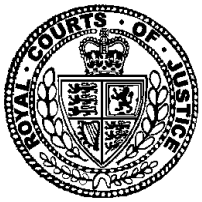

Neutral Citation Number: [2022] EWCA Civ 1057

Case No: CA-2020-001202

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE MACLEMAN
PA/01481/2017(P)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE MACUR
and
LORD JUSTICE DINGEMANS

- -

Between :

DJ (PAKISTAN)	**Appellant**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Charlotte Kilroy QC and Alasdair Henderson (instructed by **Fadiga & Co Solicitors**) for the **Appellant**
Rob Harland (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 12 July 2022

- -

Approved Judgment

Macur LJ :

Introduction:

1. The primary issue in this appeal is one of jurisdiction, namely: can this Court entertain an appeal from a decision made pursuant to rule 43 of Tribunal Procedure (Upper Tribunal) Rules 2008 ("UTR") by the Upper Tribunal (Asylum and Immigration Chamber) ("UT")?

2. This case is subject to an anonymity order and the appellant will be referred to by the initials DJ.

Background:

3. Mr DJ is a Pakistani national of Kashmiri ethnicity. He entered the United Kingdom on 18 December 2011 on a student's visa. He was arrested and detained by the Home Office. He claimed asylum on 1 July 2016.

4. The Secretary of State for the Home Department ("SSHD") refused Mr DJ's claim on credibility grounds; she did not accept that four documents on which he relied were genuine documents.

5. The First-tier Tribunal ("FtT") refused Mr DJ's asylum appeal by a decision promulgated on 6 December 2019. Permission to appeal was granted. The appeal was due to be heard on 2 April 2020 but was adjourned following the first national lockdown due to the COVID-19 pandemic.

6. On 23 March 2020 Lane J, President of the UT, issued a Presidential Guidance Note ("PGN") which contained guidance on determining 'error of law' appeals made from the FtT to the UT pursuant to section 12 of the Tribunal, Courts and Enforcement Act 2007 ("the TCEA") without a hearing pursuant to rule 34 of the UTR.

7. Consequently, on 30 April 2020, UT Judge Mandalia gave notice that he considered it was appropriate for Mr DJ's appeal to be determined without a hearing and seeking the parties' views in accordance with UTR rule 34.

8. Mr DJ indicated he was content for the appeal to be dealt with on the papers in submissions filed on 12 May 2020. The SSHD filed submissions on 4 June 2020 which agreed that an oral hearing was not required, and for the first time contested the appeal.

9. By its determination on 24 August 2020 the UT dismissed the error of law appeal. Mr DJ's application to the UT for permission to appeal was refused on 27 October 2020. Mr DJ then made an application for permission to appeal to the Court of Appeal on 18 November 2020.

10. On 20 November 2020, the judgment in *R (JCWI) v President Upper Tribunal (Immigration and Asylum) Chamber* [2020] EWHC 3103 (Admin) was handed down. The judgment concluded that the PGN was materially in error on a matter of law in that it conveyed "an overall paper norm", without adequate reference to paragraph 4 of the "*Pilot Practice Direction: Contingency Arrangements in the First Tier Tribunal and the Upper Tribunal"* issued by the Senior President of the Tribunals on 19 March 2020, which referred to the necessity to bear in mind when considering disposing of an appeal

without a hearing, "the overriding objective, the parties' ECHR rights and the Chamber's procedure rules about notice and consent".

11. The President of UTIAC gave an undertaking to use reasonable endeavours to bring the judgment in *JWCI* to the attention of claimants, whose appeals had been considered without a hearing in which SSHD had succeeded. It was brought to Mr DJ's attention on 27 November 2020.

12. Mr DJ made an application under Rule 43 of the UTR to set aside UT Judge Macleman's decision, and for an oral hearing to be convened to consider the error of law appeal.

