Upper Tribunal
(Immigration and Asylum Chamber

R (on the application of Sharif Hussein) v First-Tier Tribunal (para 353: present scope and effect) IJR [2016] UKUT 00409 (IAC)

Field House,
Breams Buildings
London
EC4A 1WR

Heard at Field House on: 20 May 2016
Final written submissions: 9 June 2016

THE QUEEN
(ON THE APPLICATION OF)
AMIN SHARIF HUSSEIN

Applicant

and

FIRST-TIER TRIBUNAL

Respondent

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

BEFORE

THE HON. MR JUSTICE DOVE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PETER LANE

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For the applicant: Mr R Toal, Counsel, instructed by Wilsons Solicitors
For the interested party: Mr T Fisher, Counsel, instructed by the Government Legal Department
The respondent was not represented

(1) Lord Neuberger's judgment in R (ZA (Nigeria)) v Secretary of State for the Home Department [2010] EWCA Civ 926 is an authoritative pronouncement on the scope of the Supreme Court's judgments in R (BA (Nigeria)) v Secretary of State for the Home Department [2009] UKSC 7.

(2) Parliament's actions in amending paragraph 353 (fresh claims) of the immigration rules in the light of the changes to the appeal regime made by the Immigration Act 2014, together with its decisions:-

> *(i) to amend, but without bringing into force, the prospective amendments made in 2006 to the definition of "human rights claim" in section 113 of the Nationality, Immigration and Asylum Act 2002; and*
> *(ii) to amend the existing definition of "human rights claim" in the light of the 2014 Act,*

show that Parliament intends paragraph 353 to be used to determine whether further submissions constitute a fresh human rights claim for the purpose of "new" section 82 of the 2002 Act.

(3) If, in the post-2014 Act world, Parliament had intended paragraph 353 to apply only to the Secretary of State's certification decisions, then Parliament would have made this plain. If the applicant were correct that paragraph 353 currently has only such a limited ambit, commencing the 2006 amendments to section 113 of the 2002 Act would not enable the Secretary of State to make any significantly greater and/or coherent use of paragraph 353.

(4) Parliament's decision to leave in place the expressions "submissions" and "if rejected" in paragraph 353 are indicative that they continue to serve the function of permitting the Secretary of State to categorise cases as between those that do not amount to a claim at all and those which, though rejected, amount to a fresh human rights claim for the purposes of "new" section 82.

(5) The Secretary of State is not the sole arbiter of whether, in any particular case, she has made a decision to refuse a human rights claim, as opposed to refusing to treat submissions as amounting to a fresh claim.

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JUDGMENT
(8 August 2016)

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JUDGE PETER LANE:

A. Introduction

1. As a result of the amendments made by the Immigration Act 2014 to the Nationality, Immigration and Asylum Act 2002, Parliament reduced from 14 to 3 the number of rights of appeal under the 2002 Act against decisions of the Secretary of State in the immigration field. Section 82 (right of appeal to the Tribunal) now reads as follows:

> "(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."

2. Section 113 (interpretation) of the 2002 Act contains the following definitions:-

"(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[1] would be unlawful under section 6 of the Human Rights Act 1998 (c.42) (public authority not to act contrary to Convention);

'the Human Rights Convention' has the same meaning as 'the Convention' in the Human Rights Act 1998 and 'Convention rights' shall be construed in accordance with section 1 of that Act;

'immigration rules' means rules under section 1(4) of the Immigration Act 1971 (general immigration rules);

'protection claim' has the meaning given in section 82(2);[2]

'protection status' has the meaning given in section 82(2);[3]

'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and its Protocol."

3. Section 12 of the Immigration, Asylum and Nationality Act 2006 (asylum and human rights claims: definition) prospectively amended section 113(1) of the 2002 Act. If section 12 had been brought into force by a relevant Commencement Order, the definitions of "asylum claim" and "human rights claim" would have read 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."

4. The amendments contained in section 12 of the 2006 Act have not been brought into force. Instead, the 2014 Act has amended the existing definition of "human rights claim" in section 113 by inserting the words "or to refuse him entry into the United Kingdom" (see footnote 1 to paragraph 2 above) and deleting the words "as being

[1] Words underlined inserted by Schedule 9, Part 4, paragraph 53(2) to the 2014 Act: see paragraph 4 below.
[2] Definition inserted by the 2014 Act (Schedule 9, Part 4).
[3] Definition inserted by the 2014 Act (Schedule 9, Part 4).

incompatible with his Convention rights". The 2014 Act also made a corresponding change to the prospective definition of "human rights claim" in the 2006 Act.[4]

5. The following are the immigration rules that are relevant to these proceedings:

> "*Procedure and rights of appeal*
>
> *Fresh claims*
>
> 353. When a human rights or protection claim[5] 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."

6. Although both Counsel had prepared for the hearing on 20 May by reference to the wording of paragraph 353, as it appeared at that time on the Home Office's website, that wording was incorrect. As a result of the approval by Parliament of the Statement of Changes in Immigration Rules (HC 1025), the word "asylum" in paragraph 353 was replaced with effect from 6 April 2015 by the word "protection".

7. As can be seen from paragraphs 1 and 2 above, the purpose of the amendment is to reflect the introduction by the 2014 Act into the 2002 Act of the expression "protection claim". The amended paragraph 353 was the version in force on 26 June 2015, when the Secretary of State issued her letter, declining to treat the applicant's further submissions as a fresh claim.

B. The issue

8. With that necessarily elaborate legislative exegesis, we can state the issue in these proceedings as follows: 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?

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[4] 2014 Act, Schedule 9, Part 4, paragraph 57(2).
[5] Formerly "asylum claim": see paragraph 6 below.

9. Mr Toal, on behalf of the applicant, says that the Secretary of State may not rely at all on paragraph 353 for this purpose. He submits that the position fundamentally changed, as a result of the changes brought by the 2014 Act. Mr Toal says the Upper Tribunal wrongly decided the cases of R (Waqar) v Secretary of State for the Home Department (statutory appeals/paragraph 353) [2015] UKUT 00169 (IAC) and R (Robinson) v Secretary of State for the Home Department (paragraph 353 – Waqar applied) [2016] UKUT 00133 (IAC), in both of which it was held that paragraph 353 still has a role to play in the post-2014 Act regime. The Court of Appeal, according to Mr Toal, was accordingly wrong to refuse permission in Waqar.

10. For the Secretary of State, Mr Fisher submits that Waqar and Robinson were correctly decided. Furthermore, although involving the immediately preceding statutory regime, Mr Fisher says that this Tribunal is bound by the judgment of the Court of Appeal in R (ZA (Nigeria)) v Secretary of State for the Home Department & Another [2010] EWCA Civ 926. Both sides respectively contend that the correct application of principles of statutory interpretation demands a decision in their favour.

C. The present proceedings

11. The applicant is a citizen of Somalia who entered the United Kingdom in April 2009. In August 2011, he was granted humanitarian protection for a period of five years, expiring on 24 August 2016. That status was revoked by the Secretary of State on 19 November 2013, on which date the Secretary of State also decided to make a deportation order in respect of the applicant, following his conviction for a series of violent and sexual offences.

12. The applicant's appeal against the deportation decision was dismissed and on 28 October 2014 the applicant became "appeal rights exhausted" in respect of that decision.

