by Bhatt Murphy Solicitors).
Respondent Jonathan Glasson QC (Instructed by The Government Legal Department).
Interested Parties Sir James Eadie QC Kate Grange QC Catherine Dobson James Bradford (Instructed by The Government Legal Department).
(Intervener - Liberty) Martin Chamberlain QC David Heaton (Instructed by Liberty).

Judgment

Lord Carnwath: (with whom Lady Hale and Lord Kerr agree)

The issue

1. The Investigatory Powers Tribunal ("IPT") is a special tribunal established under the Regulation of Investigatory Powers Act 2000 ("RIPA") with jurisdiction to examine, among other things, the conduct of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters ("the intelligence services"). Section 67(8) provides:

> "Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

The genesis of this subsection can be traced back to the Interception of Communications Act 1985 . Section 7(8) provided in relation to the tribunal established by that Act (the predecessor of the IPT):

> ”The decisions of the Tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court.”

2. There is an obvious parallel with the “ouster clause” considered by the House of Lords in the seminal case of *Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147* (”Anisminic”). Section 4(4) of the Foreign Compensation Act 1950 provided:

> ”The determination by the commission of any application made to them under this Act shall not be called in question in any court of law.”

The House of Lords decided by a majority that these words were not effective to exclude review by the courts of the legal basis of the Commission’s decision. In summary they held (in the words of the headnote):

> ”… that the word ‘determination’ in section 4(4) of the Act of 1950 should not be construed as including everything which purported to be a determination but was not in fact a determination because the commission had misconstrued the provision of the Order defining their jurisdiction. Accordingly, the court was not precluded from inquiring whether or not the order of the commission was a nullity.”

It will be necessary later to examine in more detail the reasoning in *Anisminic* , and its treatment in later cases, culminating in the major reappraisal of the relationship of courts and tribunals by the Supreme Court in *R (Cart) v Upper Tribunal (Public Law Project intervening) [2012] 1 AC 663* (” *Cart* “).

3. Reduced to its core the central issue in the present case is: what if any material difference to the court’s approach is made by any differences in context or wording, and more particularly the inclusion, in the parenthesis to section 67(8) , of a specific reference to decisions relating to “jurisdiction”?

(…)

15. On 17 June 2016 Lang J granted the appellant permission to apply for judicial review, while expressing doubts whether the High Court had jurisdiction to determine the substantive claim. She directed that the issue of jurisdiction should be heard as a preliminary issue. On 2 February 2017 the

Divisional Court gave judgment answering that question in the negative for reasons given by the President. He held that section 67(8) prohibited judicial review of the decision. Since (by contrast with *Anisminic*) the tribunal was already exercising a supervisory jurisdiction over the actions of public authorities and exercising powers of judicial review, he saw no compelling reasons for insisting that a decision of the tribunal is not immune from challenge (para 42). Further, the legislation authorised the Secretary of State to create a right of appeal (albeit that the power had never been exercised), so that the presumption that Parliament "could not have intended to make a statutory tribunal wholly immune from judicial oversight" was not engaged (paras 43, 45).

16. Leggatt J, while not formally dissenting, was "inclined" to a different view. He thought that the case was governed by the reasoning in *Anisminic* :

> "The only potentially relevant difference in the wording of section 67(8) is that it contains the words in brackets '(including as to whether they have jurisdiction)'. But I find it hard to see how these words can make a critical difference in the light of *Anisminic* . It seems to me that on a realistic interpretation that case did not decide that every time a tribunal makes an error of law the tribunal makes an error about the scope of its jurisdiction. Rather, it decided that any determination based on an error of law, whether going to the jurisdiction of the tribunal or not, was not a 'determination' within the meaning of the statutory provision. That reasoning, and the underlying presumption that Parliament does not intend to prevent review of a decision which is unlawful, is just as applicable in the present case and is not answered by pointing to the words in brackets." (para 55)

(…)

105. As Ms Rose submits, our interpretation of the subsection, whether in its present form or as originally drafted in 1985, must be informed by the close parallel with the provision under review in *Anisminic* . At least by that date, following Lord Diplock's explanation in *O'Reilly v Mackman* (1983), the drafter can have had no serious doubt about the far-reaching effect of that decision. A determination vitiated by any error of law, jurisdictional or not, was to be treated as no determination at all. It therefore fell outside the reference in the ouster clause to a "determination of the commission". In other words, the reference to such a determination was to be read as a reference only to a legally valid determination.

106. On the other side, Sir James Eadie submits that the task of interpretation is to be approached, by reference, not simply to a general presumption against ouster clauses of any kind, but rather to careful examination of the language of the provision, having regard to all aspects of the statutory scheme, and the status or the body in question, in order to "discern the policy Parliament intended in the legislation" (*R (Woolas) v Parliamentary Election Court [2012] QB 1* , para 54 per Thomas LJ). The special character and functions of the IPT, combined with the specific references to decisions relating to "jurisdiction", show a clear intention to protect it from any form of review by the ordinary courts, even in cases to which the *Anisminic* principle would otherwise have applied.

107. The main flaw in this argument, in my view, is that it treats the exercise as one of ordinary statutory interpretation, designed simply to discern "the policy intention" of Parliament, so

downgrading the critical importance of the common law presumption against ouster. In that respect it echoes the unsuccessful argument of the Commission in *Anisminic* . Lord Reid did not dispute that the "plain words" of the subsection in that case were apt to exclude any form of challenge in the courts; but this ordinary meaning had to yield to the principle that such a clause will not protect a "nullity" and that there are "no degrees of nullity" (see paras 46-47 above). Following *O'Reilly v Mackman* the concept of "nullity" for these purposes is extended to any decision which is erroneous in law, and in that sense legally invalid. If one applies that approach to section 67(8) , ignoring for the moment the words in parenthesis, the exclusion applies, not to all determinations, awards or other decisions whatever their status, but only to those which are "legally valid" in that sense. Thus, if the IPT's decision in the present case were found to have been reached on an erroneous interpretation of section 5 of the Intelligence Services Act 1994 , those words would not save it from intervention by the courts.

This court has recognised the special status of such "constitutional statutes", in particular their immunity from "implied repeal": a status which (in the words of Laws LJ in another case) -

> "… preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes and, now, applying the Human Rights Act 1998) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand." (*Thoburn v Sunderland City Council [2003] QB 151* , paras 63-64, approved in *Miller v Secretary of State for Exiting the European Union [2018] AC 61* , para 66)

(…)

121. In his introduction to *The Rule of Law* , Lord Bingham underlined the significance of section 1 of the 2005 Act to his general discussion of the concept. He attributed the absence of a statutory definition to the probable recognition by parliamentary counsel of the "extreme difficulty of devising a pithy definition suitable for inclusion in a statute", and their wish instead to "leave it to the judges to rule on what the term means if and when the question arises for decision", so enabling "the concept to evolve over time in response to new views and situations" (*op.cit* pp 7-8). Whatever the explanation, Parliament having recognised this "existing constitutional principle", and provided no definition, there is nothing controversial in the proposition that it is for the courts, and ultimately the Supreme Court (created by the same Act), to determine its content and limits.

122. Secondly, it is not I believe in dispute, and indeed was clearly established by the time of *Anisminic* , that there are certain fundamental requirements of the rule of law which no form of ouster clause (however "clear and explicit") could exclude from the supervision of the courts. The first relates to what I would call "excess of jurisdiction": that is, a decision arrived at by a tribunal of limited jurisdiction through a process which goes outside those limits whether at the inception or at any stage of the proceedings. On this category there was no disagreement in *Anisminic* . It is sufficient to quote Lord Morris, who dissented on the main issue:

> "The control cannot … be exercised if there is some provision (such as a 'no certiorari' clause) which prohibits removal to the High Court. But *it is well*

settled that even such a clause is of no avail if the inferior tribunal acts without jurisdiction or exceeds the limit of its jurisdiction ." (p 182C emphasis added)

144. In conclusion on the second issue, although it is not necessary to decide the point, I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law.

Conclusion

145. Accordingly, for the reasons given under the first issue, I would allow the appeal and hold, in answer to the preliminary issue, that the judicial review jurisdiction of the High Court is not excluded by section 67(8) . Although that is the limit of the issue before the court, it will be clear from what I have said about the significance of the substantive legal issue, that this is a case where, if judicial review is available, permission should be granted.

Lord Lloyd-Jones:

146. Two issues arise on this appeal. The first is the specific issue whether section 67(8) of the Regulation of Investigatory Powers Act 2000 ("RIPA 2000") must be taken as purporting to oust the supervisory jurisdiction of the High Court to quash a judgment of the Investigatory Powers Tribunal ("the IPT") for error of law. The second is the more general issue of whether, and, if so, in accordance with what principles, Parliament has the power by statute to oust the supervisory jurisdiction of the High Court to quash the decision of an inferior court or tribunal of limited statutory jurisdiction.

147. On the first issue, I agree with the judgment of Lord Carnwath. In view of the importance of the issue, I add some brief comments of my own.

148. The IPT was created by section 65(1) of RIPA 2000 . Its jurisdiction and procedures are described in the judgment of Lord Carnwath and I simply draw attention to the following matters. Section 65(2) includes provision that it is the only appropriate tribunal for hearing proceedings falling within section 65(3) (which includes proceedings against any of the intelligence services) for actions incompatible with Convention rights under section 7 of the Human Rights Act 1998 (section 65(2)(a)). Section 67 provides that it shall be the duty of the Tribunal to hear and determine proceedings or to consider and determine complaints or references, brought before it under section 65(2) . Section 67(2) provides that where the IPT hears any proceedings by virtue of section 65(2)(a) , "they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review". At all material times the Investigatory Powers Tribunal Rules 2000 govern procedure before the IPT. It has the power to conduct proceedings in private and, in certain circumstances, in the absence of the complaining party. Rule 6(1) provides:

> ”The Tribunal shall carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.”

149. Section 67(8) of RIPA 2000 provided at the relevant time:

> ”Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.”

An earlier version of this provision was section 7(8) of the Interception of Communications Act 1985 (”the 1985 Act”) which provided in relation to the Tribunal which it created and which was a predecessor of the IPT:

> ”The decisions of the Tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court.”

150. Considered with the benefit of hindsight, it can be seen that *Anisminic* initiated a process of fundamental change in the approach of the courts to judicial review which was to lead to their abandoning the distinction between errors of law going to jurisdiction and those that did not. Whereas previously an error of law was reviewable only if it was a jurisdictional error or if it was an error on the face of the record, all errors of law were to become reviewable. However, as Professor Feldman has observed (” *Anisminic Ltd v Foreign Compensation Commission* [1968]: In Perspective”, in Juss and Sunkin (eds) *Landmark Cases in Public Law* (Oxford, 2017) pp 92-93), this was not immediately apparent from the speeches in *Anisminic* [1969] 2 AC 147 itself. On the contrary, they maintained the distinction between jurisdictional and non-jurisdictional errors of law and the decision turns on a particularly broad notion that the tribunal did not have the power to take certain decisions. Thus, for example, Lord Reid (at p 171B-F) distinguished between those errors of law or procedure by a tribunal which render a decision a nullity and other cases where “its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law”. Similarly, Lord Wilberforce (at p 210D-E) considered that a “tribunal may quite properly validly enter upon its task and in the course of carrying it out may make a decision which is invalid - not merely erroneous” and referred to “a crucial distinction which the court has to make” between doing something which is not in the tribunal’s area and doing something wrong within that area. By addressing whether the appellants had a successor in title and its nationality, the Foreign Compensation Commission had asked the wrong question and had taken account of irrelevant considerations with the result that its decision was a nullity.

151. In the cases which followed *Anisminic* , however, the implications of the extremely broad approach to jurisdictional error of law taken in that case soon became apparent. If, as *Anisminic* suggests, addressing the wrong question renders the decision a nullity, it is possible to present almost any error of law as the result of such an error of approach. Different views on this subject were aired in the judgments in the Court of Appeal in *Pearlman v Keepers and Governors of Harrow School [1979] QB 56* . Lord Denning MR (at pp 69G-70E) considered that the resulting distinction between jurisdictional and non-jurisdictional error was very fine, was being eroded and should be abandoned. In his view the correct approach was to hold that no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. Geoffrey Lane LJ, however, (at p 76C), assuming for this purpose that the judge had made an error of law in concluding that the works did not constitute structural alterations, considered this an error within jurisdiction. It could not be said to be a determination the judge was not entitled to make. Although the approach of Geoffrey Lane LJ was approved by the Judicial Committee of the Privy Council in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union [1981] AC 363* and by the House of Lords in *In re Racal Communications Ltd [1981] AC 374* , Lord Denning's approach was to prevail.

152. In *Racal* , Lord Diplock acknowledged the true significance of *Anisminic* , observing that the break-through made by *Anisminic* had been that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not had for practical purposes been abolished. Accordingly, any error of law that could be shown to have been made by administrative tribunals or authorities in the course of reaching a decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity (at p 383C-D). Two years later, in *O'Reilly v Mackman [1983] 2 AC 237* Lord Diplock referred in similar vein to:

> "… the landmark decision of this House in *Anisminic Ltd v Foreign Compensation Commission* …, and particularly the leading speech of Lord Reid, which has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that the *Anisminic* case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie, one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination,' not being a 'determination' within the meaning of the empowering legislation, was accordingly a nullity." (at p 278D-F)

153. Thereafter, a series of decisions in the House of Lords established that there is a single category of errors of law, all of which render a decision ultra vires (*R v Hull University Visitor, Ex p Page [1993] AC 682* per Lord Browne-Wilkinson at p 701; *Boddington v British Transport Police [1999] 2 AC 143* , at p 158D-E per Lord Irvine of Lairg LC; *R (Lumba) v Secretary of State for the Home*

Department [2012] 1 AC 245 per Lord Dyson JSC at para 66). In *R (Cart) v Upper Tribunal (Public Law Project intervening) [2012] 1 AC 663* Baroness Hale considered (at para 18) that in *Anisminic* "the House of Lords effectively removed the distinction between error of law and excess of jurisdiction".

154. It is, however, necessary to consider whether the *Anisminic* principle applies equally to decision-making by both administrative and judicial bodies. *Anisminic* itself had been concerned with a decision of the Foreign Compensation Commission ("FCC"). It is significant that in that case Lord Wilberforce considered that the functions of the FCC were predominantly judicial, with the power to decide questions of law and he observed that there was every ground, having regard to the number and the complexity of the cases with which it must deal, for giving a wide measure of finality to its decisions. Accordingly, there was no reason for giving a restrictive interpretation to section 4(4) which provided that its determinations were not to be called into question in any court of law (at p 207C-D). Nevertheless, he came to his conclusion on the basis that, as he put it, the decision was made outside the permitted field.

155. By contrast, in *Racal* Lord Diplock observed (at p 382G) that in *Anisminic* the House of Lords had been concerned with decisions of administrative tribunals. He explained that *Anisminic* proceeds on the presumption that "where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined" (at pp 382H-383A). Furthermore, while Parliament could confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact and administrative policy, this requires clear words because there is a presumption that, where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so (at p 383B-C). He then proceeded to contrast the position of a court of law.

> "But there is no similar presumption that where a decision-making power is conferred by statute upon a court of law, Parliament did not intend to confer upon it power to decide questions of law as well as questions of fact. Whether it did or not and, in the case of inferior courts, what limits are imposed on the kinds of questions of law they are empowered to decide, depends upon the construction of the statute unencumbered by any such presumption. In the case of inferior courts where the decision of the court is made final and conclusive by the statute, this may involve the survival of those subtle distinctions formerly drawn between errors of law which go to jurisdiction and errors of law which do not that did so much to confuse English administrative law before *Anisminic* …; but upon any application for judicial review of a decision of an inferior court in a matter which involves, as so many do, interrelated questions of law, fact and degree the superior court conducting the review should not be astute to hold that Parliament did not intend the inferior court to have jurisdiction to decide for itself the meaning of ordinary words used in the statute to define the question which it has to decide." (at p 383E-G)

In this way, Lord Diplock raised the possibility that the distinction between jurisdictional and non-jurisdictional errors of law may survive in the case of decisions by judicial bodies and that, in the latter case, they may be immune from judicial review. (It should be noted that the decision that judicial review was not available in *Racal* is also explicable on Lord Diplock's alternative ground:

because the body concerned was the High Court, not a court of limited jurisdiction, there was no room for error going to jurisdiction.)

156. The decision of the House of Lords in *R v Hull University Visitor, Ex p Page* lends support to the approach followed by Lord Diplock in *Racal* . On the other hand, however, it should be noted that Lord Diplock's formulation of the *Anisminic* principle in *O'Reilly v Mackman* , two years after the decision in *Racal* , cited above, appears to be applicable without distinction to "inferior courts and statutory tribunals". Furthermore, in *R v Greater Manchester Coroner, Ex p Tal [1985] QB 67* Robert Goff LJ, delivering the judgment of the Divisional Court concluded (at p 81G-83B) that Lord Diplock in *Racal* had not intended to say that the *Anisminic* principle did not extend to inferior courts as well as tribunals. Goff LJ considered that, historically, inferior courts had always been subject to what was now called judicial review, although originally only in cases of error going to the jurisdiction and error of law within the jurisdiction which appeared on the face of the record:

> "Since *Anisminic* , the requirement that an error of law within the jurisdiction must appear on the face of the record is now obsolete. It follows that today, in principle, inferior courts as well as tribunals are amenable to the supervisory jurisdiction of the High Court under sections 29 and 31 of the Supreme Court Act 1981 ." (at p 82D-E)

Referring to Lord Diplock's statement of the law in *O'Reilly v Mackman* , he concluded that inferior courts as opposed to tribunals are not excluded from the *Anisminic* principle.

157. There is, moreover, no trace of such a distinction in the Supreme Court's consideration of the Upper Tribunal in *Cart* where there is no suggestion that courts of limited jurisdiction might have power to err as to law within their jurisdiction. This leads Professor Forsyth to observe:

> "This suggests that all courts - except presumably the High Court as a court of unlimited jurisdiction - stray outside their jurisdiction when they make errors of law and are, in principle, subject to judicial review, save that the Supreme Court will determine, as it did in *Cart* , the actual extent of judicial review allowed." (*Wade and Forsyth* , *Administrative Law* , 11th ed, (Oxford: 2014), p 223.)

158. The distinction between administrative tribunals and courts of law suggested by Lord Diplock in *Racal* is likely to be an arid one in the present context. Quite apart from the difficulties which are likely to be encountered in drawing such a distinction in individual cases, what matters here is whether a body is charged with performing a judicial function. If it is, then, as Laws LJ observed in the Divisional Court in *Cart* (at para 68), the true contrast is between the High Court on the one hand and courts of limited jurisdiction on the other.

159. In the present case the IPT is undoubtedly charged with performing a judicial function. The issue for decision in this case must therefore be approached on the basis that the statute makes provision as to the status of decisions of a judicial body.

160. I wholeheartedly endorse the exposition by Laws LJ in the Divisional Court in *Cart* (at paras 36-40) of the principle that it is a necessary corollary of the sovereignty of Parliament that there should exist an authoritative and independent body which can interpret and mediate legislation made by Parliament:

> "The interpreter's role cannot be filled by the legislature or the executive: for in that case they or either of them would be judge in their own cause, with the ills of arbitrary government which that would entail. Nor, generally can the interpreter be constituted by the public body which has to administer the relevant law: for in that case the decision-makers would write their own laws. The interpreter must be impartial, independent both of the legislature and of the persons affected by the texts' application, and authoritative-accepted as the last word, subject only to any appeal. Only a court can fulfil the role." (at para 37)

He goes on to explain that this is not a denial of legislative sovereignty but an affirmation and a condition of it. The paradigm for such an authoritative source is the High Court but it is not the only possible source:

> "To offer the same guarantee of properly mediated law, any alternative source must amount to an alter ego of the High Court; …" (at para 39)

and he identifies as examples the Courts-Martial Appeal Court and the Restrictive Practices Court. In the same way Parliament may modify the procedures by which statute law is mediated, inter alia by the creation of new judicial bodies. It seems to me that central to the first issue in the present appeal is whether it was the intention of Parliament to do precisely this in the case of the IPT.

161. I accept that in the case of a judicial body, by contrast with a purely administrative body, there is no presumption that Parliament did not intend to confer a power to decide questions of law as well as questions of fact. (See *Racal* per Lord Diplock at p 383E.) It is, rather, a matter of the interpretation of the legislation concerned in each case, unencumbered by such a presumption. Nevertheless, if the jurisdiction of the High Court is to be displaced or varied in some way, this is a matter of great importance and clear words will be required to achieve that result. Notwithstanding the disapproval by the House of Lords in *Racal* of the decision of the majority in the Court of Appeal in *Pearlman* , the following observation of Lord Denning MR (at p 70D) remains valid as a general proposition:

> "The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right. Not only in the

> instant case to do justice to the complainant. But also so as to secure that all courts and tribunals, when faced with the same point of law should decide it in the same way."

This jurisdiction cannot be varied by implication. Once again, I turn to the judgment of Laws LJ in the Divisional Court in *Cart* where it was submitted that the judicial review jurisdiction of the High Court was impliedly excluded by provisions designating the Upper Tribunal and Special Immigration Appeals Commission respectively "a superior court of record".

> "31. In my judgment the proposition that judicial review is excluded by sections 1(3) and 3(5) is a constitutional solecism. The supervisory jurisdiction (to the extent that it can be ousted at all: itself a question to which I will return) can only be ousted 'by the most clear and explicit words': see per Denning LJ in *R v Medical Appeal Tribunal, Ex p Gilmore [1957] 1 QB 574* , 583. The learning discloses a litany of failed attempts to exclude judicial review. In *R (Sivasubramaniam) v Wandsworth County Court [2003] 1 WLR 475* , after citing Lord Denning's dictum in *Ex p Gilmore* , Lord Phillips of Worth Matravers MR giving the judgment of the court continued, at para 44: 'All the authorities to which we have been referred indicate that this remains true today. The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory implication.'
>
> 32. I need not multiply citations. A conspicuous case is the seminal authority of *Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147* which abolished (for most purposes) the distinction between errors of law within and without jurisdiction, ushering in the modern constitutional rule that any error of law by a public decision-maker is beyond his jurisdiction. Older instances include *Cardiffe Bridge* (1700) 1 Salk 146; *Berkley v Bragge (1754) 1 Keny 80* ; *R v Cheltenham Comrs (1841) 1 QB 467* and *R v Bradlaugh, Ex p (1878) 3 QBD 509* . More recent instances include *R v Secretary of State for the Home Department, Ex p Al Fayed (No 1) [1998] 1 WLR 763* , 771B-773C. Against this background it cannot be supposed that judicial review may be ousted by an implication, far less one contained in a formula which amounts in effect to a deeming provision. But that is the sum of the defendants' case."

162. It has been suggested, on the basis of *Racal* , that while section 67(8) does not exclude judicial review on other grounds such as a lack of subject-matter jurisdiction or want of natural justice, that section excludes the jurisdiction of the High Court to entertain a challenge to the Tribunal's decisions on the merits ie it excludes judicial review on grounds which would be tantamount to an appeal on the merits. It seems to me, however, that this places more weight on *Racal* than that authority can bear. It provides an insecure foundation because, as is demonstrated by the later decisions referred to above, at the date of *Racal* the legal principles in play were still evolving. As a result, it is not appropriate to allow the reasoning of Lord Diplock in *Racal* to influence the issue of interpretation in the present case.

163. Turning to the issue of interpretation of section 67(8) , I accept that the role of the IPT is judicial. As a result, there is no presumption in favour of restricting its field or of restricting its power to decide issues of law. However, if the jurisdiction of the High Court can be excluded at all, it requires the most clear and explicit words. As Lord Reid observed in *Anisminic* (at p 170C-D):

> ”It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly - meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.”

164. Subject to one point, the wording of section 67(8) closely resembles that of section 4(4) of the Foreign Compensation Act 1950 which was the subject of *Anisminic* :

> ”The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.”

There, the House of Lords held that “determination” in section 4(4) did not include everything which purported to be a determination, but which was not in fact a determination because the Commission had misconstrued the statutory provision defining its jurisdiction. Reference has been made above to the way in which the law subsequently developed so as to remove the distinction between jurisdictional and non-jurisdictional errors of law. By 1985, when section 7(8) of the Interception of Communications Act 1985 was enacted, it would have been entirely clear from the judgment of Lord Diplock in *O'Reilly v Mackman* that a determination founded on an error of law, whether it would previously have been characterised as jurisdictional or not, was not to be regarded as a determination at all. Having regard to this ground-breaking development at common law, if it had been the intention of Parliament to exclude the jurisdiction of the High Court in respect of such decisions, it could be expected to have employed language which excluded jurisdiction not only in respect of “determinations, awards and other decisions of the Tribunal” but also in respect of purported determinations, awards and other decisions. It is a striking feature of section 67(8) and its predecessor that it failed to do so.

165. The one point of distinction between section 4(4) of the Foreign Compensation Act 1950 , on the one hand, and section 67(8) on the other, is the inclusion in the latter of the words in parenthesis “(including decisions as to whether they have jurisdiction)”. To my mind, however, these words are not apt to extend the exclusion of the jurisdiction of the High Court to what purport to be decisions but in law are not to be so regarded. While it is now established that a decision based on an error of law is not to be regarded as a decision for this purpose, this notion does not easily fit within the description of a decision as to whether it has jurisdiction. If the IPT takes a decision which is founded on an error of law, it is not in any real sense taking a decision as to whether it has jurisdiction. If the intention was to exclude the jurisdiction of the High Court from purported decisions founded on an error of law, it was necessary to say so in clear terms. Clause 11 of the Asylum and Immigration

(Treatment of Claimants etc) Bill 2003, to which Lord Carnwath refers at para 101 of his judgment, is a more recent example of an attempt to achieve the required degree of clarity if such a provision is to be effective. That provision, which was not enacted, can at least be said to have squarely confronted what it sought to achieve as required by the principle of legality. To my mind, section 67(8) does not satisfy this requirement.

166. It may be that the explanation of the words in parenthesis is, as submitted by Ms Dinah Rose QC on behalf of the appellant, that they were intended to refer to determinations of precedent fact, a matter which was highly topical in 1985 following the decision of the House of Lords in *R v Secretary of State for the Home Department, Ex p Khawaja [1984] AC 74* . On this basis the words in parenthesis in section 67(8) could be considered to have the effect that decisions of the IPT on issues of precedent fact going to its jurisdiction, but not issues of law, would be beyond the scope of review. However, it is not necessary to come to a concluded view on this point. For present purposes it is sufficient that the words employed in section 67(8) do not make provision with sufficient clarity for the exclusion of the review jurisdiction of the High Court in respect of errors of law.