13. This application, along with 17 similar applications, was considered by the UT on three days in June 2021. Judgment was handed down on 2 September 2021. Mr DJ's application was refused: see *EP (Albania) and ors (Rule 34 decisions; setting aside)* [2021] UKUT 233 (IAT) at [149] – [150]. In *Hussain v Secretary of State for the Home Department* [2022] EWCA Civ 145 the Court of Appeal held that although the PGN had been held to be unlawful in R(JCWI) that did not mean that all determinations made after the PGN had been published had to be set aside. The question in each case was whether the determination had in fact been unfair. Mr DJ sought permission to amend his notice of appeal to include an appeal against the UT's decision in *EP (Albania)*, in addition to those already aimed at the substantive decision of the FtT. On 17 March 2022, the single judge gave permission to appeal on the three original substantive grounds, and also granted the application to amend the Notice of Appeal to include grounds asserting that the UT (i) acted unlawfully in deciding A's asylum appeal without a hearing once it became clear that the SSHD was contesting the appeal, and that the UT was minded to dismiss it on new grounds, and, (ii) was wrong to treat Mr DJ's consent to a paper determination as conclusive at a point when the SSHD had not made any submissions in response to Mr DJ's asylum appeal.

14. On 31 May 2022, the SSHD sent open correspondence conceding that the determination of the FtT, and therefore the decision of the UT in August 2020, should be quashed, and Mr DJ's case should be remitted to the FtT to be determined afresh. However, she did not consent to the quashing or setting aside of any aspect of the UT's determination in *EP (Albania)*. She has maintained this position.

15. Subsequently, on 10 June 2022 my Lord, Dingemans LJ, as supervising judge in charge of the public law list, directed that Mr DJ should file a supplementary skeleton on the question of whether the Court of Appeal has jurisdiction to set aside parts of the judgment in *EP (Albania)* in light of the fact that "[c]ertain decisions of the Upper Tribunal are "excluded decisions" which cannot be further appealed. The list of "excluded decisions" is set out in section 13(8) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act")."

16. The outcome of this appeal has no practical consequences to the ostensible appellant, Mr DJ. As indicated in [14] above, the SSHD concedes that the case should be remitted to the FTT for rehearing de novo with no order as to costs of the rule 43 application. It would be inappropriate to seek to pursue an appeal to a conclusion merely to secure an advantage as to costs (see for example, *R v Holderness BC ex p James Robert Developments Ltd* (1993) 5 Admin L.R. 470 and *R (Tshikangu) v Newham LBC* [2001] EWHC Admin 92) and, if this was the only point of the appeal, then certainly when

seen in the context of the disorderliness I refer to above I would, subject to my Lords, have refused to entertain this appeal as an inappropriate use of the Court's resources. However, the appeal acts as a vehicle to determine the point of principle of general importance, namely the finality of a UTR rule 43 determination, subject to public law considerations in judicial review, and we were told that there are other applications for permission to appeal adjourned behind the determination of this appeal.

17. The first question then for us to decide is whether this Court has jurisdiction to hear an appeal from a decision of the UT pursuant to UTR rule 43, refusing to set aside judgment. My answer to that question is that this Court does not have jurisdiction for the reasons I give below. However, regardless of that answer, I have nevertheless addressed the substantive merits of grounds 4 and 5, as they have now become; see [13] above.

Jurisdiction

18. Sections 13(1) and (2) of the TCEA confer a right of appeal to the Court of Appeal, or other relevant appellate court, on any point of law arising from a decision made by the UT "other than an excluded decision", subject to permission to appeal being granted by the UT or, if refused by the UT, "the relevant appellate court": see sections 13(4) and (5).

19. Section 13(8) defines what is an "excluded decision" for the purposes of section 13(1). It includes at section 13(8)(d), "a decision of the UT under section 10 of TCEA (i) to review, or not to review, an earlier decision of the tribunal, (ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal, or (iii) to set aside an earlier decision of the tribunal." On first reading, this appears pertinent to the issue we have to determine. However, there is no issue, and I am satisfied, that this type of section 10 review is governed by the provisions of rules 45 and 46 of the UTR and does not require our consideration.

20. Rather, the power to set aside pursuant to rule 43 clearly derives from section 22 and Schedule 5, paragraph 15 of the TCEA, namely:

> "15 (2) Rules may make provision for the setting aside of a decision in the First-tier Tribunal or Upper Tribunal –
>
> (a) where a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party to the proceedings or a party's representative,
>
> (b) where a document relating to the proceedings was not sent to the First-tier Tribunal or Upper Tribunal at an appropriate time,
>
> (c) where a party to the proceedings, or a party's representative, was not present at a hearing related to the proceedings, or
>
> (d) where there has been any other procedural irregularity in the proceedings."