13. On 24 June 2015, the applicant made further submissions in support of a request to revoke the deportation order. On 26 June 2015, the Secretary of State rejected those submissions and concluded that they did not amount to a fresh claim under paragraph 353 of the immigration rules.

14. On 1 July 2015, the applicant attempted to appeal to the respondent against the decision of 26 June. On 6 July 2015, the First-tier Tribunal decided that the decision against which the applicant was seeking to appeal was not one against which there was an exercisable right of appeal. The First-tier Tribunal accordingly found that the appeal was "invalid" and that, pursuant to rule 22(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, the Tribunal would take no further action in relation to it.

15. On 17 September 2015, an application was made to apply for judicial review proceedings to challenge the decision of the First-tier Tribunal. Permission was granted by Upper Tribunal Judge Coker on 1 March 2016.

D. The cases

16. In order to engage with the submissions of Mr Toal and Mr Fisher, it is necessary to examine case law extending back some twenty years.

R v Home Secretary ex p Onibiyo [1996] QB 768

17. A Nigerian national, who had previously appealed unsuccessfully against a decision that he was not entitled to refugee status, made further submissions to the Secretary of State, who declined to treat them as a fresh asylum claim. The Court of Appeal (per Bingham MR) held that, although more than one "claim for asylum" could be made within the meaning of section 1 of the Asylum and Immigration Appeals Act 1993, the Secretary of State had power to decide whether new submissions amounted to a fresh such claim:

> "The first issue argued in this court was whether, as a matter of law, a person may during a single uninterrupted stay in the United Kingdom make more than one 'claim for asylum'. By 'claim for asylum' is meant a claim falling within the definition in section 1 of the Act of 1993. The applicant argued that after dismissal of a first claim, a fresh claim could in law be made. The Secretary of State took a different view: he argued that once a person had made a 'claim for asylum', been refused by the Secretary of State and unsuccessfully exercised his rights of appeal under section 8 of the Act of 1993, that exhausted his legal rights. He could lay new material before the Secretary of State and the latter, if so advised, could in the exercise of his discretion refer such material to a special adjudicator or the tribunal under section 21 of the Act of 1971 (applicable to asylum cases by virtue of paragraph 4(2)(d) of Schedule 2 to the Act of 1993) for consideration by that person or body. But once there had been one claim for asylum and one appeal, there could be no further 'claim for asylum' unless the claimant had left the United Kingdom and returned before making the fresh application.
>
> The judge accepted the Secretary of State's argument. After a careful review of the relevant provisions and authorities, and of the arguments addressed to him, he said:
>
> > 'I have therefore come to the conclusion that the statutory scheme of the Act of 1993 envisages a claim for asylum which becomes a historical fact entitling the asylum seeker to exercise a right of appeal under section 8 against any relevant administrative decision or action. Any further material submitted or applications made by or on behalf of the asylum seeker are submitted or made in support of the original claim, whether they are made before or after the Secretary of State has made his decision on the claim or before or after any appeal under section 8. If the appeal is dismissed, then the material or applications will be considered by the Secretary of State in the exercise of the discretion which it is accepted that he had, to reconsider his decision, and if he considers it appropriate, to refer any matter arising out of those materials or applications to an adjudicator under section 21 of the Act of 1971.'
>
> I prefer the applicant's argument on this point. The obligation of the United Kingdom under the Convention is not to return a refugee (as defined) to a country where his life or freedom would be threatened for any reason specified in the Convention. That

obligation remains binding until the moment of return. A refugee (as defined) has a right not to be returned to such a country, and a further right not to be returned pending a decision whether he is a refugee (as defined) or not. It would in my judgment undermine the beneficial object of the Convention and the measures giving effect to it in this country if the making of an unsuccessful application for asylum were to be treated as modifying the obligation of the United Kingdom or depriving a person of the right to make a fresh 'claim for asylum'. It cannot in my view make any difference whether the person making the fresh 'claim for asylum' has left the country and returned or remained here throughout.

Any other construction would in my view be offensive to common sense. However rarely they may arise in practice, it is not hard to imagine cases in which an initial 'claim for asylum' might be made on insubstantial, or even bogus, grounds, and be rightly rejected, but in which circumstances would arise or come to light showing a clear and serious threat of a kind recognised by the Convention to the life or freedom of the formerly unsuccessful applicant. A scheme of legal protection which could not accommodate that possibility would in my view be seriously defective."

.....

(1) A fresh claim?

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. If the fresh claim depended on new evidence, then it had to satisfy tests, analogous to *Ladd v Marshall* [1954] 1 WLR 1489, of previous unavailability, significance and credibility.

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? First, that the applicant has a well-founded fear of persecution; secondly, that he has that fear in relation to the country from whence he came; thirdly, that the source of the persecution is the authorities of that state or, alternatively, some other group or local population where the actions of the group are knowingly tolerated by the authorities, or that the authorities refused or are unable to offer effective protection (see the handbook of the United Nations High Commissioner for Refugees, paragraph 65); finally, that the persecution is by reason of the applicant's race, religion, nationality or membership of a particular social or political group. 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. There is danger in any form of words, which can too easily be regarded as a binding formula. In the *Manvinder Singh* case [1996] Imm A.R. 41, Carnwath J held that a change in the character of the application was required. I am content with that statement, provided it is not taken to mean that there must necessarily be a change in the nature of the persecution said to be feared. 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.

(2) Who is to decide?

It is plain from rule 328 of Statement of Changes in Immigration Rules that all asylum applications will be determined by the Secretary of State in the first instance.

(*3) Procedural consequences*

If the Secretary of State decides on a fresh claim to grant asylum, and the claimant is accordingly granted limited leave to enter, no procedural difficulty is likely to arise.

If the Secretary of State recognises a fresh claim as a 'claim for asylum', but nonetheless decides that asylum should not be granted, I see no reason why the same consequences should not follow as on refusal of an initial claim. The disappointed claimant can pursue his right of appeal under section 8.

The problematical situation is that in which, as here, the Secretary of State does not recognise a claim as a fresh 'claim for asylum' and so declines to make any decision or to take or omit to take any action which would trigger a right of appeal under section 8. Neither party suggested that the asylum-seeker was without redress in this situation, and both accepted that redress could be obtained only by resort to the court. But there agreement ended. The applicant argued that whether or not a fresh 'claim for asylum' had been made was a matter of precedent fact to be decided, in case of dispute, by the court. The Secretary of State argued that the question was one for him and his decision, while not immune from challenge, could be challenged only on grounds of irrationality. The cases already referred to contain tentative expressions of opinion both ways.

The judge did not rule on this question, and it is not clear to what extent it was argued before him. It was not raised in the notice of appeal, and not explored in the applicant's skeleton argument in this court. No authority was cited to us. For reasons given in Section V below, I do not regard the answer to the question as determinative of this appeal. Since the issue is one of importance, and also in my opinion of considerable difficulty, I accordingly proffer a tentative answer only.

