Neutral Citation Number: [2018] EWCA Civ 2838

Case No: C4/2017/1154
C4/2017/1155

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Ouseley
[2017] EWHC 59 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2018

Before :

LADY JUSTICE SHARP
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE SINGH

- -

Between :

The Queen (on the application of TN (Vietnam))	**Appellants**
and	
The Queen (on the application of US (Pakistan))	
- and -	
Secretary of State for the Home Department	**1st Respondent**
and	
Lord Chancellor	**2nd Respondent**

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Ms Stephanie Harrison QC and Ms Louise Hooper (instructed by **Duncan Lewis**) for **TN (Vietnam)**
Ms Nathalie Lieven QC and Ms Charlotte Kilroy (instructed by **Duncan Lewis**) for **US (Pakistan)**
Mr Robin Tam QC and Ms Natasha Barnes (instructed by the **Government Legal Department**) for the **Secretary of State for the Home Department**
Ms Julie Anderson (instructed by the **Government Legal Department**) for the **Lord Chancellor**

Hearing dates: 23 - 25 October 2018

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Judgment Approved

Lord Justice Singh:

Introduction

1. On 9 February 2018, at a joint case management hearing before Singh LJ and Supperstone J, it was ordered that two matters should be heard by a constitution of the Court of Appeal sitting simultaneously as a constitution of the Divisional Court so that both this appeal and the related claim for judicial review could be considered by the same judges.

2. The first matter, which is the subject of this judgment, is an appeal from Ouseley J's judgment on 20 January 2017 that earlier appeal decisions made by the First-tier Tribunal[1] ("FTT") under the (*ultra vires*) Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 (SI 2005 No. 560)[2] were not automatically nullities, and therefore required an application to be made to set them aside, an application which the relevant court or tribunal would have to determine on the facts of an individual case.

3. The second matter concerns a claim for judicial review of a decision of the FTT of 30 May 2017 that it did not have jurisdiction to determine the Claimants' applications to set aside earlier appeal decisions made by the FTT under the 2005 Rules. That claim for judicial review is the subject of separate judgments by this Court sitting as a Divisional Court, handed down at the same time as the judgments in this case: [2018] EWHC 3546 (Admin).

4. These cases are brought by the Appellants TN and US and have been selected to act as the lead (but not test) cases for a larger number of applicants whose appeals were dealt with under the 2005 Rules during the relevant period (between February 2010 and October 2014) and who have made applications to the FTT to set those appeal determinations aside under Rule 32 of the Tribunal Procedures (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 20144 No. 2604).

5. TN is a Vietnamese national who initially arrived in the United Kingdom ("UK") in December 2003, claiming asylum on several occasions before being removed in 2012. She returned to the UK in 2014 and made fresh claims of asylum, alleging that *inter alia* she had been a victim of trafficking and sexual abuse.

6. US is a Pakistani national who entered the UK in December 2009 and claimed asylum in 2014 on the grounds of fear for his life if he were returned to Pakistan. His appeal, and TN's, were decided through the Detained Fast Track ("DFT") process under the 2005 Rules which were declared by Ouseley J to be *ultra vires*. The Secretary of State has not cross-appealed against the declaration made by Ouseley J that the 2005 Rules were *ultra vires*. Therefore it is common ground in the present case that they were *ultra vires* and that starting point forms the foundation for much of the Appellants' argument before this Court.

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[1] And its predecessor, the Asylum and Immigration Tribunal ("AIT").

[2] I will refer to these simply as "the 2005 Rules" unless it is necessary to distinguish them from other rules, in which case I will refer to them as "the Fast Track Rules".

Material legislation

7. Section 82(1) of the Nationality, Immigration and Asylum Act 2002 (as amended) provides:

> "Where an immigration decision is made in respect of a person he may appeal to the Tribunal."

8. Subsection (2) sets out a list of what is meant by a "immigration decision" in this context. It is common ground that it included the adverse decisions made by the Secretary of State against which appeals were made to the FTT in the cases of TN and US.

9. Section 86 of the 2002 Act sets out the functions of the Tribunal when an appeal is made to it. In essence it must determine the appeal.

10. Section 106 of the 2002 Act confers power on the Lord Chancellor to make rules regulating the exercise of the right of appeal under section 82 (and other provisions) of the 2002 Act and for prescribing the procedure to be followed in connection with such proceedings. It is common ground that the 2005 Rules were made exercising that power.

11. The Asylum and Immigration Tribunal (Procedure) Rules (SI 2005 No. 230) were also made under section 106 of the 2002 Act. They were helpfully referred to by Ouseley J as the "Principal Rules", to distinguish them from the Fast Track Rules. They contained the following relevant provisions.

12. Rule 6(1) provided that:

> "An appeal to the Tribunal may only be instituted by giving notice of appeal against a relevant decision in accordance with these Rules."

13. Rule 8 set out the form and contents required of the notice of appeal.

14. By virtue of Rule 6 of the Fast Track Rules, these were among the procedural rules in the Principal Rules which applied to fast track appeals as well.

Factual Background

Factual background of TN

15. The facts of TN's case are summarised in the judgment of Ouseley J at paras. 119-135. The pertinent facts for present purposes are summarised below.

16. TN was first encountered by the authorities in the UK in December 2003, claiming asylum in January 2004. She absconded and her claim was refused for non-compliance. In various fresh claims and interviews subsequently, including a claim in which she sought asylum based on religious persecution for being Catholic, she stated that she had been working in a nail bar without pay, and that she had no money and passport. She was removed from the UK in 2012, but returned in May 2014. She had a miscarriage in July 2014 shortly before being arrested.

17. She again claimed asylum, claiming at various points that she had been tortured, and that she feared for her safety for having said "bad things about the government" and for her suspected involvement in a theft. She was placed in the DFT in August 2014. Her claim was rejected and one week later, on 22 August 2014, her appeal was dismissed. It is that earlier appeal decision that she now wishes to have set aside, because she asserts that adverse findings about her credibility that were made in that decision continue to have an impact on her, as the Secretary of State continues to rely on those adverse findings in the context of other decisions in relation to her. I shall have to return to the facts of TN's case in more detail later.

Factual background of US

18. The facts of US's case are summarised in the judgment of Ouseley J at paras. 152-175. The pertinent facts for present purposes are summarised below.

19. US entered the UK in December 2009 with leave to remain as a Tier 4 (General) Student. His leave, having been extended to 30 October 2014, was curtailed on 30 March 2014, and he was served with notice of intended removal on 1 April 2014. He claimed asylum, stating at his screening interview that he could not return to Pakistan because his ex-girlfriend's mother was trying to kill him. He was then placed into the DFT process. On multiple occasions he asserted that he was not well, disturbed mentally and could not proceed. He later alleged that he had been severely beaten by members of the group Lashkar-e-Tabha. His application to be removed from the DFT or for additional time, on the grounds that his case was too complex and more time was needed to gather and translate documents, was rejected. His appeal was dismissed by the FTT on 23 May 2014.

20. Evidence was then placed before the Secretary of State that US had severe psychotic symptoms, trauma-related symptoms and PTSD that were highly compatible with his reported history of traumatic experiences.

Background to this litigation

21. The procedural history of these cases is summarised in the judgment of Ouseley J at paras. 2-11, but the pertinent aspects are as follows.