167. In coming to this conclusion, I have taken full account of the various features of the statutory scheme to which Sir James Eadie QC has drawn attention in support of the respondents' case. He is correct in his submission that there is here a special allocation of judicial responsibility to the IPT in the national security context (section 67(3)(a)). Similarly, the IPT's rules and procedures create a "bespoke" system particularly well suited to the adjudication of controversial issues in the context of national security and directed to protecting the public interest. Furthermore, there can be no doubt as to the outstanding judicial quality of the members of the IPT. However, the exclusion of the review jurisdiction of the High Court in cases of error of law, if achievable at all, would require a provision of much greater clarity making abundantly clear that that was what it sought to achieve.

168. For these reasons, I would allow the appeal against the decision of the Court of Appeal on the first issue. It is, accordingly, unnecessary to express any view on the second issue.

Lord Sumption: (dissenting) (with whom Lord Reed agrees)

169. The Investigatory Powers Tribunal is a specialist tribunal established in 2000 under the Regulation of Investigatory Powers Act 2000 . Its principal functions are to determine proceedings against the intelligence services in respect of breaches of human rights and complaints about the interception of communications, in a way which enables these claims to be examined judicially without the risk of disclosure of secret matters. The Tribunal effectively replaced the Interception of Communications Act Tribunal, the Security Services Act Tribunal and the Intelligence Services Act Tribunal, which had been established under earlier enactments, as well as taking over the operation of the complaints provisions of Part III of the Police Act 1997 .

170. The appellant, Privacy International, complained that Government Communications Headquarters (”GCHQ”), one of the intelligence services, had carried out unlawful computer hacking. Computer hacking by the intelligence services requires the authority of a warrant of the Secretary of State under section 5 of the Intelligence Services Act 1994 . The relevant activities of GCHQ were said to be unlawful on the ground that the warrants authorising them included what has been called (not entirely accurately) "thematic warrants". A thematic warrant means a warrant authorising a class

of activity in respect of a class of property. The appellant's case before the Tribunal was that section 5(2) of the Intelligence Services Act 1994 empowered the Secretary of State to issue a warrant authorising "specified acts" in respect of "specified property", and did not extend to thematic warrants. Alternatively, they submitted that if the Act did authorise such warrants, it was in that respect incompatible with articles 8 and 10 of the Human Rights Convention . The Tribunal held an open hearing to determine a number of preliminary issues of law. In a judgment issued on 12 February 2016, it held that thematic warrants were lawful. The appellant began proceedings for judicial review, seeking an order quashing that decision on the ground that the Tribunal's construction of section 5(2) of the Act of 1994 was wrong in law.

171. Section 67(8) and (9) of the Regulation of Investigatory Powers Act 2000 provide:

> "(8) Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.
>
> (9) It shall be the duty of the Secretary of State to secure that there is at all times an order under subsection (8) in force allowing for an appeal to a court against any exercise by the Tribunal of their jurisdiction under section 65(2)(c) or (d) ."

The Secretary of State has not exercised his power to make exceptions from subsection (8) and the duty referred to in subsection (9) has not arisen because section 65(2)(c) and (d) has not been brought into force. The present position, therefore, is that subsection (8) stands unqualified. Section 242 of the Investigatory Powers Act 2016 has changed that by amending the Act of 2000 so as to introduce a new section 67A , allowing for appeals to the Court of Appeal in England and Wales or the Court of Session in Scotland. That section came into force on 31 December 2018, but will not apply to the Tribunal's determination in these proceedings.

172. The question at issue on this appeal is whether an application for judicial review on the ground that the Tribunal has decided an issue on a wrong view of the law, is available having regard to section 67(8) of the Act. The Divisional Court and the Court of Appeal have both held that it is not. I agree with them. I shall need to examine the law in some detail, but my reason can be shortly summarised. The effect of section 67(8) is simply to exclude the jurisdiction of the High Court to entertain a challenge to the Tribunal's decisions on the merits. In other words, it excludes judicial review on grounds which would be tantamount to an appeal. The Investigatory Powers Tribunal acts as a court. Its function is to exercise powers of judicial review over (among others) the intelligence services, which would otherwise have been exercisable by the High Court, and to do so on the same basis as the High Court. The purpose of judicial review is to maintain the rule of law. But the rule of law is sufficiently vindicated by the judicial character of the Tribunal. It does not require a right of appeal from the decisions of a judicial body of this kind. For this reason section 67(8) is not an ouster of any jurisdiction which constitutional principle requires the High Court to have.

Ouster clauses: origins

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173. Historically, the legal basis of judicial review was the concept of excess of jurisdiction. Bodies deriving their powers from statute or grant under the royal prerogative were amenable to *certiorari* in the King's Bench if they exceeded the formal or implicit limits of the grant. Strictly speaking, excess of jurisdiction was confined to want of legal competence. But the limitations of this approach led the courts in some cases artificially to expand the concept of jurisdiction to cover varieties of public law wrong that did not readily fall within established categories. In particular, it was extended to broad categories of unreasonable conduct which the grant of the relevant power was assumed not to have authorised without specific words: for example, bad faith or disregard of the rules of natural justice. The artifice became unnecessary after the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374* , in which the majority of the Appellate Committee put the grounds of judicial review on a broader basis and held that it extended generally to the exercise of justiciable public powers, including those which were not the subject of any statutory or other grant. But the historical roots of English public law have continued to influence its development, notably in the area of ouster clauses.

174. It has been recognised since the 17th century that a statute can remove the supervisory jurisdiction of the courts over inferior tribunals and administrative bodies only by clear words. In *Smith, Lluellyn v Comrs of Sewers (1669) 1 Mod 44* , the Commissioners purported to exercise a penal power to impose fines which they did not have. Sir John Kelynge, Chief Justice of King's Bench, declined to treat a statutory provision that orders of the Commissioners should be valid unless revoked by the Commissioners themselves as excluding the jurisdiction of the courts to issue certiorari. "You cannot oust the jurisdiction of this court without particular words in Acts of Parliament", he said; "there is no jurisdiction that is uncontrollable by this court." Lord Mansfield made the same point, nearly a century later, in *R v Moreley (1760) 2 Bur 1041* , when he said that "the jurisdiction of this court is not to be taken away unless there be express words to take it away." In the course of the 19th century, this proposition was applied so as to treat a statutory exclusion of the High Court's power to issue certiorari to inferior tribunals as inapplicable to cases in which the tribunal had purported to exercise a power which it did not have, or a condition precedent to the existence of a power was absent, or the court was not properly constituted. In keeping with the jurisdictional approach to judicial review, these were all cases in which the court lacked legal competence, with the result that its acts were nullities. Cases of this kind give rise to a conceptual problem that goes beyond mere construction of the statute. Where a statute confers a power on an administrative or judicial body to do some class of acts, and ousts the jurisdiction of the High Court to review its acts, the threshold question is always whether it is a body or an act to which the statute applies. If not, then the ouster clause can have no application to it. As Cockburn CJ observed in *Ex p Bradlaugh (1878) 3 QBD 509* , 513, "the section does not apply where the application for the certiorari is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction." Otherwise, a body exercising limited statutory powers would be at liberty to determine what its limits were. As Mellor J pointed out in the same case, "a metropolitan magistrate could make any order he pleased without question." If a superior court is precluded from deciding whether the statute applies to the relevant body or act, it would follow, as Lord Justice-Clerk Boyle pointed out in the early Scottish case of *Campbell v Young (1835) 13 S 535* , that "because a party says that he acts under the statute, he is to do as he pleases." His description of that suggestion as "monstrous" would be adopted by any modern public lawyer.

175. Implicit in this approach was a distinction between excesses of jurisdiction ascertained at the point where a public body embarks on the relevant function, and errors of fact or law committed in the course exercising it; and a related distinction between errors of law or fact going to the decision-maker's legal competence, and errors within competence. Lord Coleridge CJ expressed the orthodoxy of his time when he observed in *R v Justices of the Central Criminal Court (1886) 17 QBD 598* , 602, that "where a Court has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in point of law or of fact." The only power to

quash a decision within jurisdiction was the ancient and sui generis power of the King's Bench to quash for error of law on the face of the record in a case where the error was disclosed in decision-maker's reasons, if he gave any.

Anisminic v Foreign Compensation Commission [1969] 2 AC 147

176. The Foreign Compensation Commission was a statutory body created by the Foreign Compensation Act 1950 . The Act empowered Her Majesty in Council to make provision for the Commission to distribute money received by the Crown under the royal prerogative from foreign governments under international law, by way of compensation for losses suffered by British subjects in the territory of those governments. Section 4(4) of the Act provided:

> "The determination by the commission of any application made to them under this Act shall not be called in question in any court of law."

An Order in Council provided for the Commission to distribute compensation payments made by the Egyptian government after the Suez crisis. It was held to have misconstrued the provisions of the order governing Anisminic's eligibility, and thus erroneously treated Anisminic's claim as ineligible. The decision is a landmark in the development of English public law, for three reasons. First, it reaffirmed the principle, which had been well established since the 17th century, that a statutory ouster clause such as section 4(4) of the Foreign Compensation Act 1950 , if sufficiently clearly expressed, was effective to oust judicial review of any decision that was not a nullity. But it was not effective to prevent the courts from quashing a decision which was in law a nullity, ie one which, in Lord Reid's words, "does not exist as a determination," unless the clause was framed in terms which were incapable of meaning anything else. Secondly, it established that a tribunal acts without jurisdiction not only where it lacks legal competence to enter upon the inquiry in question at all, but also where "although the tribunal had jurisdiction to enter upon the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity": per Lord Reid at p 171. Thirdly, the acts or omissions which served to make the decision a nullity include errors of law if they led the tribunal to conduct an enquiry which differed from the one that it was empowered to conduct, for example by making its decision dependent on the answer to a legally irrelevant question. This was what the Commission was found to have done in Anisminic's case. It had dismissed Anisminic's claim because it considered that those who claimed to have lost their property in Egypt as a result of acts of the Egyptian state during the Suez crisis had to show that not only they but their successors in title were British. Since Anisminic had been forced to sell their Egyptian assets at an undervalue to an Egyptian company, its claim had been rejected. In the view of the Appellate Committee, the status of successors in title was, on the true construction of the Order in Council, irrelevant.

177. Lord Reid, at p 171, gave some illustrations of errors on the part of the tribunal which, without going to legal competence in its strict sense, would nevertheless invalidate the decision:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there

> are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. … It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *R v Governor of Brixton Prison, Ex p Armah [1968] AC 192* , 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses 'jurisdiction' in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law …"

The question what had been remitted to the Commission by Parliament depended on the construction of its enabling Act and of Orders in Council made pursuant to it. So, turning to Anisminic's complaint, Lord Reid concluded, at p 174:

> "If, on a true construction of the Order, a claimant who is an original owner does not have to prove anything about successors in title, then the commission made an inquiry which the Order did not empower them to make, and they based their decision on a matter which they had no right to take into account. If one uses the word 'jurisdiction' in its wider sense, they went beyond their jurisdiction in considering this matter. … It cannot be for the commission to determine the limits of its powers … if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that - not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal. If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to do and, if the view which I expressed earlier is right, their decision is a nullity."

178. Lord Morris of Borth-y-Gest was at one with his colleagues on the test to be applied, although he dissented on its application to the facts. At p 182, he expressed it in this way:

> "In all cases similar to the present one it becomes necessary, therefore, to ascertain what was the question submitted for the determination of a tribunal.

> What were its terms of reference? What was its remit? What were the questions left to it or sent to it for its decision? What were the limits of its duties and powers? Were there any conditions precedent which had to be satisfied before its functions began? If there were, was it or was it not left to the tribunal itself to decide whether or not the conditions precedent were satisfied? If Parliament has enacted that provided a certain situation exists then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists. The decided cases illustrate the infinite variety of the situations which may exist and the variations of statutory wording which have called for consideration. Most of the cases depend, therefore, upon an examination of their own particular facts and of particular sets of words. It is, however, abundantly clear that questions of law as well as of fact can be remitted for the determination of a tribunal."

179. Lord Pearce made the same distinction between errors of law which led the tribunal to address questions which it was not within their powers to determine, and other errors. At p 195, he observed:

> "Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity …
>
> The courts have, however, always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from an appellate function. … If the tribunal is intended on a true construction of the Act to inquire into and finally decide questions within a certain area, the courts' supervisory duty is to see that it makes the authorised inquiry according to natural justice and arrives at a decision whether right or wrong. They will intervene if the tribunal asks itself the wrong questions (that is, questions other than those which Parliament directed it to ask itself). But if it directs itself to the right inquiry, asking the right questions, they will not intervene merely because it has or may have come to the wrong answer, provided that this is an answer that lies within its jurisdiction."

180. Common to all the speeches in *Anisminic* was the view that the extent to which the decision-maker's errors amount to an excess of his jurisdiction depended on the breadth of the power

committed to it by the statute as a matter of construction. Lord Wilberforce agreed but proposed, at p 207, a more nuanced analysis of the effect of ouster clauses, which eschewed the language of jurisdiction and nullity with its binary test, and is perhaps more in keeping with the modern law's aversion to rigid categorisation:

> ”It is now well established that specialised tribunals may, depending on their nature and on the subject-matter, have the power to decide questions of law. and the position may be reached, as the result of statutory provision, that even if they make what the courts might regard as decisions wrong in law, these are to stand. The Foreign Compensation Commission is certainly within this category; its functions are predominantly judicial; it is a permanent body, composed of lawyers, with a learned chairman, and there is every ground having regard to the number and the complexity of the cases with which it must deal, for giving a wide measure of finality to its decisions. There is no reason for giving a restrictive interpretation to section 4(4) which provides that its 'determinations' are not to be 'called in question' in courts of law.
>
> In every case, whatever the character of a tribunal, however wide the range of questions remitted to it, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute: at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited. There is always an area, narrow or wide, which is the tribunal's area; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter. Equally, though this is not something that arises in the present case, there are certain fundamental assumptions, which without explicit restatement in every case, necessarily underlie the remission of power to decide such as (I do not attempt more than a general reference, since the strength and shade of these matters will depend upon the nature of the tribunal and the kind of question it has to decide) the requirement that a decision must be made in accordance with principles of natural justice and good faith. The principle that failure to fulfil these assumptions may be equivalent to a departure from the remitted area must be taken to follow from the decision of this House in *Ridge v Baldwin [1964] AC 40* . Although, in theory perhaps, it may be possible for Parliament to set up a tribunal which has full and autonomous powers to fix its own area of operation, that has, so far, not been done in this country. The question what is the tribunal's proper area is one which it has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality, or unquestionability upon its decisions. These clauses in their nature can only relate to decisions given within the field of operation entrusted to the tribunal. They may, according to the width and emphasis of their formulation, help to ascertain the extent of that field, to narrow it or to enlarge it, but unless one is to deny the statutory origin of the tribunal and of its powers, they cannot preclude examination of that extent.
>
> It is sometimes said, the argument was presented in these terms, that the preclusive clause does not operate on decisions outside the permitted field because they are a nullity. There are dangers in the use of this word if it draws with it the difficult distinction between what is void and what is voidable, and I certainly do not wish to be taken to recognise that this distinction exists or to analyse it if it does. But it may be convenient so long as it is used to describe a decision made outside the permitted field, in other words, as a word of

> description rather than as in itself a touchstone."

It is important to appreciate that Lord Diplock gave two independent reasons for holding that judicial review was not available. The first and principal reason was that the presumption against a statutory ouster of judicial review did not apply to the decisions of a judicial body. The second was that it could not in any event apply to decisions of the High Court. It is with the first reason that we are presently concerned. Unlike Lord Wilberforce, who had regarded the Foreign Compensation Commission as a body exercising judicial functions, Lord Diplock considered it to be an administrative tribunal. He distinguished (pp 382-383) between the two on the basis that the presumption against the ouster of judicial review depended on the scope of the decision-maker's functions, as a matter of construction of its enabling statute. The essential question was therefore the same as the one posed by Lord Wilberforce in *Anisminic* . Has the enabling Act conferred on the tribunal in question a general power to decide the questions in issue, or is its power limited to answering the questions defined in the Act? This did not mean that *Anisminic* had no application to the decisions of judicial bodies, only that the question of construction was not burdened by the same presumptions in their case. The law, he said:

> "proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined."

By comparison,

> "there is no similar presumption that where a decision-making power is conferred by statute upon a court of law, Parliament did not intend to confer upon it power to decide questions of law as well as questions of fact. Whether it did or not and, in the case of inferior courts, what limits are imposed on the kinds of questions of law they are empowered to decide, depends upon the construction of the statute unencumbered by any such presumption. In the case of inferior courts where the decision of the court is made final and conclusive by the statute, this may involve the survival of those subtle distinctions formerly drawn between errors of law which go to jurisdiction and errors of law which do not, that did so much to confuse English administrative law before *Anisminic [1969] 2 AC 147* ; but upon any application for judicial review of a decision of an inferior court in a matter which involves, as so many do, interrelated questions of law fact and degree the superior court conducting the review should not be astute to hold that Parliament did not intend the inferior court to have jurisdiction to decide for itself the meaning of ordinary words used in the statute to define the question which it has to decide."

Lord Diplock's reasoning on his first point does not depend on the fact that the decision sought to be reviewed was a decision of the High Court, and thus of a court of coordinate jurisdiction. Nor can it be brushed aside as depending on a distinction between a "court" and a judicial body of some other kind. The relevant distinction was between a judicial and an administrative body, Parliament being

in principle more likely to confer on a judicial body a power to decide wider questions of law.

186. Of particular interest in this context are the grounds on which the Appellate Committee overruled the decision of the Court of Appeal in *Pearlman v Keepers and Governors of Harrow School [1979] 1 QB 56* . In that case, the Court of Appeal, by a majority, had quashed a decision of an inferior court, namely the county court, on an application under the Housing Act 1974 to adjust the rateable value of tenanted premises, holding that the judge had erroneously construed the adjustment provisions of the Act. It had held, citing *Anisminic* in support, that a provision that the county court's decision should be "final and conclusive" was ineffective to oust judicial review. Lord Diplock (p 384) approved the dissenting judgment of Geoffrey Lane LJ, in which he had said (p 76):

> "I am, I fear, unable to see how that determination, assuming it to be an erroneous determination, can properly be said to be a determination which he was not entitled to make. The judge is considering the words in the Schedule which he ought to consider. He is not embarking on some unauthorised or extraneous or irrelevant exercise. All he has done is to come to what appears to this court to be a wrong conclusion upon a difficult question. It seems to me that, if this judge is acting outside his jurisdiction, so then is every judge who comes to a wrong decision on a point of law. Accordingly, I take the view that no form of certiorari is available to the tenant."

This analysis represents the majority view of the Appellate Committee. Lord Edmund-Davies appears to have agreed with Lord Diplock on both of his grounds. Critically for present purposes, he agreed that *Pearlman* was wrongly decided and expressly endorsed the dissenting judgment of Geoffrey Lane LJ, from which I have cited. Lord Keith agreed generally with Lord Diplock. Only Lord Salmon and Lord Scarman may be thought to have decided the matter on narrower grounds. Lord Salmon decided it solely on the second of Lord Diplock's two grounds, and Lord Scarman decided it only on the question whether the decision was appealable without considering the availability of judicial review.

187. I decline to accept that these judgments can be explained away on the ground that a tribunal is to be distinguished from a court. The Appellate Committee was concerned with a court, but the distinctive feature of a court which made its observations pertinent was that it was a judicial body. Almost all tribunals are obliged in some respects to act judicially, for example in acting fairly and without bias. But not all tribunals are judicial bodies. What matters is not the nomenclature of the decision-maker but its statutory functions. On an issue which is agreed on all sides to turn on the requirements of the rule of law, it would in my view be absurd to suggest that there is no distinction to be made between a statute providing for an administrative authority's decisions to be conclusive and a statute making corresponding provision for the decisions of a judicial body. As I shall explain, the Investigatory Powers Tribunal is indistinguishable from a court in every respect that matters to the present issue.

188. More recently, in *Lee v Ashers Baking Co Ltd [2018] 3 WLR 94* , *Racal* was considered and applied by this court. The issue was whether a statutory provision making the decision of the Court of Appeal of Northern Ireland "final", precluded a further appeal when the Court of Appeal had failed to refer a devolution issue to the Supreme Court as it had been bound to do. That question was

answered by Lord Mance (with whom the rest of this court agreed). His judgment is relevant for two reasons. First, at para 86, he adopted Lord Diplock's analysis, in particular his distinction between the presumptions to be applied to an ouster clause where the decision is that of a judicial body and those which apply where the decision is that of administrative tribunal. Secondly, he held that as a matter of construction the same language could in principle be sufficient to exclude an appeal on the merits but not an appeal on the ground that the court below had committed a procedural error or failed to perform the function with which Parliament had charged it. At para 88, he said:

> "The Court of Appeal in Northern Ireland is a superior court, but the underlying question of construction remains, whether the legislature has by article 61(7) of the 1980 Order, set out in para 63 above, excluded any right of appeal in circumstances such as the present. Article 61(1) and (7) , read together, provide for the decision of the Court of Appeal on a case stated relating to the correctness of 'the decision of a county court judge upon any point of law' to be final. They contemplate the finality of the Court of Appeal's decision with regard to the correctness of the county court judge's decision on the point of law raised by the case stated. The finality provision in article 61(7) is therefore focused on the decision on the point of law, not on the regularity of the proceedings leading to it. It would require much clearer words - and they would, clearly, be unusual and surprising words - to conclude that a focused provision like article 61(7) was intended to exclude a challenge to the fairness or regularity of the process by which the Court of Appeal had reached its decision on the point of law. Suppose the Court of Appeal had refused to hear one side, or the situation was one where some apparent bias affected one of its members. This sort of situation cannot have been contemplated by or fall within article 61(7) ."

R (Cart) v Upper Tribunal [2011] QB 120 and [2012] 1 AC 663

189. In view of the weight placed on this decision by the appellants, it is necessary to analyse the judgments with some care, although it must be borne in mind throughout that it is not direct authority on the question before us because it was not a case about ouster clauses. There was no ouster clause in the relevant statutes.

190. In the Divisional Court the issues were (i) whether the mere designation of a judicial body (in that case the Special Immigration Appeals Tribunal and the Upper Tribunal) as a superior court of record took it outside the scope of the High Court's review jurisdiction even in the absence of an ouster; and (ii) whether the scheme of the statutes from which these bodies derived their powers was inconsistent with its decisions being reviewable in the High Court even in the absence of an ouster. In an impressive judgment, Laws LJ, delivering the judgment of the Divisional Court held that the answer to (i) was No and the answer to (ii) was Yes. On issue (i), he held that the special status of the High Court as exercising a jurisdiction to keep other bodies within their powers meant that a superior court of record other than the High Court was not, simply by virtue of that status, immune from the review jurisdiction of the High Court. For present purposes, however, what matters is Laws LJ's treatment of issue (ii). He accepted that some courts and tribunals might be immune from the High Court's review jurisdiction. He expressed the basic principle as follows:

”37. The principle I have suggested has its genesis in the self-evident fact that legislation consists in texts. Often - and in every case of dispute or difficulty - the texts cannot speak for themselves. Unless their meaning is mediated to the public, they are only letters on a page. They have to be interpreted. The interpreter’s role cannot be filled by the legislature or the executive: for in that case they or either of them would be judge in their own cause, with the ills of arbitrary government which that would entail. Nor, generally, can the interpreter be constituted by the public body which has to administer the relevant law: for in that case the decision-makers would write their own laws. The interpreter must be impartial, independent both of the legislature and of the persons affected by the texts’ application, and authoritative - accepted as the last word, subject only to any appeal. Only a court can fulfil the role.

38. If the meaning of statutory text is not controlled by such a judicial authority, it would at length be degraded to nothing more than a matter of opinion. Its scope and content would become muddied and unclear. Public bodies would not, by means of the judicial review jurisdiction, be kept within the confines of their powers prescribed by statute. The very effectiveness of statute law, Parliament’s law, requires that none of these things happen. Accordingly, as it seems to me, the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it: as is the old rule that Parliament cannot bind itself. The old rule means that successive Parliaments are always free to make what laws they choose; that is one condition of Parliament’s sovereignty. The requirement of an authoritative judicial source for the interpretation of law means that Parliament’s statutes are always effective; that is another.

39. As I have said, the paradigm for such an authoritative source is the High Court, which is independent of the legislature, the executive, and any other decision-makers acting under the law; and is the principal constitutional guardian of the rule of law. In section IV(2)(a) below I discuss the historic primacy of the High Court’s predecessor, the Court of King’s Bench. To offer the same guarantee of properly mediated law, any alternative source must amount to an alter ego of the High Court; and indeed there are instances where the authoritative source is another court, such as the Courts-Martial Appeal Court and the Restrictive Practices Court: see the reference, at para 71, below to *R v Cripps, Ex p Muldoon [1984] QB 68* . But the general principle is clear. The rule of law requires that statute should be mediated by an authoritative and independent judicial source; and Parliament’s sovereignty itself requires that it respect this rule.”

Turning to the position of the SIAC and the Upper Tribunal, he observed:

”78. The answer to these questions requires a closer look at what I have described as the overriding foundation for the grant of judicial review: an excess of jurisdiction by the subject court. This concept possesses (at least) two different meanings. The first denotes the case where a court travels into territory where it has no business. Thus a court whose jurisdiction is limited to claims of a pleaded value of £5,000 or less would exceed its jurisdiction if it entertained a claim pleaded at £10,000; or if it adjudged a suit arising in

> Derbyshire though its jurisdiction was limited to County Durham. The second meaning of excess of jurisdiction denotes the case where, acting within the field ascribed to it, the court gets the law wrong. The first of these meanings is almost always unproblematic. The territory of a court's jurisdiction conferred by statute will depend, plainly, on the terms of the statute. (The same is of course true of the reach of executive power conferred by statute on a minister or other public decision-maker.) The territory's edge will usually be sharp enough.
>
> 79. But the second meaning of excess of jurisdiction has given rise to more difficulty. A court acts in excess of jurisdiction by getting the law wrong if it is not the final judge (subject to any statutory appeal) of the law it has to apply. If it is not, it exceeds its jurisdiction if it makes a legal error, and in that case the High Court as successor to the King's Bench may issue a certiorari (nowadays, a quashing order) to correct the error. By contrast if the court in question is the last judge of the applicable law (subject as I have said to any right of appeal) it will not exceed its jurisdiction by perpetrating a legal error, and the High Court will have no corrective or supervisory role.
>
> …
>
> 81. We may see, then, that the question whether SIAC or UT is amenable to the judicial review jurisdiction has more than one layer. (1) Is either body reviewable for excess of jurisdiction in the first sense of the term (transgression beyond the boundaries of its permitted subject matter)? (2) Is either reviewable for excess of jurisdiction in the second sense, as being liable to correction for error of law, albeit committed within those proper boundaries? Or is it a court possessing the final power (subject to appeal) to interpret for itself the law it must apply?"

