JR-2021-LON-000837 (formerly JR-1319-2021)

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of
AA

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE the Honourable Mr Justice Morris

HAVING considered all documents lodged and having heard Eric Fripp of counsel, instructed by Duncan Lewis Solicitors, for the Applicant and Nicholas Ostrowski of counsel, instructed by the GLD, for the Respondent at a hearing on 22 July 2022 and by written submissions on 25 and 27 July 2022

AND UPON the Respondent having agreed, further to Ground 2 in the Applicant's pleaded grounds, to the setting aside of her decision dated 23 May 2021 and to reconsider the Applicant's application for leave to remain made on 10 June 2020, including asylum and human rights claims raised therein, within 3 months of the date of this Order (absent special circumstances)

IT IS ORDERED THAT:

(1) The application for judicial review as based on Ground 2 be granted, following the agreement of the Respondent as set out above;

(2) The application for judicial review as based upon Ground 1 be dismissed, and for the reasons in the attached judgment.

(3) The Respondent shall pay to the Applicant half of her reasonable costs up to 16 February 2022 inclusive on a standard basis, to be subject to detailed assessment if not agreed;

(4) The Applicant shall pay:

(i) Half of the Respondent's reasonable costs up to 16 February 2022; and

(ii) All of the Respondent's reasonable costs from 16 February 2022

Any costs under this paragraph are to be paid on a standard basis to be subject to detailed assessment if not agreed. Costs under this paragraph are not to be

enforced without prior assessment of reasonableness under section 26(1) Legal Aid Sentencing and Enforcement Act 2012;

(5) There shall, as necessary, be detailed assessment of the Applicant's legally aided costs under the appropriate Regulations;

(6) Permission to appeal as regards Ground 1 be refused for the reasons set out at paragraph 95 of the attached judgment.

Signed:

The Honourable Mr Justice Morris

Dated: **10 March 2023**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *10 March 2023*

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2021-LON-000837
(formerly JR/1319/2021)

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

10 March 2023

Before:

THE HONOURABLE MR JUSTICE MORRIS

- -

Between:

THE KING
on the application of
AA

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Eric Fripp
(instructed by Duncan Lewis Solicitors), for the applicant

Nicholas Ostrowski
(instructed by the Government Legal Department) for the respondent

Hearing date: 21 July 2022
Further written submissions: 25 and 27 July 2022

- -

JUDGMENT

- -

Mr Justice Morris:

Introduction

1. By this application for judicial review, AA ("the Applicant") challenges the decision of the Secretary of State for the Home Department ("SSHD") dated 23 May 2021 treating his application for further leave ("the Application") as representations seeking to be considered as a fresh claim to protection under paragraph 353 Immigration Rules HC 395 ("Paragraph 353" – also referred to as "rule 353") and/or declining to accept the Application as demonstrating the existence of a fresh claim ("the Decision"). The Applicant seeks a declaration that his application for further leave to remain remains outstanding and an order quashing the Decision. Permission to apply for judicial review was granted by Upper Tribunal Judge McWilliam on 16 December 2021.

2. The SSHD has now conceded that she failed to apply the test under Paragraph 353 properly in, at least, part of the Decision and therefore the Decision falls to be reconsidered by her. As a result she has put forward a proposed consent order providing for the SSHD to reconsider the Decision within three months. However the Applicant maintains that the Application constituted a "protection claim", "asylum claim" and "human rights claim" within section 113 Nationality Immigration and Asylum Act 2002 ("NIAA 2002") and that the Decision was a refusal of such a claim which, absent statutory certification, gives rise to a right of appeal under section 82 NIAA 2002. Accordingly the SSHD was wrong to apply Paragraph 353 to the Application. The SSHD maintains that the Application was properly treated as further submissions which led to a consideration of whether they amounted to a fresh claim, and refusal of which did not result in a right of appeal.

The Facts

3. The Applicant is recorded as born on 10 December 2002. He turned 18 on 10 December 2020 and is now 20 years old. It is common ground that the Applicant comes from the Horn of Africa. The Applicant contends that he is an Eritrean national. The SSHD maintains that he is an Ethiopian national. This does not fall to be addressed in these proceedings because the SSHD has agreed that the substance of the case will be re-examined once the remaining issue between the parties is resolved.

4. The Applicant sought asylum and international protection in the United Kingdom on 19 June 2018. He claimed that he had been born

in Eritrea to an Eritrean father and an Ethiopian mother. He claimed that when he was about 5 he was taken to Ethiopia. The family were Pentecostal Christians and the Applicant understood they had left Eritrea due to persecution of Pentecostal Christians there. He stated that in November 2017 he travelled with his aunt back to Eritrea to find his father. He was told in June 2018 by his aunt that they had to leave Eritrea because of risk of persecution and their aim would be to go to Europe. He claimed they walked across the border into Sudan and two days later he was handed over to the guidance of a stranger who took him to the airport. They travelled by plane to the UK. At the airport he was taken into the safekeeping of local social services and was placed with a foster carer.

The first decision

5. By decision dated 28 March 2019 the Applicant's application for asylum/international protection was refused. However the letter also indicated that he would be granted leave to remain as an unaccompanied child asylum seeker under paragraph 352ZE Immigration Rules. That leave was to be effective until 10 June 2020 when the Applicant would be 17 ½ years old. Notice of appeal against that decision was filed, but withdrawn soon after, on the advice of his then solicitors.

The Application

6. Shortly before the expiry of his leave, on 10 June 2020 the Applicant applied for further leave to remain, relying on grounds including asylum/international protection and human rights. The Application was supported by substantial representations and evidence including a letter from Duncan Lewis Solicitors dated 3 February 2021. The Application was treated by the SSHD as submissions seeking to make good a fresh claim to protection under Paragraph 353. The Application was refused for reasons indicated in the Decision.

The Decision

7. The Decision letter was headed "Further Leave Decision". Despite the fact that the Application on its face was one seeking further leave to remain, the Decision letter stated at the outset:

> "Thank you for your application dated 10/6/20 in which you have asked for your representations to be

> considered as a fresh claim for asylum and human rights."

8. The letter continued:

> "Your further submissions have been fully considered and I have concluded that you do not qualify for leave on any basis."

9. Full reasons were then set out in the attached Consideration of Submissions document, on a standard form "ASL.2704 Refuse Further Representations". In that document, the SSHD set out first "Submissions that have previously been considered" and then "Submissions that have not previously been considered but which do not create a realistic prospect of success".

10. In summary the SSHD concluded that the Applicant had failed to provide any evidence which would overturn previous findings. It remained not accepted that the Applicant is an Eritrean national, rather than an Ethiopian national. The Decision went on to conclude that the Applicant would not be at risk on account of his religion, because he would not be returned to Eritrea; nor, for the same reason, would he be at risk of military service or penalisation; and finally the Applicant had failed to do sufficient to prove that he could not return to Ethiopia.

11. The Consideration of Submissions document concluded:

> "I have concluded that your submissions do not meet the requirements of Paragraph 353 of the Immigration Rules and do not amount to a fresh claim. The new submissions taken together with the previously considered material do not create a realistic prospect of success. This means that it is not accepted that should this material be considered by an Immigration Judge, that this could result in a decision to grant you asylum, Humanitarian Protection, limited leave to remain on the base of your family and/or private life or Discretionary Leave for the reasons set out above.
>
> I have decided that the decision of 29/03/19 should not be reversed."

12. The Decision did not give notice of any right of appeal, nor was there any statutory certification of any underlying asylum/protection or human rights claim.

The Proceedings

13. By pre-action protocol letter dated 16 June 2021, the Applicant challenged the SSHD's refusal to accept the Application as a fresh claim and her refusal to give the Applicant a right of appeal. In fact the substance of the letter was directed to the first challenge i.e. that the SSHD should accept his further submissions as amounting to a fresh claim. Although in conclusion a right to an in-country appeal was requested, the arguments now made before this Tribunal were not advanced in that letter.

14. In her reply dated 19 June 2021 the SSHD maintained the Decision, expressly applying the test in Paragraph 353, and concluding:

> "… the further submissions, taken together with the previously considered material does not create a realistic prospect of the applicants' asylum claim succeeding before another Immigration Judge.
>
> Therefore it is not accepted that the application amounts to a fresh claim under Paragraph 353… accordingly the applicant is not entitled to a right of appeal against this decision".

15. The letter concluded by referring to a possible claim for judicial review on the part of the Applicant. It is not the case, as the Applicant submitted before me, that in that letter the SSHD in some way acknowledged that the Decision amounted to a refusal of leave to remain (rather than a fresh claim refusal) or that there was a right of appeal.

16. Proceedings were commenced on 20 August 2021. By ground 1, the Applicant contends that the SSHD erred as to the nature of the application dated 10 June 2020 and failed to appreciate that it was a claim within section 113 NIAA 2002. By ground 2, the Applicant contended that, even if the SSHD was right to consider the application under Paragraph 353, her conclusion was unsustainable in law. After permission had been granted on both grounds, the SSHD filed Detailed Grounds of Defence on 24 March 2022. In those Grounds, the SSHD indicated that she did not intend to defend ground 2 and that she would revisit her decision on that basis.