22. The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 (SI 2005 No. 560) were promulgated in 2005. When the AIT was replaced by the FTT on 15 February 2010 the 2005 Rules continued in force as if they were rules of the FTT. They

remained in force until 20 October 2014 when the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014 No. 2604) ("the 2014 Rules") came into force. The Schedule to the 2014 Rules contained the new Fast Track Rules ("2014 FTR"), as well as the Principal Rules.

23. The lawfulness of the operation of the decision-making system in the Detained Fast-Track was considered in *R (Detention Action) v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) ("*DA1*"). In that case Ouseley J held that the operation of the system up *until* the stage of appeal was unlawful because it was unfair.

24. In *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840; [2015] 1 WLR 5341 ("*DA6*"), the 2014 Rules were challenged directly. On 29 July 2015, the Court of Appeal dismissed the Lord Chancellor's appeal against the order of Nicol J of 16 June 2015 in *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWHC 1689 (Admin) ("*DA5*"). The 2014 Rules were held to be *ultra vires* and quashed.

25. The Court of Appeal in *DA6* did not specify the consequences of its decision for those appeals which had already passed through the DFT under the 2014 FTR. However, in *Alvi v Secretary of State for the Home Department* (unreported) on 4 August 2015, Mr Clements (President of the FTT) used the power in Rule 32 of the 2014 Rules, which permits the FTT to set aside and remake a decision if it considers such is required "in the interests of justice" where "there has been some other procedural irregularity". He concluded that it was in the interests of justice that the appeal decisions made under the 2014 FTR should be set aside. The procedural irregularity was that the 2014 FTR were *ultra vires*.

26. The Appellants in the present case were among those Claimants who brought judicial review proceedings for the 2005 Rules, being similar in content to the 2014 FTR, to be declared *ultra vires* too. The decision on their claim for judicial review was given by Ouseley J in the Administrative Court on 20 January 2017, and has given rise to the present appeal.

The judgment of Ouseley J

27. Before Ouseley J the Appellants TN and US submitted that, in light of the 2014 rules having been ruled *ultra vires* and quashed by the Court of Appeal in *DA6*, a significant number of appellants had been denied a fair opportunity to present their cases under the 2005 Rules also. The system, like that of the materially identical 2014 Rules, was *ultra vires* and systemically unfair and unjust.

28. Further, they submitted that the 2005 Rules being systemically unjust rendered the decisions made under them automatically *ultra vires* and intrinsically unfair. The appeals, for example of TN and US, had not yet been the subject of a lawful determination, meaning that it only remained for Ouseley J to so hold, or for the FTT to set them aside under Rule 32: para. 61 of his judgment.

29. The main issue before Ouseley J was whether the 2005 Rules were *ultra vires*, and whether he ought to make a declaration to that effect. Once he found at para. 40 of his judgment that these questions should be answered in the affirmative, he set out the consequential issues before him at para. 70. They were:

(1) Does the nullification of the 2005 Rules automatically, and without the need for an application to a court of competent jurisdiction, nullify the appeal decision?

(2) Is the court of competent jurisdiction obliged to quash or set aside the appeal decision on an application being made to it? The fact that his answers to Questions (1) and (2) were "no" gave rise to three further issues.

(3) To which body, the FTT or the Administrative Court, should the application be made?

(4) What approach should it adopt to the grant or refusal of such an application?

(5) What is the effect of quashing or setting aside of the appeal decision on subsequent decisions, or of not doing so?

30. Although his answer to Issue (3) was the FTT he then elected to give his view on the application of the approach articulated on Issue (4) to the cases of TN and US, to both their appeal decisions and subsequent decisions, from para. 118 onwards.

31. First, Ouseley J held that, following *DA6*, the 2005 Rules were *ultra vires*. There were no material differences between the 2005 and 2014 Rules, including the time-scales, adjournment powers and powers to transfer out: para. 18. While he was not strictly bound by the Court of Appeal's decision in *DA6*, that case being concerned with the 2014 Rules, he regarded it as highly persuasive (para. 34), and he would have had to identify serious errors with it in order to depart from it in relation to the 2005 Rules (para. 35). Finding no such errors, he accordingly concluded that the 2005 Rules were *ultra vires* (para. 40), and, because these cases were lead cases (para. 42), he made a declaration to that effect (para. 60). That decision is not the subject of a cross-appeal by the Secretary of State.

32. Turning to the consequential Issues (1) and (2) before him, Ouseley J held, first, that at the very least an *application* was required to be made by the affected party before an appeal decision was deemed to be legally of no effect (para. 71). Otherwise approximately 10,000 appeals would be instantly rendered void overnight. Secondly, he held that the finding that the 2005 Rules were unlawful did not render all appeal decisions made under them as made without jurisdiction or inevitably unfair (para. 72). More than a mere application to set aside was needed; individual applicants had to show that there had been procedural unfairness in their *particular* case.

33. His reasoning in favour of this conclusion had two key limbs. The first was that the jurisdiction of the FTT to hear these appeals did not arise from the 2005 Rules, but from statute, namely section 82(1) of the Nationality, Immigration and Asylum Act 2002. Further, the Rules were not so bound up with these powers as to mean the invalidity of the Rules rendered the jurisdiction non-existent (paras. 73-75).

34. The second limb to Ouseley J's reasoning was that, aside from the question of jurisdiction, the invalidity of the 2005 Rules did not render the appeal decisions inevitably unfair. Thus the decision on setting aside would depend on whether the decisions could be shown to have been unfair in fact (para. 80). The Court of Appeal had not held in *DA6* that all of the decisions were unfair, only that a "significant number" would be.

35. On Issue (3), Ouseley J held that the FTT was the appropriate forum for the set aside applications under the 2005 Rules, not the Administrative Court. As in *Alvi*, Rule 32 of the 2014 Rules could be used for this purpose (para. 96). This issue is raised directly in the related claim for judicial review of the FTT's decision that it lacked jurisdiction to consider such applications to set aside, which is the subject of the decision of the Divisional Court which is being handed down today with the judgments in this appeal.

36. On Issue (4), Ouseley J held that the correct approach to the setting aside/quashing actions was largely for the FTT to determine (para. 103) but he sought to give some guidance on the issue.

37. First, the FTT should consider the delay in bringing the application, and the reason why the party had not argued that the 2005 Rules were *ultra vires*, as had happened with the 2014 Rules in the *Detention Action* litigation. Similarly, if a challenge was brought by way of judicial review, then the Administrative Court would have to consider the question of delay and whether to grant an extension of time (paras. 104-110). The question of prejudice to good administration would then be at the fore, along with the need for finality in litigation and the availability of alternative remedies (para. 113).

38. Even where the challenge was permitted to proceed, the applicant would have to show that the impugned decision was unfair beyond the fact that it was reached under the 2005 Rules. Importantly, there would be no presumption of unfairness arising from that fact (para. 114). I shall have to return to what Ouseley said at para. 114 of his judgment in more detail later, when I consider Ground 2 in this appeal.

39. Lastly, on Issue (5), Ouseley J considered whether the *subsequent decisions* in respect of TN and US were lawful on the basis that the appeal decisions were lawful. It was left to the FTT to determine whether the *appeal* decisions were lawful. The full findings on this issue will not be addressed in detail here, since the Appellants only seek to use this part of the judgement to illustrate the legal flaws with Ouseley J's approach under Issue (4). Nor is it necessary to set out his findings on US's case at length, since Ouseley J found in US's favour at para. 184. Ouseley J held that, if the appropriate forum were the Administrative Court and not the FTT, he would have quashed the appeal decision in the case of US.

