Neutral Citation Number: [2021] EWCA Civ 113

Case No: C4/2019/2729

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Richard Clayton QC, sitting as a Deputy Judge of the High Court
CO/4153/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 February 2021

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE PHILLIPS
and
SIR STEPHEN IRWIN

- -

Between:

THE QUEEN ON THE APPLICATION OF YASSER AL-SIRI	**Claimant/ Respondent**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Appellant**

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- -

Robin Tam QC and **Julie Anderson** (instructed by the **Treasury Solicitor**) for the **Appellant**
Raza Husain QC and **Alasdair Mackenzie** (instructed by **Birnberg Peirce Ltd**) for the **Respondent**

Hearing dates: 16 and 17 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 8 February 2021.

Lord Justice Phillips:

Introduction

1. On 16 April 2015 the First-tier Tribunal of the Immigration and Asylum Chamber ("the FTT") decided that the respondent ("YAS") was not excluded from the Refugee Convention[1] ("the Convention") under Article 1F(c) and that he was a refugee. That decision ("the FTT Decision") was upheld by the Upper Tribunal on 17 August 2016 following an appeal by the appellant ("the Home Secretary"). On 4 August 2017 the Court of Appeal refused the Home Secretary permission to appeal.

2. On 11 July 2018 the Home Secretary decided ("the Decision") that:

   i) notwithstanding the FTT Decision, there were reasonable grounds for regarding YAS as a danger to the security of the United Kingdom within Article 33(2) of the Convention and that he therefore did not qualify for the grant of refugee status under paragraph 334(iii) of the Immigration Rules; and

   ii) YAS would be granted Restricted Leave to remain in the United Kingdom, for a period of six months, on the grounds that to remove him would breach his rights under Article 3 of the European Convention on Human Rights. Such leave was subject to conditions requiring YAS to report quarterly and to obtain the Home Secretary's written consent before changing his residence, entering employment or engaging in business or enrolling on any course of study.

3. On 10 October 2018 YAS applied for judicial review of the Decision. On 14 June 2019 Richard Clayton QC, sitting as a Judge of the High Court ("the Judge"), determined that the Decision, to the extent that it refused YAS refugee status, was unlawful, there being insufficient new facts to justify a departure from the previous ruling of the FTT that he was a refugee. Further, the Judge ruled that YAS was entitled to challenge the Decision by way of judicial review proceedings rather than appealing once more to the FTT. The Judge further determined (whilst emphasising that he had very little factual information and heard limited argument on the issue) that, in any event, the conditions imposed on YAS breached the UK's obligations under the Convention even if Article 33(2) did apply to him.

4. Accordingly, by an order dated 10 October 2019, the Judge quashed the Decision.

5. The Home Secretary appealed that order on six grounds, permission being granted on all of them by Dingemans LJ. Grounds 1 to 4 challenged the finding that the refusal to grant refugee status was unlawful. Grounds 5 and 6 related to the finding that the imposition of conditions was a breach of Convention obligations and, as explained in paragraphs 10.1 and 10.2 of the Home Secretary's skeleton argument, would only arise for consideration if the Home Secretary's appeal in relation to the application of Article 33(2) to YAS was allowed.

6. YAS resisted all of the grounds until the end of the first day of the hearing of the appeal. At that point his leading counsel, Mr Husain QC, announced that YAS would not resist grounds 5 and 6 (assuming that they arose for decision).

[1] The 1951 UN Convention on the Status of Refugees, as amended by the 1967 New York Protocol.

The background

YAS's asylum claim

7. YAS is a citizen of Egypt and is a long-standing opponent of the regime of that country. In March 1994 he was convicted in his absence by the Supreme Military Court of Egypt for conspiracy to kill the then Prime Minister of Egypt (a conviction which was probably secured by the use of torture[2]) and sentenced to death.

8. In April 1994 YAS arrived in the United Kingdom and claimed asylum.

The relevant provisions relating to refugees and refugee status

9. The Convention does not have the force of a statute in the United Kingdom, but has been effectively incorporated into domestic law for immigration purposes: see *EN (Serbia) v Secretary of State for the Home Department* [2010] 1 QB 633 at [58]. In particular, the Convention defines an asylum claim for the purposes of our law (see the current version of section 82 of the Nationality, Immigration and Asylum Act 2002 ("the NIAA")) and has a status superior to the Immigration Rules (see section 2 of the Asylum and Immigrations Appeals Act 1993).