The relevant legislative background

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

17. Part 5 of the NIAA 2002, comprising sections 81 to 117, is entitled "Appeals in respect of Protection and Human Rights Claims". Within Part 5, section 82 NIAA 2002 provides, inter alia, as follows:

> "82 Right of appeal to the Tribunal
>
> (1) A person ("P") may appeal to the Tribunal where—

(a) the Secretary of State has decided to refuse a protection claim made by P,

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

(c) the Secretary of State has decided to revoke P's protection status.

(2) For the purposes of this Part—

(a) a "*protection claim"* is a claim made by a person ("P") that removal of P from the United Kingdom—

(i) would breach the United Kingdom's obligations under the Refugee Convention, or

(ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions-

(i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;

(ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) a person has "protection status" if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;

(d) "humanitarian protection" is to be construed in accordance with the immigration rules;

(e) "refugee" has the same meaning as in the Refugee Convention.

(3) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part."

18. Section 92 provides, inter alia, is follows:

> "92 Place from which an appeal may be brought or continued
>
> (1) This section applies to determine the place from which an appeal under section 82(1) may be brought or continued.
>
> (2) In the case of an appeal under section 82(1)(a) (protection claim appeal), the appeal must be brought from outside the United Kingdom if—
>
> (a) the claim to which the appeal relates has been certified under section 94(1) or (7) (claim clearly unfounded or removal to safe third country), or
>
> …
>
> Otherwise, the appeal must be brought from within the United Kingdom.
>
> (3) In the case of an appeal under section 82(1)(b) (human rights claim appeal) where the claim to which the appeal relates was made while the appellant was in the United Kingdom, the appeal must be brought from outside the United Kingdom if—
>
> (a) the claim to which the appeal relates has been certified under section 94(1) or (7) (claim clearly unfounded or removal to safe third country) or section 94B (certification of human rights claims) , or
>
> …
>
> Otherwise, the appeal must be brought from within the United Kingdom.
>
> …"

Prior to amendment by the Immigration Act 2014 ("the 2014 Act"), section 92 provided for an in-country right of appeal only where the appeal was of a kind there specified. One of those kinds of appeal, as provided for by section 92(4)(a) was "an appeal against an immigration decision if the appellant had made an asylum claim, or human rights claim, while in the United Kingdom". This earlier version of section 92(4) was the provision at the heart of the case of *BA (Nigeria)* (see paragraphs 32 et seq below).

19. Section 94 provides, inter alia, as follows:

> "94 Appeal from within United Kingdom: unfounded human rights or protection claim

(1) The Secretary of State may certify a protection claim or human rights claim as clearly unfounded.

…"

20. Section 96 provides, inter alia, as follows:

"96 Earlier right of appeal

(1) A person may not bring an appeal under section 82 against a decision ("the new decision") if the Secretary of State or an immigration officer certifies–

(a) that the person was notified of a right of appeal under that section against another decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined),

(b) that the claim or application to which the new decision relates relies on a ground that could have been raised in an appeal against the old decision, and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in an appeal against the old decision…."

21. Section 113 provides, inter alia, as follows:

"113 Interpretation

(1) In this Part, unless a contrary intention appears—

"asylum claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention,

...

"humanitarian protection" has the meaning given in section 82(2),

"human rights claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6

> of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention),
>
> ...
>
> *"protection claim"* has the meaning given in section 82(2),
>
> "*protection status*" has the meaning given in section 82(2), and
>
> "*the Refugee Convention*" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol."

Section 12 of the Immigration, Asylum and Nationality Act 2006

22. Section 12 of the Immigration, Asylum and Nationality Act 2006, which has not been brought into force, amends the definitions of "asylum claim" and "human rights claim" in section 113 NIAA 2002 as follows:

> "asylum claim" –
>
> a) means a claim made by a person that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention, but
>
> b) does not include a claim which, having regard to a former claim, falls to be disregarded for the purposes of this Part in accordance with immigration rules,".
>
> "human rights claim" –
>
> a) means a claim made by a person that to remove him from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights, but
>
> b) does not include a claim which, having regard to a former claim, falls to be disregarded for the purposes of this Part in accordance with immigration rules"
>
> (emphasis added)

Immigration Rules HC 395

23. Paragraph 353 of the Immigration Rules provides, as follows:

> "Fresh Claims
>
> 353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas.
>
> 353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise."
>
> (emphasis added)

24. The background to Paragraph 353 is as follows. The first provision in the Immigration Rules dealing with a previously refused application was introduced in July 1992 (paragraph 180L of HC 251). In October 1994 this was replaced, in the same wording, by Paragraph 346 of HC 395:

> "When an asylum application has previously been refused asylum in the United Kingdom and can demonstrate no relevant and substantial change in his circumstances since that date, his application will be refused."

In October 2004, Paragraph 346 was replaced with Paragraph 353 which was in terms similar to, but not the same as, the present version. Paragraph 353A was added in December 2007 and the reference to withdrawn claims in Paragraph 353 itself was added in 2008. In February 2015 the wording of Paragraph 353 was amended to reflect changes to section 82 NIAA 2002 made by the 2014 Act.

Asylum Policy Instruction

25. The Home Office's internal document "Asylum and Human Rights Policy Instruction: Further Submissions" has provided, since February 2016, as follows:

> **"5.2 No appeal pending against refusal of a previous claim**
>
> Paragraph 353 only applies where any **appeal** is no longer pending against a previous refusal of a protection or human rights claim. If there is an appeal pending, the claimant must raise all relevant matters, including any material that comes to light after the decision has been made but before the appeal hearing, in the context of that appeal.
>
> Paragraph 353 also applies in cases where an earlier decision did not generate any right of appeal – because there is no pending appeal. In other words, there does not have to have been an appeal for paragraph 353 to apply to further submissions raised after an earlier claim has been refused. For example, if a claim was certified under section 96 of the Nationality, Immigration and Asylum Act 2002, or if an asylum claim had been withdrawn or treated as withdrawn, there would have been no statutory appeal, but any further submissions must still be considered by applying paragraph 353. The exceptions to this are set out in Section 6."
>
> (emphasis added)

26. Paragraph 353 addresses the question whether there is "a claim" at all. If, on the application of Paragraph 353, the SSHD decides that there is no "fresh claim", then such a decision does not give rise to a right of appeal. It is common ground that, on the decided cases, where an appeal against an unsuccessful previous claim has been dismissed, Paragraph 353 applies. However the Applicant submits that the position is different where there has been no appeal against an unsuccessful previous claim and that, in such a case, Paragraph 353 has no application, and the rejection of a repeat claim gives rise directly to a right of appeal. The Applicant submits that this principle emerges from detailed analysis of the leading authorities on the application of Paragraph 353 in conjunction with Part 5 NIAA 2002. Before turning to consider in more detail the parties' submissions, I examine those authorities.

The Case Authorities

Ex parte Onibiyo

27. In *R v Secretary of State for the Home Department ex parte Onibiyo* [1996] QB 768 the claimant sought judicial review of the Secretary of State's refusal to determine his second claim and decision that no appeal lay from that refusal. The issue was whether, if the claimant's claim for asylum has been refused and his appeal has failed, he could make another claim for asylum and, if so, in what circumstances and with what procedural consequences. At the time of judgment, there was no Paragraph 353 in its current form; rather Paragraph 346 was in force. The Court of Appeal held, first, that in principle, a claimant might make more than one "claim for asylum" within the meaning of section 1 of the Asylum and Immigration Appeals Act 1993. After dismissal of a first claim, a "fresh claim" could in law be made. In these circumstances, three main questions arose for consideration. The first of those questions was "what constitutes a fresh claim". Sir Thomas Bingham MR answered that question as follows at 783B-784A:

> "It was accepted for the applicant that a fresh "claim for asylum" could not be made by advancing an obviously untenable claim or by repeating, even with some elaboration or addition, a claim already made, or by relying on evidence available to the applicant but not advanced at the time of an earlier claim. There had, counsel acknowledged, to be a significant change from the claim as previously presented, such as might reasonably lead a special adjudicator to take a different view. …"
>
> Stuart-Smith L.J. considered this matter in the *Manvinder Singh* case (unreported), 8 December 1995, where he said (with the agreement of Rose L.J. and Sir John Balcombe):
>
> "In my opinion, in deciding whether or not a fresh claim to asylum is made, it is necessary to analyse what are the essential ingredients of a claim to asylum and see whether any of those ingredients have changed. A useful analogy is to consider a cause of action. In order to establish a cause of action a plaintiff must prove certain ingredients. How he proves them is a matter of evidence. If he changes the essential ingredients, he is asserting a different cause of action. What are the essential ingredients of a claim for asylum?... [the four essential ingredients are then set out]… In my view, it is only if the applicant asserts that one or more of these essential ingredients is different from his earlier claim that it can be said to be a fresh claim."
>
> I agree with this passage, and with the propositions accepted by counsel for the applicant. … The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

(emphasis added)

28. I make two observations on this case. First it was decided before Paragraph 353 was first introduced and before the enactment of NIAA 2002. The concluding words of the passage above went on to form the basis of Paragraph 353 when it was introduced in 2004. Secondly, in this passage, it is not expressly stated nor suggested that what is said applies only to a case where there has been an unsuccessful appeal against the refusal of the earlier claim. The words "earlier claim" is not qualified by reference to an appeal. "Earlier rejected" is not confined to "rejected on appeal" and might include rejection of the earlier claim by the Secretary of State.