Applying that test, he held that the SIAC was but the Upper Tribunal was not amenable to judicial review in the High Court. The difference between them was that the Upper Tribunal was "the alter ego of the High Court", but the SIAC was not. This was because the Upper Tribunal was itself exercising a power of judicial review equivalent to that of the High Court. The distinction is encapsulated in Laws LJ's observations at para 94:

> "In my judgment UT is, for relevant purposes, an alter ego of the High Court. It therefore satisfies the material principle of the rule of law: it constitutes an authoritative, impartial and independent judicial source for the interpretation and application of the relevant statutory texts. It is not amenable to judicial review for excess of jurisdiction in the second sense: the case where, albeit acting within the field ascribed to it, the court perpetrates a legal mistake. It is a court possessing the final power to interpret for itself the law it must apply … And it must, I think, be obvious that judicial review decisions of UT could not themselves be the subject of judicial review by the High Court."

191. In the Court of Appeal the position of the SIAC was no longer in issue. Sedley LJ, delivering the judgment of the court, rejected the suggestion that the Upper Tribunal was the alter ego of the High Court and denied that that was the test. In his view (para 20) all courts other than the High Court itself were in principle amenable to judicial review in the High Court in the absence of a sufficiently clear ouster clause. But he thought that while the Upper Tribunal was amenable to judicial review, the scope of review of a body such as the Upper Tribunal was limited, because the scheme of the Tribunals, Courts and Enforcement Act 2007 required the tribunal system to be treated as autonomous. It therefore implicitly provided (para 42) for "the correction of legal error within rather than outside the system." It followed that judicial review extended only to what Sedley LJ called "outright" excess of jurisdiction, ie the exercise of powers that the tribunal did not have. At paras 36-37, he expressed the distinction thus:

> "36. It seems to us that there is a true jurisprudential difference between an error of law made in the course of an adjudication which a tribunal is authorised to conduct and the conducting of an adjudication without lawful authority. Both are justiciable before the UT if committed by the FTT, but if committed by the UT will go uncorrected unless judicial review lies. The same of course is true of errors of law within jurisdiction; but these, in our judgment, reside within the principle that a system of law, while it can guarantee to be fair, cannot guarantee to be infallible. Outright excess of jurisdiction by the UT and denial by it of fundamental justice, should they ever occur, are in a different class: they represent the doing by the UT of something that Parliament cannot possibly have authorised it to do.
>
> 37. Thus if for some reason the UT made an order giving a money judgment which it had no power to give, with the possibility of enforcement under its section 25 powers, it would be inimical to the rule of law if the High Court could not step in, should the appellate system for some reason not do so. Similarly if a member of the UT were to sit when ineligible or disqualified by a pecuniary interest, or if the UT conducted a hearing so unfairly as to render its decision a nullity, the High Court ought to be able to quash the determination. We do not mean this list to be exhaustive but to be illustrative of the kind of error, rare as it will be, which would take the UT outside the range of its decision-making authority. Such a division is, we consider, one of legal principle which can properly form the basis of judicial policy. It applies only to the UT, since it is the role of the UT itself to correct errors of every kind, including outright excesses of jurisdiction and fundamental denials of justice, in the FTT."

The Court of Appeal accepted that this might mean that the Upper Tribunal had "the potential to develop a legal culture which is not in all respects one of lawyers' law."

192. In the Supreme Court the sole issue was whether this implicit limitation on the scope of the jurisdiction to review decisions of the Upper Tribunal was justified. As Baroness Hale pointed out at para 37 (and again at paras 29 and 40), the starting point was that "there is nothing in the 2007 Act which purports to oust or exclude judicial review of the unappealable decisions of the Upper Tribunal. Clear words would be needed to do this and they are not there." Any limitation therefore had to be implicit, as the Court of Appeal had held it was. The Supreme Court accepted that a restrained approach should be taken to the granting of leave, but rejected the Court of Appeal's distinction

between errors of law and "outright" excess of jurisdiction. It is important to appreciate that both the Court of Appeal and the Supreme Court regarded the question whether there was an implicit limitation of the scope of judicial review as a question of judicial policy. The difference between them was about what the relevant policy considerations were. In the Supreme Court's view, the main policy consideration was the undesirability of allowing the Upper Tribunal to become (in Lady Hale's words) the "final arbiter of the law", in case inferior courts should undermine the coherence of the law by developing their own "local law" (para 43). This concern, which was mentioned by the Court of Appeal but had not troubled them, was central to the reasoning of this court. Nothing in this court's analysis suggests that policy considerations of this kind would have been relevant, let alone decisive, if the issue had been the meaning and effect of an ouster clause. Nothing in the judgments promotes the undesirability of "local laws" from an interpretative presumption to a constitutional principle. The real significance for present purposes of this court's decision in *Cart* lies in its recognition that the rule of law does not necessarily require that the decisions of an inferior tribunal be subject to a power of review, even where they are unappealable: see in particular paras 89-90 (Lord Phillips of Worth Matravers), and paras 122-124 (Lord Dyson). Lord Dyson (with whom the rest of the court all agreed) referred to the status of the Upper Tribunal as a court performing functions equivalent to those of the High Court, and observed at para 122:

> "Prima facie, judicial review should be available to challenge the legality of decisions of public bodies. Authority is not needed (although much exists) to show that there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review. But the scope of judicial review should be no more (as well as no less) than is proportionate and necessary for the maintaining of the rule of law. The status and functions of the Upper Tribunal to which I have already referred are important here."

The Investigatory Powers Tribunal

193. It follows from the modern authorities that the approach to be taken to section 67(8) of the Regulation of Investigatory Powers Act 2000 depends on the character of the Tribunal's functions, the nature of the error of law of which it is accused by the appellant, and the construction of section 67(8) as applied to alleged errors of that kind.

194. The functions of the Investigatory Powers Tribunal are defined by section 65 of the Act. Section 65(2) is in the following terms:

> "(2) The jurisdiction of the Tribunal shall be -
>
> (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;
>
> (b) to consider and determine any complaints made to them which, in

> accordance with subsection (4) are complaints for which the Tribunal is the appropriate forum;
>
> (c) to consider and determine any reference to them by any person that he has suffered detriment as a consequence of any prohibition or restriction, by virtue of section 17 , on his relying in, or for the purposes of, any civil proceedings on any matter; and
>
> (d) to hear and determine any other such proceedings falling within subsection (3) as may be allocated to them in accordance with provision made by the Secretary of State by order."

The jurisdiction invoked by the present appellant is founded on sections 65(2)(a) and (b) . Proceedings falling within subsection (2)(a) are, in summary, proceedings in respect of alleged contraventions of the Human Rights Convention against the intelligence services or those acting on their behalf, or against the authorities empowered to require the disclosure of electronic encryption keys. It also applies to the authorisation under statutory powers of what would otherwise be unlawful conduct by such bodies. The Tribunal has exclusive jurisdiction in respect of these proceedings and, under section 67(1)(a) , a duty to "hear and determine" them. Complaints under subsection (2)(b) are, in summary, proceedings challenging the interception of communications by the intelligence services and other investigatory authorities, or warrants authorising such interception. Under section 67(1)(b) , the Tribunal has a duty to "consider and determine" them, but its jurisdiction in respect of these complaints is not exclusive.

195. Section 67 regulates the manner in which the Tribunal's jurisdiction is to be exercised. It provides, so far as relevant:

> "(2) Where the Tribunal hear any proceedings by virtue of section 65(2)(a) , they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review.
>
> (3) Where the Tribunal consider a complaint made to them by virtue of section 65(2)(b) , it shall be the duty of the Tribunal -
>
> (a) to investigate whether the persons against whom any allegations are made in the complaint have engaged in relation to -
>
> (i) the complainant,
>
> (ii) any of his property,
>
> (iii) any communications sent by or to him, or intended for him, or
>
> (iv) his use of any postal service, telecommunications service or telecommunication system,
>
> in any conduct falling within section 65(5) ;

> (b) to investigate the authority (if any) for any conduct falling within section 65(5) which they find has been so engaged in; and
>
> (c) in relation to the Tribunal's findings from their investigations, to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review."

196. The importance of ensuring the confidentiality of secret material is implicit in the kind of matters with which it deals, and is reflected in a number of provisions of the Act. In the first place, section 69(3) imposes a duty on the Tribunal to carry out its own investigation of complaints brought before it, and section 68 empowers it to call for the assistance of the services in question and their officials. This is an inquisitorial power in whose exercise the complainant does not participate. Secondly, section 69 empowers the Secretary of State to make rules for the Tribunal, having regard in particular to the need to secure that they are properly heard and considered and that information is not disclosed to an extent or in a manner which is "contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services." Thirdly, section 66 empowers the Secretary of State by order to allocate further proceedings to the Tribunal, having regard in particular to the same matters. Fourthly, section 68(4) provides that in notifying to the complainant its determination of any proceedings or complaints, the Tribunal is to say only that they have made a determination in his favour or that they have not done so. It is plain that Parliament considered that ordinary proceedings in the High Court presented an unacceptable risk that secret material would be disclosed, contrary to the public interest, and that a major factor in the decision to allocate proceedings to the Tribunal was that its special procedures would reduce that risk. It was submitted to us that Parliament's concerns on this score were unjustified, because as the law was (wrongly) understood in 2000, closed material procedure was available in High Court proceedings. This submission is in my view misconceived. For the purpose of construing the Act, what matters is whether Parliament had those concerns, not whether they were justified. The terms of the Act are themselves enough to show that it did.

197. The Investigatory Powers Tribunal is a judicial body. Schedule 3 to the Act provides that its President must hold or have held high judicial office, and its other members must either have held high judicial office or have had a relevant legal qualification for at least seven years. It is a tribunal of limited jurisdiction which enjoys neither the status nor all of the powers of the High Court. But for this purpose, as I have observed, what matters is not the label but the statutory functions of the Tribunal. Those functions are judicial in an altogether more significant sense than those of the Foreign Compensation Commission. The critical point is that the Tribunal exercises a power of judicial review which would otherwise be exercised by the High Court. By section 67(2) , it is required to apply the principles which would be applied by the High Court on an application for judicial review. In relation to proceedings under section 65(2)(a) complaining of a contravention of human rights, this jurisdiction is exclusive, displacing that of the High Court. In relation to complaints under section 65(2)(b) , it is a concurrent jurisdiction, but is likewise required by section 67(3)(c) to apply the principles which would be applied by the High Court on an application for judicial review. In these respects the Tribunal is not an "inferior" tribunal. Its adjudicative jurisdiction is coordinate with that of the High Court. In *R (A) v Director of Establishments of the Security Service* , *supra* , at para 23, Lord Brown of Eaton-under-Heywood, observed of the provision of section 65(2)(a) conferring exclusive jurisdiction on the Tribunal over human rights claims that the exclusion of the High Court's

review jurisdiction "has not ousted judicial scrutiny of the intelligence services; it has simply allocated that scrutiny (as to section 7(1)(a) HRA proceedings) to the IPT." Lord Brown adopted the statement of Laws LJ in the Court of Appeal that section 65 was among a class of:

> "statutory measures which confide the jurisdiction to a judicial body of like standing and authority to that of the High Court, but which operates subject to special procedures apt for the subject matter in hand, may well be constitutionally inoffensive. The IPT …offers …no cause for concern on this score."

198. This was also the essence of the reasoning of Laws LJ in *Cart* . He regarded the Upper Tribunal as an "alter ego of the High Court", in the sense that while lacking the status of the High Court, it performed within its subject area the same functions in the same judicial fashion as the High Court. It therefore satisfied the material principle of the rule of law: see para 94 of his judgment. The Court of Appeal and the Supreme Court regarded that as insufficient to warrant implying a limitation of the scope of judicial review, and nothing that I say is intended to undermine their view. But Laws LJ's analysis is an illuminating explanation of the difference between an ouster of judicial review and a limitation of its scope to controlling the purported exercise of powers that the decision-maker did not have. That analysis is of considerable value in a case (unlike *Cart*) where an express statutory provision excludes judicial review of the legal merits of a tribunal's decisions, without impinging on the High Court's traditional jurisdiction to review "outright" excesses of jurisdiction. The next question, to which I now turn, is whether that is the effect of section 67(8) of the Regulation of Investigatory Powers Act .

Section 67(8)

199. It is agreed on all sides that the meaning of this provision is a question of construction. It is also agreed that clear words are required if it is to be regarded as ousting the review jurisdiction of the High Court. However, we must not lose sight of the reason why clear words are required. The reason is, as all the authorities (and indeed Lord Carnwath in his judgment in the present case) agree, that Parliament is presumed not to legislate contrary to the rule of law. As Lord Hoffmann pointed out in *R (Simms) v Secretary of State for the Home Department [2000] 2 AC 115* , p 131, "that Parliament must squarely confront what it is doing and accept the political cost". The degree of elaboration called for in a statutory provision designed to achieve a given effect must depend on how anomalous that effect would be. In this case, the words must be sufficiently clear to authorise a departure from the normal state of affairs, which is that the High Court has jurisdiction by way of review over the acts of lower courts. That is not the same as saying that the words must be such as to authorise a departure from the rule of law. There is nothing inconsistent with the rule of law about allocating a conclusive jurisdiction by way of review to a judicial body other than the High Court. The presumption against ouster clauses is concerned to protect the rule of law, which depends on the availability of judicial review. It is not concerned to protect the jurisdiction of the High Court in some putative turf war with other judicial bodies on whom Parliament has conferred an equivalent review jurisdiction.

251. The IPT does not form part of Her Majesty's Courts and Tribunal Service. In effect it has total autonomy. In his Report of the Review of Tribunals dated March 2001 Sir Andrew Leggatt said at

para 3.11 that the IPT's concern with security required it to be separate from all other tribunals and that the Senior President of Tribunals would not be in a position to take charge of it.

252. Parliament has therefore conferred both independence and authority upon the IPT. In the *A* case Lord Brown, with whom all other members of the court agreed, endorsed at para 23 the conclusion of Laws LJ in the court below that the IPT was "a judicial body of like standing and authority to that of the High Court".

253. In the above circumstances I conclude that Parliament does have power to exclude judicial review of any ordinary errors of law made by the IPT. My answer to the second question posed at the outset of this judgment, if limited to the sort of determination relevant to this case, namely to an ordinary determination of law, is "yes".

254. So I would have dismissed the appeal.

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The King on the Application of Mary Jane Baluden Oceana v Upper Tribunal (Immigration and Asylum Chamber) v Secretary of State for the Home Department

Positive/Neutral Judicial Consideration

Court
King's Bench Division (Administrative Court)

Judgment Date
4 April 2023

Case No: CO/3812/2022

High Court of Justice King's Bench Division Administrative Court

[2023] EWHC 791 (Admin), 2023 WL 02772502

Before : The Honourable Mr Justice Saini

Date: 04/04/2023

Hearing dates: 29 March 2023

Representation

Rajiv Sharma (instructed by Paul John and Company) for the Claimant.
The Defendant did not appear and was not represented.
John-Paul Waite (instructed by Government Legal Department) for the Interested Party.

Approved Judgment

Mr Justice Saini

Overview

1. This is the trial of a preliminary issue as to jurisdiction in a claim for judicial review. The Claimant is a citizen of the Philippines. She came to the United Kingdom as a student in 2008 but outstayed her permission to remain. She became liable to be removed from the United Kingdom and then applied for leave to remain here on grounds of her private life. That application was refused by the Interested Party ("the SSHD"). The Claimant appealed this refusal to the First-tier Tribunal ("the FTT"). That appeal was dismissed by First-tier Tribunal Judge Isaacs ("FTJ Isaacs") on 14 April 2022. Another First-tier Tribunal Judge, FTJ Scott, refused her application for permission to appeal to the Upper Tribunal, as did a judge of the Upper Tribunal, UTJ Kopieczek. The Claimant then sought judicial review of that Upper Tribunal decision.

2. Permission to apply for judicial review of that decision was obtained on "the papers" without the Claimant having drawn attention, in her claim, to the terms of section 11A of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") . That section ousts the supervisory jurisdiction of the High Court in judicial review proceedings, subject to a number of specific exceptions. The Defendant had taken no part in the permission stage and did not serve summary grounds, in accordance with normal practice where the named Defendant is a court or tribunal. However, following the grant of permission, the SSHD raised the section 11A jurisdictional issue with the Court. She argued that the High Court had no jurisdiction to hear the claim.

3. By Order dated 3 February 2023, a Judge made directions for the trial of a preliminary issue with the following observations:

> "The issue as to jurisdiction was overlooked at permission stage. I anticipate that the Claimant will concede it. If she does not, then it should be dealt with as a preliminary issue. This procedure will further the overriding objective by avoiding the time and expense of preparing for, and conducting, a full substantive hearing, including obtaining a recording of the Claimant's evidence in the First-tier Tribunal, when it may well be academic because the Court does not have jurisdiction to hear the claim".

4. The Claimant refused to accept these points and to concede that the High Court had no jurisdiction and accordingly directions were given for the trial of the preliminary issue which is before me. At the conclusion of oral submissions on 29 March 2023, I indicated I would dismiss the claim on jurisdictional grounds. These are my reasons.

The dispute

5. I begin with the relevant terms of section 11A of the 2007 Act . It was added to the 2007 Act by section 2 of the Judicial Review and Courts Act 2022 , and came into force on 14 July 2022.

6. With my underlined emphasis, section 11A of the 2007 Act provides:

> "'11A Finality of decisions by Upper Tribunal about permission to appeal
>
> Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b) .
>
> <u>The decision is final, and not liable to be questioned or set aside in any other court.</u>

In particular—

the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;

the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.

Subsections (2) and (3) do not apply so far as the decision involves or gives rise to any question as to whether —

the Upper Tribunal has or had a valid application before it under section 11(4)(b),

the Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or

the Upper Tribunal is acting or has acted-

in bad faith, or

in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

….

”decision” includes any purported decision;

”first-instance decision” means the decision in relation to which permission (or leave) to appeal is being sought under section 11(4)(b);

”the supervisory jurisdiction” means the supervisory jurisdiction of—

…the High Court, in England and Wales or Northern Ireland

…”

7. The Claimant does not accept this provision precludes her claim. Her Counsel makes two points. First, he says her complaint falls within an expressly permitted exception to the general ‘finality’ rule - the “natural justice” exception (see my underlining above). In the alternative, he argued that the “ouster” of the High Court’s supervisory jurisdiction is ineffective in this case for a number of reasons (some narrow and some of a broader nature). In response, the SSHD says that the complaint does not even arguably fall within the “natural justice” exception; and that the section is a clear and valid exclusion of the supervisory jurisdiction, which applies on the facts before me.

8. The SSHD also makes a number of points on the merits about the arguability of the underlying claim, aside from the jurisdictional finality objection. Those matters are not strictly before me because I am, in accordance with the directions for this hearing, limited to considering the jurisdictional issue. Counsel for the Claimant also stressed that his client still disputes what the tribunals below understood she said in evidence before FTJ Isaacs. This is a surprising submission given that a transcript of the recording is now available. I will however make no findings but will simply record as part of the narrative what is said by each side in order to explain the context in which the "natural justice" exception to the ouster is invoked by the Claimant.

II The Facts

9. The Claimant is a national of the Philippines who entered the UK on 22 January 2008 as a student. She was given a series of grants of leave to remain as a student until 15 July 2016. At the material times, her home residence was in Feltham, West London. From 25 March 2012 until the curtailment of her leave in 2015 the Claimant was studying at an institution called Eynsford College. The address of this College was 37-39 Oxford Street, London W1D 2DU.

10. In 2015, the Home Office determined that the Claimant had fraudulently used a proxy to complete an oral English language test at an institution called Eden College International ("Eden College") on 25 September 2013. That is, using another person to sit the test for her. The Claimant had relied upon having sat and passed this test in an application for leave to remain which she made on 4 October 2013. At the time when this test was said to have been taken, and thereafter, the Claimant was studying at Eynsford College in Central London. Eden College was at the material time located in the Mile End Road in East London. As explained by FTJ Isaacs in her decision - see [13] below - Eden College has been established in other court proceedings to be an institution where testing frauds were rife.

11. The Claimant's leave was curtailed with immediate effect on 15 October 2015. The Claimant's scores from the language test had been cancelled by the Educational Testing Service (ETS) because of claimed fraud. The Home Office decided that the Claimant's presence in the United Kingdom was not conducive to the public good because of her fraud in obtaining a TOEIC test certificate. The Claimant made no challenge at that time to the allegation of fraud. She then unlawfully remained in the UK thereafter and was eventually served with notice of her liability to removal as an overstayer. On 22 November 2019, the Claimant applied for leave to remain on the basis of her private life. That application was refused by the SSHD on 25 February 2021. This decision was the subject of the appeal before the FTT which was heard by FTJ Isaacs on 11 April 2022.

12. In addition to giving oral evidence to FTJ Isaacs, the Claimant submitted a detailed written statement in support of her case. That statement did not suggest that she completed the English Language Test at Eden College because it was close to the college at which she was studying. Her written witness evidence in relation to why she took the test at Eden College (including her journey to get there) was in the following terms:

> "15. I submit that I sat the TOEIC test and this was submitted as part of a UK visa application. I sat the test at Eden College International, 401 Mile End Road, Bow, E3 4PB.

> 16. At the time of application this was an approved test by the Respondent and therefore there was no issues or circumstances to doubt the test. It was equivalent to any other English language test. At the time also it was a very common test amongst students and it was recommended by my College.
>
> 17. I sat my test on 25 September 2013. I travelled to the test centre by bus and train. The journey was from Richmond to Mile End on the district line. This journey was roughly 1 hour by train. Richmond station was roughly 30-45 minutes by bus from my home depending on the traffic. At the time, I was living at Wigely Road, Feltham, Middlesex, TW13 5HF, UK. This was roughly 2 hours away from the test centre. I got off at Mile End station and then had a 5 minute walk from there to the test centre at Eden College International.
>
> 18. The test centre was located on the 1st and 2nd floor of the building. I did not attend any prior classes to the tests. I was confident in my level of English Language and therefore did not feel the need to take training. I paid £700 for the test fee. I paid in cash to my college. My college was called Eynsford College. They booked the test for me.
>
> …
>
> 26. I further submit that I decided to sit the TOEIC test as it was recommended by my college. I did consider sitting another English language test, that being the IEL TS, however my college advised me to sit the TOEIC test as the results arrive faster" .

13. The Claimant's appeal was dismissed by FTJ Isaacs on 17 April 2022. The Judge concluded for a number of reasons that she had indeed fraudulently used a proxy to take the test. As to Eden College, FTJ Isaacs said:

> "[15] The case of *RK and DK* at paragraph 67 and 68 makes it clear that the prevalence of fraud at an institution is relevant. At Eden College 77% of tests were found to be invalid and 23% questionable this cheating was rife at this particular college. At paragraph 117 of the case it is stated that the respondent's evidence in these kind of cases is not unreliable. Furthermore this appellant's look up tool returned her test as invalid and the reliability of the look up tool in general has never been in doubt".

14. In relation to the Claimant's oral evidence, one of the findings of FTJ Isaacs was as follows (with my underlining):

> ”[35] Secondly, her explanation as to why she chose to travel so far from her home in West London to this particular test centre [Eden College] was not convincing. She said she wanted the result quickly and that her college advised her that the tests carried out at Eden College could provide results quickly. She did not explain why she needed the result quickly – from her immigration history she was experienced in extending her leave and she appears to have made her applications for extensions close to the expiry of existing leave. She has given no explanation as to why a quick turnaround on her result was a key factor on this occasion and in oral evidence she simply said that her college had told her to go to the centre in Mile End Road. She told me that in 2010 she had taken an IELTS test at a centre in Acton. Therefore, I did not find her explanation as to why she travelled across London to Eden College to take the test in 2013 was credible”.

15. The overall conclusion of FTJ Isaacs was in the following terms (with my underlining):

> ”[37] …The appellant has not explained in a credible manner why she did not take issue with the allegation of deception as soon as it was made. This is because she has only mentioned for the first time at the tribunal hearing that she had taken previous legal advice and been told her case was hopeless. In addition she has made inquiries at ETS but only following the refusal of her current application and seemingly as part of her preparation for this appeal. The evidence she gave about travelling to the test centre added nothing to her case because she could have travelled to the test centre as normal and still used a proxy. She has not given a credible explanation as to why she chose to take a test on the other side of London to where she was living at the time for the reason I have explained above. I have considered that the appellant's performance in previous and subsequent English tests indicates that there was no logical reason for her to cheat. However this is the only piece of evidence which weighs in her favour and in my view it does not outweigh the combined weight of respondent's evidence that the appellant used a proxy, the appellant's failure to give a credible explanation as to why she took the test at Eden College in the Mile End Road and the lack of a credible explanation for her failure to take issue with the ETS cancelling of her scores until 6 months after she had lodged her appeal.
>
> [38] Therefore, I find on the balance of probabilities that the appellant did use deception to obtain the English language certificate submitted with her application on 4 October 2013”.

16. On 4 May 2022, the Claimant applied for permission to appeal against the dismissal of her appeal by FTJ Isaacs. That came on the papers before FTJ Scott. Amongst a range of complaints about FTJ

Isaacs' decision, the Grounds of Appeal stated that there was a plausible reason why the Claimant had sat the test at Eden College, namely that it was close to her existing school. The Grounds further argued that FTJ Isaacs had made an error of fact in failing to accurately record her oral evidence to that effect. The nature of the complaint made in the Grounds is recorded in the following terms in FTJ Scott's refusal of permission:

> "…the appellant submits that the Judge's recollection of the appellant's evidence is 'materially inaccurate', and that the appellant's response under cross-examination by the respondent to the question 'Why did you choose this test centre' was 'It was near my school. The college told me to get this test here.' The submissions state that the appellant had expressly stated that the reason she 'travelled across London' to take the test at Eden College was because it was near her school. The submissions state, 'On the face of it, this is a completely reasonable explanation for why she would travel from West London to East London for the test if the centre is near her school where she would have to travel to anyway."