40. However, in the case of TN, Ouseley J questioned the credibility of TN's claims, meaning that there was no basis for contemplating that she was a trafficked woman, in the light of her patchy immigration history, and the absence of any indication from her that she had been trafficked prior to the days immediately before she was due to be removed. Ouseley J said that he would not have quashed the appeal decision in TN's case because it had not been shown that there had been procedural unfairness on the facts of her case. Since this is the subject of a specific ground of appeal before this Court (Ground 3) I will return to the facts of TN's case and what Ouseley J said about them in more detail later when I consider that ground.

The Appellant's Grounds of Appeal

41. On behalf of the Appellants three grounds of appeal are advanced:

(1) The Judge erred in finding that the appeal decisions made under the 2005 Rules are not automatically a nullity.

(2) If they are not a nullity, the Judge erred in setting out the approach that a court should take to an application either to quash them or have set them aside, in particular at para. 114 of his judgment.

(3) The Judge erred in concluding that there had not been procedural unfairness on the facts of TN's case.

42. At the hearing before us Ms Nathalie Lieven QC took the lead in making submissions in relation to Grounds 1 and 2; Ms Stephanie Harrison QC took the lead in making submissions on Ground 3. In response Mr Robin Tam QC took the lead in making submissions on behalf of the Secretary of State on Grounds 1 and 2; Ms Natasha Barnes took the lead in making submissions on Ground 3. I am grateful to all counsel for their helpful written and oral submissions, which I will summarise next.

The Appellants' submissions

Ground 1

43. Ms Lieven submits on behalf of the Appellants that Ouseley J's conclusion that the appeal decisions made under the 2005 Rules were not nullities was wrong in law.

44. She begins with the Court of Appeal's decision in *DA6*. In that case, at para. 45, Lord Dyson MR stated that the time limits in the 2014 Rules were so tight as to make it impossible for there to be a fair hearing in "a significant number" of cases. Further, the system was "structurally unfair and unjust", especially in light of the complexity of asylum appeals, the gravity of the issues raised in them, and the measure of the task that faces legal representatives whose clients are in detention.

45. Ms Lieven submits that, once the 2005 Rules were declared by Ouseley J to be *ultra vires* on the ground of structural unfairness, it follows that the decisions made under them must be quashed or set aside. It might not follow in every legal situation in every statutory scheme that decisions made under *ultra vires* legal instruments are void, but where the ground for finding the rules was that they were *inherently unfair*, that consequence must follow.

46. Ms Lieven seeks to meet the argument that the jurisdiction of the FTT was not conferred by the Rules but rather by the 2002 Act, meaning that the appeal decisions were made with valid jurisdiction despite the 2005 Rules being *ultra vires*, in two stages. First, she submits that, if the 2005 Rules did not apply (having never existed), then the Principal Rules must have applied instead. It is not that the FTT's general residual jurisdiction could be fallen back on. Rather, the Principal Rules, promulgated under the 2002 Act,

applied. Secondly, in *every case* under which the strict time limits in the 2005 Rules were applied, the Principal Rules were breached. Therefore the procedure adopted in every appeal was fatally flawed.

Ground 2

47. If the above ground of appeal is not accepted, and it is deemed necessary to consider each case to quash or set aside individually, then Ms Lieven submits that the Judge erred in his analysis of the correct approach to take in such a case at para. 114 of his judgment. I will set out that passage in full later when I consider Ground 2 in detail.

48. First, his extensive focus on delays in bringing these challenges and the need for finality in litigation was manifestly unfair. It was extraordinary to suggest that a claimant who was bringing an appeal under the exceptionally short FTR timescales should bring arguments as to the *vires* of those Rules within their claim. It was only when the charity *Detention Action* amassed considerable evidence that anyone was able to successfully challenge the 2014 Rules.

49. Secondly, the Judge's view that there should be no presumption of unfairness in these cases was misconceived. Case law dictates that wherever procedural unfairness arises, unless a judge is *sure* that the individual has not been prejudiced, the offending decision must be set aside. In support of this proposition the Appellants' skeleton argument cited *R v Leicester City Justices, ex p. Barrow* [1991] 2 QB 260, at 290; and at the hearing we were reminded of other authorities that have made this clear.

50. Ms Lieven submits that, by rejecting the need for a presumption of unfairness, Ouseley J stripped the *DA6* decision of any practical consequence, since it was *always* open to the appellants to show individual fairness.

51. Moreover, she submits, the factors selected by Ouseley J at para. 114 ought to be rejected as a framework. The emphasis on the (lack of) applications made by the individuals to adjourn an appeal hearing or have the case transferred out of the fast track process was unfair since many considered that they had virtually no chance of success (cf. *DA6* at para. 43-44). Many were unrepresented and were in detention, making the evidence needed for these claims close to impossible to obtain without the assistance of an NGO.

Ground 3

52. On behalf of TN Ms Harrison submits that her case was plainly in the category of cases where the risk of unfairness was inherent in the procedure and therefore it caused her prejudice. This was because a number of aspects of her case made meeting FTR time limits close to impossible:

    a. Her personal credibility was attacked by the Secretary of State, and the appeal was dismissed on adverse credibility grounds.

    b. Hers was a legally and factually complex case.

c. She had made an application for flexibility in the timetable and to remove her case from the DFT, which was dismissed.

d. The independent evidence of rape, torture, human trafficking and PTSD diagnosis was not obtained during her DFT appeal.

53. She could not have been expected, in these circumstances, to have raised the *vires* point earlier.

54. Moreover, Ms Harrison submits that Ouseley J took the wrong approach in law by stating that the evidence looked as consistent with the behaviour of someone with no right to be in the UK as it was with someone who had been trafficked. This failed to apply the low threshold test of "credible suspicion" required in a case of trafficking. In that context she showed us this Court's decision in *R (TDT) v Secretary of State for the Home Department* [2018] EWCA Civ 1395, pointing out that it came after the judgment given by Ouseley J in the present case.

The submissions for the Secretary of State

Ground 1

55. On behalf of the Secretary of State Mr Tam submits, in response to Ground 1, that courts in the key authorities have only treated subsequent acts pursuant to an *ultra vires* provision as nullities where it is the *very provision* that conferred jurisdiction on the subsequent decision-maker that is *ultra vires*.

56. Mr Tam further submits that the Appellants wrongly conflate the issue of jurisdiction with that of procedure. Ouseley J addressed this point specifically at para. 76, stating that, if the Principal Rules applied but were not followed, there would have indeed been breaches of the rules, as *procedural irregularities*, but no necessary nullification of the appeal for want of jurisdiction. Further, Mr Tam submits that the consequence of non-compliance should be examined in each individual case.

57. Mr Tam also submits that not all appeals determined under the 2005 Rules were necessarily unfair. Only the *risk* of unfairness was established in *DA6*, meaning that Ouseley J was right to propose a case-by-case approach.

Ground 2

58. Mr Tam notes that the Appellants contend that Ouseley J erred for three reasons: (a) he placed excessive emphasis on the issue of delay; (b) he was wrong to require individuals to show specific evidence of unfairness and should have started with a presumption that there had been unfairness; (c) he incorrectly identified factors that would make it harder for an individual to demonstrate unfairness. Mr Tam addresses each of these points in turn.

59. In relation to delay, Mr Tam submits that there is a public interest in orderly and final resolution of disputes, therefore parties need to show good reason for delay in bringing

the relevant challenges. Moreover, he disputes the suggestion that no individual could conceivably have mounted a challenge prior to that taken by *Detention Action*, given that the Rules were in place for 9 years.