ZT (Kosovo)

29. In *ZT(Kosovo) v Secretary of State for the Home Department* [2008] 1 WLR 348, the Secretary of State rejected the applicant's claims for asylum and protection on human rights grounds *and* certified his claims as clearly unfounded under section 94(2) NIAA 2002. The applicant made two further submissions in support of his claims. The Secretary of State maintained her certification of the claims under section 94(2). The Court of Appeal quashed that decision, holding that the Secretary of State should have considered those further submissions under Paragraph 353.

30. On appeal by the Secretary of State, the first issue for the House of Lords was whether, once claims are certified under section 94(2), the Secretary of State should apply Paragraph 353 to further submissions (rather than being treated as a claim with a right to appeal, unless section 94(2) certification is maintained). The House of Lords (by a majority of 4 to 1) upheld the Court of Appeal on this issue. The Secretary of State was required to apply Paragraph 353 and had erred in applying section 94(2) in considering the further submissions. In the leading judgment, Lord Phillips (at §§13 and 14) rejected the Secretary of State's argument that, because it was still open to the applicant to bring an appeal (out of country), Paragraph 353 had no application. (Lord Hope dissented on this issue: §§27, 31-48). The majority went on to conclude however that, because the "clearly unfounded" test under section 94(2) was more generous to the applicant than the "realistic prospect of success" test under Paragraph 353, on the facts of the case the Secretary of State would inevitably have come to the same conclusion under Paragraph 353 and refused the applicant's claim. The Secretary of State's appeal was therefore allowed.

31. On the first issue, much of the argument centred upon the words in Paragraph 353 "*and any appeal relating to that claim is no longer pending*" . The SSHD submitted that those words covered the

situation, and thus Paragraph 353 did not apply, where, although no appeal had been brought, it remained open to a claimant to bring an appeal. The majority rejected this submission, holding clearly that Paragraph 353 does apply in such a situation and indeed more generally where no appeal has been instituted at all. Lord Phillips at §14 stated "the procedure that [rule 353] lays down must be applied if a claim has been refused and no appeal has been instituted". Lord Carswell at §§60 and 61, concluded that "If no appeal has been brought, the phrase in parenthesis [i.e. and any appeal relating to that claim is no longer pending] … does not enter into consideration and rule 353 applies". Lord Neuberger addressed the issue at §§84 to 88, expressly rejecting the contention that "an appeal has to have been brought (and to have been concluded) before rule 353 can apply" and concluding that the relevant words mean "if there is an appeal, it is no longer pending".

BA (Nigeria)

32. In *R (BA (Nigeria)) v Secretary of State for the Home Department* [2009] UKSC 7 [2010] 1 AC 444 two claimants made asylum or human rights claims which were rejected by the Secretary of State and subsequently on appeal by the Asylum and Immigration Tribunal. The Secretary of State made deportation orders against each. The claimants then made representations on asylum or human rights grounds seeking to have the deportation orders revoked. The Secretary of State rejected those representations on the basis they did not amount to a fresh claim within Paragraph 353.

33. The claimants sought judicial review of those refusals to revoke, contending that they had an in-country right to appeal to the Tribunal against those refusals, under section 82 NIAA 2002, by virtue of section 92(4)(a) NIAA 2002 (as it then was), since their representations amounted to an "asylum claim" and a "human rights claim" within the meaning of that subsection. At first instance, the judge held that only a first claim or a fresh claim within Paragraph 353, gave rise to a right to an in-country appeal under section 92(4)(a). The Court of Appeal allowed the claimants' appeal and this was upheld by the Supreme Court.

34. The Supreme Court held that the claimants did have an in-country right of appeal. Repeat claims were now dealt with by sections 94 and 96 and there was no need to resort to Paragraph 353, if neither provision in sections 94 or 96 applied. Rejected claims which were not certified under either section 94 or section 96 NIAA 2002 should be allowed to proceed to an in-country appeal under sections 82 and 92, whether or not they were accepted by the Secretary of State as fresh claims. NIAA 2002 was a complete code for dealing with repeat claims and there was no need to read words into that Act so

as to exclude further claims which did not amount to fresh claims within Paragraph 353.

35. Lord Hope, gave the lead judgment. Critically at §14, he recorded the fact that the Secretary of State accepted that her refusals to revoke the deportation orders were "immigration decisions" within the meaning of section 82(2) NIAA 2002, as it then was (i.e section 82(2)(k)) and thus that there was a right of appeal against those refusals under section 82(1). Rather the issue was whether the right of appeal could be exercised in-country or not. The Secretary of State contended that the claimants' claims were not claims within section 92(4)(a), because "asylum claim or human rights claim" in that sub-section meant a first such claim or subsequent claim which had been accepted as a "fresh claim" under Paragraph 353. In the present case, in reliance upon *Onibiyo*, inter alia, she submitted that the claimants' claims in the further representations were repeat claims which fell to be considered in the first place under Paragraph 353, and not a claim within the words of section 92(4)(a). The Secretary of State's case was that, where the further claim was not a fresh claim within Paragraph 353, there was only an out of country right of appeal.

36. Lord Hope, with whom three of other justices agreed, rejected this contention. He stated, in particular as follows:

> "29 The new system contains a range of powers that enable the Secretary of State or, as the case may be, an immigration officer to deal with the problem of repeat claims. The Secretary of State's power in section 94(2) of the 2002 Act to certify that a claim is clearly unfounded, if exercised, has the effect that the person may not bring his appeal in-country in reliance on section 92(4). The power in section 96 enables the Secretary of State or an immigration officer to certify that a person who is subject to a new immigration decision has raised an issue which has been dealt with, or ought to have been dealt with, in an earlier appeal against a previous immigration decision, which has the effect that the person will have no right of appeal against the new decision. It is common ground that the present cases are not certifiable under either of these two sections. Why then should they be subjected to a further requirement which is not mentioned anywhere in the 2002 Act? It can only be read into the Act by, as Sedley LJ in the Court of Appeal put it, glossing the meaning of the words "a . . . claim" so as to exclude a further claim which has not been held under rule 353 to be a fresh claim …. The court had to do this in *Ex p Onibiyo* … . But there is no need to do this now.
>
> 30 It is not just that there is no need now to read those words into the statute. As Mr Husain pointed out, the two systems for excluding repeat claims are not compatible. Take the system that section 94 lays down for dealing with claims that the Secretary of State considers to be clearly unfounded.

If he issues a certificate to that effect, the appeal must be pursued out of country. But the claimant will have the benefit of section 94(9), which provides that where a person in relation to whom a certificate under that section subsequently brings an appeal under section 82(1) while outside the United Kingdom the appeal will be considered as if he had not been removed from the United Kingdom. He will have the benefit too of the passage in parenthesis in section 95, which provides: "A person who is outside the United Kingdom may not appeal under section 82(1) on the ground specified in section 84(1)(g) (except in a case to which section 94(9) applies)".

31 The ground of appeal referred to in section 84(1)(g) has been designed to honour the international obligations of the United Kingdom. To exclude claims which the Secretary of State considers not to be fresh claims from this ground of appeal, when claims which he certifies as clearly unfounded are given the benefit of it, can serve no good purpose. On the contrary, it risks undermining the beneficial objects of the Refugee Convention which the court in *Ex p Onibiyo* ... under a legislative system which had no equivalent to section 95, was careful to avoid.

32 In my opinion Lloyd LJ in the Court of Appeal was right to attach importance to this point … As he said, the development of the legislative provisions and the powers given to the Secretary of State to limit the scope for in-country appeals deprive Miss Laing's submissions of the foundation which they need. There is obviously a balance to be struck. The immigration appeals system must not be burdened with worthless repeat claims. On the other hand, procedures that are put in place to address this problem must respect the United Kingdom's international obligations. That is what the legislative scheme does, when section 95 is read together with section 94(9). It preserves the right to maintain in an out of country appeal that the decision in question has breached international obligations. I would hold that claims which are not certified under section 94 or excluded under section 96, if rejected, should be allowed to proceed to appeal in-country under sections 82 and 92, whether or not they are accepted by the Secretary of State as fresh claims.