17. In refusing permission to appeal, FTJ Scott addressed this particular ground in the following terms:

> "For the purpose of assessing the merits of the appellant's application for permission to appeal, I have listened to the recording of the appellant's evidence in order to verify what the appellant said in cross-examination. She stated, 'It was advised to me by my school because I used to attend in Ilsford college, so they are the one who told me to go there and take the exam.' It is apparent from the recording that the appellant did not state that the test centre was near her school. She refers to a school college where she used to attend advising her to attend at that test centre. I find that the Judge did not make a material mistake of fact in stating what the appellant had said".

18. FTJ Scott refused permission on this and a number of other grounds on 29 August 2022. The SSHD says that an official transcript of the Claimant's oral evidence (taken from the recording) supports FTJ Scott's recitation of what is heard on the tape. I have been provided with the transcript (attached to the SSHD's skeleton argument) and it does appear to support what FTJ Scott said. The Claimant does not say in the transcript that she was told to attend Eden College because it was near her school.

19. On 17 May 2022 (some five months before the above refusal of permission by FTJ Scott) the Senior President of the Tribunal issued a Practice Direction in respect of the Immigration and Asylum

Chamber First Tier Tribunal. It includes the following provisions as regards recordings:

> ”12. Record of proceedings
>
> 12.1 The Tribunal will keep a record of the proceedings of every hearing.
>
> 12.2 The record of proceedings referred to in paragraph 12.1 will normally be an audio recording rather than a written record. Accordingly, any written record of the proceedings taken by the Tribunal will only be disclosed to the parties if an audio recording was not made or has become unavailable.
>
> …
>
> 12.3 Any application made to the Tribunal for disclosure of the record of proceedings shall be considered by the President”.

20. The Claimant renewed her application for permission to appeal to the Upper Tribunal without making an application to the President for disclosure of the Record of Proceedings. She restated the assertion that FTJ Isaacs had failed to accurately record her oral evidence to the effect that Eden College was close to her school. Permission was refused by UTJ Kopieczek on 29 August 2022 on all grounds. As to the discrete complaint about her evidence on why she took the test at Eden College, the UTJ said:

> ”There is nothing in the point raised in the grounds about the FtJ’s understanding of the evidence in terms of why the appellant went to that particular college for the test. It would appear accurate given that First-tier Tribunal judge Scott in refusing permission to appeal listened to the recording and she did not say that Eden College was near her school. In any event, the FtJ did not find the appellant’s evidence credible in terms of why she wanted a result quickly; said to have been another reason for going to Eden College. The FtJ explained why she came to that view”.

21. The Claimant applied to judicially review the refusal of permission to appeal. Her grounds of challenge argue that the parties ought to have been provided with the audio recording by the Upper Tribunal, and invited to comment prior to the UTJ reaching his decision. That is the core submission in the arguments said to ground the natural justice complaint. However, the pleaded grounds for judicial review were directed to showing how the so-called *second appeals* test was satisfied by the application (referring to the Cart case: see [23] below). The grounds failed to refer to the applicable legislation in section 11A of the 2007 Act .

22. On 7 November 2022, permission to pursue this ground was granted by a Judge of this Court without regard to the terms of s11A of the 2007 Act . The Judge's reasons show he applied the Cart JR test. After setting out the nature of the dispute about what the Claimant says she said as to why she took the test at Eden College, the Judge explained that "…this judicial review raises an important point of practice and that there is a compelling reason to permit it to proceed. If the actual evidence given at a hearing does not accord with the judge's findings of fact on a relevant matter, or a clear error of misunderstanding has been made on a relevant matter, the appellant rights should be properly aired on an appeal".

23. On 15 December 2022, Detailed Grounds were lodged by the SSHD drawing attention to section 11A of the 2007 Act which came into force on 14 July 2022 and applied to the application made to the High Court (the Upper Tribunal decision was made on 29 August 2022). Counsel for the Claimant (who drafted the grounds for judicial review) accepted before me that he should have referred to that section in his grounds and apologised for his oversight. The terms of the Judge's grant of permission reflect the old law on so-called "Cart JR" cases, after Cart v Upper Tribunal [2011] 11 UKSC 28; *[2012] 1 AC 263* . The Judge's preamble to his reasons show he directed himself specifically by reference to the Cart principles. The grounds for judicial review, wrongly, directed the Judge to apply those principles which have been superseded by the terms of section 11A of the 2007 Act .

24. The Administrative Court Guide (2022) helpfully summarises the position both before and after section 11A of the 2007 Act came into force. The material part of the 2022 Guide provides as follows:

> "9.7 Procedure where the Upper Tribunal is the defendant
>
> 9.7.1 In most cases, decisions of the Upper Tribunal are subject to appeal. Decisions subject to appeal should not be challenged in judicial review proceedings because the appeal is an adequate alternative remedy. However, where the Upper Tribunal decision is one refusing permission to appeal from the First tier Tribunal, there is no further right of appeal. In that case, the only route of challenge is by judicial review, naming the Upper Tribunal as defendant and there is a special procedure for judicial review in CPR 54.7A .
>
> 9.7.2 A party seeking to challenge a decision of the Upper Tribunal should consider whether the decision was taken before or after 14 July 2022, the date on which s. 2 of the Judicial Review and Courts Act 2022 was commenced:
>
> > 9.7.2.1 Where the Upper Tribunal's decision was taken before 14 July 2022, the Court will only grant permission to apply for judicial review if it considers that: there is an arguable case which has a reasonable prospect of success that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law;

> and either the claim raises an important point of principle or practice or there is some other compelling reason to hear the claim: see CPR 54.7A(7) .
>
> 9.7.2.2 Where the Upper Tribunal's decision was taken on or after 14 July 2022, parties should bear in mind in addition that the High Court's judicial review jurisdiction is ousted except "so far as the decision involves or gives rise to any question as to whether—
>
> (a) the Upper Tribunal has or had a valid application before it under section 11(4)(b) ,
>
> (b) the Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or
>
> (c) the Upper Tribunal is acting or has acted—
>
> (i) in bad faith, or
>
> (ii) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice
>
> …".

III Section 11A of the 2007 Act

25. Given the wide-ranging nature of the arguments made on behalf of the Claimant, particularly in relation to her second ground (concerning effectiveness of the ouster), I must briefly address the history of this section and its purpose. Following the Government's Manifesto commitment to "ensure that Judicial Review is available to protect the rights of the individual against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays", the Independent Review of Administrative Law ("the IRAL") was established on 3 July 2020 to examine trends in judicial review and make recommendations for reform.

26. The IRAL was conducted by a distinguished panel of public law experts. Insofar as presently material, these experts concluded:

> "…the continued expenditure of judicial resources on considering applications for a Cart JR cannot be defended, and that the practice of making and considering such applications should be discontinued".

27. Following consultation, the Government introduced the Judicial Review and Courts Bill 2022 (”the Bill”). I note that the relevant clause in its original form referred (in describing the exception to the proposed exclusion of the supervisory jurisdiction) to the Upper Tribunal acting “in fundamental breach of the principles of natural justice.” During its passage through Parliament, the relevant clause in the Bill was amended to refer to the Upper Tribunal acting “in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice”. That is how it now stands. The purpose of the amendment was to clarify that the fundamental breach of natural justice must be procedural in nature: see hyperlink Hansard - UK Parliament .

28. In his written submissions, Counsel for the Claimant argued that section 11A is inconsistent with the decision of the Supreme Court in Cart . The Claimant’s submission however ignores the fact that Section 11A was intended to overturn that very decision. Thus, in introducing the Bill in the House of Lords the Parliamentary Under Secretary of State at the Ministry of Justice observed as follows:

> ”…Clause 2 implements another recommendation of the independent review: it ousts the supervisory jurisdiction of the High Court and Court of Session over the Upper Tribunal under certain circumstances. This overturns a Supreme Court judgment in 2011 that established what is now commonly known as a Cart judicial review…”

29. I turn to the language of the section. Giving section 11A its plain and ordinary meaning, its effect is to abolish the right to judicially review a refusal of permission by the Upper Tribunal, save in the specific circumstances set out in s11A(4). To retain jurisdiction, the Administrative Court must make an objective assessment as to whether one or more of those circumstances arguably arise on the facts of the case. The necessity for such an assessment stems from the words “ *involves or gives rise to any question”* in section 11A(4) . If, on an objective analysis of the case by the Court, no such issue or question arguably arises then the Court must decline jurisdiction. The above analysis will ordinarily be undertaken at the permission stage.

30. In addition to being satisfied that the complaint arguably falls within an exception, the Judge will need to be satisfied that the complaint itself has sufficient merit to meet the traditional JR “arguability” threshold. But that only arises if a claimant gets through one of the jurisdictional gateways (the exceptions).

31. I pause here to note that the issue of why the Claimant chose to travel from Feltham in West London to take her test at Eden College in East London (and her now disputed evidence on that

matter) was only a single factor in FTJ Isaacs' overall factual conclusions that the Claimant had been involved in procuring a fraudulent result. A number of other more detailed reasons were given by the Judge for disbelieving the Claimant's evidence. I mention this point given the time, energy and cost expended in pursuing the present JR proceedings which concern a matter that was not the principal issue decided against the Claimant. Although it is not a matter for my decision, the Claimant would have faced substantial hurdles in challenging FTJ Isaacs' overall conclusions as to fraud in any appeal to the Upper Tribunal.

The principles of natural justice or fairness

32. I was referred to a large number of cases as to what natural justice or fairness requires. Subject to the need to be flexible and to avoid hard and fast rules, a high level summary of what fairness in process generally requires would include the following guarantees: the right to be heard by an unbiased tribunal; the right to have notice of the case to be met or proved; and the right to be heard on those matters. However, several cases of high authority underline that the principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision. An essential feature of the context is the statute which gives the relevant public body the power to make decisions, as regards both its language and the shape of the legal and administrative system within which the decision is taken. The requirements of fairness must be interpreted in a manner which does not frustrate the intention of Parliament.

33. Crucially, in the present context, Parliament has taken care to require a "fundamental breach" of natural justice before the exception comes into play. That is an important qualification and needs to be given some meaning. Without seeking to be prescriptive, in my judgment that requires a claimant to identify a failure in process which is so grave as to rob the process of any legitimacy. That is a substantial hurdle. When considering whether this hurdle has been surmounted, a court will need to consider the *entire* process, as opposed to focussing on the discrete aspect which is the subject of the claim. The fairness of a process has to be assessed holistically.

34. Given some of the arguments made by the Claimant, I also need to underline that complaints about the result and the merits of the decision cannot be the subject of the exception. The exception is concerned with failures of *process* and not with disappointing *outcomes*. Parliament has decided that an outcome may in fact be shown to be wrong, but has determined that this is not a basis for allowing a judicial review challenge to be made.

IV Ground 1: the Natural Justice Exception

35. The Claimant's primary submission is that her complaint falls within this exception. She argues that she had a right to be informed prior to any decision on permission to appeal by FTJ Scott and UTJ Kopieczek (acting in their appellate jurisdiction as regards her application for permission to appeal to the Upper Tribunal) of any discrepancy between her grounds (and her adviser's recollection of evidence) and the official record of the evidence she gave (the recording).

36. It is said given that the Claimant had no access to the evidence giving rise to the purported inconsistency, that right could only be exercised following provision of the evidence relied upon by the judges who refused permission. Counsel for the Claimant argued that in terms of practical reality she would not have been able to access the recording in accordance with the Practice Direction (see [19] above).

37. Counsel for the SSHD submitted that the facts do not fall within the natural justice exception. He argued that the issue is whether the Claimant had a reasonable opportunity to present her case, and she was provided with that.

38. The question for me is whether it is arguable that there was a procedural error of such severity as to amount to a fundamental breach of the principles of natural justice or fairness. In my judgment, there was no such arguable error. Taking the Claimant's factual case at its highest, she plainly had a reasonable opportunity to present her case. First, the Claimant understood the issues which she was required to address at the substantive appeal and purported to address them. Second, she was then afforded a further opportunity to assert (by way of grounds of appeal) that FTJ Isaacs has misunderstood her oral evidence as to why she attended Eden College. Third, the latter assertion was considered by both FTJ Scott and UTJ Kopieczek. The former took the fair and appropriate step of checking the recording against what FTT Isaacs had understood the evidence to be. This was scrupulously fair. Inserting a process where submissions on what was said on the tape would be made was not necessary as a condition of fairness on the facts before me.

39. In my judgment there was no procedural error in any sense, let alone a "fundamental breach" of the principles of natural justice. FTJ Scott simply checked the official record of evidence when dealing with the complaint. It is entirely proper and reasonable for a judge who is determining a permission application to consult the official record of proceedings and to decide (without further recourse to the parties) whether that record corroborates an assertion in the grounds of appeal. A judge has the necessary skill and independence to decide whether the record is sufficiently clear or whether further recourse to the parties is necessary.

40. I put an example to Counsel. In an ordinary civil case, a judge may well be asked to grant permission to appeal because they have incorrectly recorded a party's oral evidence in a judgment. That judge is entitled to consult their own notes, a recording or transcript and take their own view. It is not a fundamental requirement of common law fairness principles that the judge is first obliged to convene a further mini-trial for a debate on the terms of the Judge's notes, or the transcript and how it compares to Counsel's own notes.

41. In the event, the Claimant's case is even weaker than this because there *was* a process in place under which she could have applied to the President for the Record of Proceedings if she disputed the accuracy of its interpretation by the FTT in its refusal of permission. I have noted above that the transcript of the recording on its face supports FTJ Scott's understanding but Counsel for the Claimant insisted that the hearing was not to consider the merits but just the jurisdictional issue.

42. A number of cases were cited to me as to the requirements of natural justice. I did not find that of assistance. These cases concern the differing procedural requirements in specific factual and legal contexts. Particular reliance was placed by the Claimant upon two cases. The first was *R v Deputy Industrial Injuries Commissioner ex parte Jones [1962] 2 All ER 430* . I do not find that case of assistance. The relevant tribunal in that decision decided the substantive issue in the appeal with reference to medical evidence which the Claimant had not seen and had no opportunity to comment upon. That is far removed from the present case. The second case was *Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC)* . That case applies uncontroversial principles in a very different factual

situation to that in the present case.

43. I reject the first ground. There was no arguable fundamental breach of the principles of natural justice.

V Ground 2: efficacy of the ouster

44. The scope of the Claimant's secondary argument was not altogether clear but it appeared to me that there were ultimately two sub-arguments being made. These arguments arise in circumstances where I have concluded the exception does not apply so effect is to be given, subject to these arguments, to the ouster.

45. As I understood it, the first sub-argument was that if cases such as the present (in which it is said an arguable error has been identified, the error first surfaces in the refusal of permission to appeal, and the second appeals test has been met) do not satisfy the test for a grant of permission, then the provisions have gone beyond what was envisaged in Cart . It was argued that the provisions "exceed the restriction on the Jurisdiction of the Courts that was deemed acceptable in those cases". The short answer is that this submission misses the point of the legislation, which was to remove Cart JRs.

46. The second sub-argument was the ambitious submission that section 11A is an impermissible ouster of the inherent supervisory jurisdiction; and that I had the power at common law to ignore what Counsel for the Claimant agreed was a clear statutory exclusion of judicial review. That was put on a specific basis, in relation to section 11A , and also on a wider basis that challenged the ability of Parliament to enact any form of ouster of the supervisory jurisdiction.

47. I reject these submissions. In Cart , the Supreme Court expressly acknowledged the right of Parliament to oust or exclude judicial review with the use of clear language: see [37]. Parliament did that in the present case by way of section 11A . The section does not amount to a full ouster but a partial one which restricts judicial review to the particular circumstances referred to in section 11A(4) .

48. I note that the second appeals test was adopted by the Supreme Court in Cart because Parliament had not at that stage specified how the scope of judicial review should be limited, requiring the Court to fulfil that task. This is apparent from Lord Dyson's observations in Cart :

> "120. Thus a consequence of giving effect to the Leggatt Report was to bring about a strategic reorganisation of the tribunals system by making it more coherent and improving its expertise and standing. I agree with the views expressed in the Leggatt Report and the 2004 White Paper that the changes demanded a reappraisal of the scope of judicial review. Parliament refused to undertake it. The task of deciding the scope of the judicial review jurisdiction falls therefore to be performed by the courts".

49. However, Parliament has now performed the task which Lord Dyson said it had previously refused to undertake and enacted section 11A . It has covered the relevant field. I note that the new legislation was preceded by an analysis of the number of Cart challenges and their success rate. Parliament decided that a more stringent exclusion was necessary. In my judgment, the policy behind the change does not conflict with the rule of law in any sense and is consistent with the principle set out at [100] of Cart , namely that:

> "The rule of law is weakened, not strengthened, if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff".

50. What I have decided above is sufficient to dispose of the particular issue before me which is confined to the effectiveness of the specific ouster in section 11A of the 2007 Act . However, as I have noted above, Counsel for the Claimant framed his attack on the ouster on a much broader basis by reference to the historic inherent jurisdiction of the High Court at common law.

51. Counsel for the Claimant forcefully submitted that the High Court had the power at common law to ignore clear primary legislation ousting judicial review. In addition to the judgments in Cart at both the Court of Appeal and Supreme Court levels, the parties cited the familiar cases on ouster clauses including Anisminic . I drew to their attention *R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22; [2020] A.C. 49* , which is the most recent discussion of this issue from a higher court. Without citing from the extensive body of case law and learning on this subject, I will briefly summarise why the Claimant's wider argument must be rejected.

52. Putting aside obiter observations in certain cases and academic commentaries, in my judgment, the legal position under the law of England and Wales is clear and well-established. The starting point is that the courts must always be the authoritative interpreters of all legislation including ouster clauses. That is a fundamental requirement of the rule of law and the courts jealously guard this role. However, the rule of law applies as much to the courts as it does to anyone else. That means that under, our constitutional system, effect must be given to Parliament's will expressed in legislation. In the absence of a written constitution capable of serving as some form of "higher" law, the status of legislation as the ultimate source of law is the foundation of democracy in the United Kingdom. The most fundamental rule of our constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. The common law supervisory jurisdiction of the High Court enjoys no immunity from these principles when clear legislative language is used, and Parliament has expressly confronted the issue of exclusion of judicial review, as was the case with section 11A . In short, there is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to

happen.

53. Counsel for the Claimant sought to draw support for his submission from the Human Rights Act 1998 ("the HRA 1998 ") and the ability of a court under that legislation to make a declaration of incompatibility in relation to primary legislation. In my judgment, the terms of the HRA 1998 undermine the Claimant's submissions, and in fact support the established constitutional approach I have summarised above. When a court makes a declaration of incompatibility under section 4(2) of the HRA 1998 , it is using a power which Parliament has given to it. Such a power had to be conferred in circumstances where the common law of England and Wales has never permitted the courts to disregard or disapply primary legislation. To the same effect, when we were within the European Union, it was Parliament, by enacting the European Communities Act 1972 , that decided EU law would prevail over our laws including primary legislation. The courts then policed this qualification of sovereignty on behalf of Parliament.

54. The second ground fails. Section 11A of the 2007 Act is a clear, binding and effective partial exclusion of the common law supervisory jurisdiction of the High Court in the circumstances before me.

VI Conclusion

55. I decide the jurisdictional issue in favour of the SSHD and dismiss the claim for judicial review.

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R. (on the application of FB (Afghanistan)) v Secretary of State for Home Department
R. (on the application of Medical Justice) v Secretary of State for Home Department

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

2020 WL 06151614

Neutral Citation Number: [2020] EWCA Civ 1338

Case No: C2/2019/2478

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

THE PRESIDENT AND UPPER TRIBUNAL JUDGE O'CONNOR

[2018] UKUT 428 (IAC)

AND FROM THE HIGH COURT

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

THE HON MR JUSTICE FREEDMAN

[2019] EWHC 2391 (Admin)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 21/10/20

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES

LORD BURNETT OF MALDON

LORD JUSTICE HICKINBOTTOM

and

LORD JUSTICE COULSON

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1.A state has the right to control those who wish to enter or remain in its territory, and consequently to set criteria for entitlement to enter or remain and for the removal of those within its borders who have no right to be there. Where individuals dispute an executive decision that bears upon such entitlement and/or removal, as part of their right to access to justice, they generally have the right to apply to a court or tribunal to challenge that decision.

2.In these claims, the Appellants contend that the Secretary of State's policy for removing those without the right to enter or remain in the UK – which, for those who fall within its scope, after a relatively short notice period in which removal cannot be effected, sets a removal window within which the individual can be removed at any time without further notice – is unlawful as abrogating the right to access to justice in respect of decisions which bear upon their removal. In brief, it is submitted that the notice period is too short for those affected to instruct lawyers to make representations that leave to enter or remain should be granted, for any such representations to be considered by the Secretary of State, and then for an application to be made to a court or tribunal to challenge any negative decision; and so it is inevitable that many negative decisions affecting their right to remain and their removal (including decisions to extend the notice period or defer the removal window) are made after the notice period has ended, so that they become at risk of immediate removal without an adequate opportunity to challenge the material decision or decisions before a court or tribunal.

The Policy

25.Where an irregular migrant does not voluntarily leave the UK, his or her enforced removal involves the Secretary of State making appropriate travel arrangements. Removal is so often by air that, for the purposes of this judgment, other modes of travel can be ignored (although generally the same principles and practice apply). The arrangements needed for any enforced removal are often extensive, and include arranging travel documents and a place on a commercial flight or charter plane. They frequently involve the person's prior detention. Where those arrangements have to be cancelled (e.g. because of late representations, claim or injunction), substantial cost and delay are incurred; and the migrant may have to be released from detention pending removal whilst the representations and any subsequent claim are

considered.

26.As a result, from 1999, the Secretary of State put in place a policy designed to cover arrangements for responding to such late events, in the face of a then-current practice of serving any irregular migrant whom it was intended to remove with notice of removal directions setting out details of the removal flight such as date, time, exit airport and route as part of the single decision letter process.

27.The history of the policy is comprehensively set out in the judgment of Silber J in *R (Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1925 (Admin)* ("the 2010 Medical Justice case") at [5]-[30]. For the present appeal, it is sufficient to say that, there was a period when the Secretary of State would defer removal directions on the mere threat of a judicial review; but in many cases proceedings were never subsequently issued, so that irregular migrants effectively had a right of veto against removal, even if they had no real claim to entitlement to leave to enter or remain. The policy was consequently changed so that the Secretary of State would defer removal only if and when a judicial review claim had been issued (as evidenced by an Administrative Court case number) and she had received the grounds of challenge.

28.The Secretary of State agreed with the President of the Queen's Bench Division that there would be a minimum of 72 hours between the notification of removal directions and actual removal, including at least two working days, with the last 24 hours including at least one working day.

29.How that minimum period was determined is set out in paragraph 9 of the statement of Julia Dolby (who has a post in the Home Office Removals, Enforcement and Detention Policy Team) dated 12 April 2018 and filed by the Secretary of State in relation to FB's claim. The Secretary of State's initial proposal was to have a period of only 48 hours, which, she considered, was "the minimum necessary [to enable the individual] to obtain legal advice and lodge a claim". That rightly acknowledged that most irregular migrants would require legal assistance to formulate submissions and make a legal claim in respect of their removal and any underlying issues; and also that, following a negative decision relating to removal, the policy had to give an irregular migrant sufficient time to instruct legal representatives and for them to make submissions to the Secretary of State and, if necessary, prepare and issue a claim for judicial review.

30.It was eventually agreed that, if the minimum period between the setting of removal directions and actual removal as identified in those directions was 72 hours, the Civil Procedure Rules would be amended to require full grounds to be lodged with any judicial review claim. It was thought that that would (i) give a sufficient period for a judicial review challenging the decision to issue removal directions and/or any underlying decision to be prepared with full grounds, and issued; and (ii) enable the court to deal with the issue of permission to proceed on an expedited basis – within days – which would mean that the Secretary of State could maintain the irregular migrant in detention until the application for permission was disposed of, and removal directions could then be reset promptly if permission was refused. As Ms Dolby put it (at paragraph 5 of her statement: emphasis added):

"The date of removal had to be set after a minimum of 72 hours, to include 2 working days…, after the individual was notified that removals directions had been set, *in order to allow them time to access justice*."

31.Because some classes of case were considered to be potentially more complex, and therefore the preparation of a claim might take longer, the policy prescribed a five-day notice period for a charter flight, and three days (rising to five days in 2010) for third country and non-suspensive appeal ("NSA") cases.

32.That policy was adopted in 2007. I pause to note that, within the policy, there were several exceptions which allowed for removal less than 72 hours after notification of removal directions was given, e.g. where the Secretary of State considered reduced notice necessary to maintain order and discipline because there had been an earlier frustrated removal. These exceptions were successfully challenged in the 2010 *Medical Justice [2011] EWCA Civ 1710* case (in which Silber J was upheld by this court: ("the 2010 Medical Justice case (CA)"); and were then abandoned. In that case, it was assumed that it was not unlawful for the policy to fix 72 hours as the usual minimum removal notice period.

33.However, the policy introduced in 2007 was not entirely successful in eradicating late claims, which were administratively challenging and, in the Secretary of State's view, being used abusively. In paragraph 12 of her statement, Ms Dolby identified the perceived mischief as follows:

"It was felt that the… process of allowing 72 hours' notice period starting from the point where an individual being given notice of removal directions led to the submission of late claims which could reasonably have been raised and considered earlier in the process and that in some cases this was being used in an attempt to frustrate or delay removal."

34.In other words, instead of making representations as to why they should be granted leave to enter or remain earlier, some irregular migrants were waiting until they received removal directions before taking steps to regularise their immigration status, leading to their representations and any subsequent legal claim having to be dealt with in an unnecessarily short period and removals being cancelled late, with all the attendant disruption and cost that that entailed.

35.Therefore, from 6 April 2015, the policy was changed again. It is clear from the Home Office PES dated 14 September 2015, which assessed the new policy, that it was part of the same suite of measures as section 10. Indeed, that PES was in similar terms to the PES used in relation to the 2014 Act quoted above (see paragraph 12). As the 14 September 2015 PES explained:

"The aim of the single power [of removal in the new section 10], which as well as refusing or curtailing leave (or giving notice that an overstayer or illegal entrant had no leave) would make clear the person was liable to removal with no need for a separate decision or notice. An ongoing duty was introduced to raise any reason why they should not be removed at the earliest opportunity [i.e. the obligation in section 120(5): see paragraphs 20-21 above].