60. As to the requirement that individuals should show unfairness, the Appellants conflate actual unfairness with structural unfairness. It cannot be the case that appeal determinations are to be set aside despite being determined entirely fairly, merely because there was a *risk* of unfairness. Mr Tam submits that there is and should be no presumption of unfairness.

61. Turning to the factors that Ouseley J identified at para. 114 of his judgment, Mr Tam submits that these were not intended to be an exhaustive list that is determinative of the question of unfairness. At the hearing before us Mr Tam described them as being no more than "headline indicators". The factors in themselves are perfectly legitimate. The absence of applications to transfer out of the fast track, or absence of unfairness being raised during the appeal, or of claims based on vulnerability, or the fact that evidence was not provided as a fresh claim soon afterwards, at least require explanations when the existence of an opportunity to bring them existed.

Ground 3

62. On behalf of the Secretary of State Ms Barnes submits that TN's challenge to Ouseley J's judgment on this point essentially amounts to a disagreement with his findings of fact.

63. The Secretary of State agrees with the Judge that there was no real basis for contemplating that TN was trafficked, in light of her immigration history, her evasion of the authorities, and the fact that she had been assessed by a Detention Centre GP. The relevant factors were all considered: this means that TN's argument that Ouseley J erred in law lacks merit, since this amounts simply to a criticism of his weighting of the relevant factors, not a sound contention of an error of law. Further, Ouseley J was entitled to draw the conclusion from the facts that a number of the factors were consistent with an illegal immigrant not wanting to be removed from the UK.

<u>The first issue</u>

64. The first issue in this appeal is whether the individual appeal decisions made under the 2005 Rules are a nullity and for that reason should be set aside.

65. On behalf of the Appellants the argument advanced by Ms Lieven is a straightforward one. She submits that, once it was determined by the Court (as it was by Ouseley J and that aspect of his decision has not been appealed by the Secretary of State) that the Rules were *ultra vires*, then it followed that decisions made under the Rules could not stand since they were a nullity and should have been treated as having no legal effect as a matter of general principle. In support of that submission she cites the decision of the House of Lords in *DPP v Hutchinson* [1990] 2 AC 783, at 819; and the decision of the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2011]

UKSC 12; [2012] 1 AC, para. 66. She submits that the principle is best encapsulated by Lord Diplock in *Hoffman-La Roche v Secretary of State for Trade and Industry* [1975] AC 295, at 365. She also cites the approval of that passage by Lord Irvine LC in *Boddington v British Transport Police* [1999] 2 AC 143, at 156.

66. Based upon those authorities, Ms Lieven submits that:

(1) Asylum appeals determined under procedural rules which are declared to be *ultra vires* as structurally unfair and unjust are void, a nullity and of no legal effect.

(2) Such appeals cannot be treated as a lawful and valid determination of the asylum appeal and any subsequent decisions will themselves be unlawful.

(3) Adverse appeal determinations made under *ultra vires* rules should be set aside by the Court.

(4) Alternatively, adverse appeal determinations cannot be lawfully and fairly relied upon by the Secretary of State in re-consideration of asylum claims and in making decisions to remove asylum claimants from the UK without a fresh right of appeal and in detaining them.

(5) The contention to the contrary should be rejected as being contrary to basic principle and also the rule of law.

67. Furthermore, Ms Lieven submits that, since each and every appeal was determined by the FTT (or the Upper Tribunal if there was an appeal) under the 2005 Rules, it is inevitable that the *ultra vires* rules both influenced and infected the resulting decision in the individual appeal. She submits that it might be otherwise if there were clearly what, at the hearing before us, she called a "*cordon sanitaire*" but she submits that is not the case here. Ms Lieven derives the test of whether an *ultra vires* decision has influenced or infected a later decision, which it is sought to challenge, from the decision of this Court in *Connors v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1850, in which the earlier decision of Cranston J in *Mulvenna v Secretary of State for Communities and Local Government* [2015] EWHC 3494 (Admin) was upheld.

68. I sought to summarise the relevant legal principles in this area of law in *White v South Derbyshire District Council* [2012] EWHC 3495 (Admin); [2013] PTSR 536, in a judgment with which Gross LJ agreed (at para. 55). My analysis of the relevant legal principles and main authorities can be found at paras. 25-36, so I can be relatively brief here.

69. In *Smith v East Elloe Rural District Council* [1956] AC 736, at 769 Lord Radcliffe said:

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

That case concerned a statutory time limit and a partial ouster clause, which was held by the House of Lords to be effective even though, on a strict view of the *ultra vires* doctrine, it might have been said that a void decision is and always has been a nullity and therefore can be ignored.

70. In *Hoffman-La Roche*, at 365 Lord Diplock said:

> "It would … be inconsistent with the doctrine of *ultra vires* as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was *ultra vires* were to have any less consequence in law than to render the instrument incapable of ever having had any legal effect."

71. That passage was cited with approval by Lord Irvine in *Boddington*, at 156:

> "… Lord Diplock confirmed that once it was established that a statutory instrument was *ultra vires*, it would be treated as never having had any legal effect. That consequence follows from application of the *ultra vires* principle, as a control on abuse of power; or, equally acceptably in my judgment, it may be held that maintenance of the rule of law compels this conclusion."

72. Earlier in his opinion, at 154, Lord Irvine had considered the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, which had made obsolete the historic distinction between errors of law on the face of the record and errors of law which went to a body's jurisdiction. It had done so by extending the doctrine of *ultra vires*, so that any misdirection in law would render the relevant decision *ultra vires* and therefore a nullity. Lord Irvine continued that the old distinction between void and voidable acts no longer holds good.

73. In *Boddington*, at 171-172, Lord Steyn expressed a similar view about the fundamental principle of *ultra vires*. He continued, however, that he accepted "the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences."

74. He continued:

> "The best explanation that I have seen is by Dr. Forsyth who summarised the position as follows in '"The Metaphysic of Nullity' – Invalidity, Conceptual Reasoning and the Rule of Law,'[3] at p.159:

[3] C. Forsyth and I. Hare (eds.), The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC (Oxford, Clarendon Press, 1998), p.141.

> 'it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. *The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act.* And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.' (Emphasis supplied.)"

75. As I said in *White*, at para. 32:

> "Further support for the relative, as opposed to an absolute, view of voidness can be found in *Boddington* … in the opinion of Lord Browne-Wilkinson, at p.164, and in the opinion of Lord Slynn of Hadley, at p.165."

76. A similar view, that the concepts that a decision is "void" or a "nullity" should be regarded as relative rather than absolute, is to be found in Craig, Administrative Law (8th ed., Sweet & Maxwell, 2016), p.739. At pp.745-746 Professor Craig suggests that, for the purposes of analysis, two questions should be kept separate. The first is: is an act *ultra vires*? The second is, if yes, what is the consequence of that finding?

77. Furthermore, in my view, it is important not to lose sight of the fact that what the present appeal concerns is earlier decisions of a *judicial* body (the FTT) and, moreover, decisions in which, on their face, appeals had been finally disposed of.

78. In that context it should be recalled that the normal rule is that an order of a court must be treated as valid unless and until it is set aside or varied on appeal: see the decision of the Divisional Court in *DPP v T* [2006] EWHC 728 (Admin); [2007] 1 WLR 209. As Richards LJ put it, at para. 27:

> "… Even if the order should not have been made in the first place, a person may be liable for any breach of it committed before it is set aside. …"

See also the citations from other cases and the analysis set out by Richards LJ at paras. 28-32.