21. Section 22 of TCEA provides for Tribunal Rules to govern practice and procedure in the FtT and UT, and to be made by the Tribunal Procedure Committee. Notably, pursuant to subsection 22(4), the power to make "Tribunal Procedure Rules" is to be exercised with a view to securing that: justice is done; the tribunal system is accessible and fair; proceedings are handled quickly and efficiently; the rules are both simple and simply expressed: and, where appropriate, confer on members of the FtT, or UT, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

22. Rule 43 UTR is headed "Setting aside a decision which disposes of the hearings". It states at (1) the overriding consideration to be 'the interests of justice' in deciding whether to set aside and re-make the decision, or relevant part of it, which disposes of the proceedings, if any of four specified gateways applies. The text of these gateways mirrors Schedule 5, paragraph 15(2). Rule 43 (3) to (5) provides the time limits in which an application can be made. These time limits are subject to the UT's power to extend time pursuant to rule 5.

23. There can be no question that rule 43 furthers the aims of the UTR. Applications are usually considered on the papers. The set aside provision provides a cheap and effective method of potentially avoiding a lengthy and more costly appeal process. The manner in which the exercise is conducted will be subject to public law considerations of fairness, regardless that the decision is determined to be an excluded decision for the purpose of section 13(8) of TCEA.

24. A decision made on an application pursuant to rule 43 is not expressly listed in section 13(8) TCEA as an "excluded decision". However, subsection 13(8)(f) refers to a UT decision that is of "a description" specified in an order made by the Lord Chancellor if: (a) in the case of a decision of that description, there is a right of appeal to the court from the decision and that right is or includes a right to appeal on any point of law arising from the decision; or (b) decisions of that "description" are made in carrying out a function transferred under section 30 and prior to the transfer of the functions there was no right of appeal from decisions of that description: see subsection (9).

25. The 'Explanatory Notes' to the TCEA provide, at paragraph 115, that the constraints set out under subsection 13(9) are for two purposes: (i) to preserve existing appeal rights where those rights are or include something other than a right of appeal on a point of law and (ii) the preservation, in cases where there is currently no appeal right, of the existing position.

26. The Appeals (Excluded Decisions) Order 2009 (SI 2009/275) ("AEDO") was made in exercise of the power conferred by section 13(8)(f). As amended and in force from 6 April 2015, an excluded decision includes, at Article 3(m) "any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British Nationality Act 1981, section 82 of the Nationality, Immigration and Asylum Act 2002, or regulation 26 of the Immigration (European Economic Area) Regulations 2006."

Vires:

27. Without prejudice to her submissions upon whether a rule 43 decision is "procedural, ancillary or preliminary", Ms Kilroy QC has raised a vires argument, based upon her

interpretation of section 13(9)(b). That is, she contends that section 30 of the TCEA provided for the transfer of functions from a scheduled tribunal, in this case the Asylum and Immigration Tribunal ("AIT"), to the unified tribunal system set up under the TCEA. The AIT was abolished by section 2(2) of the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010. Judicial officers of the AIT were transferred to either the FTT or the UT. The functions of the AIT were primarily transferred to the FtT. However, functions relating to appeal and reconsideration of FtT decisions were transferred to the newly created UT. Prior to transfer, the AIT were subject to the Asylum and Immigration Tribunal (Procedure) Rules 2005 ("AITR"). The AITR did not provide the AIT with the right to set aside, that is 'reconsider,' a decision in the circumstances described in UTR rule 43 (1), and therefore there was no decision of that "description" against which an appeal could be made. Consequently, there was no position, whether of the right of appeal or lack of it, to preserve.

28. It appears to me that Ms Kilroy's argument is dependent upon a wholly artificial premise. Section 13(9) does not define a function, nor a decision of that "description", by reference to the manner in which it is exercised. The relevant function exercised by AIT for these purposes was that of reconsideration and review of "immigration decisions" as defined by section 82 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") as amended and governed by Part 3 of the AIT Rules. The decisions of that description and function have been transferred and augmented by UTR rule 43.