The role of the court in the immigration field varies, depending on the legislative and administrative context. Where an exercise of administrative power is dependent on the establishment of an objective precedent fact the court will, if called upon to do so in case of dispute, itself rule whether such fact is established to the requisite standard. Thus, for example, where power to detain and remove is dependent on a finding that the detainee is an illegal entrant, one who has entered clandestinely or by fraud and

deceit, the court will itself rule whether the evidence is such as to justify that finding: *Reg. v Secretary of State for the Home Department, EX.1 parte Khawaja* [1984] A.C. 74. By contrast, the decision whether an asylum-seeker is a refugee is a question to be determined by the Secretary of State and the immigration appellate authorities, whose determinations are susceptible to challenge only on *Wednesbury* principles: *Reg v Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514. I am of opinion, although with some misgivings, that the judgment whether a fresh 'claim for asylum' has been made should be assimilated with the latter, and not the former, class of judgment. If the test propounded in (1) above is correct, the answer to the question whether or not a fresh 'claim for asylum' has been made, will depend not on the finding of any objective fact, nor even on a literal comparison of the earlier and the later claim, but on an exercise of judgment, and this is a field in which the initial judgments are very clearly entrusted to the Secretary of State. In giving effect, for example, to rule 346 of the Statement of Changes in Immigration Rules, it must be for the Secretary of State and not for the court to rule whether the applicant can demonstrate a relevant and substantial change in circumstances since his refusal of an earlier application. In a case such as the present, the judgment is not very different from that which the Secretary of State may make under section 21 of the 1971 Act.

I would accordingly incline to accept the Secretary of State's argument on this point, while observing that decisions reached by him are susceptible to challenge on any *Wednesbury* ground, of which irrationality is only one: see *Associated Provincial Picture Houses Ltd. V Wednesbury Corporation* [1948] 1 KB 223."

ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6

18. This case involved the appeals system under the Nationality, Immigration and Asylum Act 2002, as it stood before the extensive changes made by the 2014 Act. The House of Lords held that, where P had made asylum and human rights claims that had been refused by the Secretary of State and certified under section 94 of the 2002 Act as "clearly unfounded" (with the result that P could appeal only from outside the United Kingdom), any new submissions made by P whilst still in this country fell to be considered pursuant to the procedures set out in paragraph 353. The Secretary of State had, accordingly, been wrong merely to maintain the certification of the claims; although the appeal was dismissed on the basis that there was, in effect, no material error of law. This was because the test for certification was more stringent than that contained in paragraph 353.

R (BA (Nigeria)) v Secretary of State for the Home Department & Another [2009] UKSC 7

19. The Supreme Court judgments in BA (Nigeria) are heavily relied upon by Mr Toal. BA lost an appeal against a decision that he should be deported as a result of serious criminal offending. BA subsequently made further submissions as to why he should not be deported. The Secretary of State "agreed to consider his reasons for seeking revocation of the deportation order, but she declined to revoke it" [3]. PE, a citizen of Cameroon, also lost his appeal against a decision to deport as a result of criminality.

PE made new submissions and claimed that he had a right of appeal against the Secretary of State's refusal to revoke his deportation order.

20. As in force at the relevant time, section 92 of the 2002 Act, so far as relevant, provided as follows:-

> "(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.
>
> .....
>
> (4) This section also applies to an appeal against an immigration decision if the appellant –
>
> (a) has made an asylum claim, or a human rights claim, while in the United Kingdom, or
>
> (b) ....."

21. BA and PE argued that section 92(4)(a) conferred a suspensive in-country right of appeal unless the appeal had been certified under either section 94 or section 96 of the 2002 Act. Section 94 entitled the Secretary of State to certify a case as "clearly unfounded", while section 96 removed a right of appeal altogether if subject to a certificate that the issue raised had been, or should have been, dealt with in an earlier appeal. At paragraphs 14 to 23 of the judgments, Lord Hope set out the competing arguments in more detail. In particular:-

> "14. For the Secretary of State Miss Laing QC did not dispute that a right of appeal arises under section 82(1) when a decision that is an immigration decision is taken. Nor does she dispute that the Secretary of State's refusal in these cases not to revoke the deportation orders were immigration decisions within the meaning of section 82(2)(k) of the 2002 Act. What was in issue was whether the right of appeal against those decisions was to be exercised from within the United Kingdom. Her submission was that the words 'an asylum claim, or a human rights claim' in section 92(4)(a) mean a first asylum or human rights claim or a second or subsequent asylum or human rights claim which has been accepted as a fresh claim under rule 353 of the Immigration Rules.
>
> 15. She acknowledged that this was not the literal meaning of this provision, as the definitions of these expressions made no reference to the fact that the claims to which they referred had to be a first or a fresh claim. But she said that they had to be construed in the context of the scheme of the statute as a whole, and that they had to be read in the way she suggested to avoid an absurdity. She submitted that the authorities also showed that they had to be read subject to this qualification."

22. Lord Hope rejected the Secretary of State's contentions:-

> *"Discussion*
>
> 24. I have set out the competing arguments at some length, partly out of respect for the excellent submissions that were advanced by counsel on either side in the

Chamber of the House of Lords on the occasion of the last sitting of the House in its judicial capacity, and partly because they demonstrate very clearly the essence of the issue that we must decide. Miss Laing invites us to follow Sir Thomas Bingham MR's analysis of the problem in *R v Secretary of State for the Home Department, Ex p Onibiyo* [1996] QB 768, to hold that the words 'an asylum claim, or a human rights claim or a second or subsequent claim which has been accepted by the Secretary of State as a 'fresh claim', and that the procedure for determining whether or not a second or subsequent claim is a fresh claim is to be found in rule 353 of the Immigration Rules. Mr Husain on the other hand invites us to examine those words in the context of the current legislation read as a whole, taking full account of the progress of thinking since *Ex p Onibiyo* as to how the problem of repeat claims should be addressed. He submits that there is no justification, in the light of the provisions for dealing with repeat claims that the 2002 Act contains, for enlarging upon the plain words of the statute.

25. The strength of Miss Laing's argument lies in the fact that the definition of the phrase 'claim for asylum' has remained, in substance, the same since its first appearance in section 1 of the 1993 Act where it was said to mean:

> 'a claim made by a person (whether before or after the coming into force of this section) that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom.'

The Convention there referred to was, of course, the Refugee Convention. The definition in section 167 of the 1999 Act was in substantially the same terms. Section 113 of the 2002 Act varies the language a little bit, because it calls this kind of claim 'an asylum claim', introduces a requirement for it to be made at a place designated by the Secretary of State (no such place has been designated) and adds a definition in almost identical terms of 'a human rights claim'. The relevant phrase throughout is 'a claim'.

26. In *R v Secretary of State for the Home Department, Ex p Onibiyo* [1996] QB 768 the Secretary of State's argument that once there had been a claim for asylum and one appeal there could be no further 'claim for asylum' unless the claimant had left the United Kingdom and returned before making the fresh application was rejected. It was held that there could be a fresh 'claim for asylum' with the same consequences as to the right of appeal as follow on the refusal of an initial claim, provided that the Secretary of State recognised the fresh claim as a 'claim for asylum'. If one looks no further and applies what *Bennion on Statutory Interpretation*, 5th ed (2008), section 201 and Part X1V described as 'the informed interpretation rule', there is plainly much to be said for the view that the definitions that are set out in section 113 of the 2002 Act should be read in the same way. The procedure for determining whether a repeat claim is or is not a 'fresh claim' is set out in rule 353 of the Immigration Rules, the effect of which I attempted to explain in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] 1 WLR 348, para 33. It is a short step to conclude that a repeat claim which is not held under rule 353 to be a fresh claim falls to be disregarded as 'an asylum claim', or a 'human rights claim' for the purposes of section 92(4)(a). Like Lloyd LJ, I would not draw an inference either way from the amendment of section 113 by section 12 of the 2006 Act as it is not yet in force.