79. The fact that the FTT had disposed of the earlier appeal decisions in the way that it had also had consequences (both potential and real) for the actions of third parties, in particular the Secretary of State. For example the Secretary of State relied upon the earlier appeal decisions in making a number of subsequent decisions in respect of both TN and US, in 2014 and 2015.

80. What this goes to illustrate is the need for great caution in a context like the present. A simplistic logic (to use the phrase of Ouseley J) would simply be inappropriate. It is not as if a "domino theory" applies in a context such as this. If it did, it would mean that all sorts of subsequent decisions, including those taken by third parties acting in good faith on the basis of a valid appeal decision, would automatically have to be regarded as a nullity. The true position, in my view, is (as illustrated by the task performed by Ouseley J in the present two cases) that the court must engage in a close analysis of the sequence of events in order to determine whether subsequent decisions are indeed to be set aside.

81. Although I see force in Mr Tam's submissions based on cases such as *Percy v Hall* [1997] QB 924, in particular at 947-948, and *Secretary of State for the Home Department v Draga* [2012] EWCA Civ 842, I consider that it is unnecessary to examine them in detail because they were decided in different contexts. For example, *Percy v Hall* was concerned with whether an innocent third party (in that case a police constable who arrested a person pursuant to a byelaw which was later found to be *ultra vires*) can be liable for damages, in that case for the tort of false imprisonment.

82. In my judgement, the straightforward argument made on behalf of the Appellants by Ms Lieven must be rejected on its own merits in the present context and without the need for extensive reference to authority from other contexts.

83. The first and fundamental reason for this is that, in my view, there is a conceptual distinction between holding that the Procedural Rules were *ultra vires* and the question whether the procedure in an individual appeal decision was unfair.

84. The jurisdiction of the Court to consider the lawfulness of a procedural regime, such as that in the 2014 Rules (which was quashed as a result of the Court of Appeal decision in *DA6*) is an important one, whose roots can be traced back to the decision of the Court of Appeal in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219. In order to challenge the entire system of such rules it is not necessary to show that the rules will lead to unfairness in every case. Rather it is the creation by the rules of an "unacceptable risk" of unfairness which founds the ability of the Court to strike them down. This is because it is important that rules which are systematically capable of creating unfairness should not be allowed to stand and should be removed or amended.

85. However, that does not entail the necessary conclusion that in each and every case decided pursuant to the *ultra vires* procedural rules a particular decision was itself procedurally unfair. This is reinforced by the consideration that, in *DA6* itself, the Court of Appeal said that the 2014 Rules would inevitably lead to unfairness in a "significant" number of cases. The Court did not expand upon what that meant, for example whether it meant in a majority of cases or in a significant minority of cases. That was unnecessary. Similarly, it had been unnecessary in the *Refugee Legal Centre* case, which concerned a policy rather than secondary legislation but where the analysis was similar. It was for that reason that, in *Refugee Legal Centre*, the Court did not feel it appropriate to consider evidence as to how the scheme had operated in practice. It was the fact that a scheme was capable of creating unfairness in an unacceptable way which would render the scheme unlawful.

86. I agree with Mr Tam that "jurisdiction" to determine the appeals in the pure or narrow sense of that word (the legal authority to decide a question) existed by virtue of the primary legislation (section 82 of the 2002 Act) and the FTT was not deprived of jurisdiction in that sense by reason of the fact that the 2005 Rules were *ultra vires*. I would also reject Ms Lieven's suggestion that the FTT's jurisdiction was created by the 2005 Rules themselves. She submitted that a valid appeal required a notice of appeal to be filed in accordance with Rule 6 of the Principal Rules, applied to the fast track process by Rule 6 of the 2005 Fast Track Rules. In my view, that submission is misconceived. It is a commonplace feature of an appellate system that there will be procedural rules which require a notice of appeal to be filed in a certain form. That is not what creates the jurisdiction of a court or tribunal; it is merely a rule which regulates procedure and form. What creates the jurisdiction is the principal legislation, here the 2002 Act.

87. However, in my view, that would only go so far in meeting Ms Lieven's fundamental submission, which is that any appeal decision which was made under those Rules was necessarily infected by the fact that they were unlawful because they created an unacceptable risk of procedural unfairness. It is in that sense that she submits the FTT did not have jurisdiction, in other words a post-*Anisminic* understanding of jurisdiction: not in the pure or narrow sense of having the legal authority to determine a question, but that a body has acted in a way which is unlawful, including (for this purpose) in a way which is procedurally unfair. That said, it seems to me that the answer which Mr Tam gives to that contention is correct: there has to be shown to be procedural unfairness on the facts of the individual case.

88. In my view, the decision of this Court in *Connors*, if anything, supports the submissions advanced on behalf of the Secretary of State by Mr Tam rather than those advanced by Ms Lieven. This is because the question which has to be addressed is whether the *ultra vires* act influenced or infected the later decision which it is now sought to challenge. That requires an assessment of whether there has in fact been procedural unfairness in the individual case.

89. Finally, I would add that, as a matter of legal principle, if the Appellants' submissions on the first issue were correct, it would necessarily follow that even appeal decisions where the appeal was allowed would fall to be set aside, because they would be a nullity. That cannot possibly be correct. At the hearing before us Ms Lieven submitted that this was a theoretical point and not a real one, since in practice individuals will have been granted leave to remain in the light of a successful appeal decision and this would not be curtailed. However, in my view, it is revealing that, if the logic of her submission were accepted, this would be the result as a matter of principle. That analysis of principle helps to test whether the submission can be correct.

90. For those reasons, I conclude on the first issue that the Appellants' submissions must be rejected. It follows that it is necessary, if an application is made to set aside an earlier appeal decision, to assess whether there was procedural unfairness on the particular facts of that case. There may or may not have been. That will depend on a careful assessment of the individual facts. It is not enough to say that the 2005 Rules were *ultra vires*.

The second issue

91. If, as I have in fact concluded, the answer to the first issue is that the FTT's appeal decisions are not automatically nullities, the second issue which arises is whether the Judge erred in the approach which he considered should be taken to applications to set aside an earlier appeal decision.

92. At para. 114 Ouseley J said:

> "Even where some such challenge is permitted, for it to be successful there would also have to be a basis for holding that the decision was unfair beyond that it was reached under the FTR 2005. There is no presumption of unfairness in relation to appeal decisions under the 2005 FTR. The basis must be evidenced by reference to disadvantages, specific to the case, which the FTR timetable caused but which the Principal Rules timetable and practice would have avoided, and which led to an unfair process. A high standard of fairness is required. The SSHD might be able to show that there was no unfairness in reality. This is not the same at all as requiring the appellant to show that the result would have been different under a different regime; that is not required. But the claim may require greater justification where no applications for transfer out of the fast track or for adjournments have been made, and where no attempt has been made to advance claims or circumstances based on vulnerability, or if no issues about fairness have been raised during the appeal, or if the evidence which was said to be missing is not provided as part of a fresh claim made reasonably swiftly after the appeal concluded. The points I have referred to in relation to the 'interests of justice' in the F-tT would also be relevant in judicial review cases as to whether or not time should be extended, and relief granted, if that were a route to relief available for challenging appeal decisions."