29. Subsequently, in supplying materials omitted from the authorities bundle and to which provisions Ms Kilroy is said to have referred, Mr Henderson, her junior, draws attention to sections 82 to 106 of the Nationality, Immigration and Asylum Act 2002, which provided for rights of appeal against an "immigration decision". He highlights the wording in sections 103A (7)(a) and 103E(7)(a), inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and which applied in England and Wales to a review of a Tribunal's decision by the High Court and Court of Appeal respectively and which provide that reference to the Tribunal's decision "does not include a reference to (a) a procedural, ancillary or preliminary decision…". He draws attention to the similarity in terminology with that in Article 3(m) of the AEDO. Consequently he says, "it was this previous state of affairs that the Lord Chancellor was seeking to preserve through the Order."

30. There was no permission given to make further written submissions, as these essentially are. In any event, I do not see how this submission, if it is intended to do so, advances the vires argument. If anything, it appears to undermine it. There was no right of appeal to the Court of Appeal against a "procedural, ancillary or preliminary decision…" Article 3(m) continues the status quo as far as such previously excluded decisions are concerned. The real issue, therefore, is whether a TR 2008 rule 43 decision is one that is procedural, ancillary or preliminary.

Procedural, ancillary or preliminary?

31. Ms Kilroy argues that the requirement of a procedural irregularity as defined in rule 43(2) does not identify the nature of the decision made whether to set aside the decision that disposes of the proceedings, or part of it, as a procedural decision. That is, she says it is not procedural since it relates to the substance of the decision. I reject that submission. The UTR are *procedural* rules and govern practice and *procedure* in the

UT. They are made by the Tribunal *Procedure* Committee. Rule 43(2)(a) to (c) list the circumstances which may trigger an application. Rule 43(2)(d) refers to *"other procedural"* irregularities. The adjective is telling.

32. Ms Kilroy has referred us to *VOM (Error of law- when appealable) Nigeria* [2016] UKUT 00410 (IAC), which addressed whether there is a right to apply for permission to appeal to the Court of Appeal against any act or determination of the UT which is not finally dispositive of the appeal of which it is seized. This authority does not appear to me to advance her argument. At paragraph 25, McCloskey J, President, giving the judgment of the UT indicated the overwhelming conclusion that "Parliament cannot have intended to establish a right to seek permission to appeal to the Court of Appeal against an *intermediate* decision of this genre. This *intermediate* decision will, ultimately, merge with the final decision of the UT, thereby generating a composite decision and it will be open to the Appellant to seek to challenge any aspect thereof if so advised. … the only further right which arises is a right to seek to pursue an appeal against the final, dispositive decision of the UT …." (Emphasis provided)

33. The UT went on to say that if it had been persuaded that the UT had, after making a finding of an error of law and before remaking the decision, already made a 'decision' carrying in principle a right of appeal, then that constituted a 'decision' which was an 'excluded decision' within the meaning of Article 3(m) of the AEDO. That is:

> "32. Article 3(m) excludes 'any procedural, ancillary or preliminary' decision made in relation to an appeal. We consider that there are good reasons for categorising the steps so far taken by the UT in this appeal as having the characteristics not merely of one but of all three of those categories. They are 'procedural' because they are part of the statutory procedure prescribed by s 12 and do not finally determine the merits of the appeal. They are 'ancillary' because they provide necessary support to the prime task of 'deciding an appeal under s 11 (see s 12(1)), an adjunct to the central and ultimate task of the UT. They are 'preliminary' because they have to be made at an early rather than late stage of the process, necessarily preceding the performance of the ultimate task of the UT. If there were any doubt about their exclusion, we would pray in aid the same reasoning that we have deployed earlier: if these are 'decisions' there is no good reason to interpret the 2009 Order so as not to have them 'excluded' and there are very good reasons for interpreting the Order as excluding them from any right of appeal."

34. In *Terzaghi v Secretary of State for the Home Department*, 2019 EWCA Civ 2017 at paragraph 40, My Lord, Dingemans LJ, referred with approval to the UT judgment in *VOM* from which to draw the principle that, if the UT finds an error of law in the decision of the FtT and goes on to remake the decision, rather than remit the case to the FTT, the "error of law decision" is an intermediate decision. "Once the final decision has been made by the [UT], the intermediate decision of the [UT] will merge with the final decision of the [UT] generating a composite decision for the purposes of an appeal, see paragraph 25 of *VOM…"* He cited paragraph 30 of *AA(Iraq) v Secretary of State*

for the Home Department [2017] EWCA Civ 944; [2018] 1 WLR 1083 to the same effect. I respectfully agree.