As a consequence, the practice of serving copies of removal directions, which allows claims to be withheld until removal is imminent, would be discontinued where migrants were removed under the Immigration Act."

36.The new policy envisaged an individual being served with a notice which confirmed liability for removal, and set a short notice period during which there would be no risk of removal, followed by a removal window during which he or she might be removed without service of removal directions or, indeed, any further notice. The PES makes very clear that it was a quite deliberate element of the policy to withhold details of removal (such as time and date) from the person to be removed, on the basis that, in line with the intention of the policy, this would encourage earlier representations and, equally, discourage delay in making representations which were then more likely to be disruptive of the removal process.

37.The new policy was set out in Chapter 60 of the Home Office Immigration returns, enforcement and detention: General Instructions, "Judicial reviews and injunctions", which gives guidance to caseworkers on notice periods, removal windows and the judicial review process in enforcement cases. We do not have the original 2015 version of the policy. In FB's case, the Upper Tribunal was concerned with Version 15. In Medical Justice's case, Freedman J was concerned with Version 17, which included some relatively minor changes made as a result of the tribunal judgment. Versions 18 to 20 (the current version) have required removal directions (rather than a removal window) to be set, following the Order of Walker J dated 14 March 2019 in the Medical Justice claim in which, when granting permission to proceed with the claim, he imposed an interim injunction on removal without removal directions (with the caveat that, in respect of removal by charter flight, notice of the time of the flight need not be given), which is still in place. There are no other material changes in the later versions. I will consequently focus on Version 17; and references in this judgment are to that version ("the JRI Policy").

38.There are two other relevant General Instructions policy chapters:

i)Arranging removal (Version 2) (4 October 2018), which gives guidance on the powers associated with arranging removal, after leave had been brought to an end and an individual has been notified of his or her liability to be removed ("the AR Policy").

ii)Liability to administrative removal (non-EEA: consideration and notification) (Version 3) (6 April 2017), which gives guidance in relation to those "who may be liable to administrative removal from the UK under section 10… [as to] what factors to consider when deciding whether a person is liable to be removed, when and how to bring someone's leave to an end, how to serve a notice of liability to administrative removal, and how to notify a person of their liability to be detained" ("the LAR Policy").

39.As I have described, prior to the changes in the JRI Policy, notice of removal directions was given to the person to be removed, setting out details of the removal flight. Under the JRI Policy, "notice of removal" can be given in one of three forms.

i)Notice of removal directions: This form of notice remains available and, when given, the scheme is essentially unchanged. The JRI Policy confirms that the notice period is 72 hours (including at least two working days), but five working days in third country and NSA cases.

ii)Notice of a removal window: This is the form of notice with which this appeal is primarily concerned. It is said to be suitable for persons being removed under section 10 and persons being deported, and appears to be the default for such persons. (The argument before us focused upon notice of removal window in section 10 cases, as will this judgment: but similar notices in deportation cases do not raise any significantly different issues.) When such a notice is given, it starts "the notice period" during which the person cannot be removed, which is normally 72 hours (including at least two working days), but seven calendar days if the person is not detained and five working days in third country and NSA cases. During the notice period, although a person remains "liable to removal" under section 10, he or she is not at risk of removal. From the end of the notice period, the person is both liable to removal and also at actual risk of removal. "The removal window" begins when the notice period ends, but it runs for three months from the date of notice of removal. As the JRI Policy (at page 11) makes clear, although still not having leave to enter or remain and thus remaining liable for removal under section 10: "When a removal window has expired without the person leaving the UK in that time, any further proposal to enforce removal will require a new notice of removal with a completely new notice period".

66.On the basis of that proposition, they submitted that the Policy is unlawful because, when the Secretary of State makes an adverse decision in the removal window, the Policy allows for no adequate opportunity – or, indeed, any opportunity at all – for the individual to take advice and lodge a judicial review challenging that decision before he or she is at risk of removal which arises immediately upon the adverse decision being taken and notified.

67.Mr Kovats submitted that the JRI Policy is not unlawful for two primary reasons. I will deal with the substance of these submissions when I consider the grounds of appeal: here, it is sufficient briefly to set out his submissions, and the evidence of how the JRI Policy works in practice relevant to them.

68.First, Mr Kovats submitted that, as there is never a legal bar or impediment to an irregular migrant who is served with a notice of removal window seeking redress from the courts, this is essentially a rationality claim; and, in considering rationality, it is legitimate to balance the public interest in having a coherent and enforceable scheme to remove irregular migrants who do not have any right to be in the UK on the one hand, and the rights and interests of those migrants on the other. It is in the public interest for irregular migrants to be required to make promptly any claim for leave to remain that they may have: late claims are potentially wasteful of time, effort and public money. It is therefore legitimate to take into account opportunities that any particular irregular migrant has had to regularise his immigration status before any notice of removal is served on him – most, Mr Kovats submits, have had more than a reasonable opportunity to put forward any claim for leave they may have, as exemplified by some of the case studies – and also the opportunity they will have to challenge the lawfulness of their removal, after the event, from abroad.

(…)

91.The importance of the rule of law, and the role of access to justice in maintaining the rule of law, was recently considered by Lord Reed JSC (with whom the rest of the Supreme Court agreed) in *R (UNISON) v Lord Chancellor [2017] UKSC 51* ; *[2017] 3 WLR 409* at [68]:

"At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have

unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade…".

Thus, the right to access to justice is an inevitable consequence of the rule of law: as such, it is a fundamental principle in any democratic society which more general rights of procedural fairness are to a large extent designed to support and protect (see, e.g., *R (CPRE Kent) v Dover District Council [2017] UKSC 79* : *[2018] 1 WLR 108* at [54] per Lord Carnwath of Notting Hill JSC, and *R (Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812*; *[2018] 4 WLR 123* at [83-[84] per Singh LJ).

92.The right of access to justice means, of course, not merely theoretical but effective access in the real world (UNISON at [85] and [93]): it has thus been said that "the accessibility of a remedy *in practice* is decisive when assessing its effectiveness" (*MSS v Belgium and Greece (2011) 53 EHRR 2* (European Court of Human Rights ("ECtHR") Application No 30696/09) at [318], emphasis added). This means that a person must not only have the right to access the court in the direct sense, but also the right to access legal advice if, without such advice, access to justice would be compromised (*R (Daly) v Secretary of State for the Home Department [2001] UKHL 26* ; *[2001] 2 AC 532* at [5] per Lord Bingham of Cornhill; and *MSS* at [319]). For these rights to be effective, as the common law requires them to be, an individual must be allowed sufficient time to take and act on legal advice.

93.So, where tribunal rules set a "timetable for the conduct of.. appeals [that was] so tight that it [was] inevitable that a significant number of appellants [would] be denied a fair opportunity to present their cases…", those rules were held to be unlawful (*The Lord Chancellor v R (Detention Action) [2015] EWCA Civ 840* ; *[2015] 1 WLR 5341*, the quotation being from [38] per Lord Dyson MR).

94.Even closer to this case, in the 2010 Medical Justice case at [43], Silber J said that effective legal advice and assistance requires sufficient time to be given between service of notice of a decision by the Secretary of State which puts the individual at risk of removal (in that case, notice of removal directions) and removal itself:

"… to find and instruct a lawyer who:

(i) is *ready* to provide legal advice in the limited time available prior to removal, which might also entail ensuring that the provider of the advice would be paid;

(ii) *is willing and able* to provide legal advice under the seal of professional privilege in the limited time available prior to removal which might also entail being able to find and locate all relevant documents; and

(iii) (if appropriate) would after providing the relevant advice be *ready, willing and able* in the limited time available prior to removal to challenge the removal directions." (emphasis in the original)

On appeal, upholding Silber J, Sullivan LJ said (the 2010 Medical Justice case (CA) at [19]):

"I refer to 'effective' legal advice and assistance because the mere availability of legal advice and assistance is of no practical value if the time scale for removal is so short that it does not enable a lawyer to take instructions from the person who is to be removed and, if appropriate, to challenge the lawfulness of the removal directions before they take effect."

95.In that case, the challenge to the part of the Secretary of State's policy which allowed for removal less than 72 hours after notification of removal directions was a systemic challenge, i.e. it contended that the risk to the right of access to justice was inherent in the policy itself and it was not dependent upon the claimant showing that particular irregular migrants who fell within the scope of this part of the policy had in fact been denied access to a court. As Sullivan LJ put it (at [21]):

"On the assumption that legal advice would be available Silber J was concerned with the practicalities of obtaining that advice in sufficient time for it to be effective. Would there be a sufficient time between the service of the removal directions and the removal itself to enable a legal adviser to challenge the lawfulness of the removal directions? If the answer to that question was no, time would not be sufficient, then the… policy abrogates the right of access to the courts to challenge the lawfulness of the removal directions."

96.I will pick up this issue of the nature of the challenge when I consider Medical Justice Ground 1 (see paragraphs 119 and following below).

97.However, before I deal with the key submissions on the application of these uncontroversial principles to this case, it would be helpful to clear the decks. There are five preliminary points, which I will deal with in turn, as follows:

i)the ways in which the common law right to access to justice may be restricted (paragraph 98);

ii)the stage, during the immigration process as a whole, at which notice of removal in the form of notice of a removal window is given (paragraphs 99-101);

iii)the scope of the right to access the court, including the scope of the right, if any, to bring a bad claim/application (paragraphs 102-106);

iv)the requirement, if any, for automatic suspensory effect of proceedings on removal (paragraphs 107-114); and

v)the extent, if any, to which the right to access to justice has to be balanced against other aspects of public interest such as that of having an effective immigration scheme including an effective removals policy, and of discouraging abusive claims/applications (paragraphs 115-118).

98.First, the common law right to access to justice may be restricted, but only by Parliament and then only by clear authorisation in the form of express statutory provision or necessary implication (see UNISON at [76]-[85]). Substantial submissions were made on behalf of both Appellants which emphasised the limited ways in which a restriction of the right to access to justice might be authorised, and how such restrictions should be construed: but the Appellants were here pushing at an open door, because it is not the Secretary of State's case that Parliament has given any such authorisation. She does not, for example, suggest that section 10 of the 1999 Act contains words authorising any restriction on the right of access to justice. Rather, it is her case that the JRI Policy does not involve any such restriction. Insofar as it is suggested in FB Ground 3 that the tribunal erred in proceeding on the basis that section 10 permits interference with the right to access to justice, I deal with that below (see paragraphs 153-155).

99.Second, Ms Kilroy submitted that, when notice of removal was in the form of removal directions, it was served at a relatively late stage in the immigration process, by which time any substantive issues relating to leave to enter and remain had usually been determined; whereas the JRI Policy of giving notice of a removal window as part of a single decision letter is given at a relatively early stage in the process when it is far more likely that there will be outstanding issues concerning leave.

100.However, as I have described (paragraph 36 above), it was the deliberate policy intention of both the change made to section 10 by the 2014 Act and the subsequent JRI Policy in respect of removal windows to encourage prompt representations with regard to any asserted claim for leave to enter or remain and discourage late representations which would be more likely to be disruptive of the removal process and wasteful of public money. Although Ms Naik submitted that it was unreasonable to withhold the details of removal, in my view, there is nothing arguably wrong as a matter of principle with such a policy, which can be justified on the ground that it is in the public interest to have an effective and efficient system for removing irregular migrants who have no right to be in the UK.

101.I accept that for some irregular migrants (e.g. those who are subject to Dublin III, or who have had their leave curtailed), the single decision letter will include, for the first time, notice to an individual that he or she does not have appropriate leave to enter or remain (and thus is liable for removal); as well as, again for the first time, notice of removal. The receipt of the notice will therefore be the first trigger for any, or any further, representations. Consequently, the Policy will inevitably lead to more post-notice representations that will require a decision by the Secretary of State than would otherwise be the case. However, in my view, that is justifiable and unobjectionable, so long as the person served has an appropriate opportunity to challenge the decision before a court or tribunal.

102.Third, the right to access to the court is not restricted to a right to access the court to pursue a good claim: it is a right to bring any claim or application, no matter how abusive or even repellent it might be, subject only to those who repeatedly bring such claims having to satisfy any leave requirement imposed by the court as part of a civil restraint order under CPR PD 3C. Even those who are subject to a civil restraint order are not denied access to the courts.

103.However, the right to access to the court to seek interim relief in the form of a stay on removal does not, of course, guarantee that the court will accede to the application. The High Court has a general inherent power (now supported by the CPR) to control its own procedure so as to prevent it being used to promote injustice (*Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Limited [1981] AC 909 at page 977* D-F per Lord Diplock). Therefore, as well as being able to refuse an application for a stay on the basis that the underlying claim for leave to enter or remain is unarguable, the court is not bound to hear in full and rule on the merits of an application for interim relief where it considers that the application or underlying claim amounts to an abuse of process (see, e.g., *Hunter v Chief Constable of West Midlands Police [1982] AC 529 at page 536* B-C per Lord Diplock, and *Johnson v Gore Wood & Co [2002] 2 AC 1 at page 22* C-E per Lord Bingham of Cornhill). The court may therefore refuse to determine the merits of an application for interim relief in the form of a stay on removal because it considers the application to be an abuse.

104.The authorities provide examples of cases in which not only do late representations that an individual should not be removed have arguable merit, but there is also a good reason for the claim not having been made earlier. However, it is also true to say that the court also has well-documented experience of cases in which an application for a stay on removal of no merit has been made by legal representatives to disrupt removal operations and to buy more time in the UK for the irregular migrants who are their clients. The courts have given guidance to legal representatives emphasising their professional obligations to take steps to challenge removal as early as possible, and with maximum notice to the Secretary of State (*R (Madan) v Secretary of State for the Home Department (Practice Note) [2007] EWCA Civ 770* ; *[2007] 1 WLR 2891*, *R (Hamid) v Secretary of State for the Home Department [2013] EWHC 3070* ; *[2013] CP Rep 6* and *R (SB) v Secretary of State for the Home Department (Practice Note) [2018] EWCA Civ 215* ; *[2018] 1 WLR 4457*). However, none of these cases has questioned the inviolable right to access the court: rather, they have emphasised the rights of the High Court to control its own procedure including the consequences for legal representatives of bringing and pursuing meritless applications.

105.Before us, it is not suggested that the procedures of the court are inadequate to provide an effective remedy to an individual who is at risk of being removed. In addition to the procedures available during court opening hours – including the availability of a High Court judge (and, if necessary, a Court of Appeal judge) to deal with applications immediately – there are facilities to make an application by telephone out-of-hours, immediately and at any time. Even in cases to which we were referred in which, the court found, the Secretary of State had deliberately notified a material decision (e.g. to give notice of removal directions, or to refuse to defer directions which had been set) at a time when the courts would not be open prior to the actual removal, the legal representatives had nevertheless made an out-of-hours application and removal had been prevented (*R (Collaku) v Secretary of State for the Home Department [2005] EWHC 2855 (Admin)* and *R (Karas and Miladinovic v Secretary of State for the Home Department [2006] EWHC 747 (Admin)*). There had been no difficulty in those cases in approaching a judge to hear the application, even in the middle of the night.

106.The focus of the Appellants and Intervener before us was not on our court procedures, which appear entirely consistent with guaranteeing an effective remedy, but on the alleged failure of the JRI Policy to afford an irregular migrant who has had an adverse decision material to his or her removal notified in the removal window any time to challenge that decision in a court or tribunal prior to being at risk of removal.

107.Fourth (and closely related to the previous point), Ms Harrison and Ms Luh for the Intervener

submitted that judicial review can only be an effective remedy in respect of a non-appealable decision if it has automatic suspensive effect until the court or tribunal has had the opportunity of considering the question of relief. They relied on ECtHR authorities in relation to the right to an effective remedy for a violation of ECHR rights guaranteed by article 13 of the Convention, such as *Čonka v Belgium (2002) 34 EHRR 54* (ECtHR Application No 51564/99) and *De Souza Ribeiro v France (2014) 59 EHRR 10* (ECtHR Application No 22689/07) .

108.In the former case, the availability of an "extremely urgent procedure" before the Belgian Conseil d'État to stay the deportation of Romany families to Slovakia was considered insufficient to amount to an effective remedy because article 13 was in the form of a guarantee: and the implementation of the remedy by way of application to the Conseil d'État was "too uncertain to enable the requirements to be satisfied" (see [83]). The ECtHR emphasised that article 13, as well as article 6, is an absolute right in this sense: it does not allow for the right to access to the court to be balanced against (and possibly outweighed by) the risk of abuse of process or overloading the court, but rather imposes on Contracting States "the duty to organise their judicial systems in a such a way that their courts can meet its requirements" (see [84]).

109.*De Souza Ribeiro* concerned a Brazilian national who was deported from French Guiana at 4pm on the day after his detention, despite his having lodged an application for judicial review in the Cayenne Administrative Court challenging the lawfulness of removal on article 8 grounds together with an urgent application to stay removal, in the meantime. Later that same day, a judge refused the application for a stay on the basis that it was devoid of purpose, the applicant having already been removed. The Grand Chamber held that effectiveness of remedy for the purposes of article 13 required that "the person concerned should have access to a remedy with automatic suspensive effect" where removal exposes him or her to a real risk of exposure to treatment that would breach articles 2 and/or 3 of the ECHR; but not where there was exposure to a risk of a breach of only article 8 (see [82]-[83]).

110.Ms Harrison and Ms Luh submitted that, because removal windows are used under the JRI Policy in cases in which representations may be made that removal would breach article 2 and/or 3 of the ECHR, and/or the non-refoulement provisions of the Convention and Protocol relating to the Status of Refugees adopted on 25 July 1951 and 16 December 1976 ("the Refugee Convention") and the European Directives, a judicial review of the lawfulness of removal where a removal window has been notified must have automatic suspensive effect.

111.However, I do not consider that, in this regard, the European jurisprudence materially adds to the common law; and I do not accept that the mere issue of judicial review proceedings challenging removal must automatically suspend the removal it challenges, irrespective of merit. For these purposes, I readily accept that the test for effectiveness of remedy at common law is as rigorous as it is for the purposes of article 13 of the ECHR: where the Secretary of State makes a decision in respect of an irregular migrant that is material to his or her removal, then he or she must have access to an independent court or tribunal which must consider whether removal should be stayed prior to removal in fact taking place. Again, I am not here referring to access to a court that is merely theoretical, but access that is available in practice in the real world. However, for the reasons I have already given, on the Appellants' case, in respect of any interference with the right to access to justice, the alleged mischief is not (as it appeared to have been in both *Čonka* and *De Souza Ribeiro*) any deficiency in the court in considering an application for relief sufficiently promptly, but the failure of the JRI Policy to afford sufficient time for an irregular migrant to seek advice and make a claim or application involving a stay on removal.

112.That is also the answer to Mr Kovats' submission that a requirement that removal must be automatically suspended upon the issue of judicial review proceedings challenging the right to remove would amount to an effective veto on removals exercisable by the irregular migrant irrespective of the merit of the challenge; and that would fatally undermine the policy objectives. It is for the court to determine whether, in the light of all the circumstances, removal should be stayed.

113.As recognised in *De Souza Ribeiro*, in addition to whether the application is unreasonably (and, possibly, abusively) late, one factor material to the question of whether removal should be stayed is the nature and extent of the risk on return, an issue considered by this court in SB (Afghanistan). Giving the judgment of the court, the Lord Chief Justice said (at [80]):

"… [I]f SB had shown that he faced a real risk of being persecuted on some ground covered by the Refugee Convention or killed or subjected to ill-treatment contrary to the article 3 standard if returned to Afghanistan, we are doubtful that his removal there could nonetheless be justified on the grounds of a decision by the court to refuse relief in the exercise of its discretion in order to impose a penalty to deter abuse of its process. The relevant rights under the Refugee Convention and the ECHR are unqualified and it does not seem to us that it would be open to a Contracting State or, domestically, a public authority to seek to justify infringing them on the basis of the public interest in deterring abuse of process in the courts. The position might be more open to debate in the context of claims under article 8…".

114.Therefore, whilst an application for judicial review to challenge removal will not have automatic suspensive effect, unless the court can summarily dismiss the challenge on its merits (e.g. by refusing permission to proceed), where it is alleged that the claimant's return will risk him or her suffering treatment in breach of article 2 and/or 3 of the ECHR, and/or the Refugee Convention, the court will usually be bound to grant a stay on removal by way of interim relief. As the Lord Burnett indicated in SB (and see paragraph 199 below), the position may be different if the risk is only of, say, a breach of article 8 of the ECHR.

115.Fifth, the Appellants submit that both the tribunal (at [158]-[188] of its determination) and Freedman J (at [212]-[223] of his judgment), referring to (i) limitation rules and (ii) the line of cases including Madan, Hamid and SB (Afghanistan) (see paragraph 104 above), erred in proceeding on the basis that the right to access to justice has to be balanced against the public interest of having an effective immigration scheme including an effective removals policy – and concluding that the JRI Policy struck an appropriate balance. In particular, it is submitted that the tribunal and judge were wrong to suggest that the right of access to the court progressively diminishes, eventually disappearing, as removal approaches (see tribunal determination at [162] and Freedman J's judgment at [212]).

116.Looked at discretely, I am not persuaded by the particular submission, because it seems to me that the tribunal at [162] and Freedman J at [212] were perhaps making a different point. They do not refer to the *right* to access to the court diminishing as the time for removal approaches, but rather "the *ability* to access the courts…". It is that which the tribunal considered was authorised by section 10. On its face, that appears to be no more than the trite proposition that an irregular migrant's ability in practice to access a court may be reduced as the time for removal approaches, e.g. when he or she is in the plane on the runway ready for take-off, or even on the way to the airport at a time when he or she may not have ready access to a telephone.

117.However, in my view, the broader submission has substantial weight. As I have described, although the court may summarily refuse an application that removal be stayed on the grounds that it could and should have been made earlier and is thus an abuse of the process, the right to access the court is an absolute and inviolable right, subject only to the inevitable practical constraints to which I have referred. The UK's obligation not to remove an irregular migrant where to do so would result in a risk to him or her of treatment contrary to article 2 and/or 3 of the ECHR and/or the Refugee Convention and European Directives has been expressly held by this court to remain binding until the moment of return (*R v Secretary of State ex parte Onibiyo [1996] QB 768 at page 781* E-G per Sir Thomas Bingham MR giving the judgment of the court). It seems to me that that is clearly so. But, in any event, the right to access to the court is not a relative right to be balanced against other rights and interests, the convenience of the executive or the courts, or the risks of abuse of process. As much as the right to an effective remedy under article 13 of the ECHR (see *Čonka* at paragraph 106 above), the common law right to access to justice is not susceptible to being outweighed by factors such as other rights and interests, the convenience of the executive or the courts and the risks of abuse of process. To the extent that the tribunal (see, e.g., [163] of its determination) or Freedman J (see, e.g., [220]-[222] of his judgment) considered such an exercise legitimate, I disagree. The court must organise its systems in such a way that it can meet the requirement for an effective remedy, no matter when and the circumstances in which an application to prevent removal on the grounds of unlawfulness is made. As I have indicated, there is no suggestion in this appeal that the court does not organise itself in such a way. The question in this appeal is whether the Secretary of State, through the JRI Policy, has organised her systems to the same effect.

118.Reference to the limitation rules are of no assistance to the Appellants in this regard: those rules are set out in statutory provisions and, if and insofar as they do restrict access to justice, they have Parliamentary sanction for doing so. As I have indicated, there is no Parliamentary authorisation in section 10 or elsewhere for restricting the right to access to justice in the context of immigration challenges, the only restriction (exercisable at the discretion of the court) being that of CPR rule 54.5(1) which requires a claim challenging an executive decision to be filed promptly and no later than three months after the date of the decision. Nor does the line of cases including Madan, Hamid and SB (Afghanistan) assist. Those cases are concerned with the consequences (primarily for legal representatives) of issuing and pursuing abusive claims and applications: they do not limit the right to access the court in any way.

119.Having dealt with those preliminary matters, I can now turn to the main submissions of the parties on the primary ground of appeal, i.e. Medical Justice Ground 1.

Breach of the Right of Access to Justice: Medical Justice Ground 1

120.This ground involves a systemic challenge to the JRI Policy itself. Although systemic unfairness may be illustrated by what has happened in individual cases, such a challenge does not focus upon the consequences of unlawfulness for a particular individual or group as do most judicial reviews, but rather upon the administrative scheme itself and the risk of unfairness in a public law sense arising from that scheme as a scheme. As Lord Dyson MR said in Detention Action, at [27], "a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself"; or, as Sedley LJ put it in *R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1481* ; *[2005] 1 WLR 2219*, at [7], it is sufficient for the claimant to show that there is "a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself". As I observed in *R (Woolcock) v Secretary of State for Justice [2018] EWHC 17* ; *[2018] 4 WLR 49* at [68(iv)], there is

a conceptual difference between something inherent in a system which gives rise to an unacceptable risk of unfairness, and any number (even a large number) of decisions that are simply individually aberrant.

121.Where it is contended that a scheme is in itself unfair, the correct approach was described by Sedley LJ, giving the judgment of the court, in Refugee Legal Centre (which concerned the fairness of a pilot scheme of fast-track asylum judicial determination), at [7], as follows:

"We accept that no system can be risk-free. But the risk of unfairness must be reduced to an acceptable minimum. Potential unfairness is susceptible to one of two forms of control which the law provides. One is access, retrospectively, to judicial review if due process has been violated. The other, of which this case is put forward as an example, is appropriate relief, following judicial intervention to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself."

Sedley J considered that "provided that [the system] is operated in a way that recognises the variety of circumstances in which fairness will require an enlargement of the standard timetable – that is to say lawfully operated – the… system itself is not inherently unfair" (see [20]), i.e. provided the system was operated with appropriate flexibility, it was not inherently unfair: it could operate without an unacceptable risk of unfairness.

122.*R (Tabbakh) v Staffordshire and West Midlands Probation Trust [2014] EWCA Civ 827* ; *[2014] 1 WLR 4620* involved a challenge to the Secretary of State for Justice's policy for the review of prison licence conditions on the basis that it failed to give the prisoner an appropriate opportunity for input. Richards LJ (giving the judgment of the court) rejected the contention that "unacceptability of risk" in this context required a consideration of the degree of risk, the consequences if the risk materialises, the extent of anything that minimises the risk and the cost of minimising the risk. Rather, he said (at [35], emphasis in the original):

"In my judgment, the question to be asked in the present context is a more straightforward one, namely whether the system established by the guidance in the policy documentation is *inherently unfair* by reason of a failure to provide the offender with a fair opportunity to make meaningful representations about proposed licence conditions. If it is, then the guidance itself may be found to be unlawful; but if it is not, the correct target of challenge is not the guidance but any individual decisions alleged to have been made in breach of the requirements of procedural fairness."