27. It is an elementary principle, however, that the words of a statute should be construed in the context of the scheme of the statute as a whole. And it is plain that the scheme of the 2002 Act is not the same as that of the 1993 Act to which Sir Thomas Bingham MR addressed himself in *Ex p Onibiyo* [1996] QB 768. The problem to which he addressed himself was created by the absence of any provision in the statute to prevent abuse. The question was how that gap might best be filled, having regard to the fact that the blunt solution that was proposed by the Secretary of State would, as the Master of the Rolls pointed out at p 781G, undermine the beneficial object of the Convention and the measures giving effect to it in this country.

28. Parliament might, of course, have stood still and left the matter to be dealt with under the Immigration Rules. But it has not stood still. The experience of the intervening years has been taken into account. First, there were the provisions against abuse in sections 73 to 77 of the 1999 Act. Now there is a set of entirely new provisions in the 2002 Act. As Lord Hoffmann said in *A v Hoare* [2008] AC 844, para 15, while there is a good deal of authority for having regard in the construction of a statute to the way a word or phrase has been construed by the court in earlier statues, the value of such previous interpretation as a guide to construction will vary with the circumstances. In this case the phrase in question has remained, in essence, unchanged. But the system in which it must be made to work is very different. This is a factor to which full weight must be given.

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: [2009] QB 686, paras 20, 30. The court had to do this in *Ex p Onibiyo* [1996] QB 768. But there is no need to do this now.

.....

32. .... 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 *Z T (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."

R (ZA (Nigeria)) v Secretary of State for the Home Department [2010] EWCA Civ 926

23. In this case, the applicants contended that, on the basis of BA (Nigeria), paragraph 353 could not preclude them from pursuing an in-country right of appeal, and that the only means available to the Secretary of State of restricting the applicants' appeal rights was to certify them as clearly unfounded, with the result that they could appeal only once outside the United Kingdom. The Court of Appeal rejected that argument.

24. At paragraph 1, Lord Neuberger MR described the issue as being:-

> "whether, as the Administrative Court decided, the Secretary of State is entitled to refrain from making an appealable immigration decision in response to an asylum claim or a human rights claim which he reasonably concludes is merely repetition of an earlier claim whose rejection has been unsuccessfully challenged in a concluded appeal".
>
> .....
>
> "5. The contention of the claimants, SM and ZA, on the other hand is that, irrespective of the weakness or repetitious nature of the renewed purported claims, the Secretary of State had to make a decision on them, and that her duties with regard to them were governed by the provisions of Part 5 of the Nationality, Immigration and Asylum Act 2002 whose effect was either impliedly to repeal rule 353 or to render it of no further application.
>
> 6. These rival submissions obviously require one carefully to consider the terms of rule 353 and of certain of the sections in Part 5 of the 2002 Act. However, they also require consideration of the decision of the House of Lords in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] 1 WLR 348, and of the Supreme Court in *R (BA (Nigeria)) v Secretary of State for the Home Department* [2010] 1 AC 444, this latter decision providing the main plank for the claimant's argument.
>
> .....

15. Rule 353 of the Statement of Changes in Immigration Rules (1994) (HC 395), as inserted and amended, is concerned with a case where a person has already made 'a human rights or an asylum claim' which has been determined, and in respect of which he makes 'further submissions'; in such a case, the question for the Secretary of State is whether those submissions amount to 'a fresh claim': if it does not, she can refuse to treat it as a claim at all, so there is no decision which can be appealed under section 82. Section 94(1)(2) is concerned with a case where a person makes 'an asylum claim or a human rights claim (or both)', and the question for the Secretary of State is whether the claim is 'clearly unfounded': if it is, then she will dismiss it, and can shut out an appeal under section 82 by so certifying.

16. It is rightly common ground that there is no difference between 'a human rights or an asylum claim' and 'an asylum claim or a human rights claim (or both)', and that what are described in rule 353 as 'further submissions' could, subject to the question of whether they raise a new point, amount to a fresh 'claim' capable of falling within the ambit of the sections in Part 5 of the 2002 Act.

17. The Secretary of State's case is that the two procedures under rule 353 and section 94(1)(2) can and do co-exist perfectly satisfactorily; the claimants' case is that they do not happily co-exist and that, when Part 5 of the 2002 Act came into force, rule 353 became of no effect in practice, and therefore could not be relied on by the Secretary of State.

18. At the time when the 2002 Act was enacted, there was no attempt to repeal or amend rule 353, and it has stood unamended to this day. Further, in recent legislation (albeit not so far brought into force), Parliament appears to have assumed that rule 353 still has a part to play. Section 53 of the Borders, Citizenship and Immigration Act 2009 will amend section 31A of the Senior Courts Act 1981 to enable transfer from the High Court to the Upper Tribunal of judicial review applications where –

> 'the application calls into question a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim....wholly or partly on the basis that they are not significantly different from material that has previously been considered...'.

19. A rule, indeed even primary legislation, can be impliedly repealed or rendered nugatory by later legislation, and the neutering of a rule by subsequent legislation can be overlooked by a government department, even when promoting subsequent legislation. However, it seems to me that, where the rule remains unamended, then at least where the rule and the subsequent legislation are in pari materia and are promoted or promulgated by the same government department, there must be a presumption that the rule was intended to survive and have effect. While this is not, I accept, a particularly strong presumption, it is strengthened in a case such as this where, in a more recent statute, Parliament has plainly legislated on the basis that the rule or regulation is in force; indeed section 53 of the 2009 Act would be positively meaningless if rule 353 has no further function.

20. Having said that, the two important questions on these appeals, as it seems to me, are, first, whether in the absence of authority, on a fair reading of the

relevant provisions of Part 5 of the 2002 Act, rule 353 has no function, at least in cases such as those of *SM and ZA*. The second question is whether the conclusion one would otherwise reach on the first question is undermined, or indeed supported, by binding authority. If the effect of the two relevant authorities was clear, it might be inappropriate to consider the first question, but as there is a sharp difference of view as to the effect of the authorities, it is better to take the questions in the order which I have indicated.

21. The first argument raised by the claimants SM and ZA is that rule 353 can no longer apply, because a decision to reject a claim under the rule would be a decision falling within section 82, and could therefore be appealed. That will not do, in my opinion. If rule 353 can be relied on, then, on receipt of a purported renewed claim (which I shall refer to hereafter as 'further submissions'), the Secretary of State can decide that it is not a 'fresh claim', and then decline to make a decision on whether or not to refuse leave to enter etc; in that event there would be no decision which could give rise to a right of appeal under section 82, as explained in *Cakabay v Secretary of State for the Home Department (Nos 2 and 3)* [1999] Imm AR 176, 180-181, per Schiemann LJ. A decision under rule 353 is not a decision to refuse the relief which the further submissions seek: it is a decision that the further submissions do not amount to a fresh claim – i.e. that it is not a claim at all. The claimants' further argument that it is inherent in section 82 that the Secretary of State must decide whether to grant or refuse the relief sought in such further submissions involves circular reasoning: there can be no such duty if rule 353 applies.

.....

23. 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.

24. Perhaps more importantly the issue between the parties should not be determined simply by seeing whether sections 94 and 96 can be interpreted so as to cover every application and purported application falling within rule 353. It is equally valid to consider whether they can be construed consistently with rule 353 continuing to have an independent effect.