33 There is no doubt, as I indicated in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] 1 WLR 348, para 33, that rule 353 was drafted on the assumption that a claimant who made further submissions would be at risk of being removed or required to leave immediately if he does not have a "fresh claim". That was indeed the case when this rule was originally drafted, as there was no equivalent of section 92(4) of the 2002 Act. But Mr Husain's analysis has persuaded me that the legislative scheme that Parliament has now put in place does not have that effect. Its carefully interlocking provisions, when read as a whole, set out the complete code for dealing with repeat claims. Rule 353, as presently drafted, has no part to play in the

> legislative scheme. As an expression of the will of Parliament, it must take priority over the rules formulated by the executive. Rule 353A on the other hand remains in place as necessary protection against premature removal until the further submissions have been considered by the Secretary of State."
>
> (emphasis added)

37. Lord Brown of Eaton-under-Heywood agreed, observing (at §46) that the words "an asylum claim" in section 92(4)(a) were not to be construed as meaning the same as "a claim for asylum" in the provision of Asylum and Immigration Appeals Act 1993, the subject of analysis in *Onibiyo*.

38. I make the following observations on *BA (Nigeria).* First, Mr Fripp for the Applicant relies heavily on §§32 and 33 of the judgment of Lord Hope to the effect that NIAA 2002 trumps Paragraph 353. Secondly, on the facts, in this case, there was a distinct right of appeal against the second decision. There was a distinct subsequent "immigration decision", namely the decision to refuse to revoke the deportation order which, at the time under the then section 82(2)(k) NIAA 2002, gave an express right of appeal. Thirdly, the issue in this case was not whether there was a right of appeal or not, but the narrower issue of whether that right of appeal could be exercised in-country or only out of country. Finally, this case was not addressing the usual Paragraph 353 scenario of a refusal of further submissions as being a fresh claim and a challenge to such a decision by way of judicial review.

ZA (Nigeria)

39. In *R (ZA (Nigeria)) v Secretary of State for the Home Department* [2010] EWCA Civ 926 [2011] QB 722 the first claimant's claim for asylum was rejected by the Secretary of State and his appeal to an adjudicator was dismissed. His further submissions based on Article 8 ECHR were rejected on the grounds that they did not constitute a fresh claim under Paragraph 353. Similarly the second claimant's asylum claim was rejected and his appeal was dismissed. He made two sets of further submissions, which the Secretary of State rejected on the grounds that they merely repeated his original claim and thus was entitled to reject them under Paragraph 353 without making a decision. The claimants sought judicial review on the basis that the further submissions constituted renewed claims upon which the Secretary of State had to make a decision and which decision would be appealable under Part 5 NIAA 2002. Both claimants had had appeals from first claims dismissed. The provisions of NIAA 2002 were in similar terms to those in *BA (Nigeria)* and before further amendment by 2014 Act.

40. The Court of Appeal, upholding the dismissal of the claims below, held that section 94(2) was concerned to prevent an appeal, which a claimant would otherwise have under sections 82 and 92(4) where the Secretary of State had considered and refused on its merits a valid claim, whether original or renewed, but had concluded that it was so weak as to be clearly unfounded. By contrast Paragraph 353 was concerned to prevent further submissions, which purported to be a renewed claim, but merely repeated a claim which had been refused, having to be considered on its merits at all. A decision under Paragraph 353 was a decision, not that the relief sought should be refused, but that the submissions did not constitute a claim at all. Having decided that the further submissions did not amount to fresh claims, the Secretary of State had been entitled to rely on Paragraph 353 and was not obliged to issue section 94(2) certificates.

41. The claimants argued, relying upon the decision in *BA (Nigeria)*, that the Secretary of State had to make decisions on the further renewed submissions and that the effect of Part 5 NIAA 2002 (and in particular sections 94 and 96) was impliedly to repeal Paragraph 353 or to render it of no further application or effect. This contention (wholesale redundancy of Paragraph 353) was described by Mr Fripp in argument before me as the "roundhead argument". It was rejected by the Court of Appeal. The Court of Appeal applied *ZT (Kosovo)* and distinguished *BA (Nigeria)*.

42. Lord Neuberger MR (with whom Laws and Sullivan LJJ agreed) identified two questions: first, whether, in the absence of authority, on a fair reading of the relevant provisions of Part 5 NIAA 2002, Paragraph 353 has no function; and secondly, whether the conclusion on the first question was undermined or supported by binding authority, and in particular *ZT (Kosovo)* and *BA (Nigeria)*.

43. At §§21 to 31, Lord Neuberger addressed the first question, concluding at §31 that, as a matter of principle, it was open to the Secretary of State to rely on Paragraph 353 in relation to a purported renewed claim. At §23 he stated:

> "I accept that it is obviously right to consider whether sections 94 and 96 render rule 353 valueless: that indeed is the central point on the first issue. However, I consider that SM and ZA put their case on the point too high. First, it overlooks the fact that Parliament has, albeit in a negative sense, approved subsequent amendments to the rules, which do not include the deletion of rule 353. Further, it is rather paradoxical for the claimants to invoke the will of Parliament when the most recent relevant statute clearly proceeds on the basis that rule 353 is in force and has practical effect: on the claimants' case, when Parliament enacted section 53 of the 2009 Act, it was simply beating the air."

At §26 he observed that section 94(2) does not relieve the Secretary of State from making a decision to refuse leave to enter in respect of a claim which she considers to be "clearly unfounded". Rather she must consider it on its merits. He went on to state at §26:

> "If she could rely on rule 353, however, and she considered that the further submissions she has received raise no issues other than those already raised by an earlier, rejected, claim, she would neither have to consider its merits nor formerly refuse it: she could merely reject the submissions. Thus rule 353 can be operated as a sort of gatekeeper by the Secretary of State to prevent further submissions amounting to, or being treated as, a claim, thereby not getting into Part 5 territory at all."
>
> (emphasis added)

He continued at §27:

> "If further submissions on analysis merely repeat a claim which has already been made, it is a perfectly normal use of language to say that they do not really amount to a new claim, but should be treated as being no more than an attempt to revive a previous unsuccessful claim. None the less I accept that the description of a clearly unfounded claim in section 94(2) is capable, as a matter of language, of being applied to such further submissions which, on analysis, raise no new points over and above a previous, rejected, claim. However, given that the 2002 Act was passed at a time when rule 353 existed, I would incline to the view that it was not intended to apply to such further submissions which do not amount to a fresh claim."
>
> (emphasis added)

In the course of his analysis he stated at §29:

> "As for section 96 itself, subsection (1) is clearly concerned with different territory from rule 353: the section is directed to new points which could and should have been raised in the claimant's original, rejected claim - an administrative procedural equivalent of *Ladd v Marshall* [1954] 1 WLR 1489 - whereas rule 353 is directed to points which were raised in the claimant's original, rejected, claim - an administrative procedural equivalent of res judicata..."
>
> (emphasis added)

At §30 he concluded that, absent binding authority to the contrary, section 94(2) is not wide enough to catch further submissions which do not amount to a fresh claim within Paragraph 353, stating:

> "Section 94(2) is concerned to prevent appeals in relation to any claim (whether original or renewed) which has been considered and refused by the Secretary of State on its merits, where she concludes that the merits are so weak that the claim was clearly unfounded. Rule 353 is concerned to

> prevent a purported renewed claim having to be considered on its merits and refused, where the Secretary of State considers that it is merely a repetition of a claim which has already been made and refused. As for section 96(1), it is concerned with a different aspect of renewed claims from rule 353."

44. Lord Neuberger then turned to address his second question at §§32 to 59. The claimants' contention was that *BA (Nigeria)* was such authority to the contrary. Lord Neuberger addressed *ZT (Kosovo)* first, concluding that the decision of the majority of the House of Lords actually supported the conclusion that he had reached on the first question, although he recognised that the argument that Part 5 NIAA 2002 had revoked Paragraph 353 had not been advanced in that case. He then turned to consider the effect of *BA (Nigeria)*. At §41 he pointed out that in that case the Supreme Court had decided that where the Secretary of State had received further submissions "on which she proceeds to make an immigration decision within section 82" there will be an in-country right of appeal under section 92(4) and it was not then open to the Secretary of State to invoke Paragraph 353. Once further submissions are treated as amounting to a claim and the claim is decided by the Secretary of State, the statutory code contained in NIAA 2002 leaves no room for Paragraph 353. He then recorded the Secretary of State's submission that *BA (Nigeria)* was not relevant in the present case where there had been no appealable immigration decision in relation to the further submissions which the Secretary of State had decided did not amount to a fresh claim. The claimant's submission was that Lord Hope in *BA (Nigeria)* had concluded that Paragraph 353 had effectively been replaced and neutered by Part 5, relying upon a number of passages from Lord Hope's judgment and in particular §33 (as cited above). On the other hand (at §48), the Secretary of State argued that those passages in *BA (Nigeria)* had to be considered in the context of the actual point at issue there and bearing in mind that no member of the Supreme Court has suggested or implied that they were overruling or even departing from *ZT (Kosovo)*.

45. Lord Neuberger concluded at §§51 and 52 as follows:

> "51 Like the Administrative Court, I have not found it entirely easy to resolve the issue of whether the Supreme Court was saying (a) as the claimants contend, that rule 353 has no part to play at all following the introduction of Part 5 of the 2002 Act, or (b) as the Secretary of State argues, that rule 353 has no part to play <u>where there has been an appealable immigration decision</u> and the only issue is whether the appeal is of a kind to which section 92 applies. Ultimately, however, again like the Administrative Court, I have come to the conclusion that the Secretary of State's more limited interpretation is to be preferred.

