



THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or any member of her family in connection with these proceedings.

22 September 2021

PRESS SUMMARY

R (on the application of TN (Vietnam)) (Appellant) v Secretary of State for the Home Department and another (Respondents)
[2021] UKSC 41
On appeal from [2018] EWCA Civ 2838

JUSTICES: Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Sales, Lord Stephens

BACKGROUND TO THE APPEAL

The Detained Fast Track procedure (“the DFT”) was a system for processing asylum claims. Individuals were detained pending the determination by the Secretary of State of their claims, and there was an accelerated timetable for preparation and hearing of appeals against the refusal of asylum claim. It is no longer challenged that this system was unfair. It was originally contained in the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2003, which were then replaced by the Fast Track Procedure Rules 2005 (“FTR 2005”). The FTR 2005 was in turn replaced in October 2014 by the Fast Track Rules 2014 (“FTR 2014”). In July 2015, the Court of Appeal in *R (Detention Action) v First-tier Tribunal* [2015] EWCA Civ 840 (“*DA6*”) upheld an order quashing the FTR 2014 as *ultra vires* because they were structurally unfair and unjust and created an unacceptable risk of unfairness.

This appeal is about the FTR 2005. The principal issue is the effect of structural unfairness in the FTR 2005 on individual appeal determinations. The Appellant’s unsuccessful appeal against the rejection of her first asylum claim was heard by the First-tier Tribunal (“FTT”) under the FTR 2005. In these judicial review proceedings, the Appellant failed on her claims before Ouseley J that appeal determinations under the FTR 2005 were automatically a nullity (so the appeals would potentially have to be reheard) and that the appeal determination in her case was unfair. The Court of Appeal (Sharp, Peter Jackson and Singh LJ) upheld Ouseley J’s judgment. By this appeal, the Appellant seeks primarily to establish that the determination of her appeal was automatically a nullity.

The factual background is complex. The Appellant, TN, is a Vietnamese national who was first encountered by the UK authorities in December 2003. TN claimed asylum in January 2004 based on religious persecution in Vietnam for being a Catholic. She was granted temporary admission but absconded. Her asylum claim was refused for non-compliance in April 2004. TN came to the attention of the authorities again in April 2011 when she made fresh submissions to the Secretary of State, claiming that she had been working in a nail bar. TN was detained at the nail bar in February 2012 and removed to Vietnam in March 2012.

TN re-entered the UK clandestinely in May 2014 and suffered a miscarriage for which she received hospital treatment in July 2014. Also, in July 2014, TN was arrested again on suspicion of illegal working while present at a different nail bar. TN made a fresh asylum claim on the basis of events that she claimed

had occurred after she was removed to Vietnam. She claimed that she could not return to Vietnam due to religious persecution and that her mother and a local priest had caused a financial crisis in the community. On 2 August 2014 the Secretary of State decided that TN’s asylum claim was suitable for determination in the DFT process, and TN was detained at Yarl’s Wood Detention Centre. In her asylum interview on 12 August 2014, TN alleged that she had been detained and tortured by the Vietnamese authorities on her return in 2012. TN also said that she had been sexually abused on her return journey to the UK in 2014.

The Secretary of State refused TN’s asylum claim on 14 August 2014. The FTT dismissed her appeal on 22 August 2014, finding that her account was not credible. On 7 August 2015 the Secretary of State set removal directions for 21 August 2015. On 19 August 2015, TN claimed for the first time that she was a victim of trafficking both on her return journey to the UK in 2014 and within the UK. Following a medical assessment to assess whether TN had been a victim of trafficking, on 20 August 2015 the Secretary of State rejected TN’s assertion that her new claim should be treated as a fresh asylum claim and maintained the removal directions. Ouseley J held that this new claim was a valid fresh claim, and it remains outstanding; but he rejected her claim that the FTT’s previous determination was automatically a nullity. On 19 December 2018, the Court of Appeal dismissed her appeal in relation to this latter point. Singh LJ gave the leading judgment. On the question of automatic nullity, he held that the FTT in determining an appeal in a way which was procedurally unfair would be acting without jurisdiction, and so unfairness had to be shown in the individual case (“Singh LJ’s jurisdictional reason”).

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lady Arden gives the first judgment. Lord Sales gives a concurring judgment. Lord Lloyd-Jones agrees with Lord Sales, and Lord Briggs and Lord Stephens agree with both judgments.

REASONS FOR THE JUDGMENT

Lady Arden takes the appellant’s submissions in turn and dismisses them. Lady Arden rejects the appellant’s principal submission that the FTT’s determination was automatically a nullity and without effect. The fact that the system was structurally unfair did not mean that it operated unfairly in every case ([53]). Agreeing with Lord Sales, she accepts Singh LJ’s jurisdictional reason ([55]). Lady Arden rejects the submission that the determination was “inextricably linked” to the systemic unfairness ([56]). Lady Arden affirms the principle that a court order is valid until set aside ([57]). She distinguishes the judicial bias cases which can lead to automatic nullity ([59-60]). She distinguishes the Court’s recent decision in *Pathan v Secretary of State for the Home Department* [2020] UKSC 41; [2020] 1 WLR 4506 on the facts ([64]). TN failed to show that the rules impacted adversely on her in the conduct of the hearing ([63]). The guidance given by Singh LJ for determining unfairness is helpful ([4]). In determining unfairness, tribunals must apply anxious scrutiny and may apply the principle of overall fairness ([66]). TN’s new trafficking claim has still to be determined. Lady Arden agrees with the conclusions reached below on absence of unfairness in TN’s case and finds no error of law. ([70]-[71]).

Lord Sales agrees with Singh LJ’s jurisdictional reason and amplifies the “conceptual distinction” between *ultra vires* and procedural unfairness in an individual case ([80] to [85]). He agrees with Lady Arden on the judicial bias cases ([86]). He also agrees with the guidance given by Singh LJ for determining whether an appeal determination was unfair. He rejects any presumption of unfairness where a decision has been made pursuant to the FTR 2005 ([88]). He comes to the same conclusion as Lady Arden that there is no basis for setting aside the conclusion below that the determination in TN’s case was fair ([90]-[92]).

References in square brackets are to paragraphs in the judgment

NOTE This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

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