25. Section 94(2) differs from rule 353 in that it is concerned with hopeless, or 'clearly unfounded' claims, whether original or renewed, whereas rule 353 covers only purported renewed claims, ie further submissions, which merely repeat previous rejected claims by the same claimant. So section 94(2), unlike rule 353, can apply not only to a renewed claim (or purported renewed claim) but also to the original claim made by a particular claimant. That, no doubt, is the reason why section 94(2) envisages a claim to which it applies being treated as a valid, albeit hopeless, claim, which has to be considered on its merits: hence its machinery involves the Secretary of State certifying that it is clearly unfounded, so as to prevent an appeal. On the other hand, as rule 353 is concerned with purported

claims which repeat earlier, rejected, claims, it envisages that such purported claims are not to be considered or treated as claims at all.

26. Section 94(2) therefore does not relieve the Secretary of State from making a decision to refuse leave to enter or entry clearance in respect of a claim which she considers to be 'clearly unfounded': she must consider it on its merits and, having no doubt refused it, she is then entitled, by virtue of section 94(2), to prevent the claimant raising an appeal under section 82 by issuing a certificate. 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 formally 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.

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.

.....

30. Accordingly, while there is plainly a substantial argument to the effect that the words of section 94(2) are wide enough to catch further submissions which do not amount to a fresh claim within rule 353, I would hold, at least in the absence of binding authority to the contrary, that it does not do so. 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."

25. At paragraph 44, Lord Neuberger noted the contention of the applicants that the House of Lords in BA (Nigeria) had held that paragraph 353 had "effectively been replaced and neutered by Part 5 of the 2002 Act, and in particular section 94(2) and that that conclusion is binding on this court....there are a number of observations in the speech of Lord Hope DPSC which, at any rate if taken at face value, can fairly be said to support that proposition."

26. Lord Neuberger continued:

"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 where there has been an appealable immigration decision 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) 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] 1 WLR 348.

53. There is no statement in the judgments of the *BA (Nigeria)* case [2010] 1 AC 444 which says in terms that the reasoning in the *ZT (Kosovo)* case is being effectively overruled or departed from, but that is the effect of the claimants' contention on the present appeals. I accept, of course, that the Supreme Court (an expression which for present purposes includes the House of Lords) can impliedly, as well as expressly, depart from and effectively overrule its previous decisions. However, in this case I have great difficulty with the notion that the later case relied on by the claimants overruled the earlier case. (i) Both decisions relate to a much litigated issue, and the earlier decision was given less than a year before the later decision; (ii) the point at issue was directly addressed and decided in all five reasoned judgments in the earlier decision, and even the reasoning of the dissenter would have to be treated as overruled; (iii) the earlier decision is expressly referred to three times in the leading judgment, and once in the only other reasoned judgment, in the later decision without apparent disapproval, and both judgments were given by judges involved in the earlier decision; (iv) the actual outcome in the later decision can perfectly easily be reconciled with the earlier decision, namely on the basis that the later decision is limited to further submissions which have been treated as a fresh claim; (v) this more limited interpretation of the later decision is consistent with the Court of Appeal's reasoning and conclusion in that case, which was specifically approved by the Supreme Court; (vi) this more limited interpretation of the later decision is also consistent with a recent statute, whereas the wider interpretation, which would involve overruling the earlier decision, is not.

.....

57. … If the wider interpretation of the *BA (Nigeria)* [2010] 1 AC 444, overruling *ZT (Kosovo)* [2009] 1 WLR 348, is adopted, rule 353 has had no role to play since the 2002 Act came into force; on that basis, section 53 of the Borders Citizenship and Immigration Act 2009 would have been misconceived and pointless legislation. That would not be so if the narrower interpretation is adopted. That factor was

not considered in *BA (Nigeria)* [2010] 1 AC 444, nor should it have been given the point actually at issue. However, it should have been considered, and presumably would have been considered, if the Supreme Court was deciding that rule 353 was a dead letter. It is true that in *BA (Nigeria) [2010] 1 AC 444* paragraph 26, Lord Hope DPSC rejected an argument relating to rule 353 based on Section 12 of the Immigration, Asylum and Nationality Act 2006 on the ground that that section had not been brought into force. However, the argument was far less clear, as it is much less apparent from section 12 of the 2006 Act than it is from section 53 of the 2009 Act that rule 353 was assumed by Parliament to be effective. Further, with all due respect, it seems to me that, where one is dealing with an issue of statutory interpretation, one is considering what the legislature intended or understood, so legislation as enacted is relevant, whereas the question whether the executive has chosen to bring that legislation into force is not relevant.

58. In all these circumstances, unless it is pellucidly clear from the judgments in *BA (Nigeria)* [2010] 1 AC 444, and in particular the passages relied on by the claimants, at paras 29-33, in the judgment of Lord Hope DPSC, as set out above, that the reasoning and conclusion in *ZT (Kosovo)* [2009] 1 WLR 348 was being overruled, it seems to me that we should dismiss this appeal. Those passages (and in particular the words I have emphasised) undoubtedly give support to the claimants' argument, if read on their own.

59. However, as with any observations contained in a judgment, one cannot properly interpret the passages other than in their factual and juridical context. Given all the factors I have mentioned, I have reached the conclusion that what was said in those passages can, and therefore should at any rate in this court, be read as being 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)* [2009] 1 WLR 348, 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'."

R (Waqar) v Secretary of State for the Home Department [2015] UKUT 00169

27. Reference has been made to this decision at paragraphs 9 and 10 above. The Upper Tribunal's conclusions were as follows:-

"14. Paragraph 353 does not appear and is not alluded to in the legislative framework. It and its predecessor have never been alluded to. The two systems exist alongside each other. It remains in the Rules and, despite the amendment of s82 of the 2002 Act from 20th October 2014 and despite there being amendments to the Rules since that date there has been no amendment to paragraph 353. Although Ms Akinbolu submitted that the paragraph 353 process still applied in for example asylum cases and therefore the Rules could not be amended, this is not the case. Had there been an intention that the paragraph 353 process would cease to apply in certain categories of cases this could and would have been set out in amendments to the Immigration Rules.

15. Can paragraph 353 co-exist with the legislative scheme? Ms Akinbolu submits not, because the protections that exist in the statutory scheme mean that paragraph 353 is no longer required and thus the paragraph has been impliedly repealed or is of no effect and should not be utilised.

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."

The Court of Appeal's decision on the renewal application for permission to appeal against the Tribunal's decision in Waqar

28. Although fully aware of the status of the judgment of Beatson LJ, given on 17 November 2015, both Counsel in the present case made reference to it. The relevant passages are as follows:

> "6. The Secretary of State in the submissions before the Tribunal, which were accepted, maintains that paragraph 353 continues to act as a gateway and relies on the decision of ZA (Nigeria) for this.
>
> 7. Miss Akinbolu submits first, that ZA (Nigeria) was dealing with the previous statutory regime. Secondly, she submits that its approach contradicts that of the Supreme Court in BA (Nigeria) that paragraph 353 has no bearing. She maintains that if paragraph 353 is added as a gloss to the statutory scheme, it removes cases from the control of an independent court. That matter was a matter which concerned, for example, Lord Brown and Lord Hope in BA (Nigeria).
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> .....
>
> 12. Permission to appeal was refused by Underhill LJ on 31st July, essentially on the grounds that ZA (Nigeria) had confirmed that under the pre-2014 regime, rule 353 permitted the Secretary of State to decide that a purported human rights claim was not in fact such a claim but was no more than an attempt to revive a previously unsuccessful claim (see paragraph 27). Underhill LJ stated that if she did that, there was no immigration decision within the meaning of section 82 and that nothing in the changes introduced by the 2014 Act undermined that reasoning. He also stated that:
>
> > 'If the rejection of a claim under rule 353 did not constitute an 'immigration decision' for the purposes of the old section 82, there is no reason why it should constitute a 'decision' for the purpose of the new rule (in fact the relevant word is 'decided', not 'decision', but the use of the very rather than the noun is obviously immaterial). It is suggested that it makes a difference that the old section 82 used the label 'immigration decision', which was then defined to cover a number of specific kinds of refusal, whereas the new section refers simply to a 'decision to refuse'; but that is just a matter of drafting technique and connotes no difference of substance.'
>
> .....
>
> 15. There is no longer a right of appeal against a decision about deportation unless the decision refuses a protection claim or revokes a protection status. The case advanced on behalf of HW below and today is that if a person makes a human rights claim, then that person has a right of appeal against the refusal of that claim and that the definition of human rights claim is that in section 113. As amended by the 2014 Act, section 113 provides that:
>
> > '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][6] would be unlawful under section 6 of the Human Rights Act 1998 (c.42) (public authority not to act contrary to Convention)...'

16. In this case the Upper Tribunal decided (see paragraphs 14 and following of its decision) that the regime in paragraph 353 co-exists with the legislative scheme. The amendments to section 82 do not refer to it and there is no indication in the statute that paragraph 353 would cease to apply. The legislation is concerned with circumstances in which an appeal will lie against a refusal of a claim to protection. Part V of the 2002 Act does not affect what constitutes 'a claim', a prior question to whether there is a decision refusing what is 'a claim'. The tribunal held that for that reason the decision in BA (Nigeria) was not of assistance.

.....

20. … My starting point is that it is not legitimate to take isolated statements from BA (Nigeria) out of context. In that case the context was a situation which, by section 82(2)(k), a decision to revoke a deportation order generated a right to an in-country appeal unless it was certified under section 94. Accordingly, it was not in issue that there was an appealable decision, only the locus of the appeal. The right to that appeal existed, whether or not it was repetitious. BA (Nigeria) was not concerned with whether a right of appeal should arise at all. That was what ZA (Nigeria) was concerned with. This court, in a judgment given by the Master of the Rolls, Lord Neuberger, held that BA (Nigeria) did not require the Secretary of State to issue an appealable immigration decision whenever further submissions were made. He gave BA (Nigeria) a narrow reading: see Lord Neuberger at 21:

> '...the Secretary of State can decide that it is not a 'fresh claim' and then decline to make a decision on whether or not to refuse leave to enter etc; in that event, there would be no decision which could give rise to a right of appeal under section 82...'.

21. Secondly, ZA (Nigeria), which binds this court, recognised that the public interest in not affording scope for repetitive and abusive claims with a second right of appeal, which is reflected in paragraph 353, applies notwithstanding sections 94 and 96. Those provisions do not have the same function of limiting access to a second right of appeal.

22. Thirdly, I respectfully agree with Underhill LJ that the difference between the term 'immigration decision' in the old section 82 Act and 'decided' in the new section 82 is a matter of drafting technique, rather than reflecting a fundamental difference in the nature of the decision. I do not consider that the use of the word 'decision' in the letter assists Miss Akinbolu: it refers to not reversing the rejection of a previous decision which had been the subject of appeal.

23. Fourthly, on the applicant's submission, as Miss Akinbolu accepted, any person who makes an entirely repetitive second claim the day after appeal rights in relation to a first claim are exhausted will be entitled to a further right of appeal. I accept the argument that the process of leaving this matter to a process of

[6] The words in square brackets are correct. The judgment contains a typographical error at this point.

certification would not only impose a higher administrative burden on the Home Office, but would also completely forestall the ability of the Secretary of State to decide whether some communication between a person in this country without status and the Secretary of State qualifies or does not quality as a relevant decision. Although Miss Akinbolu's submissions about BA (Nigeria) would apply where a submission purporting to be a protection claim or a human rights claim are in fact such, I do not consider that it is arguable that the Secretary of State was precluded from deciding that submissions do not constitute such a claim. In short, I do not consider that BA (Nigeria) precludes the Secretary of State from making a categorisation decision about a communication from an individual."

R (Robinson) v Secretary of State for the Home Department [2016] UKUT 00133

29. It will be apparent that what the Upper Tribunal said at paragraph 14 of Waqar is incorrect, in so far as the Tribunal thought that paragraph 353 had not been "alluded to in the legislative framework". As we have seen, the 2006 Act, if brought into force, would provide new definitions of "asylum claim" and "human rights claim", paragraph (b) of which is plainly intended to refer to paragraph 353.

30. In Robinson, the Tribunal addressed this issue:-

> "23. At this point I must address Ms Robinson's submissions concerning the amendment to Section 113 of the 2002 Act. In short she argues that it is implicit in the fact that the new unimplemented version of the definition of what is a human rights claim specifically excludes from that definition a claim that fails to meet the fresh claims test of paragraph 353 that the original version did not do so, otherwise there would have been no reason to provide for the exclusion in the new version.
>
> 24. Mr Fisher contends that that is not correct. In his submission the new version of the definition does no more than to clarify the position that pertained before. For reasons that will be clear from the judgment, I do not accept the analysis urged upon me by Ms Robinson. I have no doubt at all that I should follow the approach to Waqar taken by Lord Justices Underhill and Beatson. I cannot say that Waqar is wrongly decided and in fact I am confident that it is correctly decided and so will follow it in determining this application. In any event, as Mr Fisher has submitted, I am bound by the decision of the Court of Appeal in ZA (Nigeria) and so must accept the narrow reading of the ration in BA (Nigeria)."

R (MG) v First-tier Tribunal (Immigration and Asylum Chamber) ("fresh claim"; para 353: no appeal) [2016] UKUT 00283

31. In this recent case, the Upper Tribunal (per Blake J) rejected the submission that, although paragraph 353 remains operative, following the changes made by the 2014 Act, the First-tier Tribunal has power to decide whether the Secretary of State has lawfully refused to treat submissions as a fresh claim:-

"10. In fact Mr Mackenzie was at pains to submit that his client took no issue with the decision of the UT in Waqar and therefore accepted that for present purposes s.82(2)(a) of the 2002 Act should be read as meaning 'a person may appeal to the tribunal where (a) the Secretary of State has decided to refuse a protection claim (that is a fresh claim within the meaning of para 353) made by P'. He submits that the issue in the present application is who decides whether the claim is a fresh claim.

11. Whereas the previous case law is clear that this is a question for the Secretary of State subject to the supervision of judicial review (see R v SSHD, ex parte Onibiyo [1996] QB 768; Cakabay v SSHD (No 2) [1998] Imm AR 623; and ZA (Nigeria) itself), Mr Mackenzie contends that as a result of Parliament's decision to grant a right of appeal from a refusal of a protection claim, then the FtT judge has jurisdiction to decide whether there had been a decision to refuse a protection claim.

12. His argument proceeds as follows:-

    i. If there has been a refusal of a protection claim, there is an appealable decision. If there has not, a preliminary ruling will conclude that there is no such decision and the FtT has no jurisdiction.
    ii. As the issue of whether the further representations are a fresh claim is an integral part of the question whether there has been a protection claim made and refused, it is necessary for the FtT judge to reach a view on that issue.
    iii. Whether or not the claim for protection is a fresh claim is a matter of fact for determination by the FtT judge in the same way as is a dispute as to whether a fee had been paid and accordingly whether a proper application had been made is a matter for the FtT judge to decide: see Basnet [2012] UKUT 113 (IAC) and R (Khan) v SSHD [2015] UKUT 353 (IAC).