He later described the nature of the "unacceptable risk" as "a risk of unfairness inherent in the system itself rather than one arising in the ordinary course of individual decision-making" (see [38]); and approved the approach in Refugee Legal Centre as to the potential for the reduction of risk to an acceptable level as the result of flexible operation of the scheme (see [49]).

123.There is a substantial amount of jurisprudence about the situation where a scheme on its face may be unexceptionable, but there is a contention that it is being (or, in the future, will be) applied or implemented in such a way that it will give rise to a risk of unfairness to at least some who fall within

its scope. For example, *R (Bibi and Ali) v Secretary of State for the Home Department [2015] UKSC 68* ; *[2015] 1 WLR 5055* concerned the application of the "exceptional circumstances" exemption to the requirement for the production of a certificate of knowledge of the English language to a prescribed standard for entry clearance to the UK, which was challenged on article 8 grounds. The Supreme Court held that that policy would be unlawful if a breach of ECHR rights (or other similar right) would occur in a "significant number of cases" (per Baroness Hale at [54] and [61], and per Lord Neuberger at [101]). *R (BF (Eritrea)) v Secretary of State for the Home Department [2019] EWCA Civ 872* ; *[2020] 4 WLR 38* concerned the application of the Secretary of State's policy/guidance with regard to age assessments in the context of administrative detention for the purposes of removal. It was held that the policy/guidance would be unlawful "if but only if the way that [it is] framed creates a risk of more than a minimal number of children being [unlawfully] detained" (at [63] per Underhill LJ with whom, on this issue, Simon and Baker LJJ appear to have agreed).

124.No doubt reflecting the fundamental nature of the right, the courts have used somewhat more circumscribed terms when considering policies (including those incorporated into secondary legislation) which potentially impact adversely upon the right to access the court. UNISON concerned a fees order in respect of employment tribunal proceedings, which, it was contended, imposed fees of such amount as effectively to discourage many potential claimants from bringing claims at all. Having referred to the approach of earlier authorities (notably *R v Lord Chancellor ex parte Witham [1998] QB 575* and *R (Hillingdon London Borough Council) v Lord Chancellor [2008] EWHC 2683 (Admin)* ; *[2009] 1 FLR 39*, both also court/tribunal fee cases), Lord Reed said (at [87]):

"It follows from the authorities cited that the Fees Order will be *ultra vires* if there is a real risk that persons will effectively be prevented from having access to justice."

It would be *ultra vires*, of course, because Parliament has not sanctioned any fees order that would compromise the right to access to justice. Lord Reed suggests that, without Parliamentary authorisation, it is unlawful for a measure to deny *any* person access to justice.

125.Similarly, as I have described (paragraphs 94-96 above), in the 2010 Medical Justice case the court did not consider how many irregular migrants were in fact denied access to justice as a result of falling within the scope of one of the exemptions to the usual requirement of 72 hours' notice of removal directions: it focused on the risk to the right of access to justice that was inherent in the policy itself. In respect of that category of people, this court held that it was sufficient for the claimant to show that the policy abrogated the right of access to the court to challenge the lawfulness of removal by showing that the policy gave insufficient time between notice of removal and the removal itself to enable a legal adviser to be instructed and thereafter to challenge the lawfulness of the removal directions.

126.I respectfully agree that that is the correct approach in such cases as this. It is the approach that the Appellants have adopted. Essentially, Ms Kilroy submitted that, so far as those in respect of whom notice of removal is in the form of a notice of a removal window are concerned, the abrogation of the right to access to justice in the JRI Policy is materially indistinguishable from the defect identified in the 2010 Medical Justice case as it then applied to those who fell within an exemption to the 72 hours' notice requirement. The right is infringed because, following an adverse decision material to their removal which is notified in the removal window, like those who fell within an exemption, as a result of the Policy itself, those involved are at risk of removal without any opportunity to challenge the relevant decision in a court or tribunal, i.e. they are at real risk of effectively being prevented from

having access to justice. As I have described (paragraph 61 above), the evidence clearly shows that almost all decisions material to removal which are made in respect of applications and representations made following service of the notice of the removal window are made within the window period itself. As the unfairness is inherent in the Policy itself, Ms Kilroy submitted that the focus of the tribunal and (particularly) Freedman J on the case studies and evidence of numbers of cases in which an irregular migrant's access to justice had in fact been interfered with was misplaced. I agree.

127.As I have indicated (paragraphs 67-70 above), in response, Mr Kovats relied upon two overarching reasons why the JRI Policy is not unlawful. I am afraid I am unpersuaded by either.

128.First, he submitted that, as there is never a legal bar or impediment to an irregular migrant who is served with a notice of removal window seeking redress from the courts, this is essentially a rationality claim; and, in considering rationality, it is legitimate to balance the public interest in having a coherent and enforceable scheme to remove irregular migrants who do not have any right to be in the UK on the one hand, and the rights and interests of those migrants on the other.

129.However, Medical Justice Ground 1 is not a rationality claim: it is a claim that, without Parliamentary authorisation, the JRI Policy abrogates or restricts the right of access to the court for those who have been notified of a removal window and wish to make a new claim that removal would be unlawful. I accept that there is a legitimate public interest in encouraging irregular migrants to make any claim for leave to enter or remain that they may have promptly and to discourage late claims (see paragraph 100 above): but (i) whilst the failure to take earlier opportunities to make such a claim may be relevant to the question of whether the court should grant or refuse interim relief, it cannot restrict access to the court (see paragraph 104 above), and (ii) unless sanctioned by Parliament, the right to access to justice cannot be ousted by other rights and interests, the convenience of the executive or the courts/tribunals, or the risks of abuse of process (see paragraph 117 above).

130.Nor am I persuaded that the opportunity that irregular migrants who are removed may have to challenge the lawfulness of their removal, after the event and from abroad, is a compelling argument in favour of Mr Kovats' submission that the scheme is lawful. The Secretary of State herself recognises in the JRI Policy that access to justice prior to removal may be important if not imperative: the reason why she set the periods between notification and the risk of removal as she did was to enable access to the court prior to the risk of removal arising (see paragraphs 29-31 above). Whilst I accept that the opportunity to challenge underlying decisions relating to leave to enter or remain, and the lawfulness of the removal, out-of-country following removal is a factor which the court can take into account in deciding whether interim relief should be granted, it is not a factor that bears on the issue of access to the court prior to removal. A migrant must be entitled to access to a court prior to removal, if only to contend that out-of-country proceedings would be ineffective in his or her case; although, for the reasons I have already given, it is open to the court to conclude that the Secretary of State was not legally obliged to consider very late, lengthy submissions prior to removal and/or that any form of interim relief is not appropriate.

131.The potential difficulties for out-of-country challenges are well-known, having been considered by the Supreme Court in *R (Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42* ; *[2017] 1 WLR 2380* (especially at [60]-[78] per Lord Wilson JSC giving the judgment of the court) and subsequent cases such as *R (Ahsan) v Secretary of State for the Home Department [2017] EWCA Civ 2009* ; *[2018] HRLR 5*. For example, once removed, an irregular migrant may be "lost"; and

continued, effective legal representation may be difficult, and the individual may lose the ability to give oral evidence which might be crucial. Furthermore, unlike Kiarie and Byndloss (an article 8 claim) and Ahsan (a claim for indefinite leave to remain, refused as a result of the Secretary of State suspecting dishonesty), notice of removal in the form of a removal window is used in cases where the irregular migrant contends that removal will subject him or her to treatment contrary to article 2 and/or 3 of the ECHR and/or the Refugee Convention. Therefore, the consequences of an unlawful removal may be grave, and irremediable after the event. Subject always to Parliamentary intervention, it is the role of the court (and not of the executive) to balance such factors against the public interest in having an effective and efficient immigration system including an effective and efficient scheme for removing those who have no right to be in the UK.

132.In support of this part of the defence, Mr Kovats submitted that the evidence adduced by the Appellants in the form of case studies etc did not show that there was any restriction of access to justice in more than a very few cases. However:

i)The general difficulties in a claimant obtaining statistically significant data in support of a contention that an administrative scheme is systemically defective are well-known (see, e.g., *R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2004] UKHL 55* ; *[2005] 2 AC 1 at 91*] per Baroness Hale; and *R (Howard League for Penal Reform) v Lord Chancellor [2017] EWCA Civ 244* ; *[2017] 4 WLR 92* at [53] per Beatson LJ giving the judgment of the court).

ii)In this case, the collection of such data is even more difficult, because it is the Appellants' case that irregular migrants are removed without having had an opportunity to access legal representation yet alone the courts. It is understandable that the case studies provided by practitioners involve irregular migrants who have managed to instruct legal representatives and have thus, in the main, prevented removal prior to the courts adjudicating upon an application for interim relief. However, these cannot be regarded as necessarily representative.

iii)The Secretary of State has given disclosure; but does not keep full records of those who may have been removed without having had the opportunity to access a court prior to removal.

iv)In any event, the Appellants' primary case is not based upon numbers of irregular migrants who may in fact have been unlawfully removed: as with the 2010 Medical Justice case, it is based on the JRI Policy being inherently defective. That case is not dependent upon showing that any individual irregular migrants have in fact been deprived of access to justice. It is sufficient that it is inherent in the JRI Policy as it applies to those who are notified of adverse decisions in the removal window, that they – indeed, *all* those who have negative decisions made within the removal window – are at immediate risk of removal without an opportunity to access the court.

v)Insofar as actual inability to access justice is relevant, the evidence clearly shows that at least some of those who fall in that category have been (and, in the future, will be) deprived of access to a court prior to removal (see paragraph 61 above). It is no answer to say that these are merely aberrant individual decisions: if the scheme is to afford an effective remedy at common law, it is requirement that irregular migrants have access to a court to challenge adverse decisions of the Secretary of State, aberrant or not, that bear upon their removal including decisions not to defer etc removal. In this regard,

the JRI Policy fails to respect the common law right to have an effective remedy in the form of access to a court.

133.That brings me to the second strand of Mr Kovats' submission in defence of the JRI Policy.

134.This relied upon Lord Dyson's observation in Detention Action at [27(v)], drawing on the passages from Refugee Legal Centre and Tabbakh referred to above (paragraphs 121-122), that the "core question" in a systemic challenge is "whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness")。

135.With that in mind, Mr Kovats submitted that there were adequate safeguards within the scheme of which the JRI Policy forms a part to avoid the right to access to justice being undermined. He submitted that the safeguards included both opportunities to apply to the court earlier in the immigration process and after removal, as well as discretionary powers in the Policy itself to (e.g.) defer removal.

136.Freedman J was impressed by this safeguards argument, concluding that there are a "whole series of safeguards" (see [234]) which "are real and operate so as to preserve rather than impede access to justice" (see [284]) and which mean that the system has "the capacity to react appropriately to avoid unfairness" within the meaning of Lord Dyson in Detention Action (see [234]). The judge identified four safeguards relied upon by the Secretary of State before him, and now before us, as follows:

i)the requirement of the JRI Policy that a notice of removal window should not be served where there is an extant human rights or protection claim or appeal (see [227]);

ii)the requirement of the Policy that the removal window should be cancelled when a person makes a human rights, protection or EU free movement claim (see [227]);

iii)the discretion in decision-makers to defer a removal window, which the judge considered to be the most important safeguard in relation to the suggestion that the notice period was short (see [162], [262] and [285]); and

iv)the availability of judicial review to correct erroneous decisions, in particular in respect of a refusal to defer the removal window (see [194], [196], [219], [271] [290] and [335]).

137.However, as to (i), that is of no assistance to the category of irregular migrants with whom we are concerned, namely those who have been served with a notice of removal window and who may have a claim that removal is unlawful. Nor is Mr Kovats' submission that, in considering whether the right to access to a court has been infringed, it is appropriate to take into account earlier (but untaken) opportunities to approach the court: as I have indicated, whilst untaken earlier opportunities may be

relevant to the exercise of the court's discretion to grant interim relief in the form of a stay of removal, they do not diminish the right of access to the court (paragraphs 102-106 above). I have also dealt with the issue of post-removal opportunities to access the court (paragraphs 130-131 above).

138.As to (ii), as Freedman J himself acknowledged, the requirement to cancel the removal window only applies when the Secretary of State considers the representations amount to a non-certifiable fresh claim, and an adverse decision which removes the right to an (in-country) appeal is only challengeable by way of judicial review. I deal with the judge's reliance on the supervisory nature of judicial review in this context below (see, especially, paragraph 142).

139.As to (iii) and (iv), it is clear that Freedman J considered that these – the availability of the discretion to defer within the terms of the JRI Policy, and the availability of judicial review to challenge any refusal of deferral – to be crucial. He said (at [196]) that "deferral enables the risk of unfairness to be reduced"; and "it is capable of being controlled by judicial review, so that those caseworkers who operate [it] know that they are answerable for their actions". Thus, "the policy regarding deferral provides some inbuilt flexibility into the system on which the [Secretary of State] relies". This was equally the thrust of Mr Kovats' submissions to us.

140.However, I am unable to accept that the discretion to defer, supervised by judicial review, is able to bear the weight of this argument.

141.In terms of data, as I have indicated (paragraph 70 above), in the period 25 May 2018 to 9 March 2019, caseworkers considered deferring a removal window in 71 cases, initiated either on the caseworker's own initiative or on request; and, of those cases, deferral was granted in thirteen. Those data show that (i) there were few cases in which deferral was considered, and very few in which it was granted; and (ii) in the vast majority of cases in which it was considered, it was refused, such refusal being open to challenge only by way of judicial review.

142.In my view, the fatal flaw in Mr Kovats' submissions (and in the analysis of both the tribunal and Freedman J) on this issue is that an irregular migrant who applies for deferral (or, I should add, extension, cancellation or suspension of the window: see paragraphs 44-48 above) and is refused within the removal window – as will almost always be the case – will be at immediate risk of removal without having had an opportunity of challenging the refusal in a claim for judicial review (supported by an application for interim relief) before a court or tribunal. For the reasons I have given, contrary to Freedman J's conclusion, judicial review is not in practice immediately available to challenge a decision of the Secretary of State material to removal (including a decision not to defer etc) prior to the relevant person being at risk of immediate removal without further notice. There is, at that point, a real risk of denial of access to justice.

143.In response, Mr Kovats made two particular submissions, neither of which in my view provides an answer to the point.

144.First, he submitted that the JRI Policy throughout stresses to decision-makers that they should ensure that those who are served with notices of a removal window are given an appropriate opportunity

to access justice, notably in the section of "Consideration of deferral…", quoted at paragraph 47 above, where it is said that:

"A key consideration [on consideration of deferral] is whether the person has had a reasonable opportunity to access legal advice and recourse to the courts".

However, that does not answer the point; because, if (as is statistically very likely) a decision is made not to defer, it is then when the right of access to justice may be called upon but, in practice, is not available.

145.Second, Mr Kovats submitted that the point was undermined by the fact that in most cases the individual will not, in fact, be removed prior either to having that opportunity or to the removal being cancelled or deferred because of some extraneous reason, such as ill-health. However, the fact that many irregular migrants in these circumstances are not removed is not as a result of the JRI Policy, which puts them at the immediate risk I have identified; it is despite that Policy. On the basis that the Secretary of State does not deliberately delay notifying decisions until immediately prior to removal is due to take place (and, as I understood the submissions, no party suggested that she now does: although see paragraph 105 as to previous practice), whether an irregular migrant is removed before he or she has had an opportunity to obtain legal advice and apply to the court is a matter of pure happenchance. It is, in the legal sense, arbitrary and thus in any event unlawful.

146.Third and finally, Mr Kovats submitted that notice of removal in the form of a removal window leaves the relevant person in no worse position than if given 72 hours' notice of removal directions with a fixed date and time, and the Appellants do not argue that such notice is unlawful. However, unless accepting that it would be appropriate and necessary for any person served with a notice of removal by way of removal window to issue judicial review proceedings – which he did not expressly accept, and which would be contrary to the intention of the Policy to reduce appeals and save costs (see paragraph 12 above) – I do not see any force in this submission. In practice, there is a significant difference; because, where the irregular migrant knows the date and time of his or her removal, that focuses not only his mind, but also the minds of both his legal representatives and the Secretary of State. It is noteworthy that (i) although the Secretary of State responds to representations within hours if removal directions have been set, it takes weeks or even months when they have not been set (see paragraph 59(v) above), and (ii) the Secretary of State does not suggest that, as a result of the Policy, every irregular migrant served with notice of a removal window who may wish to make representations should issue a protective claim and application for interim relief to be considered by the court prior to expiry of the notice period. As I have said, that would be contrary to the express aim of the Policy to save costs.

147.For those reasons, in my view, the JRI Policy with which we are concerned (Version 17) incorporated an unacceptable risk of interference with the right of access to court by exposing a category of irregular migrants, including those who have claims on article 2 and/or article 3 human rights and protection grounds, to the risk of removal without any proper opportunity to challenge a relevant decision in a court or tribunal.

148.Consequently, I would allow the appeal on Medical Justice Ground 1.

Breach of the Right of Access to Justice: Other Grounds of Appeal

149.I can deal with the remaining grounds briefly. In short, I consider they add nothing of substance to Medical Justice Ground 1.

150.As Medical Justice Ground 2, Ms Kilroy submitted that the serious inherent risk in the JRI Policy that removal will be effected before the relevant individual is able to access the court to challenge the decision amounts to an unacceptable risk of a breach of the right to access to justice at common law which renders the Policy not only *ultra vires* but also irrational, given that it is the express aim of the Policy to maintain the right to access to justice by giving every person served with a notice of removal window sufficient time to raise a claim and for such a claim to be properly considered. Whilst it may be that a policy which abrogates the right to access to justice without Parliamentary sanction is, in law, irrational, I do not consider that this adds anything to Medical Justice Ground 1.

151.As Medical Justice Ground 3, Ms Kilroy submitted that, whenever a decision is made to give notice of removal in the form of a notice of removal window in the context of (i) Dublin III, and/or (ii) the European Directives and/or (iii) the ECHR, then, in addition to that being in breach of the common law right to access a court, it is unlawful as failing to acknowledge the rights to legal advice and/or an effective remedy under those measures. I accept that the European jurisprudence in relation to those instruments emphasises the need for, and scope of, an effective remedy. However, given my conclusion in relation to the common law right, again I do not consider that this ground adds anything of substance.

152.Similarly, although not the basis of a ground of appeal, Ms Harrison and Ms Luh submitted that the JRI Policy failed properly to take into account vulnerable groups who might be subject to it. Again, given my conclusion on the primary ground, it is unnecessary to say anything further on the position of such groups.

153.Finally in relation to the systemic challenge, Ms Naik submitted that the tribunal at [157]-[169] of its determination erred in proceeding on the basis that section 10 permits the abrogation of, or the imposition of hindrances to the enjoyment of, the right to access to justice.

154.For the reasons I have given (paragraphs 10 and 74 and following), neither section 10 nor any other legislative provision authorises any restriction in the right of access to justice. The tribunal, at [162], said that it authorised the progressive diminishing of the *ability* to access to the courts, in the sense I have explained (at paragraph 116 above); which may be a somewhat different proposition from authorising the diminishing of the right to access the courts.

155.Given my conclusion in relation to the Medical Justice Ground 1, it is unnecessary to comment further on this ground, other than to say that, as it is framed, I am unconvinced that the ground has been made good.

FB's Individual Claim

156.I can deal with FB's individual claim briefly, because, irrespective of the risk that irregular migrants in general might face, the tribunal held (at [183] of its determination) that FB was not in the event denied access to justice as a result of the operation of the JRI Policy or otherwise; and FB does not seek to challenge that conclusion in this appeal.

157.FB is an Afghan national who, it appears, was removed from the UK to Afghanistan on 29 March 2011, his asylum claim having been refused in December 2010. In April 2011, he again left Afghanistan for Turkey and then Germany, where he lived until September 2017. That month, he travelled via Calais arriving in the UK clandestinely in the back of a lorry on 30 September 2017.

158.That evening, he voluntarily attended Wembley Police Station. The following day he was interviewed by an immigration officer, with a Dari interpreter, when he said he had come to the UK because Germany were going to return him to Afghanistan. Although this is not accepted by the Secretary of State, he claims that he also indicated at that interview that he wished to claim asylum here. In any event, that day, he was served with a number of documents including Form RED.0001 in the usual form, in which he was given notice of a removal window beginning on 5 October 2017 and ending three months from the date of the notice.

159.On 2 October 2017, FB was transferred to Campsfield IRC. The following day, he made an oral request to claim asylum, and obtained and attended a DSA surgery slot with a lawyer from Duncan Lewis. On 4 October 2017, he was told by an immigration officer that, having been refused asylum in 2010, he would need to put his further submissions into writing. It was noted that FB was unable to write in English, and that he would require legal assistance to make those representations.

160.FB's notice period duly expired on 5 October. Unfortunately, due to capacity issues, Duncan Lewis did not internally allocate FB's case until 19 October. That day, the firm went onto the record with the Home Office as solicitors acting for FB. They asked for a copy of the decision refusing asylum in 2010, which was provided on 24 October. That day, Duncan Lewis made a full disclosure request and subject access request. On 14 November, they asked for the removal window to be cancelled pending full disclosure; and, the following day, they sent a letter before action which was treated by the Secretary of State as further submissions.

161.On 22 November, the Secretary of State set FB's removal for 24 December, but, in accordance with the JRI Policy, did not disclose that to FB or to his legal representatives.

162.On 28 November, Duncan Lewis issued judicial review proceedings in the Upper Tribunal on the basis that removal following only notice of a removal window under the JRI Policy was unlawful, with an application for urgent consideration and interim relief to prevent FB's removal pending the outcome of the claim. The following day (29 November), the Secretary of State refused FB's further submissions; but, that same day, Upper Tribunal Judge Craig granted the application for interim relief staying FB's removal. On 30 November, removal was deferred; and, on 5 December, FB was released from immigration detention.

163.FB thus complains that, from 5 October to 29 November 2017, he was at risk of removal. However,

as Ms Naik accepts, in the event he was not in fact denied access to justice; and, so, no relief specific to FB's individual case is required or appropriate.

164.For the sake of completeness, I should say that, on 18 October 2018, Duncan Lewis made further representations in support of FB's claim for international protection, which was treated by the Secretary of State as a further claim and rejected as such on 16 December 2019. However, in a determination promulgated on 6 August 2020, the FtT (First-tier Tribunal Judge Povey) allowed FB's appeal on asylum grounds. As I understand it, FB is currently awaiting formal confirmation of his refugee status from the Secretary of State. That has an initial period of five years leave to remain attached (paragraph 339Q(i) of the Immigration Rules). That is the result of the access to justice which he in fact obtained; but has no direct bearing upon his appeal.

Disposal

165.For the reasons I have given, I would allow the appeal on Medical Justice Ground 1 (which, of course, FB supported); and, having considered the parties' written submissions on relief, I would make a declaration that the JRI Policy was unlawful insofar as it gave rise to a real risk of preventing access to justice.

166.In respect of FB, as I have indicated (paragraph 3 above), the tribunal found the Policy before it to have been deficient and declared it unlawful in a number of respects (none of which is material to this appeal); but, in paragraph 4 of its Order of 8 November 2018, "subject as aforesaid", simply dismissed the application for judicial review. In my view, in the light of the conclusion to which we have come on Medical Justice Ground 1, that Order looked at as a whole cannot properly stand without some amendment. Therefore, whilst none of FB's specific grounds of appeal has succeeded, I would allow his appeal, and order that the tribunal's Order be amended by the insertion of a new paragraph 3A as follows:

"It is declared that Chapter 60 is unlawful insofar as it gave rise to a real risk of preventing access to justice."

With that amendment, it is not necessary to alter paragraph 4 of the Order in any way.

167.Finally, I have had the benefit of reading the Lord Chief Justice's judgment, with which I agree. In particular, I would associate myself with his observations on Kiarie and Byndloss.

Lord Justice Coulson :

168.I agree that, for the reasons given both by my Lord, Hickinbottom LJ, and the Lord Chief Justice, this appeal should be allowed on the basis of what has been called Medical Justice Ground 1, namely that inherent in the JRI Policy is an unacceptable risk of interference with the common law right of access to justice. I also agree to the disposal of the appeals which Hickinbottom LJ proposes.

169.I reject the Appellants' submission that a system based on the giving of a notice of a removal window (a critical element of the JRI Policy) is inherently unlawful, or that an irregular migrant is additionally entitled to receive separate removal directions specifying the date and time of the proposed removal. As Hickinbottom LJ explains at [74]-[87], there is no legal basis for either submission. An irregular migrant in receipt of the Notice of Removal, in RED.0001 form, will know that, if he or she does not take their own steps to leave the UK, they will be removed during the removal window period. That is sufficient. There is no right to another notice giving details of how and when the Secretary of State will remove that individual if he or she refuses to leave of their own volition.

170.Where, however, the JRI Policy goes wrong is that it does not allow sufficient opportunity for the individual to challenge (in court or tribunal) any adverse decision relevant to the removal which may have been made/notified during the removal window period itself. In such circumstances, the individual could only bring such a challenge when he or she was at risk of imminent removal or might even have already been removed. That would deny the individual a fair – or perhaps any – opportunity to present their case: see Lord Dyson MR in *The Lord Chancellor v R (Detention Action) [2015] EWCA Civ 840* at [38].

171.It should perhaps be emphasised that the Secretary of State's case on this crucial issue was very limited. On her behalf, Mr Kovats accepted that only Parliament could authorise any restriction to the common law right of access to justice, and he agreed that no such authorisation existed here, whether express or implied. His only argument, therefore, was that the JRI Policy did not amount to such a restriction. For the reasons given by Hickinbottom LJ at [120]-[148], I consider that that submission is unsustainable.

172.I should add that, at the hearing of the appeal, Mr Kovats devoted much time to an argument that there was no restriction on access to justice because the irregular migrant could still challenge the lawfulness of their removal after it had happened, making their case from another country. In my view, that submission is contrary to the JRI Policy itself (which appears to recognise expressly the importance of access to the court prior to removal). Moreover, although I consider that the practical problems that affect such out-of-country challenges were perhaps over-stated by the Appellants, I respectfully agree with the Lord Chief Justice's analysis at [196]-[199] below, that there are readily identifiable categories of case where the harm might be irredeemable.