35. Significantly, the UTR specifically do not contemplate a right of appeal to arise from a Part 7 decision which requires "notification of any rights of review or appeal against the decision."; see rule 40.

36. Rule 45 enables a review triggered by an application for permission to appeal to the Court of Appeal pursuant to section 13(1) of the TCEA. Instead of granting permission to appeal, the UT may set aside the decision in circumstances in which the UT overlooked a legislative provision or binding authority which could have had a material effect on the decision; or where, since the decision was made, another court has made a decision which is binding on the UT and it could have had a material effect on the decision. If, however, the UT decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision or part of it, the UT must consider whether to give permission to appeal to the Court of Appeal in relation to the substantive decision, not the refusal to grant permission to appeal. The UT, in these circumstances, must provide notification of the right to make an application to the relevant appellate court for permission to appeal and the time within which, and the method by which, such application must be made.

37. Rule 46(1) limits the power of the UT to review a decision pursuant to section 10 of the TCEA. The UT may not review its decision on an application for permission to appeal pursuant to section 10(1) of TCEA, since this is a decision that is an excluded decision for the purposes of section 13(1): see section 13(8)(c).

38. I consider that a rule 43 decision is certainly an intermediate decision; that is, a decision whether it is in the interests of justice to set aside a final dispositive decision, or part of it, and remake the same because of a procedural irregularity. This intermediate determination will merge with the final decision – that is, either the UT's remade decision, or the original FtT decision. In those circumstances, it is difficult to see why it would ever be necessary to appeal the rule 43 decision, whatever the outcome of that decision. It is the remaining or remade substantive decision that potentially carries the appeal.

39. Nevertheless, Ms Kilroy submits that there are good policy reasons why a rule 43 decision should be subject to challenge on appeal, since it may be necessary to do so when it would be impossible to make application pursuant to section 13(1) and (2). When invited to indicate in which type of case an appeal against a rule 43 decision, as opposed to an appeal against the substantive decision, would be necessary she suggested that it may apply in a case in which the tine limits for making application pursuant to section 13 had elapsed.

40. I found this to be unconvincing. By UTR rule 44, a party seeking permission to appeal must make a written application to be sent or delivered to the UT so that it is received within 1 month after the latest of the dates on which the UT sent (a) written reasons for the decision; (b) notification of amended reasons for, or correction of, the decision following a review; or, if the application for the decision to be set aside was made within the time stipulated in rule 43 (setting aside a decision which disposes of proceedings) or any extension of that time granted by the UT under rule 5(3)(a), (c) notification that

an application for the decision to be set aside has been unsuccessful. However, it is possible to request an extension of time for good reasons.

41. Further, the UT in *EP (Albania)* at paragraph 25 concluded that whilst there is a "practical restriction on how long after a decision an application under rule 43 might successfully be raised (because good cause would always be needed before any extension of time could be granted), there is no jurisdictional cut-off point [beyond which a rule 43 application may not be made]…" The UT did not consider that, if the application for permission to appeal is refused by the UT, there would be any jurisdictional bar to a rule 43 application if the applicant then applied directly to the Court of Appeal for permission to appeal. However, "[i]f such an application for permission to appeal has been made, a subsequent rule 43 application might encounter difficulties, for example on grounds of lateness, or perhaps even on the ground that pursuing a rule 43 application in parallel with the application to the Court of Appeal might be some form of abuse of process. But the success or failure of any such objection to a rule 43 application would depend on the circumstances in which the application had been made, not any jurisdictional barrier." I agree with the UT on this point. Consequently, it is possible to make concurrent applications for a rule 43 decision and, in the alternative for permission to appeal to the Court of Appeal.

42. Ms Kilroy also submits that if the only route of appeal is by way of judicial review, itself subject to appeal to this court, the prospect of multiple appeals looms. This argument is unpersuasive also. Rule 43 has no application to judicial review claims before the UT. Relief in Judicial Review proceedings is discretionary. Permission to judicially review a decision would be refused if there is or had been an alternative remedy available to the applicant, namely a substantive appeal on the merits of the substantive decision, which they had failed to take without good reason.