13. Attractively as Mr Mackenzie has presented his submissions to us, we are unable to agree with them.

14. In our view, notwithstanding the significant change in s.82 from a right of appeal against an immigration decision on a protection ground to a right of appeal against a protection decision itself, Parliament can be presumed to have legislated against the background of satisfaction with the previous law as declared in ZA (Nigeria). There is no indication in the amendments made, that it was intended to transfer responsibility for the categorisation decision of whether a claim is a fresh claim to the FtT. Indeed the general purpose of the 2014 amendments was to reduce the appellate jurisdiction of the FtT.

15. Second, we do not agree that an assessment of whether a protection claim is a fresh claim is a question of jurisdictional fact to be determined by the FtT judge. In our judgment it remains a matter of assessment and evaluation by the SSHD subject to supervision in judicial review. Both the High Court and the Court of Appeal decisions in Cakabay are to this effect and nothing in the legislative changes suggests that a new approach must now be taken. We do not accept that these decisions are explained merely because the judicial review court does not

apply the approach of jurisdictional fact rather than public law review on nationality grounds.

16. Third, we do not accept that the Secretary of State refused a protection claim when she rationally concludes that the claim before her is not a fresh claim. Mr Mackenzie's reliance on the decisions in Basnet and Khan does not avail him. The UT subsequently decided in the case of VED [2014] UKUT 150 (IAC) that a decision that no valid application has been made and no immigration decision is required to respond to it is not itself an appealable decision, and there is no jurisdiction in the FtT judge to examine the facts for himself and conclude that as a valid application had in fact been made there ought to have been an immigration decision in response to it.

17. Here, the rationality of the Secretary of State's decision is not in issue. Mr Mackenzie does not in addition to the challenge to the FtT decision contend that the SSHD's assessment was flawed; the application rests on the proposition that a new decision can be made by the FtT judge on this issue. We consider that this case falls on the VED side as opposed to the Basnet side of the line as regards the limits of the FtT's ability to determine whether it has jurisdiction to determine an appeal. In our view there can be no decision to refuse a protection claim where the representations are not recognised (rationally) to be a protection claim."

E. Discussion

32. We should begin by saying that we consider the parties have provided us with comprehensive submissions on the role of paragraph 353 in the post-2014 Act world, which delve more deeply and widely than appears to have been the case with the arguments put to the Tribunal in Waqar and Robinson. We are very grateful to Mr Toal and Mr Fisher for their thoroughness.

33. Mr Toal relies heavily upon the judgment of Lord Hope in BA (Nigeria). He submits that BA (Nigeria) involves answering the same question that faces us: namely, what constitutes a "claim"? At [29], Lord Hope agreed with Sedley LJ in the Court of Appeal that there was, in effect, no longer a need to gloss the words "a ..... claim", as had been done in ex p Onibiyo because the appeal regime, including the certification provisions of the 2002 Act, was now a "complete code", in which Parliament had made express provision in the primary legislation for dealing with unmeritorious claims:

> "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."

34. This is, however, very difficult to reconcile with the House's judgment in ZT (Kosovo). In that case, there was no suggestion that "Rule 353, as presently drafted, has no part to play in the legislative scheme" [cf BA (Nigeria)]. On the contrary, the issue in ZT (Kosovo) was whether the application of paragraph 353 extended to cases

within the certification provisions of the legislation. As we have seen, the House of Lords held that it did.

35. The relationship between ZT (Kosovo) and BA (Nigeria) was explained by Lord Neuberger in ZA (Nigeria). At paragraph 52 of his judgment, Lord Neuberger made the crucial finding that "the binding ratio" of BA (Nigeria) is not "that rule 353 is effectively a dead letter". Lord Neuberger held that the contrary contention, "which I might very well otherwise have accepted", had to be rejected on the ground that it was "plainly inconsistent with the reasoning and conclusion... in ZT (Kosovo)". Lord Neuberger's conclusion was that the decision in BA (Nigeria) had turned on the crucial fact that, in each of the appeals, the Secretary of State had made an appealable immigration decision; namely, the decision to refuse to revoke a deportation order. In that circumstance, paragraph 353 "had no further part to play" [52]. Since paragraph 353 serves as a means of enabling the Secretary of State to decide, in certain circumstances, whether submissions from P, should, if rejected, be the subject of an immigration decision, the Secretary of State's making of an immigration decision placed matters firmly within the ambit of the "complete code" of the 2002 Act.

36. This is made pellucid in paragraph 59 of ZA (Nigeria):-

> "59. ...I have reached the conclusion that what was said in [BA (Nigeria)] can and therefore should at any rate in this court, be read as being 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."

37. We are firmly of the view that the Upper Tribunal is bound by the ratio of ZA (Nigeria). It is not open to the Tribunal to depart from that ratio and apply the judgments in BA (Nigeria) to the facts of the present case, in the way for which Mr Toal contends. The result, therefore, is that the present applicant must fail unless he can demonstrate that the legislative regime, as it stands after the amendments made by the 2014 Act, requires to be interpreted in a way that changes the function of paragraph 353 of the Rules.

38. In ZA (Nigeria) the Court of Appeal considered the issue of whether paragraph 353 had, in fact, been rendered as a dead letter by the advent of the 2002 Act, including its certification provisions. At [19] Lord Neuberger held that where a rule remains unamended by later legislation, "then at least where the rule and the subsequent legislation are *in pari materia* and are promoted or promulgated by the same government department, there must be a presumption that the rule was intended to survive and have effect".

39. Lord Neuberger accepted that this was not a particularly strong presumption. It was, however, strengthened because in a more recent statute – that is to say section 53 of the Borders, Citizenship and Immigration Act 2009 – Parliament had amended

section 31A of the Senior Courts Act 1981 to enable transfer from the High Court to the Upper Tribunal of judicial review applications where "the application calls into question a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim... wholly or partly on the basis that they are not significantly different from material that had previously been considered...". The reference in new section 31A was, unarguably, to what was then (and still is) paragraph 353.

40. Although section 31A has subsequently been amended so as to widen the jurisdiction of the Upper Tribunal in respect of immigration judicial review, the fact of that amendment does not, in our view, strengthen the argument that the changes made by the 2014 Act have materially affected the operation of paragraph 353.

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.

43. Mr Toal submits that the continued presence of paragraph 353 can be explained on the basis that, as a result of the changes made by the 2014 Act and in the light of ZT (Kosovo) (see paragraph 18 above), paragraph 353 is now relevant (only) to certification decisions under the amended 2002 Act. We are unpersuaded by this submission. If Parliament had intended paragraph 353 to have such a restricted ambit, following the changes of the 2014 Act, it is reasonable to suppose that paragraph 353 would have been amended to make it clear that, henceforth, it was to apply only in certification cases.

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.

45. Mr Toal submits that the Secretary of State has it in her power to commence the amendments to section 113 of the 2002 Act contained in the 2006 Act, so as to reverse

what he says is the present position concerning the ambit of paragraph 353. The Secretary of State's position, however, is that in the light of the case law, particularly ZA (Nigeria), there is no need to commence the 2006 Act amendments because the legal position is sufficiently clear. Paragraph 353 can be operated by the Secretary of State in such a way as to prevent certain submissions from being treated as a "human rights claim".