Lord Burnett of Maldon LCJ :

173.Two issues arise for determination in this appeal. First, whether irregular migrants must be given notice of the date, time and mechanism of their removal. Secondly, whether the policy of the Secretary of State in issue in this appeal ("the JRI Policy") denies access to justice to some of those to whom it is applied and is thus, without amendment, unlawful to that extent.

174.I am grateful to Hickinbottom LJ for setting out the background to the appeals before us, the relevant statutory provisions, such evidence as bears on the questions we have to decide together with the parties' submissions.

175.Like Hickinbottom and Coulson LJJ, I am satisfied that there is no basis in law for requiring the

Secretary of State to give an irregular migrant notification of the date, time and mechanism of removal.

176.I should like to add a few words on the second ground.

177.In 2007 the Secretary of State introduced a policy to give 72 hours' notice of removal to many irregular migrants, to others five and seven days. Provisions within the policy which truncated the time scale to fewer than 72 hours in limited circumstances were challenged successfully in *R (Medical Justice) v. Secretary of State for the Home Department [2010] EWHC 1925 (Admin)* and *[2011] EWCA Civ 1710* on the basis that the shorter time frame denied many an effective opportunity to challenge the decision in question before removal. Shorn of those offending provisions that policy continued in operation until April 2015 when the underlying statutory provisions were amended and the policy under challenge in these proceedings was introduced. The notice periods, whilst tight, provided sufficient time in each of the applicable circumstances for those affected to challenge the removal decision. It is no part of the Appellants' case that the time limits in these notice periods themselves deny access to justice.

178.Any system of removing irregular migrants must operate in the sure knowledge that some are reluctant to leave the United Kingdom, even when there is no basis for remaining here, and will take whatever steps are permitted by the legal and administrative arrangements in place to resist, delay or frustrate removal. Late claims raised shortly before the known date of removal have been endemic, many fanciful or entirely false. Whilst there is no suggestion of any such conduct in these proceedings, it is a matter of regret that a minority of lawyers have lent their professional weight and support to vexatious representations and abusive late legal challenges. The courts have developed controls which provide some protection for its own processes and for the proper functioning of immigration control (e.g. Madan, Hamid and SB, cited at paragraph 104 above); but the practical and administrative problems for the Home Office in dealing at speed with substantial new representations in the days and hours leading up to a removal are legion. Some of those difficulties are summarised in SB at [54]-[57].

179.The changes wrought by the statutory amendments in 2014, together with the JRI Policy, were in part designed to bring forward any arguments and thus avoid last minute wrangling, possible delays in removal and even the interruption of flights. The policy has been subject to many revisions and updates. As Hickinbottom LJ has explained fully, the practice of giving notice of removal directions, was later discontinued. Instead, an irregular migrant would be given a notice which explained that he had no right to remain in the United Kingdom, with accompanying reasons, and encouraging immediate representations if the migrant disagreed. To that end, the policy created the dual concepts of a notice period (which mirrored the old periods of the 2007 policy, amended to take account of the successful 2010 challenge) and a removal window of three months which followed immediately upon the notice period. Nobody would be removed within the notice period but might be removed without further notice during the currency of the removal window.

180.The need for expedition in challenging the decision to remove is made plain by the documentation served upon the migrant. None can have a legitimate complaint if removal follows swiftly at the end of the relevant notice period and they have remained silent. That conclusion follows from the consensus underlying this appeal that those periods, whilst tight, do not deny a migrant a reasonable opportunity to challenge the decision to remove of which he has been notified. The essential problem identified by the Appellants was that the version of the policy with which we have been concerned enables a migrant to raise new arguments within the time scale of the initial notice period, but for a decision to be made in the removal window and removal to follow so quickly that there is no opportunity for an in-country

challenge in cases where the right to access to justice includes the right to mount such a challenge.

181.This appeal is concerned with three sets of circumstances which might lead to removal very shortly after an adverse decision during the removal window:

i)representations are made during the notice period seeking to persuade the Secretary of State that the migrant has a right to remain in the United Kingdom, but an adverse decision is taken after the end of that period, during the removal window;

ii)such representations are made after the end of the notice period (i.e. during the removal window itself) with an adverse decision following;

iii)a timely request to extend, cancel or defer the removal window is made but refused.

182.The reality is that, even if representations are made within the notice period, relevant decisions are likely, indeed more than likely, to be made after the notice period has expired and therefore during the removal window; and representations supporting the contention that the migrant does have a right to remain can, and often will, be made during the removal window even when there has been no calculated delay.

183.It is in those circumstances that the Appellants argue that an adverse decision might be made and an irregular migrant removed without an effective opportunity to obtain legal advice and take steps to challenge the decision, including seeking injunctive relief from the court to restrain removal pending resolution of a claim. The Appellants point to the possibility of having a request to extend the removal window, envisaged by the JRI Policy itself, refused and removal following immediately without any possibility of challenge.

184.Something of the order of 40,000 removals were made between 2015 and 2019 applying the JRI Policy in its evolving iterations. Its operation so far as removal windows was concerned was then suspended in these proceedings in the limited respect described by Hickinbottom LJ in paragraph 37 above. Of those 40,000, the Secretary of State has identified eight individuals who were removed but were returned either because a court ordered return, or the Secretary of State later recognised their right to be in the United Kingdom. The various solicitors who have given evidence of their experience have identified about 20 individuals who would have been removed but as a result of prompt action were protected. That illuminates the risk, but does not help to establish how many it might apply to. There is some evidence of individuals being removed very promptly following adverse decisions. What is missing from the evidence is any indication of the numbers of migrants who were removed more quickly after an adverse decision than the equivalent times used for the notice period (72 hours or five or seven days as the case may be). That information would provide a more reliable estimate of those who were likely to have had too little time to get advice and challenge the decision before removal, although not, of course, the numbers of those who would have done so.

185.A challenge to a policy, or statutory instrument, on the grounds that it deprives those affected by it of a realistic opportunity to challenge an adverse decision, and thus deprives them of effective access to justice, must demonstrate not a theoretical impediment but something more concrete. The vice must result from something inherent in the policy itself rather than its aberrant application: Lord Dyson in Detention Action at [27].

186.*R (UNISON) v Lord Chancellor [2017] UKSC 51* ; *[2017] 3 WLR 409* concerned fees introduced by statutory instrument which had the effect of dramatically reducing the number of claims issued in the Employment Tribunal. The Supreme Court decided that the statute empowering the Lord Chancellor to set fees did not provide the *vires* to impede access to justice, although it did not question the principle that fees could be charged. Between [74] and [84], Lord Reed traced the right of access to the courts long recognised in English law from one of the few extant provisions of Magna Carta through to modern times. A provision which prevents access to justice will not survive scrutiny unless expressly authorised by statute. Moreover, the common law has arrived at the position that even an interference with access to the courts, which is not insurmountable, will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective (see [89]).

187.In the context of removals of irregular migrants, tight timescales for mounting challenges before removal are clearly necessary to meet the legitimate objective of controlling immigration even though they provide a limited temporal opportunity to secure access to justice.

188.There was a wide range of challenges in the UNISON case but the central argument was that the adverse impact on access to justice rendered the Fees Order unlawful.

189.Lord Reed, with whom all members of the court agreed, framed the question as "whether the Fees Order effectively prevents some persons from having access to justice" (at [90]). The Lord Chancellor contended that, in the absence of distinct proof of individuals who had been prevented by fees from bringing claims, the Fees Order could not be unlawful. He relied upon fee remission for those of very limited means together with a residual discretion to remit fees. He argued that those who did not bring proceedings were making choices about how to spend their money. In the context of fees, at [91], Lord Reed explained that "in order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission." The evidence was not conclusive in demonstrating that the fees had prevented people from bringing claims, but conclusive evidence was not required. Citing *R (Hillingdon London Borough Council) v Lord Chancellor [2008] EWHC 2683 (Admin)* ; *[2009] 1 FLR 39*, he said that "it is sufficient in this context if a real risk is demonstrated."

190.The evidence in UNISON demonstrated the general risk and also the adverse impact on bringing low value claims and claims where monetary redress was not sought. The Lord Chancellor's discretionary power of remission did not save the Fees Order from illegality because the problem was systemic. The Fees Order "effectively prevents access to justice, and is therefore unlawful" (at [98]).

191.In the context of other statutory rules and policies that are said to prevent access to justice or otherwise inherently give rise to a risk of unlawful decisions (by contrast with individually aberrant decisions), formulations of words have been used in the authorities which are to the same effect as the "real risk" identified in the UNISON case. They are discussed in the judgment of Hickinbottom LJ

between paragraphs 92 and 95, and 120 and 125, above.

192.The Appellants' core submission on this point is that the JRI Policy inevitably results in many decisions which bear upon the question whether an individual served with a notice of removal window is entitled to leave to enter or to remain being made during the removal window. The result is that removal is possible without any opportunity to challenge the decision.

193.There is no escaping the conclusion that the Policy puts irregular migrants at risk of removal immediately following an adverse decision made, or notified, during the removal window which thus deprives that group of a proper opportunity to challenge the decision before removal.

194.There is a distinction to be drawn between, on the one hand, notified decisions with removal to follow almost instantly; and, on the other hand, decisions (including decisions at the time the notice period and removal window are set) which are notified with sufficient time for fresh representations or an application for an extension of time or a legal challenge to be made but the migrants in question fail to take prompt steps to do any of these things, only seeking to take such steps when confronted with the reality that removal is imminent. In the latter case, any difficulties in accessing justice arise from the migrants' own choice not to do anything promptly. Whilst, for the reasons set out in Hickinbottom LJ's judgment at paragraph 102, that does not impact on the migrants' legal right to access the court, in those circumstances *the policy* has not in any way impeded the migrants' ability to make fresh representations or challenge a relevant decision.

195.In the class of case where it is the policy which denies a reasonable opportunity to challenge a decision before removal, the question then becomes whether any of the safeguards of ameliorating factors identified by the Secretary of State meet the underlying objection.

196.Like Hickinbottom and Coulson LJJ, I consider that whilst in many cases the safeguards built into the policy go some way towards avoiding the risk of peremptory removal without a realistic chance of challenging an adverse decision made during the removal window, they do not meet the central vice of denial of access to justice before removal of a readily identifiable subset of irregular migrants. Between paragraphs 44 and 47 above, Hickinbottom LJ considers four aspects of the policy itself which are prayed in aid by the Secretary of State. In their various ways, they are concerned with circumstances in which removal will be deferred, or the notice period or removal window extended, to enable representations to be considered or to facilitate an opportunity for a migrant to take advice or challenge a decision. But none meets the distinct problem identified in this appeal. There is no general requirement to delay removal in cases within the three categories I have identified to provide an opportunity to seek advice and make a challenge.

197.Mr Kovats placed significant reliance of the opportunity of any migrant who has been removed to mount a challenge from abroad. The Appellants cite *R (Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42* ; *[2017] 1 WLR 2380* in support of a broad proposition that out-of-country appeals or judicial review claims are inadequate for the purposes of satisfying access to justice. That is not what the Supreme Court held nor a correct proposition of law. The Supreme Court was faced with two fact-specific cases in which two foreign nationals convicted of serious criminal offences were subject to deportation. Each relied upon article 8 of the European Convention on Human

Rights ("the ECHR") and their private and family life to argue that their deportation would violate Convention rights. They raised an issue under the procedural obligations which attach to article 8 resulting from the legislative regime requiring them to pursue their appeals from abroad. There were questions concerning certification under section 94B of the Nationality, Immigration and Asylum Act 2002.

198.The practical consequences of having to pursue an appeal from abroad were considered by Lord Wilson beginning at [60] of his judgment (three other members of the court agreed with his reasoning). It was an appeal heard in February 2017 in the Supreme Court and in September 2015 in the Court of Appeal. It considered the practical and technological arrangements available at that time. Even so, as Lord Wilson explained at [67] in connection with giving evidence from abroad, "it might well be enough to render the appeal effective for the purposes of article 8, provided only that the appellant's opportunity to give evidence in that way is open to him." The focus was on giving oral evidence. Plainly, that will rarely be a consideration in judicial review claims. The consideration of the practicalities that followed were rooted in the technology available to and used both by the First-tier Tribunal and appellants. In the intervening years both have been transformed and their use has become ubiquitous in courts and tribunals the world over, a process accelerated by the effects of the Covid 19 pandemic which has swept around the globe since the beginning of this year. Lord Wilson discussed the cost of hiring video conference rooms and equipment, for example, which have long ago become an irrelevance in holding online video meetings. From the point of view of a litigant, whether discussing a case with legal representatives, attending a hearing or giving evidence all that is required is video enabled device attached to the internet, with widely available commercial software installed in it. The position in courts and tribunals is entirely different from how it was even three or four years ago.

199.As Lord Carnwath put it at [85], it was necessary to distinguish between the substantive and procedural aspects of article 8. Practical arrangements for hearings from abroad bore upon the procedural aspect. It is clear from both the judgment of Lord Wilson and, for example, [103] of the judgment of Lord Carnwath that the conclusions were dependent on evidence of the practical arrangements available when the Secretary of State made the original decision in connection with the two appellants. There was material in an agreed note that had been placed before the Court of Appeal and further evidence before the Supreme Court to which he refers at [85]. Whilst agreeing with the result in the cases before the Supreme Court Lord Carnwath said (at [103]):

"I see no reason in principle why use of modern video facilities should not provide an effective means of providing oral evidence and participation from abroad. So long as the necessary facilities are available."

I respectfully agree and would add that the position has become clearer as time has gone by.

200.Nonetheless, that does not provide a complete answer to this aspect of the appeal. Whilst it is true that the ability to challenge a decision from abroad will mean that there is no unlawful impediment to access to justice in many cases, there are readily identifiable classes of case where that will not be so. The most obvious are those where removal itself exposes the migrant to immediate risk of harm; cases raising articles 2 and 3 of the ECHR or under the Refugee Convention, for example. Like Lord Wilson and Lord Carnwath, I do not consider that the same is true as a matter of principle in article 8 cases.

201.Mr Kovats raised the prospect of irregular migrants being in a position endlessly to raise arguments at the last moment which would always require a deferral of removal to enable a challenge to be made, thus cynically manipulating the system to make removal impossible. The protection of a right of access to justice does not entail anything so impractical. Examples were given in paras 72 and 73 of SB of circumstances where the Secretary of State would not be obliged to defer removal to consider very late representations and, as I have explained, a distinction must be drawn between the operation of the policy and the lack of action by a migrant.

202.Whilst on analysis the number of migrants who would be denied a proper opportunity to challenge a decision as a result of the inherent operation of the policy may be small, to the extent that the policy does so, I agree that it is unlawful and would require some modification to make good that deficiency.

203.For those reasons, subject to any submissions as to the precise form of relief, I agree to the disposal of these appeals proposed by Hickinbottom LJ at paragraphs 165-166 above.

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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

28th February 2024

B e f o r e :

FORDHAM J

Between:

R (MD AYAZ KARIM)	**Claimant**
- and -	
UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)	**Defendant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

FORDHAM J: Adjournment

1 This is a permission-stage judicial review claim. The Claimant has appeared in person today and I have not needed to hear any submissions from him. I have been assisted by the submissions made by Mr Waite for the Interested Party ("SSHD") but, having heard from Mr Waite, I am quite satisfied of two things. The first is that I need to start today with the question of whether to adjourn this hearing. The second is that the answer to that question is that it is in the interests of justice that I should adjourn today's hearing. I have also ventilated with Mr Waite the possible 'fallback' position of directions with a view to a Judge, whether me or another Judge, considering further representations, in the first instance at least, on the papers. It is clear that the SSHD wants the "jurisdictional" issue in this case to be ventilated at a hearing. I have been urged to press on with that hearing today, but I am unwilling in the circumstances to take that course.

Decision

15. In my judgment, as I have already indicated, what the interests of justice in this case require is that today's hearing be adjourned rather than to proceed with the Claimant unrepresented. The reality is that he and his solicitors have been able to engage Leading Counsel to assist, who wishes to make representations on the issue of "jurisdiction" and other aspects of the case if they arise. The idea that "nothing is achieved other than Counsel attending" the hearing is one with which I have difficulty. Oral hearings and the engagement which they bring are a central value to our legal system and there is all the difference in the world between any litigant – whether the SSHD or a claimant – appearing in person and being represented by specialist Counsel. The "jurisdictional" point and any related issues may prove to be very straightforward. But I am not prepared to proceed today into that territory in circumstances where an adjournment was requested for what, in my judgment, are legitimate reasons in the interests of justice.

Kiarie v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)

Regina (Byndloss) v Secretary of State for the Home Department (Bail for Immigration Detainees and others intervening)

Positive/Neutral Judicial Consideration

Court

Supreme Court

Judgment Date

14 June 2017

Report Citation

[2017] UKSC 42

[2017] 1 W.L.R. 2380

Supreme Court

Baroness Hale of Richmond DPSC , Lord Wilson , Lord Carnwath , Lord Hodge JJSC , Lord Toulson

2017 Feb 15, 16; June 14

Immigration—Deportation—Conducive to public good—Home Secretary ordering deportation of claimant foreign nationals following convictions for serious criminal offences—Claimants asserting breaches of Convention right to respect for private and family life—Home Secretary certifying that removal pending appeal not unlawful under human rights legislation—Claimant in consequence only entitled to appeal from outside United Kingdom—Whether out-of-country appeal procedure infringing Convention right to respect for private and family life—Whether satisfying procedural guarantees of requirements of effectiveness and fairness—Whether Home Secretary able to satisfy self at time of certification that requirements met— Human Rights Act 1998 (c 42), Sch 1, Pt I , art 8 — Nationality, Immigration and Asylum Act 2002 (c 41), s 94B (as inserted by Immigration Act 2014 (c 22), s 17(3))

The claimant in the first case was a Kenyan national who had spent the majority of his life in the United Kingdom where his parents and siblings also resided. The claimant in the second case was a Jamaican national who had entered the United Kingdom, aged 21, as a visitor and had later been granted indefinite leave to remain as the spouse of a British citizen. He subsequently became the father of a number of children who also resided in the United Kingdom. The Home Secretary made a deportation order against each claimant by reason of his serious criminal offending, having rejected his contention that deportation would be in breach of his right to respect for his private and/or family life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms [1] , and certified under section 94B of the Nationality, Immigration and Asylum Act 2002 [2] , as inserted, that his removal pending any appeal would not be unlawful under section 6 of the Human Rights Act 1998 . In certifying the claims under section 94B , the Home Secretary chose not to certify them instead as “clearly unfounded” under section 94 , indicating that their appeals were arguable. The effect of the certification was that any appeals against the decisions on human rights claims had to be brought by the

claimants from outside the United Kingdom. The claimants sought to challenge the section 94B certifications. In the first case the Upper Tribunal refused the claimant permission to apply for relief under section 15 of the Tribunals, Courts and Enforcement Act 2007 ***2381** and in the second case the judge refused permission to proceed with a claim for judicial review. The claimants appealed against those refusals. The Court of Appeal, although allowing the appeals and granting the relevant permissions, dismissed the substantive claims, finding that, although the certifications were based on a misdirection that the claimants would not face a real risk of serious irreversible harm if removed in advance of an appeal, that misdirection was not material in the first claimant's case and the first certification of the second claimant's claim had been corrected by a second certification.

On the claimants' appeals—

Held , (1) allowing the appeals, that, since a human rights claim certified under section 94B of the Nationality, Immigration and Asylum Act 2002 was by its nature not unfounded, any appeal against it would be arguable; that the public interest in a foreign criminal's removal in advance of an arguable appeal was outweighed by the wider public interest that an arguable appeal should remain effective even if brought from abroad; that, if a section 94B certificate were lawful, the appellant would already have been deported before the appeal challenging the lawfulness of the deportation was heard and his integration into United Kingdom society and his relationships with his family there would already have been damaged thereby with the result that the observance of his Convention rights would be less likely to require his re-entry to the United Kingdom; and that such significant weakening of an arguable appeal before it could be heard called for considerable justification (post, paras 35, 39, 57, 58).

Ali v Secretary of State for the Home Department [2016] 1 WLR 4799 , SC(E) considered.

(2) That considerable practical difficulties faced an out-of-country appellant in that (i) he might not be granted legal aid or have a realistic opportunity to give live evidence by electronic link to the tribunal hearing his appeal, which would in most cases be required in order for such an appeal to be effective, (ii) the overall costs of giving evidence in an out-of-country appeal could be considerable and (iii) the appellant would have to confront formidable technical and logistical difficulties as well as problems in obtaining supporting professional evidence; that, since the power under section 94B of the 2002 Act to certify claims of foreign criminals under article 8 of the Convention was therefore exercised by the Home Secretary in the absence of a Convention-compliant system for the conduct of an out-of-country appeal, of appropriate facilities at the hearing centre, and of means by which an appellant could have access to such facilities, deportation of the claimants pursuant to the section 94B certificates would interfere with their Convention rights to respect for their private or family lives established in the United Kingdom and, in particular, with the aspect which required that their challenge to a threatened breach of them should be effective; that the burden therefore fell on the Home Secretary to establish that such interference was justified and proportionate, in that deportation in advance of an appeal had a sufficiently important objective with which it was rationally connected, that nothing less intrusive at that stage could accomplish it, and that it struck a fair balance between the rights of the claimants and the interests of the community; that, while the claimants had established that the requisite balance was unfair, the Home Secretary had failed to establish that it was fair; and that, accordingly, their deportation before their appeals were heard would breach the procedural requirements of article 8 of the Convention (post, paras 60–61, 63, 67, 72–74, 76, 78–79, 80).

R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2012] 1 AC 621 , SC(E) considered.

Per Lord Carnwath JSC. Article 8 of the Convention does not require an out-of-country appellant to have access to the best possible procedure, merely to one which is effective and fair, and the Home Secretary is obliged to satisfy herself that the procedural mechanisms are in place to ensure that that requirement is met. It would be wrong to allow the Home Secretary to dictate the conduct of an appellant's case or ***2382*** the evidence on which he chooses to rely and she has to be able, at the time of certification, to satisfy herself that the necessary facilities can and will be provided. In the present case, since there is no evidence that the Home Secretary has given serious consideration to the practical problems of out-of-country appellants in presenting evidence and participating in the hearing, she cannot have satisfied herself that such an appeal would be effective (post, paras 87, 102, 103, 105).

Kiarie v Secretary of State for the Home Department

By a claim form dated 4 November 2014 the claimant, Kevin Kinyanjui Kiarie, a Kenyan national, applied for "judicial review" relief under section 15 of the Tribunals, Courts and Enforcement Act 2007 in respect of a decision of the Secretary of State for the Home Department dated 10 October 2014 to certify under section 94B of the Nationality, Immigration and Asylum Act 2002 , as inserted, that his removal from the United Kingdom pending the outcome of his appeal, asserting human rights claims under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms , against a deportation order made against him by the Secretary of State following his convictions for serious offences, would not be unlawful under section 6 of the Human Rights Act 1998 . By a decision dated 6 March 2015 the Upper Tribunal (Immigration and Asylum Chamber) (Judge Kopieczek) refused the claimant permission to bring the claim.

By a notice of appeal dated 25 March 2015 and pursuant to permission granted by the Court of Appeal (Lord Dyson MR and Underhill LJ) the claimant appealed. On 13 October 2015 the Court of Appeal (Richards, ***2384*** Elias and McCombe LJJ) [2015] EWCA Civ 1020; [2016] 1 WLR 1961 allowed the appeal and granted permission but dismissed the claim for "judicial review" relief.

Pursuant to permission granted on 22 March 2016 by the Supreme Court (Lord Kerr of Tonaghmore, Lord Reed and Lord Toulson JJSC) the claimant appealed. The issues as stated in the statement of facts and issues agreed between the parties were (1) the correct approach to conclusions of fact reached by the Secretary of State in the course of determining whether to certify a human rights claim under section 94B of the 2002 Act, and whether, in resolving that dispute, the court or tribunal should hear evidence, including evidence which post-dated the Secretary of State's decision; (2) the correct approach to an assessment of the proportionality of, and in particular the nature of the public interest in, the removal of a person liable to deportation, pursuant to certification under section 94B of the 2002 Act and pending the resolution of his human rights appeal against deportation; (3) whether the Court of Appeal had been wrong in concluding that a requirement to pursue a human rights appeal against deportation from abroad would not amount to a breach of the procedural guarantees provided by article 8 of the Convention; (4) the correct approach to the assessment of the best interests of any children affected by the removal of a person liable to deportation, pursuant to certification; and (5) whether the Court of Appeal had been wrong in concluding that the claimant's removal from the United Kingdom pending the determination of his appeal against deportation (a) did not amount to a breach of his procedural rights as protected by article 8 , and/or (b) was lawful within the meaning of article 8.2 .

By permission granted on 19 December 2016 by the Supreme Court (Baroness Hale of Richmond DPSC, Lord Wilson and Lord Carnwath JJSC) Bail for Immigration Detainees intervened in the appeal.

The facts are stated in the judgment of Lord Wilson JSC, post, paras 17–20.

Regina (Byndloss) v Secretary of State for the Home Department

By a claim form dated 4 November 2014 the claimant, Courtney Aloysius Byndloss, a Jamaican national, sought judicial review of the decisions of the Secretary of State for the Home Department dated 6 October 2014 (subsequently superseded by a supplementary decision letter dated 3 September 2015) to certify under section 94B of the Nationality, Immigration and Asylum Act 2002 , as inserted, that the removal of the claimant pending the outcome of his appeal, asserting human rights claims under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms , against the deportation order made against him by the Secretary of State following his convictions for serious offence, would not be unlawful under section 6 of the Human Rights Act 1998 . By a decision dated 19 December 2014 Males J sitting in the Administrative Court refused the claimant permission to proceed with his claim.

By a notice of appeal dated 21 January 2015 and pursuant to permission granted by the Court of Appeal (Lord Dyson MR and Underhill LJ), the claimant appealed. On 13 October 2015 the Court of Appeal (Richards, Elias and McCombe LJJ) [2015] EWCA Civ 1020; [2016] 1 WLR 1961 ***2385** allowed the appeal and granted permission to proceed but dismissed the claim for judicial review.