43. I can see no good policy reason at all why a rule 43 decision should be other than an excluded decision. To the contrary, I agree with paragraph 33 in *VOM*:

> "33. The appeal which the Appellant seeks to pursue at this intermediate of these proceedings would be an expensive and delaying distraction, a diversion having no discernible utility, fulfilling no identifiable imperative, countering no mischief and, fundamentally, vindicating no legal right. "

44. For the sake of completeness, and for the reasons discussed above, I agree with Mr Harland that, as far as *R on application of AVB v Upper Tribunal* [2021] EWHC 2013 (Admin) finds at paragraph 24 that a refusal to set aside is not an excluded decision for the purpose of section 13(1) TCEA, it is wrongly decided. In any event it was a decision per incuriam.

Substantive appeal on grounds 4 and 5

45. Turning then to what would be the extant substantive appeal, I agree with the single judge that it is arguable, at least in theory, that despite Mr DJ's consent to a hearing on the papers, the UT should have re-visited this question once it became clear, when the SSHD lodged her written submissions, that she, who had not previously taken part in

the appeal, was resisting it actively. It is also arguable, at least in theory, that the UT's approach to the merits of the appeal differed from that of the FtT, and of the SSHD in her brief written submissions, and that the UT should therefore have considered holding a hearing, or at least giving Mr DJ the opportunity to respond, once it decides that it was going to uphold the determination of the FtT on what were, arguably, new grounds.

46. However, this was not the basis upon which the rule 43 application was made to the UT, and the grounds raise entirely different points. In his argument to the UT, Mr DJ argued that the main reason he "reluctantly" agreed to a paper determination was "a belief that realistically he did not have much choice." Further, he wished to progress his appeal, which had been ongoing since 2017, rather than have to wait, and also to cooperate with the UT, in line with the overriding objective, in its attempts to keep dealing with cases despite the ongoing COVID-19 pandemic. Finally, that he had a "good basis to believe that he had strong prospects of success on appeal, rather than it being finely balanced". However, UTJ Macleman formed a different view of the strength of the appeal. If there had been an oral hearing, Mr DJ's representative would have had the chance to dynamically engage with the judge in order to try and persuade him to adopt a different view.

48. Ms Kilroy did not represent Mr DJ in the UT. However, she accepts that the issue was not put "squarely" on the same terms in the written arguments prepared for the rule 43 application and cannot assert that a transcript of oral submissions would reveal otherwise.

49. Ms Kilroy does not seek to appeal against the generic guidance provided by *EP Albania* in paragraphs [14] to [69] but the specific decision made in Mr DJ's case. In fact, Ms Kilroy relies upon the dicta in paragraph [36] to the effect that the UT embarking upon a no hearing determination must keep its previous directions under review. However, the UT address the written submissions made in support of Mr DJ's application in paragraphs [149] and [150] and I doubt that oral submissions differed, for undoubtedly they would have also been addressed by the UT. The judgment is concise and clear. It is patently right on the merits of the arguments advanced.

50. I would reject these grounds of appeal.

Grounds 1, 2 and 3.

51. As indicated above, the SSHD have conceded that the determinations of the FtT and UT should be quashed and Mr DJ's appeal remitted to the FtT to be determined afresh and to pay costs up to an including 15 May 2022, but not in respect of the hearing in *EP(Albania)*. Subject to my Lords, I would allow the appeal on these grounds on the terms agreed by the SSHD without determining the merits of grounds 1 to 3.

Conclusion

52. A decision made on an application under rule 43 is an excluded decision. The decision merges with the judgment made hitherto or remade. Therefore, there is no jurisdiction for this court to hear an appeal on the intermediate decision, rather than the substantive decision.

53. In any event, the grounds advanced with leave of the single judge did not form the basis of the application in the UT below. The decision made on the grounds that were

advanced was entirely merited. Consequently, if the appeal was able to be entertained on its merits, I would reject the grounds as drawn and, subject to my Lords I would dismiss the appeal on grounds 4 and 5.

54. Finally, I would allow the appeal on grounds 1, 2 and 3 by consent.

Dingemans LJ:

55. I agree.

Lewison LJ:

56. I also agree.