> 52 Mr Tam is plainly right in his argument that the actual decision in the *BA (Nigeria)* case is not inconsistent with the *ZT (Kosovo*) case or is not determinative of the present appeals in favour of the claimants. The actual decision was that rule 353 had no further part to play for the purposes of section 92(4)(a) once there was an appeal against an immigration decision. The question therefore is whether, in the light of the passages in the judgment of Lord Hope DPSC relied on by the claimants, we should, as Mr Gill and Mr Jacobs contend, conclude that a wider interpretation of the reasoning in the *BA (Nigeria)* case is appropriate, so that the binding ratio is that rule 353 is effectively a dead letter. In my opinion, that contention, which I might very well otherwise have accepted, is one which should be rejected on the ground that it is plainly inconsistent with the reasoning and conclusion of the House of Lords in the *ZT (Kosovo)* case [2009] 1WLR 348."
>
> (emphasis added)

46. At §§53 to 58, Lord Neuberger then explained why in *BA (Nigeria)* the Supreme Court did not overrule *ZT (Kosovo)*, even impliedly. He concluded at §59 that Lord Hope's passages in *BA (Nigeria) (*at §§29 to 33) were:

> "confined to cases where there is an appealable immigration decision. Once there is such a decision, the complete code contained in the legislative scheme applies and rule 353 has no part to play. However, as decided in *ZT (Kosovo)* … rule 353 still has "a part to play": the Secretary of State can decide that the further submissions are not a "fresh claim", in which case one does not enter the territory governed by the "complete code" of the "legislative scheme."
>
> (emphasis added)

Waqar

47. In *R (Waqar) v Secretary of State for the Home Department* [2015] UKUT 169 (IAC) the applicant appealed unsuccessfully against a decision to make a deportation order. The Secretary of State made a deportation order. The applicant made further submissions based on Article 8 ECHR, which the Secretary of State treated as an application to revoke the deportation order. That application was refused by the Secretary of State. The applicant sought judicial review, contending that Paragraph 353 was now subsumed within the statutory provisions and that the right of appeal as by then defined in section 82 NIAA 2002 enabled all refused human rights claim to have an appeal, limited only by certification under sections 94 or 96. The applicant contended that the recent amendment to section 82 resulted in the Secretary of State not having to make a separate immigration decision. The applicant relied on *BA (Nigeria)*

and submitted that *ZT (Kosovo)* and *ZA (Nigeria)* were predicated upon an old construction of section 82. The Secretary of State contended that the Paragraph 353 process remained in force and that *ZT (Kosovo)* and *ZA (Nigeria)* remained relevant, despite the subsequent amendment to the legislation. The Upper Tribunal set out the legislative and case law background in considerable detail.

48. The Upper Tribunal rejected the Applicant's contentions in the following terms:

> "16. The current appeal scheme enables an appeal against a *decision* by the SSHD *refusing* the applicant's human rights *claim.* There has to be a claim and then a decision in order to enable an appeal. The current scheme no longer enables an appeal against a decision refusing to revoke a deportation order. The SSHD may, having decided to refuse a human rights claim, thereafter decide whether to invoke the certification process. Without a claim (and without a decision) there is no appeal.
>
> 17. The history of paragraph 353 and the jurisprudence is set out above. *BA (Nigeria)* was concerned with a *decision*, not whether there had been a decision. *ZT (Kosovo)* concerned the continuing responsibility of the respondent to consider representations made whilst an applicant remained in the UK even though the initial claim had been refused and certified – again there had been a decision and the issue was what to do with submissions. *ZA (Nigeria)* confirmed that the respondent was not obliged to issue an appealable immigration decision whenever further submissions were made.
>
> 18. If the applicant is correct and any submission made amounts to a claim, the response to which is an appealable decision, this would result in an applicant being able to make numerous consecutive claims that would result in numerous consecutive appeals. Although each of those could be certified, the mere existence of such a scenario would result in it being virtually impossible to reach finality. *BA (Nigeria)* is not authority for the proposition that submissions amount to a claim and that the response to those submissions is a decision within the meaning of Part 5. The current statutory framework continues to provide for unmeritorious *claims* to be certified. There is nothing in this framework that precludes the making of a categorisation decision; paragraph 353 remains in force.
>
> 19. The current statutory appeal context requires a decision to be made on a human rights claim. Without a claim and without a decision there is no appeal. Submissions that purport to be a human rights claim do not without more trigger a right of appeal. There has to be an intermediate step, a categorisation, namely "do the submissions amount to a claim at all". Paragraph 353 of the Rules provides the mechanism to determine whether they amount to a claim; if

> not then the decision does not amount to a decision to refuse a human rights claim.
>
> 20. If an applicant is aggrieved by a decision not to categorise submissions as a claim, then s/he has a remedy in judicial review proceedings. Where a claim has already been determined, submissions made subsequent to that require a decision as to whether they amount to a claim. If determined to be a claim the decision to refuse that claim will trigger a right of appeal, subject to certification. If the submissions are determined not to be a claim, as here, there is no decision and thus no right of appeal."
>
> (emphasis added)

Amin Sharif Hussein

49. In *R (Amin Sharif Hussein) v First Tier Tribunal and Secretary of State for the Home Department* [2016] UKUT 00409 (IAC) the applicant's appeal against a deportation decision was dismissed. The applicant then made further submissions in support of a request to revoke the deportation order. The Secretary of State rejected those submissions under Paragraph 353. The applicant attempted to appeal to the First-tier Tribunal against the Secretary of State's decision. The First-tier Tribunal decided that there was no exercisable right of appeal against that decision. The applicant then challenged the First-tier Tribunal's decision by way of judicial review. The Upper Tribunal stated the issue in the case in the following terms: "to what extent, if at all, can the Secretary of State utilise paragraph 353 of the Rules so as to preclude P from appealing to the First-tier Tribunal under section 82 of the 2002 Act?"

50. The Upper Tribunal recorded the applicant's submissions to the effect that the Secretary of State may not rely at all on Paragraph 353; the position had fundamentally changed as a result of the changes brought about by the 2014 Act and in particular the amendments to sections 82 and 113 NIAA 2002. The applicant submitted that the Upper Tribunal had wrongly decided *Waqar* and *Robinson* (see paragraphs 59 et seq below). The Secretary of State contended that those cases were correctly decided and further that, although involving the immediately preceding statutory regime, the Upper Tribunal was bound by the decision in *ZA (Nigeria).* In their judgment the Upper Tribunal reviewed in significant detail the relevant case law, namely *Onibiyo*, *ZT (Kosovo)*, *BA (Nigeria)*, *ZA (Nigeria)* and *Waqar*, including the judgment of Beatson LJ on the renewed application for permission to appeal in the case of *Waqar*.

51. The Upper Tribunal's analysis is set out at extensively at §§32-58. They stated that it was bound by the ratio in the *ZA (Nigeria)*, as set out ultimately at §59 of that judgment (see paragraph 46 above).

The Tribunal then went on to consider whether that position had changed as a result of the amendments made by the 2014 Act:

> "41. It is evident that, in enacting the 2014 Act, Parliament was intending to reduce the ability of persons faced with adverse decisions in the immigration field to appeal against those decisions. It would therefore be strange if the result of those changes has been to enable repeated claims raising asylum or international protection issues to generate multiple appeals. This is so, whether or not such appeals might be certified, with the result that they could be prosecuted only from outside the United Kingdom.
>
> 42. As can already be seen, despite the changes made by the 2014 Act, the concept of a "claim" remains central to new section 82. There is, on the face of it, nothing which suggests that paragraph 353 does not apply to the "categorisation" issue of whether submissions are a "claim" for the purposes of section 82."

They concluded that the position had not changed. At §43 the Tribunal rejected a submission that Paragraph 353 is now relevant only to certification decisions under the amended NIAA 2002, and continued:

> "44. This point is reinforced by the amendment to paragraph 353, made in the wake of the 2014 Act, which ensures that paragraph 353 now applies to human rights claims and protection claims (as opposed to asylum claims): see paragraph 6 above and paragraph 47 below. It seems particularly strange that Parliament would be concerned to make this amendment in the light of the 2014 Act and yet fail to make it evident that the amended paragraph 353 was henceforth to have a drastically reduced ambit. In our view, not only does the amendment made by HC 1025 demonstrate that paragraph 353 is intended by the legislature to have continued effect; the absence of an amendment limiting the paragraph to certification cases points to the fact that no such limitation was intended."

52. The Tribunal also rejected (at §47) the submission that the, as yet unimplemented, changes to section 113 brought about by section 12 of the 2006 Act supported the applicant's contention as to the meaning of section 113, absent amendment. The Tribunal concluded at §48:

> "In short, what Parliament has chosen to do by way of the 2014 Act's amendments to section 113, and by way of the April 2015 amendment to paragraph 353 of the rules, firmly indicates that that paragraph operates as a gateway to section 82 appeals, as well as to certification."