Pursuant to permission granted on 22 March 2016 by the Supreme Court (Lord Kerr of Tonaghmore, Lord Reed and Lord Toulson JJSC) the claimant appealed. The issues as stated in the statement of facts and issues agreed between the parties were (1) the correct approach to conclusions of fact reached by the Secretary of State in the course of determining whether to certify a human rights claim under section 94B of the 2002 Act, and whether, in resolving that dispute, the court or tribunal should hear evidence, including evidence which post-dated the Secretary of State's decision; (2) the correct approach to an assessment of the proportionality of, and in particular the nature of the public interest in, the removal of a person liable to deportation, pursuant to certification under section 94B of the 2002 Act and pending the resolution of his human rights appeal against deportation; (3) whether the Court of Appeal had been wrong in concluding that a requirement to pursue a human rights appeal against deportation from abroad would not amount to a breach of the procedural guarantees provided by article 8 of the Convention; (4) the correct approach to the assessment of the best interests of any children affected by the removal of a person liable to deportation, pursuant to certification; and (6): whether the Court of Appeal had been wrong in concluding that the claimant's removal from the United Kingdom pending the determination of his against deportation (a) did not amount to a breach of his procedural rights as protected by article 8 of the Convention, and/or (b) did not amount to a breach of the Secretary of State's obligations under section 55 of the Borders, Citizenship and Immigration Act 2009 , and/or (c) was lawful within the meaning of article 8.2 of the Convention.

LORD WILSON JSC (with whom BARONESS HALE OF RICHMOND DPSC, LORD HODGE JSC and LORD TOULSON agreed)

A— Introduction

1. The issue surrounds "out-of-country" appeals. These are appeals against immigration decisions made by the Home Secretary which immigrants are entitled to bring before the First-tier Tribunal (Immigration and Asylum Chamber) ("the tribunal") but only if they bring them when they are outside the United Kingdom.

2. Mr Kiarie, the first claimant, has Kenyan nationality. He is aged 23 and has lived in the United Kingdom with his parents and siblings since 1997, when he was aged three. In 2004 he was granted indefinite leave to remain in the United Kingdom. He has been convicted of serious offences in relation to drugs. Sent to him under cover of a notice dated 10 October 2014 was an order made by the Home Secretary for his deportation to Kenya.

3. Mr Byndloss, the second claimant, has Jamaican nationality. He is aged 36 and has lived in the United Kingdom since the age of 21. In 2006 he was granted indefinite leave to remain in the United Kingdom. He has a wife and their four children living here; and he has three or four other children also living here. He has been convicted of a serious offence in relation to drugs. Sent to him under cover of a notice dated 6 October 2014 was an order made by the Home Secretary for his deportation to Jamaica.

4. In deciding to make deportation orders against them, the Home Secretary rejected the claims of Mr Kiarie and Mr Byndloss that deportation would breach their right to respect for their private and family life under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). Mr Kiarie and Mr Byndloss have a right of appeal to the tribunal against her rejection of their claims and they propose to exercise it. But, when making the deportation orders, the Home Secretary issued certificates, the effect of which is that they can bring their appeals only after they have returned to Kenya and Jamaica.

5. As I will explain in paras 33 and 55 below, it may well, for obvious reasons, be difficult for Mr Kiarie and Mr Byndloss to achieve success in their proposed appeals. But the question in these proceedings is not whether their appeals should succeed. It is: are the two certificates lawful?

6. Yes, said the Court of Appeal (Richards LJ, who gave the substantive judgment, and Elias and McCombe LJJ, who agreed with it) on 13 October 2015 [2016] 1 WLR 1961, when dismissing the applications of Mr Kiarie and Mr Byndloss for judicial review of the certificates.

K— Weakening the arguments on the appeal

57. On an appeal against a deportation order the overarching issue for the tribunal will be whether the deportation would be lawful. But, if the certificate under section 94B is lawful, the appellant will already have been deported. In determining the overarching issue the tribunal will be likely to address in particular the depth of his integration in United Kingdom society and the quality of his relationships with any child, partner or other family member: see para 55(a)(b) above. But, were the certificate under section 94B is lawful, his integration in United Kingdom society would already have been cut away; and his relationships with them ruptured.

58. Statistics now produced by the Home Secretary, which the claimants consider to be surprisingly optimistic, suggest that an appeal brought from abroad is likely to be determined within about five months of the filing of the notice. So, by the time of the hearing, an appellant, if deported pursuant to a certificate, will probably have been absent from the United Kingdom for a minimum of five months. No doubt the tribunal will be alert to remind itself of its duty to set aside the deportation order and thus to enable an appellant to re-enter the United Kingdom if his human rights were so to require. But, by reason of his deportation pursuant to a certificate, his human rights are less likely so to require! It is one thing further to weaken an appeal which can already be seen to be clearly unfounded. It is quite another significantly to weaken an arguable appeal: such is a step which calls for considerable justification. The Home Secretary argues that, by definition, the foreign criminal will have been in prison, perhaps also later in immigration detention, in the United Kingdom and so he will already have suffered both a loosening of his integration, if any, in United Kingdom society and, irrespective of any prison visits, an interruption of his relationship with family members. I agree; but in my view the effect of his immediate removal from the United Kingdom on these two likely aspects of his case would probably be significantly more damaging than that of his prior incarceration here.

59. For present purposes, however, I put these substantial concerns aside. In my view what is crucial to the

disposal of these appeals is the effect of a certificate under section 94B in obstructing an appellant's ability to present his appeal.

L— Obstructing presentation of the appeal

60. The first question is whether an appellant is likely to be legally represented before the tribunal at the hearing of an appeal brought from abroad. Legal aid is not generally available to an appellant who contends that his right to remain in the United Kingdom arises out of article 8 : paragraph 30, Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 . So, in order to obtain legal aid, he must secure an "exceptional case determination" under section 10 of that Act. Although an appeal brought from abroad is in principle as eligible for such a determination as an appeal brought from within the United Kingdom, the determination cannot be made unless either the absence of legal aid *would* breach his rights under article 8 or it *might* breach them and provision of it is appropriate in all the circumstances: section 10(3) . It suffices to say for present purposes that it is far from clear that an appellant relying on article 8 would be granted legal aid. One can say only that, were he required to bring ***2401** his appeal from abroad, he might conceivably be represented on legal aid; that alternatively he might conceivably have the funds to secure private legal representation; that alternatively he might conceivably be able to secure representation from one of the specialist bodies who are committed to providing free legal assistance to immigrants (such as Bail for Immigration Detainees: see para 70 below); but that possibly, or, as many might consider, probably, he would need to represent himself in the appeal. Even if an appellant abroad secured legal representation from one source or another, he and his lawyer would face formidable difficulties in giving and receiving instructions both prior to the hearing and in particular (as I will explain) during the hearing. The issue for this court is not whether article 8 requires a lawyer to be made available to represent an appellant who has been removed abroad in advance of his appeal but whether, irrespective of whether a lawyer would be available to represent him, article 8 requires that he be not removed abroad in advance of it.

61. The next question is whether, if he is to stand any worthwhile chance of winning his appeal, an appellant needs to give oral evidence to the tribunal and to respond to whatever is there said on behalf of the Home Secretary and by the tribunal itself. By definition, he has a bad criminal record. One of his contentions will surely have to be that he is a reformed character. To that contention the tribunal will bring a healthy scepticism to bear. He needs to surmount it. I have grave doubts as to whether he can ordinarily do so without giving oral evidence to the tribunal. In a witness statement he may or may not be able to express to best advantage his resolution to forsake his criminal past. In any event, however, I cannot imagine that, on its own, the statement will generally cut much ice with the tribunal. Apart from the assistance that it might gain from expert evidence on that point (see para 74 below), the tribunal will want to hear how he explains himself orally and, in particular, will want to assess whether he can survive cross-examination in relation to it. Another strand of his case is likely to be the quality of his relationship with others living in the United Kingdom, in particular with any child, partner or other family member. The Home Secretary contends that, at least in this respect, it is the evidence of the adult family members which will most assist the tribunal. But I am unpersuaded that the tribunal will usually be able properly to conduct the assessment without oral evidence from the appellant whose relationships are under scrutiny; and the evidence of the adult family members may either leave gaps which he would need to fill or betray perceived errors which he would seek to correct.

Rex (AAA (Syria) and others) v Secretary of State for the Home Department

Rex (HTN (Vietnam)) v Secretary of State for the Home Department

Rex (RM (Iran)) v Secretary of State for the Home Department

Rex (ASM (Iraq)) v Secretary of State for the Home Department

Rex (AS (Iran)) v Secretary of State for the Home Department

Rex (SAA (Sudan)) v Secretary of State for the Home Department

Court

Supreme Court

Judgment Date

15 November 2023

Report Citation

[2023] UKSC 42

[2023] 1 W.L.R. 4433

Supreme Court

Lord Reed PSC , Lord Hodge DPSC , Lord Lloyd-Jones , Lord Briggs , Lord Sales JJSC

2023 Oct 9, 10, 11; Nov 15

Immigration—Asylum—Removal—Secretary of State's policy of removing certain asylum seekers to Rwanda for asylum claims to be determined—Whether policy unlawful by reason of risk of refoulement from Rwanda—Whether policy unlawful by reference to retained EU law— Asylum and Immigration Appeals Act 1993 (c 23), s 2 — Human Rights Act 1998 (c 42), s 6 , Sch 1, Pt I , art 3 — Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (c 20), s 1 , Sch 1, para 6(1) —Immigration Rules, paras 345A–345D— Council Directive 2005/85/EC, arts 25 , 27 — Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmnd 3906), art 33(1)

The United Kingdom Government entered into an agreement with the Rwandan Government, pursuant to which certain asylum seekers who arrived in the United Kingdom could be removed to Rwanda where their asylum claims would be decided under the Rwandan asylum system. The Secretary of State's policy of removing asylum seekers to Rwanda in such circumstances ("the Rwanda policy") was given effect under paragraphs 345A to 345D of the Immigration Rules, pursuant to which an asylum claim could be treated as inadmissible and the asylum seeker removed to a safe third country if the asylum seeker had had the opportunity to apply for asylum in a safe third country but had not done so. The claimants, including ten individual asylum seekers who were to be removed to Rwanda in accordance with the agreement, brought claims for judicial review of the Rwanda policy. The Divisional ***4434** Court of the King's Bench Division dismissed those claims. The Court of Appeal allowed the claimants' appeal, holding that the Divisional Court had applied the wrong test when determining that the Secretary of State had been entitled to conclude that Rwanda was a safe country from which asylum seekers would not be at serious risk of ill-treatment by reason of refoulement to their countries of origin, contrary to article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and section 6 of the Human Rights Act 1998, and that on the evidence there was such a risk. The Court of Appeal dismissed the claimants' argument that the Rwanda policy was unlawful by reference to articles 25 and 27 of Council Directive 2005/85/EC , holding that any provisions of retained EU law that were inconsistent with the Immigration Rules were to be disapplied pursuant to paragraph 6(1) of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 .

On appeal by the Secretary of State and cross-appeal by one of the claimants—

Held , (1), dismissing the appeal, that asylum seekers were protected against refoulement not only by article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and section 6 of the Human Rights Act 1998 , but also by article 33 of the Convention and Protocol relating to the Status of Refugees and section 2 of the Asylum and Immigration Appeals Act 1993 ; that, where an issue of indirect refoulement arose, the test to be applied by the court was whether there were substantial grounds for believing that the removal of an asylum seeker to the receiving country would expose them to a real risk of ill-treatment as a consequence of their refoulement to a further country; that, when applying that test, the court had to make its own assessment of whether such substantial grounds existed in the light of all the evidence bearing on that issue; that assurances given by the receiving country's Government were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment; that, rather, there was an obligation on the court to examine whether such assurances provided, in their practical **application**, a sufficient guarantee that the asylum seeker would be protected against the risk of ill-treatment, carrying out a fact-sensitive examination of how the assurances would operate in practice in the circumstances prevailing at the material time; that the court would attach weight to the United Kingdom Government's view as to the value of the receiving country's assurances, but it was not required to accept that evaluation; that, indeed, the United Kingdom Government was not necessarily the only or the most reliable source of evidence about factors which might affect the risk of refoulement, and where evidence bearing on such factors was adduced from sources other than the Government, such as the United Nations High Commissioner for Refugees, the court would have to consider it; that, in the present case, whether or not the Divisional Court had applied the correct test, it had erred in its approach to the evaluation of the evidence by (a) taking the view that, unless there was compelling evidence to the contrary, it could not go

behind the Government's opinion that the assurances given by Rwanda could be relied upon and (b) failing to engage with the evidence of the United Nations High Commissioner for Refugees; that, on the current evidence, there were substantial grounds for believing that asylum seekers who were removed to Rwanda would face a real risk of ill-treatment by refoulement, given (i) the general human rights situation in Rwanda, (ii) the inadequacy of Rwanda's asylum system, including its history of refoulement, and (iii) Rwanda's failure to comply with assurances which it had given to the Government of Israel under a similar agreement; and that, accordingly, the Rwanda policy was unlawful (post, paras 26 , 33–34 , 38 , 42 , 45 , 47–49 , 52 , 55–57 , 59–62 , 72–74 , 102–105 , 149).

Soering v United Kingdom (1989) 11 EHRR 439 , ECtHR, *Othman v United Kingdom (2012) 55 EHRR 1* , ECtHR, *Ilias v Hungary (2019) 71 EHRR 6* , ECtHR (GC) and *Zabolotnyi v Mateszalka District Court, Hungary [2021] 1 WLR 2569* , SC(E) applied.

Secretary of State for the Home Department v Rehman [2003] 1 AC 153 , HL(E), ***R*** *(EM (Eritrea)) v Secretary of State for the Home Department [2014] AC 1321* , ****4435*** SC(E) and ***R*** *(Begum) v Special Immigration Appeals Commission [2021] AC 765* , SC(E) considered.

(2) Dismissing the cross-appeal, that on a true construction, section 1(b) of and Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 did apply to retained EU law that related to asylum; that there was no justification for reading references to "immigration" in section 1(b) and Schedule 1 as excluding matters relating to asylum, since there was no consistent usage or settled practice in domestic legislation which distinguished between "immigration" on the one hand and "asylum" on the other; that, thus, the asylum-related rights conferred by articles 25 and 27 of Council Directive 2005/85/EC fell within paragraph 6(1)(a) of Schedule 1 as EU-derived rights that were inconsistent with, or were otherwise capable of affecting the interpretation, **application** or operation of, "any provision made by or under the Immigration Acts", which included the Immigration Rules; that there was no ambiguity about paragraph 6(1)(a) such that the Explanatory Notes to the Bill which became the 2020 Act or parliamentary committee reports could aid in its interpretation; that the principle of legality as a special rule of construction did not apply since the rights afforded by articles 25 and 27 of the Directive were not fundamental or constitutional rights and, in any event, the principle did not permit a court to disregard an unambiguous expression of Parliament's intention; that, therefore, the effect of section 1(b) of, and paragraph 6(1)(a) of Schedule 1 to, the 2020 Act was that articles 25 and 27 of the Directive did not have effect in the domestic law of the United Kingdom as retained law; and that, accordingly, there was no provision of retained EU law which made the Rwanda policy unlawful (post, paras 132–137, 140, 142–145, 148–149).

G v G [2022] AC 544 , SC(E) and ***R*** *(Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2023] AC 255* , SC(E) considered.

Per curiam . It is apparent from the evidence that significant changes need to be made to Rwanda's asylum procedures, as they operate in practice, before there can be confidence that it will deal with asylum seekers sent to it by the United Kingdom in accordance with the principle of non-refoulement. The necessary changes may not be straightforward, as they require an appreciation that the current approach is inadequate, a change of attitudes, and effective training and monitoring (post, para 104).

Decision of the *Court of Appeal [2023] EWCA Civ 745; [2023] 1 WLR 3103; [2023] 4 All ER 253* affirmed.

APPEAL from the Court of Appeal

On 8 June 2022 the claimants, **AAA**, AHA, AT, AAM and NSK, brought a claim for judicial review (CO/2032/2022) of decisions made by the Secretary of State for the Home Department, declaring each of their asylum claims inadmissible, issuing a certificate under paragraph 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 certifying as unfounded claims made by reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and directing the removal of each claimant to Rwanda. In all cases the decisions were made by letter and confirmed on 5 July 2022. The claim for judicial review was amended to reflect developments between 8 June 2022 and 5 July 2022. On 10 June 2022 the United Nations High Commissioner for Refugees was given permission to intervene in the claim. The grounds of the claim were: (1) that the decisions of the Secretary of State that asylum claims made in the United Kingdom should not be decided in the United Kingdom but, instead, that the claimants should be relocated to Rwanda and their asylum claims determined in that country in accordance with arrangements made between the governments of the United Kingdom and Rwanda, were unlawful; and (2) that the Secretary of State did not consider their circumstances properly.

On 13 June 2022 the claimant, HTN, brought a claim for judicial review (CO/2104/2022) of a decision made on 1 June 2022 by the Secretary of State, and confirmed on 5 July 2022, refusing asylum, issuing a certificate under paragraph 17 of Schedule 3 to the 2004 Act , and directing the removal of the claimant to Rwanda. The claim was later amended to reflect a decision of the Secretary of State on 5 July 2022 to refuse HTN's human rights claim. The grounds of the claim corresponded to those in case CO/2032/2022.

On 10 June 2022 the claimant, RM, brought a claim for judicial review (CO/2077/2022) of decisions made on 6 June 2022 by the Secretary of State, and confirmed on 13 June and 5 July 2022, refusing asylum, issuing a certificate under paragraph 17 of Schedule 3 to the 2004 Act , and directing the removal of the claimant to Rwanda. The grounds of the claim corresponded to those in case CO/2032/2022.

On 13 June 2022 the claimant, ASM, brought a claim for judicial review (CO/2025/2022) of a decision made by the Secretary of State, confirmed on 5 July 2022, refusing asylum, issuing a certificate under paragraph 17 of Schedule 3 to the 2004 Act , and directing the removal of the claimant to Rwanda. The grounds of the claim corresponded to those in case CO/2032/2022.

On 13 June 2022 the claimant, AS, brought a claim for judicial review (CO/2026/2022) of a decision made on 2 June 2022 by the Secretary of State, and confirmed on 5 July 2022, refusing asylum, issuing a certificate under paragraph 17 of Schedule 3 to the 2004 Act , and directing the removal of the claimant to Rwanda. The grounds of the claim corresponded to those in case CO/2032/2022.

On 13 June 2022 the claimant, SAA, brought a claim for judicial review (CO/2094/2022) in respect of a notice of intent given on 27 May 2022 by the Secretary of State. The grounds of the claim were that the Secretary of State was acting unlawfully in contemplating making a decision to detain the ***4438** claimant for the purposes of removing him to Rwanda in circumstances in which the Secretary of State proposed to share the claimant's personal data with other countries, deferred his human rights claim, failed to provide adequate reasons as to why the claimant's protection claim should be treated as inadmissible, failed to disclose relevant documents, and gave an inadequate time for response.

On 9 June 2022 the claimant, Asylum Aid, brought a claim for judicial review (CO/2056/2022) on the grounds that the system adopted by the Secretary of State for dealing with asylum claims contravened procedural requirements and was inherently unfair.

On 19 December 2022 the Divisional Court of the King's Bench Division (Lewis LJ and Swift J) *[2022] EWHC 3230 (Admin)* gave permission for all the claims to proceed, allowed the claims of **AAA**, AHA, AT, AAM, NSK, HTN, RM, ASM and AS on ground (2), dismissed those claimants' claims on ground (1) and dismissed the claims of SAA and Asylum Aid.

With permission granted by the Divisional Court on 16 January 2023 and by the Court of Appeal (Underhill LJ) on 14 March 2023, **AAA**, AHA, AT, AAM, NSK, HTN, RM, ASM and AS appealed. On 29 June 2023 the Court of Appeal (Sir Geoffrey Vos MR and Underhill LJ; Lord Burnett of Maldon CJ dissenting) *[2023] EWCA Civ 745; [2023] 1 WLR 3103* allowed the appeal.

With permission granted by the Court of Appeal on 13 July 2023 (amended on 20 July 2023) the Secretary of State appealed. The issues in the appeal were agreed to be as follows. (1) Whether the majority of the Court of Appeal was correct to conclude that the Divisional Court had applied the incorrect legal test to the question to be answered under article 3 of the ECHR. (2) If the Divisional Court had applied the correct test to the article 3 question, whether the Court of Appeal was entitled to interfere with its conclusion. (3) If the Divisional Court had not applied the correct test, or there was another basis for interfering with its conclusion, so the Court of Appeal was permitted to answer the question afresh for itself, whether the majority of the Court of Appeal was wrong to conclude that, on the evidence before the Divisional Court, there were substantial grounds for thinking that asylum seekers would face a real risk of ill-treatment (in the form of refoulement) following removal to Rwanda due to the inadequacy of the Rwandan system for refugee status determination, including by giving insufficient weight to the Government's assessment of the likelihood of the Government of Rwanda abiding by its assurances.

With permission granted by the Supreme Court (Lord Reed PSC, Lord Hodge DPSC and Lord Lloyd-Jones JSC) dated 31 August 2023 **AAA**, AHA, AT, AAM, NSK and HTN cross-appealed. The issues in those cross-appeals were agreed to be as follows. (1) Whether, on the evidence before the Divisional Court, there were substantial grounds for believing that asylum seekers removed to Rwanda would face a real risk of ill-treatment within Rwanda contrary to article 3 of the ECHR, in addition to the alleged risk of refoulement. (2) Whether, on the evidence before the Divisional Court, the Secretary of State failed to discharge her procedural obligation under article 3 to "examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an ****4439*** adequate asylum procedure, protecting him or her against refoulement" as required by *Ilias v Hungary (2019) 71 EHRR 6, para 134* .

With permission granted by the Court of Appeal on 13 July 2023 (amended on 20 July 2023) ASM cross-appealed. The issue in that cross-appeal was agreed to be whether section 1 of and Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 , correctly construed, caused Council Directive 2005/85/EC to cease to have effect as retained EU law. It was common ground that if the Directive continued to have effect as retained EU law, paragraphs 345A to 345D of the Immigration Rules did not comply with articles 25 and 27 of the Directive insofar as they permitted removal to a third country to which the individual whose asylum claim was declared inadmissible had no previous connection.

5. Conclusion

149. For the reasons we have explained in our discussion of Issues 2 and 3, at paras 42–105 above, we conclude that the Court of Appeal was correct to reverse the decision of the Divisional Court, and was entitled to find that there are substantial grounds for believing that the removal of the claimants to Rwanda would expose them to a real risk of ill-treatment by reason of refoulement. It was accordingly correct to hold that the Secretary of State's policy is unlawful. The Secretary of State's appeal is therefore dismissed. For the reasons explained in our discussion of Issue 4, at paras 107–148 above, the cross-appeal by ASM is also dismissed.

Ms B L Scully, Barrister ***4481***

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*3784 HA (Iraq) v Secretary of State for the Home Department

RA (Iraq) v Secretary of State for the Home Department

AA (Nigeria) v Home Secretary (SC(E))

Positive/Neutral Judicial Consideration

Court

Supreme Court

Judgment Date

20 July 2022

Report Citation

[2022] UKSC 22

[2022] 1 W.L.R. 3784

Supreme Court

Lord Reed PSC , Lord Hamblen , Lord Leggatt , Lord Stephens JJSC , Lord Lloyd-Jones

2022

May 17, 18; July 2022

4. The very compelling circumstances test

46. Under section 117C(6) of the 2002 Act deportation may be avoided if it can be proved that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2'.

47. The difference in approach called for under section 117C(6) as opposed to 117C(5) was conveniently

summarised by Underhill LJ at para 29 of his judgment as follows:

> ”(A) In the cases covered by the two Exceptions in subsections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances there specified the public interest in the deportation of medium offenders does *not* outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.

> ”(B) In cases where the two Exceptions do not apply—that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements—a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decision-maker is required by section 117C(6) (and paragraph 398 of the Rules) to proceed on the basis that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2'.'

48. In *Rhuppiah v Secretary of State for the Home Department [2016] 1 WLR 4203, para 50* Sales LJ emphasised that the public interest 'requires' deportation unless very compelling circumstances are established and stated that the test 'provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of article 8 to remove them'.

49. As explained by Lord Reed JSC in his judgment in *Hesham Ali v Secretary of State for the Home Department [2016] 1 WLR 4799, para 38* :

> 'great weight should generally be given to the public interest in the deportation of [qualifying] offenders, but …it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the *SS (Nigeria) case [2014] 1 WLR 998* . The countervailing considerations ***3800** must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State.”

50. How Exceptions 1 and 2 relate to the very compelling circumstances test was addressed by Jackson LJ in *NA (Pakistan) [2017] 1 WLR 207* . In relation to serious offenders he stated as follows:

> ”30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2,

> but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of article 8 .'

In relation to medium offenders he stated:

> '32. Similarly, in the case of a medium offender, if all he could advance in support of his article 8 claim was a 'near miss' case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. He would need to have a far stronger case than that by reference to the interests protected by article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to article 8 but not falling within the factors described in Exceptions 1 and 2. The decision-maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.'

He also emphasised the high threshold which must be satisfied:

> '33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.'

51. When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in ***3801** deportation. As explained by Lord Reed JSC in *Hesham Ali* at paras 24-35, relevant factors will include those identified by the European Court of Human Rights ("ECtHR") as being relevant to the article 8 proportionality assessment. In *Unuane v United Kingdom (2020) 72 EHRR 24* the ECtHR, having referred to its earlier decisions in *Boultif v Switzerland (2001) 33 EHRR 50* and *Uner v The Netherlands (2006) 45 EHRR 14* , summarised the relevant factors at paras 72-73 as comprising the following:

”• the nature and seriousness of the offence committed by the applicant;

• the length of the applicant’s stay in the country from which he or she is to be expelled;

• the time elapsed since the offence was committed and the applicant’s conduct during that period;

• the nationalities of the various persons concerned;

• the applicant’s family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple’s family life;

• whether the spouse knew about the offence at the time when he or she entered into a family relationship;

• whether there are children of the marriage, and if so, their age; and

• the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled …

• the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

• the solidity of social, cultural and family ties with the host country and with the country of destination.’

52. The weight to be given to the relevant factors falls within the margin of appreciation of the national authorities. As Lord Reed JSC explained in *Hesham Ali* at para 35:

> ”35. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The Convention on Human Rights can thus accommodate, within limits, the judgments made by national legislatures and governments in this area.’