46. We are unable to accept Mr Toal's submission on this issue. Far from the 2014 Act acting as a catalyst to bring the 2006 amendments into force, Parliament chose, in the 2014 Act, to amend the existing definition of "human rights claim" (see paragraph 4 above). The fact that Parliament had been concerned to amend the definition was noted at paragraph 15 of the judgment of Beatson LJ, refusing permission in Waqar (paragraph 23 above). The 2014 Act has inserted the phrase "or to refuse him entry into the United Kingdom" after the phrase "require him to leave the United Kingdom" into the definition, in order to cover the full range of situations in which a human rights claim can now be made. The decision to make a corresponding amendment to the prospective amendment of "human rights claim" shows beyond question that, in enacting the 2014 Act, Parliament was very much aware of the 2006 Act amendments and deliberately decided that nothing in that Act necessitated their commencement.

47. Furthermore, the 2014 Act has inserted into section 113 of the 2002 Act a definition of "protection claim" by reference to section 82(2) (see paragraph 2 above). This shows that Mr Toal is, in fact, wrong to contend that, merely by commencing the amendments of the 2006 Act, the Secretary of State can reverse the effect of what he says is the present limited ambit of paragraph 353. The 2006 amendments are only to the definitions of "asylum claim" and "human rights claim". If commenced, they would result in the plainly anomalous position that – according to Mr Toal – paragraph 353 would bite with full force on submissions purporting to be a human rights claim but not on those purporting to be a protection claim, despite the fact that submissions purporting to be a protection claim have been specifically brought within the paragraph 353 regime by the amendment in HC 1025, which supplanted the previous reference in that paragraph to an asylum claim.

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.

49. The Tribunal directed further written submissions on the Secretary of State's decision-making process under paragraph 353. Both parties complied with that direction.

50. In his response of 27 May 2016, Mr Fisher summarises the process as follows:-

> "Stage 1: further submissions are provided to the Secretary of State.

Stage 2: the Secretary of State considers whether the submissions warrant a grant of leave. No decision is or needs to be made at this stage as to whether those submissions amount to a 'fresh claim'.

Stage 3: if the submissions are accepted, leave is granted. If the submissions are rejected, however, the Secretary of State will go on to consider whether those submissions amount to a 'fresh claim'. There are then two options:

(i) if, as here, the Secretary of State determines that submissions do not amount to a fresh claim, per *ZA (Nigeria)*, then the further submissions are 'not a claim at all'. Accordingly, there is no 'claim' to refuse. In these circumstances, because there has been no refusal of a protection/human rights claim, no appeal right arises;

(ii) if, however, the Secretary of State determines that the further submissions do constitute a 'fresh claim', she will refuse the claim. In these circumstances, an appeal right arises under section 82(1) of the 2002 Act."

51. Mr Fisher submits that the order of the decision-making process, as set out above, follows the language of paragraph 353 and is the same as that which applied under the previous appeal regime. The order allows the Secretary of State discretion to grant leave to applicants who make entirely repetitious submissions if, on a re-assessment, it is thought appropriate to do so.

52. In his submissions of 9 June 2016, Mr Toal argues that, unless and until the 2006 Act amendments to section 113 come into force, submissions which rely upon assertions that removal from the United Kingdom would be unlawful in human rights terms, or would be contrary to the United Kingdom's international protection obligations, are a "claim", the refusal of which is an appealable decision. At stage 2, the Secretary of State's consideration precedes a decision whether the submissions are a fresh claim and so are not contingent upon a finding that the submissions are such a claim.

53. According to Mr Toal, the Secretary of State acknowledges that such consideration takes place even in response to entirely repetitious submissions. Mr Toal says the Secretary of State has to choose between two possible outcomes; namely, the grant of leave or the rejection of the applicant's assertion, and that this choice involves deciding whether to grant or refuse the claim. Only after making such a decision on the merits can the Secretary of State go on to decide "whether those submissions amount to a fresh claim". Thus, by the time the Secretary of State turns to the question of whether a claim is a fresh claim, she has already made a decision that is appealable under section 82. This differs from the position under the previous version of that section, where a decision to reject a claim was not, as such, appealable. There had to be an immigration decision before an appeal could arise.

54. Whilst there is a superficial attraction in Mr Toal's submission that the rejection of submissions falls to be treated as a decision to refuse a human rights or protection claim, within the ambit of section 82, we do not consider it to be the correct interpretation. Paragraph 353 is about the process by which the Secretary of State determines whether particular submissions, although not such as to give rise to the grant of leave, fall to be categorised as human rights or protection claims, the refusal

of which can trigger an appeal under section 82. The expressions "submissions" and "if rejected" make it clear that we are, at this point, removed from the language of new section 82, which speaks of the Secretary of State having "decided" to "refuse" a "protection/human rights claim". Although the expressions "submissions" and "if rejected" pre-date the changes made by the 2014 Act, that they remain in place is, we find, indicative of the legislature's view that they continue to serve the function of permitting the Secretary of State to categorise cases as between paragraphs (i) and (ii) of stage 3, as set out in paragraph 50 above.

55. The fact that the Secretary of State may choose to accept P's submissions, and grant P leave in order to comply with the Secretary of State's international obligations, does not mean the Secretary of State has to be viewed as treating those submissions as a "fresh claim". On the contrary, under paragraph 353 a "fresh claim" is a claim which necessarily is refused by the Secretary of State; but which, importantly, gives rise to a right of appeal (subject to certification).

56. We are strengthened in our conclusions on this issue by the following matter. If Mr Toal is right, then contrary to what he submits in his response of 9 June, the bringing into force of the 2006 Act amendments to section 113 would not assist the Secretary of State. Those amendments exclude claims which fall to be disregarded in accordance with immigration rules. But, on Mr Toal's construction of paragraph 353, if the rejection of submissions automatically means that a human rights claim has been refused, then a right of appeal will have been generated, irrespective of whether the remaining paragraph 353 process results in the submissions not being a fresh claim. At best, the status of paragraph (b) of the 2006 definitions would, on this construction, be mired in uncertainty.

57. It is important to make the following final point. The fact that the Secretary of State can continue to operate paragraph 353 as a "gateway" to section 82 does not mean she is the sole arbiter of whether she has, in fact, made a decision to refuse a human rights claim, as opposed to refusing to treat submissions as amounting to a fresh claim.

58. The Secretary of State's letter of 26 June 2015, addressed to Wilson Solicitors, refers in various places to the applicant's "claim", where it would plainly have been preferable to refer to his "submissions". Nevertheless, the first substantive paragraph of the letter refers to "your letter of 24 June 2015 in which you made further submissions about your client's deportation from the UK". In the circumstances, we consider that the subsequent references to a claim in the letter need to be read as referring to those submissions. Overall, we consider that the letter of 26 June, properly construed, amounts to a decision to refuse to treat the applicant's submissions as a fresh claim. Paragraph 353 is mentioned in terms in several places and the letter makes it evident that the Secretary of State has asked herself the correct questions in terms of WM (DRC) [2006] EWCA Civ 1495, applying the requisite anxious scrutiny.

F. Decision

59. The application for judicial review is refused. The Tribunal will hear Counsels' submissions as to costs, unless these can be agreed. ~~~~*0*~~~~