93. In this regard Ms Lieven makes two principal complaints. First she submits that his approach to the issue of delay was wrong in principle. Secondly, she submits that the Judge set out a number of factors at para. 114 of his judgment which were wrong. In particular she submits that he was wrong to say that there is no presumption of unfairness in relation to appeals which were heard under the *ultra vires* 2005 Rules.

94. I do not accept the first of those submissions, which concerns delay. In my view, the Judge was correct to emphasise the need for finality in litigation. In theory a very strict view might be taken: that time begins to run from the date when secondary legislation is made or at least when it comes into force. However, that would be contrary to both principle and authority. It is unnecessary to go into that in detail since, at the hearing before this Court, Mr Tam made it clear that the Secretary of State accepts that time for judicial review begins to run not from the date of the legislation (the 2005 Rules) but

from the date when that legislation was applied in a particular case (in other words here the relevant appeal decisions in 2014). Nevertheless, as the Judge observed, no challenge was made for another five months even after the decision of the Court of Appeal in *DA6*, on 29 July 2015.

95. Ms Lieven submitted to us that time did not begin to run even after the decision of the Court of Appeal in *DA6* and would not do so until this Court had given judgment in the present appeal. However, she appeared to accept that it might be reasonably said that time began to run from the date when Ouseley J granted a declaration that the 2005 Rules were *ultra vires*.

96. I do not accept those submissions by Ms Lieven. In my view, the ordinary principles apply. That means that time began to run from the date of the appeal decisions now sought to be challenged. That is different from a second question which may have to be addressed: was there good reason for that delay and, if so, should an extension of time be granted? That will depend on the particular facts of the individual case.

97. In my view, the Judge was also correct to say that there is no presumption of unfairness in this context. In fact I would say that there is no presumption either way. It seems to me that the concept of a presumption either way is not helpful in the present context. What has to be assessed is whether there has been unfairness on the facts of the individual case. That is a matter of evaluation for the court or tribunal which has to determine the question. It is not unusual for a court or tribunal to have to make such an assessment without there being any presumption in place or the imposition of a burden of proof on either party. For example, in employment proceedings where it is alleged that a dismissal was unfair, the burden of proof lies on the claimant to show that they were dismissed; the burden lies on the employer to show what the reason for dismissal was; but there is no burden in relation to the question of whether the dismissal was unfair. That question of fairness of the dismissal has to be answered by an assessment by the Employment Tribunal of all the circumstances of the case, to consider whether the decision to dismiss fell within the band of reasonable responses available to an employer.

98. In my judgement, on a fair reading of para. 114 in the judgment of Ouseley J, it is clear that he was not imposing a burden on the claimant to show that there had been unfairness. To the contrary, he said:

> "The SSHD might be able to show that there was no unfairness in reality."

Furthermore, it is clear that Ouseley J did not fall into the error (as suggested on behalf of the Appellants) of not appreciating the importance of procedural fairness irrespective of the outcome. He said:

> "This is not the same at all as requiring the appellant to show that the result would have been different … that is not required."

99. In my view, there was nothing wrong in the approach which Ouseley J took in para. 114. Indeed in my view it was correct: he was in essence saying that the issue of the fairness of the procedure had to be determined by reference to the specific facts of an individual case.

100. However, it is important not to read what he said in the second half of para. 114 as if it were a checklist. Mr Tam disavowed any suggestion that it is a checklist and invited this Court to make it clear that it should not be regarded as such. I agree. This Court should make it clear, in my view, that there is no such checklist. Each such case will be highly fact-sensitive.

101. As long as that is understood, it seems to me that there was no error of law into which Ouseley J fell in setting out specific factors which he said might or might not be relevant in a particular case.

102. Even the reference to the fact that there had been no application to transfer out of the fast track process or for an adjournment was only something which Ouseley J said "may require greater justification" in the application to set aside. In the end everything will turn on the facts of the specific case. It is important to note, as Mr Tam reminded us at the hearing, that there *were* applications to transfer out or to adjourn and that some of those applications were successful.

103. For the future I would recommend that a court which has to consider an application to set aside an earlier appeal decision made under the 2005 Rules should approach its task having regard to the following:-

(1) A high degree of fairness is required in this context.

(2) What the Court of Appeal said in *DA6* should be borne in mind: that the 2005 Rules created an unacceptable risk of unfairness in a significant number of cases. Depending on the facts it may be that the case which the court is considering is one of those cases.

(3) There is no presumption that the procedure was fair or unfair. It is necessary to consider whether there was a causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.

(4) It should also be borne in mind that finality in litigation is important. There may be a need to ask how long the delay was after the appeal decision was taken before any complaint was made about the fairness of the procedure. There may also need to be an examination of what steps were taken, and how quickly, to adduce the evidence that is later relied on (for example medical evidence) and whether it can fairly be said that in truth those further steps were taken for other reasons, such as a later decision by the Secretary of State to set removal directions. This may suggest that there is no causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.

104. The above should not be regarded as an exhaustive checklist. At the end of the day, there can be no substitute for asking the only question which has to be determined: was the procedure unfair in the particular case? That has to be determined by reference to all the facts of the individual case.

The third issue

105. The third issue arises only in the case of TN since in the case of US the Judge concluded that, if the proper forum had been the Administrative Court and not the FTT, he would have quashed the appeal decision after a close consideration of the particular facts. On behalf of TN Ms Harrison submits that he should also have done so on the facts of her case. In order to assess that submission, it is necessary to consider in some detail the facts of TN's case and what Ouseley said about them.

106. At para. 118 of his judgment Ouseley J said that he would proceed to consider the lawfulness of the subsequent decisions in the two individual cases on the basis that the earlier appeal decisions of the FTT had been lawful. However "lest that approach be wrong", he would also consider the lawfulness of those earlier appeal decisions. He considered the facts of TN's case in detail at paras. 119-151 of his judgment.

107. TN was placed in the detained fast track process after screening on 2 August 2014.

108. Her substantive asylum interview took place on 12 August 2014.

109. Her claim for asylum was rejected on 14 August 2014.

110. Her appeal was heard on 21 August 2014, for which she submitted a witness statement and grounds of appeal referring to her being trafficked for sexual exploitation, mental distress, but (importantly) did not say that this was happening in the UK. Further, her counsel did not pursue a claim based on her experiences on the journey, so no allegation of sexual trafficking was pursued. Two Vietnamese men were present at the hearing and gave evidence in support of her claim. Her appeal was dismissed by the FTT the following day, 22 August 2014: para. 123 of the judgment of Ouseley J.

111. The FTT dismissed the appeal on the ground that the claim was not credible.

112. It is important to note that, on 7 July 2015, the Secretary of State wrote to TN alerting her to the litigation about the fast track rules, saying that she should seek advice about whether she might have been prejudiced by any unfairness resulting from the fact that her appeal had been processed in the fast track. If so, she was advised to submit written representations within seven days but she did not do so. It was only after removal directions had again been set that, on 19 August 2015, her then solicitors made fresh representations to the effect that she had been trafficked, that one person who attended her appeal hearing had in fact been "a customer", and saying that she may have been tortured. This was the first time that TN had made the allegation that she had been trafficked into the UK for sexual exploitation, according to the Secretary of State. On 20 August 2015 the Secretary of State rejected the further representations as amounting to a fresh claim: paras. 127-128 of the judgment of Ouseley J.

113. At the same time there was what Ouseley J called the "negative reasonable grounds decision", in other words the decision that there were not reasonable grounds to suspect that TN had been the victim of trafficking on her referral to the National Referral Mechanism ("NRM"): paras. 128-129 of the judgment of Ouseley J.