VM (Jamaica)

53. In *VM (Jamaica) v Secretary of State for the Home Department* [2017] EWCA Civ 255 the claimant appealed unsuccessfully against the Secretary of State's decision to deport him. On two occasions the Secretary of State then refused to treat further representations as amounting to a fresh claim under Paragraph 353. The claimant then appealed against the second of those decisions (made on 13 April 2015), and, despite the Secretary of State's objections as to jurisdiction, the First-tier Tribunal ("FTT") proceeded to hear and determine that appeal. On the substantive appeal, the FTT rejected the claimant's case. However on further appeal, by decision dated 15 September 2016 ("the Appeal Decision"), the Upper Tribunal reversed that decision and allowed the appeal. The Secretary of State then appealed against the Appeal Decision to the Court of Appeal.

54. In the meantime the claimant made further representations, which the Secretary of State again refused under Paragraph 353. The claimant challenged that later decision by way of judicial review. Permission to apply for judicial review was refused in the Upper Tribunal ("the JR Decision"). The claimant appealed against the JR Decision to the Court of Appeal.

55. The Court of Appeal allowed the Secretary of State's appeal against the Appeal Decision and dismissed the claimant's appeal against the JR Decision.

56. Sales LJ addressed *the Secretary of State's appeal* at §§25 to 33, and her objection, from the outset, that the FTT had no jurisdiction to hear an appeal against her "no fresh claim" decision of 13 April 2015. After setting out the provisions of section 82(1) and Paragraph 353, he continued at §28 as follows:

> "Section 82(1) and para. 353 of the Immigration Rules operate in combination. If the Secretary of State decides that new representations in relation to some earlier decision (whether of her own or by the tribunal) which is now final and closed do not amount to a fresh claim under para. 353 she will simply reject the representations as matters which do not affect the position of the applicant within the regime of immigration law. In that sort of case, on the assessment of the Secretary of State the representations do not amount to a "claim" by the applicant, so her decision is not a decision "to refuse a human rights claim" (or any other sort of claim) within the scope of section 82(1). No right of appeal arises in relation to her decision that the new representations do not amount to a fresh claim. Such a decision can only be challenged by way of judicial review. On this point I agree with the decision of the UT in *Waqar …* at [19]-[20]."
>
> (emphasis added)

57. Sales LJ concluded that since neither the FTT nor the Upper Tribunal had jurisdiction to entertain the claimant's appeal against the decision of 13 April 2015 the Upper Tribunal's purported determination of that appeal in the claimant's favour was flawed and the Secretary of State's appeal against the Appeal Decision had to be allowed.

58. Sales LJ went on then to consider *the claimant's appeal* against the JR Decision. It was common ground that that in turn depended upon the court's view of the Secretary of State's appeal against the substance of the Appeal Decision. Sales LJ concluded at §73:

> "Against this background I turn to consider VM's judicial review appeal. As explained above, it is common ground that the fate of this appeal turns on this court's view of the substantive merits of the Secretary of State's appeal against the UT appeal decision. As I would have allowed the Secretary of State's appeal on the substantive merits, it follows that VM's appeal should be dismissed. Even if HHJ Oliver-Jones QC had granted permission to apply for judicial review and VM had succeeded in showing that the Secretary of State's "no fresh claim" decision of 16 April 2015 was flawed, and that in fact there was a fresh claim giving rise to a right of appeal, the appeal would have been consolidated with the appeal which did in fact take place leading to the same 2015 FTT decision. The outcome would have been the same, namely (assuming that the FTT had jurisdiction, as it would have done on this hypothesis) a lawful decision by the FTT to dismiss VM's appeal, as upheld by this court on the substantive merits. Therefore VM has in fact had the benefit of the review of his case which he would have had even if his judicial review claim had proceeded successfully. It is not just or appropriate to set the proceedings back to the starting point all over again. Accordingly, I would dismiss VM's judicial review appeal in the exercise of the court's discretion to refuse permission for judicial review where it would serve no legitimate practical purpose and would be contrary to justice to allow the claim to proceed."

Robinson

59. In *R (Robinson) v Secretary of State for the Home Department* [2019] UKSC 11 [2020] AC 942 the Secretary of State made a deportation order against the claimant. The claimant's appeal to the FTT on Article 8 grounds was dismissed. The claimant then made further representations. The Secretary of State refused to revoke the deportation order in response, finding that the representations did not amount to a fresh claim within Paragraph 353. The FTT held that the claimant had no right of appeal against that decision. The claimant sought judicial review of the refusal to treat the representations as a fresh claim, contending he had a right of

appeal under section 82 NIAA 2002 because his further representations amounted to a "human rights claim" within section 82(1)(b). The claimant's case was dismissed by the Upper Tribunal and, on appeal, by the Court of Appeal and by the Supreme Court.

60. Lord Lloyd-Jones gave the judgment of the Supreme Court. In his introductory observations, he stated (at §2):

> "In appropriate cases, it will be necessary to afford access to the statutory system of appeals when a second or subsequent submission is rejected. Nevertheless, it is necessary to protect such a scheme of legal protection from abuse. There is, therefore, a need to exclude from the statutory system of appeals second or successive applications which are made on grounds which have previously been rejected or which have no realistic prospect of success, and which are often advanced simply in order to delay removal from the United Kingdom. The challenge is to provide a system which can deal fairly and effectively with all such applications while also complying with the United Kingdom's international obligations."
>
> (emphasis added)

61. After setting out the relevant statutory provisions, at §§ 26 to 28 he set out the party's contentions. The claimant submitted that the *Onibiyo* line of authority had not survived the decision in *BA (Nigeria)* and that there was no longer any role for Paragraph 353. He invited the court to reject the reading of *BA (Nigeria)* favoured in *ZA (Nigeria*). The claimant further submitted that the amendments to Part 5 effected by the 2014 act abrogated the control mechanism established by Paragraph 353 and that the words "human rights claim" in section 82(1)(b), following amendment by the 2014 Act, are to be interpreted without reference to Paragraph 353. On that basis the claimant submitted that any second or subsequent submission which is a "human rights claim" under section 113(1) attracts a right of appeal, notwithstanding that the individual has made a previous claim that removal would breach a relevant obligation, whether the same relevant obligation or a different one, whether on the same basis or a different one, whether with the same or different submissions and evidence, but subject however to the certification provisions in section 94 and 96. In response the Secretary of State submitted that *BA (Nigeria)* does not establish that the words "human rights claim" are to be interpreted without reference to *Onibiyo* and Paragraph 353. The decision in *BA (Nigeria)* was that Paragraph 353 had no further part to play once there was an appeal against an immigration decision and did not determine that the Secretary of State was no longer entitled to decide the prior question as to whether a second or subsequent submission constituted a claim at all. The Secretary of State supported the analysis in *BA (Nigeria)*. Further the amendments to the NIAA 2002 by the 2014 Act had not changed the position.

62. Lord Lloyd-Jones then conducted a detailed review of the case law. In relation to *ZT (Kosovo)* he stated at §38:

> "[The House of Lords held….] The words "any appeal relating to that claim is no longer pending" in rule 353 should be interpreted in accordance with the definition of a "pending" appeal in section 104 of the 2002 Act. If there was no appeal pending, the qualifying words had no application. Furthermore, it made sense that the rule should be disapplied during, and only during, the currency of an appeal since if an appeal was pending further submissions could be made to the appeal tribunal. As Lord Neuberger of Abbotsbury observed (at para 86), it would seem silly if rule 353 only applied after an appeal had been brought and concluded but did not apply before an appeal was brought and could never apply in a case where no appeal had been brought."
>
> (emphasis added)

At §42, he recorded that the claimant sought to persuade the Court that the broader reading of *BA (Nigeria)* was correct and that the narrow reading favoured by Lord Neuberger was not correct. He then identified those passages in *BA (Nigeria)* which lent support to the view that the new scheme introduced by the 2002 Act had rendered Paragraph 353 redundant (and in particular §§ 29, 30, 31 and 33 of the judgement of Lord Hope).

63. Lord Lloyd-Jones then continued:

> "45. Nevertheless, there are to my mind major difficulties inherent in this reading of *BA (Nigeria)* [2010] 1 AC 444. Here I find myself in total agreement with the reasoning of Lord Neuberger MR on this point in *ZA (Nigeria)* [2011] QB 722 which I gratefully acknowledge.
>
> 46. First, in principle there is no conflict between *Onibiyo* [1996] QB 768 and rule 353 on the one hand and the statutory scheme in Part 5 of the 2002 Act on the other. I note that when *Onibiyo* was decided in 1996 there was in force a system of certification under paragraph 5 of Schedule 2 to the 1993 Act which established special appeal procedures for claims without foundation. With respect to Lord Hope DPSC, I do not consider that there is any incompatibility between what he described, at para 30, as the two systems for excluding repeat claims They operate at different stages of the response to a purported renewed claim. *BA (Nigeria)* establishes that, as the statutory provisions then stood, where the Secretary of State receives further submissions on which he makes an immigration decision within section 82 there will, in the absence of certification, be an in-country right of appeal. It decides that in those circumstances it is not then open to the Secretary of State to rely on the *Onibiyo* reasoning or rule 353 in order to contend that the submissions did not amount to a claim and that, as a result, there is no need for a decision and no

> entitlement to a statutory appeal. It is entirely understandable that in such a case there is no room for the operation of rule 353. *Onibiyo* and rule 353, by contrast, address a prior issue, namely whether there is a claim which requires a decision at all.
>
> 47. Secondly, I do not consider that the effect of the machinery introduced by Part 5 of the 2002 Act, in particular the powers of certification under sections 94 and 96, is to render the *Onibiyo* reasoning and rule 353 redundant. ,… [he goes on to endorse the reference to "gatekeeper function" in *ZA (Nigeria)* at §26] …
>
> …
>
> 48. Thirdly, there are features of the regulatory scheme which are difficult to reconcile with an intention on the part of Parliament that provisions in Part 5 of the 2002 Act should provide a comprehensive and exclusive code for dealing with repeat claims and that rule 353 should no longer be effective.
>
> …
>
> 49. Fourthly, I am persuaded that the broad reading of *BA (Nigeria)* [2010] 1 AC 444 for which the claimant contends is inconsistent with *ZT (Kosovo)* [2009] 1 WLR 348 where the House of Lords held (Lord Hope dissenting) that the Secretary of State had erred in applying section 94(2) of the 2002 Act rather than rule 353 in considering the applicant's further submissions. By contrast, there is no difficulty in reconciling the two decisions if the ratio decidendi of *BA (Nigeria)* is merely that rule 353 has no part to play where there is an appealable immigration decision. If the Supreme Court did decide in *BA (Nigeria)* that rule 353 is entirely redundant following the introduction of Part 5 of the 2002 Act, it must have intended to overrule or to depart from the decision of the House of Lords some nine months earlier in *ZT (Kosovo)*. However, *BA (Nigeria)* contains no express statement to that effect. Moreover, while an earlier decision may be impliedly overruled, it is extremely improbable that this was the intention here, for reasons summarised by Lord Neuberger MR in ZA *(Nigeria)* as follows, at para 53: …. [which he then set out]
>
> 50. For these reasons I agree with the Court of Appeal in *ZA (Nigeria)* that what is said in *BA (Nigeria)* is limited to cases where there is an appealable decision." [he then set out §59 of *ZA (Nigeria)*]

64. Lord Lloyd-Jones then turned to the claimant's second submission that the picture had been changed by the 2014 Act amendments to NIAA 2002. He first addressed the recent Upper Tribunal decisions on this point, citing with approval the decisions in *Waqar,* and *Sharif Hussein* (at §§54 and 56). Importantly, at §57 Lord Lloyd Jones expressly approved §28 of Sales LJ's judgment (see paragraph 56 above) in *VM Jamaica* in the following terms:

> "These matters have been considered recently by the Court of Appeal (Arden and Sales LJJ) in *Secretary of State for the Home Department v VM (Jamaica)* [2017] Imm AR 1237, a judgment delivered shortly before that of the Court of Appeal in the present case. Sales LJ described the relationship of section 82(1) and rule 353 in the clearest terms [and he then set out §28 of *VM (Jamaica)* in full]"

65. He concluded at §62 that the Court of Appeal in *ZA (Nigeria)* had provided an authoritative explanation of the effect of *BA (Nigeria)*. Parliament could be assumed to have legislated in the light of a consistent line of authority. Had Parliament intended to depart from that approach, it would surely have made express provision to that effect. On the contrary there was nothing in those amendments to support the view that Parliament had intended to open the door to enable repeated claims to generate multiple appeals, citing §42 of *Sharif Hussein* (see paragraph 51 above).

66. At §63 he addressed the claimant's argument that the fact that the 2006 Act amendments to section 113 had not been brought into force showed that, absent their implementation, Paragraph 353 did not have a gatekeeper function. To this he responded, first, that it would not be appropriate to speculate as to why the amendment had not been brought into force and, secondly, referring to the explanatory notes to the 2006 Act, pointing out that those amendments were made "to clarify that further submissions which follow the refusal of an asylum or human rights claim but which do not amount to a fresh claim do not carry a further right of appeal". Lord Lloyd-Jones' overall conclusions at §64 was as follows:

> "For these reasons I consider that the Court of Appeal was correct to conclude that a human rights claim in section 82(1)(b) of the 2002 Act as amended means an original human rights claim or a fresh human rights claim within rule 353. More generally, where a person has already had a protection claim or a human rights claim refused and there is no pending appeal, further submissions which rely on protection or human rights grounds must first be accepted by the Secretary of State as a fresh claim in accordance with rule 353 of the Immigration Rules if a decision in response to those representations is to attract a right of appeal under section 82 of the 2002 Act."
>
> (emphasis added)

Analysis

The Parties' submissions

The Applicant's case

67. The Applicant contends that the Application constituted a "claim" within the meaning of that word in the terms "asylum claim" and "human rights claim" in sections 82 and 113 NIAA 2002 and that the Decision amounted to the refusal of such a claim, giving rise to a right of appeal under section 82(1). He accepts that, where a previous claim has been refused and there has been an unsuccessful appeal against that decision, a further application is not a "claim" within section 113 and that it falls be considered under Paragraph 353 as "further submissions". However, where, as in this case, there has been no appeal against the refusal of the previous claim, then a further application is a "claim" within section 113, Paragraph 353 does not apply and there is a right of appeal against the refusal of such a claim. In the present case the Applicant's case was never adjudicated upon by an independent judicial process and so he has a right of appeal.

68. First, the issue is one of the interpretation of the various definitions of "claim" in sections 82 and 113. Each of "asylum claim", "human rights claim" and "protection claim" is to be interpreted as excluding a second claim in a dismissed appeal case, but as including a second claim where there has been no appeal from the refusal of the first claim.

69. Secondly, the leading authorities (*ZA (Nigeria)* and *Robinson*) establish that "asylum claim" and "human rights claim" do not include repeat claims only where there had been a previous judicial determination of the claimant's claim by a court or tribunal. In those cases it was held that the fact of a past judicial decision meant that the repeat "claim" was in essence not a claim at all. Mr Fripp however submits that *ZA (Nigeria)* is to be distinguished, first, because it was dealing with the "roundhead argument" (which he does not support anyway) and because it was a "dismissed appeal" case. Whilst he accepts that *ZA (Nigeria)* is binding authority on the proper interpretation to be put on *BA (Nigeria)*, it does not deal with the distinct case where, as here, there is no appeal. In all the relevant decided cases there has been a previous judicial determination on an appeal. None of the authorities address the position where there has not been any previous concluded *litigation* of the relevant issues.

70. Thirdly, as regards *VM (Jamaica)*, §28 is to be read merely as a summary of the previous jurisprudence, in particular the decision in *ZA (Nigeria)*, dealing with cases where there had been a previous appeal. It does not decide the issue before the Tribunal. Lord Lloyd-Jones' citation of that passage in *Robinson* §57 merely confirms §28 as no more than such a summary. He further submits that at §2, Lord Lloyd-Jones assumed that past failure on *appeal* was the basis for subsequent consideration.

71. Fourthly, the underlying policy rationale for those decided cases (i.e. where there has been a previous judicial determination) is the principle of the public interest in finality in litigation, both generally and as expressed in the principle of res judicata. He refers to the relevant principles set out at *Bennion on Statutory Interpretation* 5th edn at pp 786-787 and *Bennion, Bailey and Norbury on Statutory Interpretation* 8th edn at pp 869-870. That principle is central to the proper interpretation of "claim" in Part 5 NIAA and to Paragraph 353.

72. Fifthly, this construction of "claim" in section 113 means that Paragraph 353 would still serve a purpose, namely, first, where a previous claim has been rejected on appeal; and secondly, as "a backstop" where a claim is refused and then certified under section 94 NIAA 2002 so preventing an in-country appeal. In such a case Paragraph 353 has a role which is complementary to statute.

73. Sixthly, he refers to the position in Canada and US where higher requirements for renewed claims are imposed after there has been a final judicial adjudication on an earlier claim. In the US in particular, a distinction is made between a previous asylum claim denied by a judge and one denied by an asylum officer.

74. Finally, in this case, since there has been no past judicial adjudication, the Application should be understood as raising a protection or asylum claim and/or human rights claim, therefore requiring a decision. The SSHD should have acknowledged the Applicant as having filed a protection and human rights claims leading to an appeal under Part 5, in the absence of section 94 certification.

The SSHD's case

75. The SSHD contends that, as the Applicant's application for asylum had been refused in 2019 and as he did not pursue an appeal against that refusal, the Application constituted further submissions and the SSHD was right to consider, first, the question of whether they amounted to a fresh asylum or human rights claim pursuant to Paragraph 353. The fact that the Applicant had not been the subject of an adverse decision by the judiciary in 2019 or thereafter does not mean that any further representations automatically amount to an asylum or human rights claim or that Paragraph 353 is the incorrect rubric to assess the Application.