114. Also on 20 August 2015 the Secretary of State rejected the suggestion that the Rule 35 report constituted independent evidence of torture.

115. The present proceedings for judicial review were lodged on 20 August 2015.

116. Subsequently Underhill LJ granted permission to apply for judicial review on 4 July 2016 (para. 135 of the judgment of Ouseley J).

117. As Ouseley J said at para. 136 of his judgment, accordingly the decisions which were under challenge before him were the decisions to remove TN to Vietnam by removal directions set in August 2015, the near contemporaneous decisions of 20 August 2015 to refuse to treat her further representations as a fresh claim, and the negative decision on whether there were reasonable grounds for believing that she was a trafficked person. Although the claim had not been formally amended to include a challenge to the further decision in October 2015, it was implicit in the order of Underhill LJ that that should also be considered.

118. Ouseley J returned to the decision of 2 October 2015 at para. 146 and considered that to be a separate decision from that of 20 August 2015 and that it was directed at the report by Dr Bingham dated 28 September 2015 (to which he had referred at para. 132 of his judgment).

119. Also at para. 146 Ouseley J granted any necessary extension of time to amend the grounds for judicial review and bring a challenge to the October decision.

120. At para. 147 Ouseley J concluded that the October decision should be quashed. This was because by the time of that decision the Secretary of State had received the report by Dr Bingham. On the basis of that report, read with the other evidence previously rejected, the claim "could no longer rationally still be dismissed as lacking any reasonable prospect on appeal."

121. At paras. 148-151 Ouseley J turned to the lawfulness of the NRM reasonable grounds decision. He concluded that it was lawful: see para. 150. He was well aware, as both para. 148 and 150 make clear, that this is only an initial filter and that the threshold is low. However, Ouseley J was of the view that, in the particular circumstances of TN's case, the Secretary of State would have found it very difficult to reach a different conclusion: see para. 151. He considered that the trafficking indicators were weak on any view, separately or in the round. Conversely, the credibility issues and delay were very strong adverse points. He did not think that these could only rationally be attributed to traumatic experiences without cogent evidence. This was not least because TN had shown that she was willing to talk about traumatic events (such as the claim of rape *en route* to the UK) but had not raised in particular the issue of being trafficked for sexual exploitation in the UK until very late in the day, shortly before she faced further removal directions. Furthermore, she had had solicitors throughout.

122. That all said, Ouseley J stated at para. 144 of his judgment that he would also have quashed the reasonable grounds decision if he had formed the view that the earlier appeal decision by the FTT had been procedurally unfair. This was because it was clearly affected by the adverse conclusions reached by the FTT.

123. Of crucial importance therefore to Ouseley J's reasoning was his conclusion that that appeal decision by the FTT was not unfair. His reasons for reaching that conclusion were set out in paras. 141-142 of his judgment:

"141. I am not persuaded that the appeal decision was unfair. There was no real basis for contemplating that she was a trafficked woman, in the light of her immigration history, the absence of any indication from her that she had been trafficked despite her knowledge of the asylum system and the risk of return on the story she had given. The fact that she had scarring did not, without more, mean that there was a need for a rule 35 report. She had been seen by the detention centre GP. I agree with Ms Barnes that a number of indicators, such as evading authorities, are consistent with not wanting to be removed from the UK. Merely asking to be removed from the DFT proves nothing. So I see nothing in her presentation in the DFT to show that she should not have been in it at all.

142. She was represented throughout by solicitors. She made no application for a rule 35 report. No adjournment was sought so that an appointment could be obtained with the Medical Foundation for example. Transfer out was not sought from the immigration judge. No adjournment was sought in order to obtain medical evidence of any sort. There was no indication either made expressly or noted by the immigration judge from observation, that the issues which were raised could not be dealt with in that time frame, or that further evidence, oral or documentary, was awaited or even obtainable. The possible relevance of what happened on the journey to the UK was not pursued. The immigration judge could assess the two men present who gave evidence, knowing that one was alleged to be a boyfriend. Such further evidence as came did not come within the time-frame that the application of the Principal Rules would have permitted, but was first presented over a year after the appeal decision. There is no basis for supposing that the evidence would have been relevant to whether her claim as advanced to the SSHD or on appeal was credible. There is no evidence that she would have presented a completely different claim if only she had had more time in which to produce medical evidence of the sort she did a year later. I note what is said in *DA2* [2014] EWHC 2525 (Admin) at [8] that applicants' solicitors said that they were often preparing fresh claims before the substantive appeal was finally determined since they anticipated its receipt but not quickly enough for the DFT timetable. She made no complaint about the fairness of the appeal hearing or procedure in her first judicial review proceedings. The further representations leading to the August decision had provided no evidence that the appeal decision was unfair. It was only in these judicial review proceedings lodged on 20 August 2015 that the fairness of the appeal proceedings was raised. Accordingly, I would not have quashed the appeal decision. This does not, formally at any rate, dispose of the application before the F-tT to set aside the appeal decisions."

124. It should also be noted that Ouseley J had earlier summarised in some detail the submissions which had been advanced on behalf of TN by Ms Harrison at para. 139; and those advanced on behalf of the Secretary of State by Ms Barnes at para. 140. It is clear from those passages that, although Ouseley J did not have the benefit (which this Court has had) of seeing the decision of the Court in *TDT*, the parties did make submissions before him about the fact that the test for trafficking is a low one.

125. On behalf of TN Ms Harrison now submits that, on the reasoning of the Court of Appeal in *DA6*, the short timeframes in the DFT process did not permit enough time for full instructions to be taken and supporting evidence to be identified and obtained in a case such as this, which she submits was both complex and turned on TN's credibility. She submits that it is plain beyond argument that TN did not have a fair opportunity to present her case in the DFT.

126. She also submits that, at para. 142 of his judgment, Ouseley J impermissibly held, inconsistent with the reasoning of this Court in *DA6*, that TN's failure to apply for either an adjournment or transfer out were factors to be held against her. She points out that even Ms Barnes at the hearing before us accepted that these should be regarded at most as neutral factors. Ms Harrison does not accept that they are in truth neutral factors. She submits that to regard them as such would be inconsistent with the reasoning of this Court in *DA6.*

127. Ms Harrison also submits that the fact that TN had legal representatives in the fast track process is not a relevant factor. This is because *DA6* proceeded on the basis that there would be lawyers but that they would not be able to do their jobs properly in obtaining instructions and evidence in the truncated timetable available.

128. In summary, Ms Harrison submits that Ouseley J erred because he started at the wrong end. He asked the wrong question, namely whether the failure to afford a fair procedure affected the outcome. She submits that Ouseley J erred in his assessment of the relevant factors in determining whether the appeal decision was tainted by the systemic unfairness of the 2005 Rules which he himself had declared to be *ultra vires* and in particular the relevance of the vulnerability factors present in TN's case. She further submits that, on the individual facts of TN's case, it is clear that the deficiencies in the DFT system and unfairness caused by the *ultra vires* rules prevented her having an opportunity for a fair determination of her claim. Consequently, submits Ms Harrison, the decision made within the NRM that she was not a potential victim of trafficking was necessarily flawed and unreliable.

129. Attractively though those submissions were made, and even after the most anxious consideration which cases such as this warrant, I have come to the conclusion that this Court cannot say that the decision to which Ouseley J came was one that was wrong.