76. The principle of res judicata does not explain why Paragraph 353 was put in place, nor does the ratio of *BA (Nigeria)*, of *ZA (Nigeria)* or of *Robinson* take into consideration, or even refer to, this principle. None of the decided cases draw a distinction between an

earlier claim decided by the executive and one decided by the judiciary.

77. Paragraph 353 serves a "gatekeeper" function to prevent further repeat submissions being treated as a claim; it is an administrative device. If the Applicant's case is correct, it denudes Paragraph 353 of this function, deprives it of the meaning ascribed to it by the authorities and there is nothing to stop claimants making repeat claims.

78. The rules, and in particular Paragraph 353, have been left unamended despite amendments to the legislation over time.

79. The SSHD's contention does not make the test hopelessly lopsided and favourable towards the SSHD, because the SSHD is bound to apply anxious scrutiny to her decisions under Paragraph 353. In such circumstances, the question of whether an applicant has been the subject of a previous adverse decision by the judiciary is relevant, but only to the intensity of review which the SSHD should apply, when considering whether the submissions amount to a fresh asylum or human rights claim.

80. Finally, §28 of *VM (Jamaica)*, expressly approved in *Robinson* at §57, provides strong support for the SSHD's case.

Discussion

81. First, the position – under the legislation as amended - where there has been an appeal from a previous refusal decision by the SSHD is now clear. A further application falls to be considered in the first place under Paragraph 353: see *Robinson* (and the UTIAC cases of *Waqar* and *Sharif Hussein*) endorsing the Court of Appeal in *ZA (Nigeria)* and confining *BA (Nigeria)* to the narrower analysis. This is common ground.

82. *ZA (Nigeria)* not only rejected the argument that Paragraph 353 has no role to play at all following the introduction of Part 5 NIAA 2002, but goes on to establish that there is a role for Paragraph 353 as a "gatekeeper/threshold" i.e. if further submissions do not amount to a fresh claim, Part 5 does not apply at all; it is not just a "backstop": see *ZA (Nigeria)* at §§26 and 59; *Waqar* at §19 (see paragraph 48 above), expressly endorsed by Sales LJ in *VM (Jamaica)* at §28, effectively describes that "gatekeeper" function. *BA (Nigeria)* is to be considered in the specific context that in that case there was there an appealable immigration decision – namely a refusal to revoke a deportation order. There was a right of appeal in any event

and the issue there was whether it was exercisable only out of country, or in-country under section 92(4) as it then was.

83. Secondly, Mr Fripp's case depends on making a distinction between a claim where a previous claim has been subject to an appeal and a claim where there was a previous claim but no appeal. In my judgment, first, there is nothing in the primary legislation which distinguishes between those two cases; nor, secondly, is there anything in the wording of Paragraph 353 which makes that distinction.

84. As regards the primary legislation, Mr Fripp's case is that the issue is a question of construction of the word "claim" as it appears in the terms "asylum claim", "protection claim" and "human rights claim" in sections 82 and 113 NIAA 2002. However, as a matter of construction of the words themselves, there is no warrant for concluding that the word "claim" in those terms has a different meaning depending on whether or not, in respect of a previous claim, there has been an appeal.

85. As regards Paragraph 353 I accept that the decided cases, on their facts, do not concern the position where there has been no appeal. However, the case law, and in particular *Robinson*, *VM (Jamaica)* and the two UTIAC decisions in *Waqar* and *Sharif Hussain* provide strong support for the conclusion that Paragraph 353 applies to a second claim, whether or nor there has been an appeal from a previous claim. In *VM (Jamaica)*, Sales LJ at §28 (see paragraph 56 above) deals expressly with the case under Paragraph 353 where there has been no appeal from the earlier decision (as well as where there has been a dismissed appeal), confirming that the refusal of a repeat claim does not give rise to a right of appeal. Further this very passage was approved ("in the clearest terms") by Lord Lloyd-Jones in *Robinson* at §57. I do not accept Mr Fripp's submission that seeks to downplay the significance of §28, nor that Lord Lloyd-Jones observations at §2 are confined to the cases where there has been a dismissed appeal.

86. Furthermore, there is nothing in the wording of Paragraph 353 itself to suggest it is confined to cases where there had been an appeal from the previous claim; rather, the contrary appears from the wording. Whilst I accept that Paragraph 353, as an immigration rule, cannot override the effect of primary legislation, Paragraph 353 has remained in place and not been removed or amended, despite subsequent legislative amendments: see Lord Neuberger MR in *ZA (Nigeria)* at §§23 and 27 (and also 19); and also *Sharif Hussein* at §44 and *Robinson* at §48. Moreover the provisions of Paragraph 353 themselves provide further support of this conclusion.

87. In my judgment, as a matter of construction, Paragraph 353 applies where there has been no appeal at all, for two reasons. First it

expressly applies where the claim is withdrawn (or treated as withdrawn under the rules); and, in such a case, there will necessarily have been no appeal. The Applicant's approach gives no meaning to the words "withdrawn" in Paragraph 353. Secondly the further wording "any appeal is no longer pending" refers not only to a case where there has been an appeal which has concluded, but also to a case where there has been no appeal at all. This was the construction placed on those relevant words in Paragraph 353 by Lord Phillips, Lord Carswell and Lord Neuberger in *ZT (Kosovo)*: see paragraph 31 above. Lord Neuberger's analysis was subsequently approved by Lord Lloyd-Jones in *Robinson* at §38: see paragraph 62 above. (The Home Office Asylum Policy Instruction (see paragraph 25 above) is also consistent with such a construction).

88. Thirdly, contrary to Mr Fripp's submission, the underlying rationale for Paragraph 353 and the case law (*Onibiyo ZT*, *BA*, *ZA*, *Robinson* etc) is not "res judicata" or the public interest in finality in litigation (i.e. in judicial determination). None of the cases rely upon, or even refer, to this principle. In fact, to the contrary, Lord Neuberger's reference at §29 *ZA (Nigeria)* to "administrative procedural equivalent of res judicata" suggests that Paragraph 353 itself is based on finality in *administrative* decision making i.e. finality of administrative decision and not, or not just, finality of judicial decision. This positively supports the SSHD's case that the outcome is not dependent on whether there has been a prior appeal against the refusal of the first claim and undermines the Applicant's distinction based on judicial, as opposed to executive, determination.

89. Fourthly, the power to certify a claim as unfounded under section 94 is not sufficient protection from the problem of advancing obviously untenable claims on a repeated basis: see *Waqar* § 18.

90. Additionally, I take some account of section 12 of the 2006 Act and the changes to the definitions of "asylum claim" and "human rights claim" in section 113 NIAA 2002 which have not been brought into force. On their face, they address expressly the issue before this Tribunal. It might be said that the fact that they have not been implemented supports the Applicant's case, on the basis that those amendments were necessary *to change* what is the position under section 113, absent those the amendments. However I note Lord Lloyd-Jones's observation in *Robinson* at §63 (see paragraph 66 above), based on the explanatory notes to that provision, that the purpose of that provision was "to clarify" the position under Paragraph 353 (and from which he derived support). See also *Sharif Hussein* at §§46 to 48.

91. Finally, where there has been no appeal from a previous decision, the applicant's position is protected by the application of the

principle of anxious scrutiny. In a case where there has been no previous judicial determination, the burden of anxious scrutiny upon the SSHD is all the greater. Where there has been a previous judicial determination, by, for example, the FTT, then this will carry greater weight with the SSHD than a case where there has been no such previous judicial determination. It is likely to be easier for the SSHD to conclude that there is no realistic prospect of success before an FTT judge, if there is already in existence a prior decision of the FTT. If there is no such prior decision, the SSHD will have to consider the facts and evidence more carefully.

92. For these reasons, I reject the Applicant's contention that the Application constituted a protection or human rights claim within the meaning of section 113 NIAA 2002 and that he should have been granted a right of appeal, under section 82, against the Decision. The SSHD correctly considered the Application under the provisions of Paragraph 353. Ground 1 fails and to that extent this application for judicial review is dismissed

Decision

93. In the light of these conclusions the Applicant's claim for judicial review succeeds but only to the extent that, as agreed, the SSHD must reconsider the Decision, on the basis of Ground 2. The Applicant's application for a declaration that the application for further leave to remain remains outstanding is refused.

94. I will hear the parties on the appropriate form of the order and any further consequential matters.

Permission to appeal

95. The Applicant has applied for permission to appeal by written submissions dated 6 March 2023. The Respondent responded by written submissions dated 8 March 2023. None of the Applicant's grounds of appeal have a realistic prospect of success and there is no other compelling reason to grant permission to appeal. I agree with §§3 to 7 of the Respondent's written submissions. The Applicant does not address the central points made at paragraphs 82, 84 to 86 and 88 of this judgment, and in particular does not address *VM (Jamaica)* at §28 as endorsed by *Robinson* at §57, nor the passages in the judgments in *ZT (Kosovo)* referred to at paragraph 87 and 31 of the judgment. Accordingly permission to appeal is refused.

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

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