130. This was a highly fact-sensitive question. The Judge, who has vast experience in this field, carried out a meticulous enquiry into the facts after setting out the parties' submissions in some detail.

131. The chronology is very important, so I return to it again.

132. TN was assessed as being suitable for the detained fast track process on 2 August 2014.

133. On 3 August 2014 TN was subject to medical examination on arrival at Yarl's Wood. Her physical and emotional state was described as being "fit and well" and she stated that she had never been the victim of torture.

134. On 9 August 2014 a Rule 35 assessment was done by a GP. She was described as being "physically fit" and "mentally stable". No question had been raised as to alleged torture outside the UK at that time.

135. When TN did refer to having been tortured by the Vietnamese authorities and also to scarring and multiple rapes on her journey to the UK, in her substantive asylum interview on 12 August 2014, she still made no reference to sexual exploitation within the UK. As Ouseley J said, she was even at that time able and willing to talk about what were clearly traumatic matters. But she did not refer to that additional factor.

136. At the hearing before the FTT on 21 August 2014 TN was represented and her counsel confirmed that she was not pursuing the allegation that she had been raped on the way to the UK.

137. The decision of the Court of Appeal in *DA6* was given on 29 July 2015.

138. On 7 August 2015 removal directions were set in the case of TN by the Secretary of State.

139. It was only at that stage that, on 19 August 2015, for the first time representations were made alleging that TN had been the victim of trafficking. It was the first time (according to the Secretary of State) TN claimed to have been sexually exploited within the UK.

140. Also on 19 August 2015 there was done a Rule 35 report at Yarl's Wood which referred to "scarring to A's head, hand, abdomen and leg", and stated that the injuries were "consistent with her explanation" and concluded that:

> "I have concerns that this detainee may have been the victim of torture."

141. On 20 August 2015, TN was interviewed in relation to a possible referral to the NRM. However, it was noted that there were inconsistencies in her account even at that interview.

142. The Secretary of State decided on that date to reject her further representation and concluded that there were no reasonable grounds to believe she had been the victim of trafficking.

143. Removal directions were set on 21 August 2015.

144. It was only after that that on 28 September 2015 the report from Dr Bingham was submitted.

145. The report from Zahra Kellaway-Paine was not produced until almost a year later, on 19 August 2016. This was before Ouseley J. She stated that from the information available she was concerned that TN had been a potential victim of human trafficking and that a referral to the competent authority was necessary. She said that this was a complex case which required full investigation in an appropriate, secure and supported environment.

146. Certain aspects of TN's account have remained consistent throughout. For example, her claim based on religious persecution was made from 4 May 2011 right through to the report by Dr Bingham.

147. However, the fundamental difficulty for her appeal is that many of her reasons for not producing evidence are not attributable to the shortened timetable which was to be found in the 2005 Rules. Instead, they relate to the receipt of threats from alleged traffickers. It may also be (as the chronology appears to support) that representations were not made on her behalf until action was prompted by the imminence of removal directions.

148. In those circumstances, in my judgement, Ouseley J cannot be criticised for the view which he reached on the facts of TN's case.

149. It is also important, in my view, to have a realistic appreciation of what the FTT had before it when it reached the decision which it is now said was procedurally unfair. In particular I would note the following features of the case at the time of the FTT hearing on 21 August 2014:

(1) The claim for asylum was originally based on alleged persecution on religious grounds.

(2) TN had previously been removed from the UK, with multiple instances of absconding, and an immigration claim had been based on her seeking a better quality of life.

(3) TN was encountered in a nail bar in Rotherham and attempted to evade officers. It is notorious that nail bars can be associated with trafficking.

(4) TN was described on her arrival at Yarl's Wood on 30 July 2014 as being "fit and well" and no scars were noted.

(5) TN's claim that she had been tortured on the way to the UK was raised in her substantive asylum interview. This was not pursued even though she had legal representation at the hearing. There was at no time up to that point reference to sexual exploitation within the UK although there was reference to beatings in a Vietnamese prison.

(6) TN had had a miscarriage in the UK.

150. In those circumstances, in my view, the FTT decision is not to be criticised with the benefit of hindsight as having been procedurally unfair. In all the circumstances of this case, the fact that the 2005 Rules were declared to be *ultra vires* does not have a causal link to what happened in the particular circumstances of TN's case.

Conclusion

151. For the reasons I have set out above I would dismiss these appeals save that I would quash the appeal decision of the FTT in the case of US. This follows from a combination of the conclusion reached by Ouseley J that he would have quashed that decision if the appropriate forum were the Administrative Court and not the FTT; and the decision of the Divisional Court in the related claim for judicial review which is being handed down today, in which we have held that the FTT does not have jurisdiction to consider applications to set aside such as that made by US.

Costs

152. Having seen the judgments of this Court (and of the Divisional Court in the related claim for judicial review) in draft, the parties have been unable to agree the appropriate costs orders which should follow. I hope it is convenient if I deal with the issue of costs in both this appeal and the claim for judicial review here. I will address the case of TN first and then the case of US.

153. On behalf of TN it is submitted that the appropriate order is no order as to costs. This is principally on the basis that the appeal was brought in the public interest. Both the appeal and the claim for judicial review, it is argued, raised issues of general importance and TN was selected as one of the two lead cases. In the claim for judicial review, it is also submitted that TN had no direct interest in the argument about jurisdiction.

154. I do not accept those submissions. Although the appeal did raise some issues of general application, TN chose to contest in detail the application of those principles to the particular facts of her case (in particular under Ground 3 of the appeal). In those circumstances, in my view, the just order is for her to be liable for her share of the costs, that is 50%.

155. In relation to the claim for judicial review, the fact is that the claim for judicial review was brought by these two Claimants. In principle they could have accepted the determination of the FTT that it did not have jurisdiction. Having brought the claim for judicial review and failed in it, it is just that they should pay the costs of that claim. Accordingly, the order should be that TN must pay 50% of the costs in the claim for judicial review also.

156. On behalf of US it is submitted that he should receive his costs of both the appeal and the claim for judicial review; alternatively that there should be no order as to costs. It is submitted, first, that he has ultimately succeeded because the earlier appeal decision by the FTT in his case has been quashed. Secondly, the only live issue in his case following Ouseley J's judgment was the correct forum which had jurisdiction to set aside the earlier appeal decision. Thirdly, reliance is placed on the public interest in the broader issues of principle that were raised on the appeal. Fourthly, reliance is placed on the relatively late stage of the proceedings at which the Respondents raised the jurisdiction point.

157. In my view, none of those arguments has sufficient weight to warrant a departure from the application of ordinary costs principles. The reality is that US chose not to accept the determination of the FTT that it lacked jurisdiction and brought a claim for judicial review against it, a claim which has now been rejected. On the claim for judicial review therefore it is clear that the ordinary rule should apply, that costs follow the event. The just order is that US should pay 50% of those costs.

158. So far as the appeal is concerned, US had no particular interest in the outcome of that appeal save so far as it concerned the issue of jurisdiction. But the only reason why there has been a decision in his favour ultimately is because it has been held by the Court that the FTT lacks jurisdiction and so that jurisdiction rests with the High Court. None of that required the active participation of US in the appeal, still less the advancement of very general submissions (for example as to nullity under Ground 1), on which it was his leading counsel that took the lead before the Court. Accordingly, in my view, the just order on the appeal is also that US should pay 50% of the costs.

Peter Jackson LJ:

159. I agree.

Sharp LJ:

160. I also agree.