10. Article 1A(2) of the Convention provides that the term "refugee" applies to any person who:

> "Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country…"

11. However, a person who would otherwise qualify as a refugee within the above definition will be excluded from the scope of the Convention altogether if Article 1F applies, the relevant provision in this case being 1F(c):

> "The provisions of [the] Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> ….
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

12. If a person is a refugee under the provisions of the Convention, Article 33(1) prohibits the expulsion or return ("refoulement") of that person to territories where they would be at risk of persecution. However, that prohibition is qualified by Article 33(2) as follows:

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[2] See *Al-Sirri v Secretary of State for the Home Department* [2013] 1 AC 745 SC at [21]. YAS's name is spelt differently in the title to these proceedings. His skeleton argument for this appeal states that "Al-Siri" is the more accurate translation from Arabic and is preferred by him.

> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

13. As the Judge pointed out in paragraphs [6] and [7] of his judgment, Article 1F essentially looks backwards at what a person has done in the past and, if applicable, takes the person out of the scope of the Convention and its protections altogether. In contrast, Article 33(2) looks forward, focusing on the danger a refugee poses to the country in which he is located. If applicable, the person remains a refugee and has the protection of the Convention, save that they may be subject to refoulement.

14. Paragraph 334 of the Immigration Rules provides as follows:

> "An asylum applicant will be granted refugee status in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
>
> (ii) they are a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
>
> (iii) there are no reasonable grounds for regarding them as a danger to the security of the United Kingdom; and
>
> (iv) having been convicted by a final judgment of a particularly serious crime, they do not constitute a danger to the community of the United Kingdom;
>
> (v) refusing their application would result in them being required to go … in breach of the [Convention], to a country in which their life or freedom would be threatened on account of their race, religion, nationality, political opinion or membership of a particular social group."

15. Paragraph 336 provides that an application which does not meet the criteria set out in paragraph 334 will be refused.

The progress of YAS's asylum claim

16. YAS's asylum claim was eventually rejected on 11 October 2000 on the ground that Article 1F(c) applied to him. The Home Secretary accepted, however, that YAS was at risk of persecution in Egypt, engaging his Article 3 rights in relation to any return to that country. In 2004 YAS was granted discretionary leave to enter, which was thereafter extended for period of six months at a time. Under section 83 of the NIAA,

a section since repealed[3], after a year of discretionary leave YAS acquired a right to appeal the decision to refuse him asylum. YAS duly appealed in September 2006.

17. On 5 December 2006 the Secretary of State issued a fresh decision letter, giving reasons for refusing YAS asylum. The letter set out that an individual is not entitled to the protection of Article 33(1) if either Article 1F or Article 33(2) applies to them. The letter concluded that Article 1F(c) was applicable to YAS, based on allegations as to his involvement with terrorist organisations and offences. No reliance was placed on Article 33(2).

18. The most important allegation was that he had conspired in the murder of General Ahmad Shah Masoud in Afghanistan on 9 September 2001, two days before the 9/11 atrocities. It was said that General Masoud had warned of an impending Al-Qaeda attack on the United States and that it was believed that his assassination may have been ordered by Osama bin Laden to cut off the most obvious source of support for US retaliation against such an attack. YAS was indicted at the Central Criminal Court for conspiracy to murder, but the charges were dismissed by the Common Serjeant on the basis that the evidence against YAS was consistent with innocence and that a jury could not properly convict. However, the Home Secretary took the view that the charges and the underlying evidence provided serious reasons for considering that YAS had been guilty of acts contrary to the purposes and principles of the United Nations.

19. The path of YAS's appeal was unusually convoluted and need only be summarised briefly for present purposes. The appeal was initially dismissed by the Asylum and Immigration Tribunal ("the AIT") on 2 August 2007, but on 18 March 2009 the Court of Appeal set aside that determination and remitted the case for rehearing before a different tribunal. YAS nevertheless further appealed to the Supreme Court, challenging the decision to remit the case rather than to find that he was not excluded from the Convention. That further appeal was dismissed on 21 November 2012, although his challenge to certain aspects of the Court of Appeal's reasoning was upheld. In particular, the Supreme Court gave guidance as to the meaning of the autonomous words "serious reasons for considering" in Article 1F.[4]

20. The result was that YAS's appeal against the refusal of his asylum claim came before the FTT afresh in May 2014. Four months earlier, on 10 January 2014, the Secretary of State had issued a further decision letter, again referring to the exclusionary effect of both Article 1F and Article 33(2), but making the decision to refuse YAS's asylum claim solely on the former. That decision was reached on the basis of:

    i) a considerably more detailed account of evidence said to point to YAS's involvement in the murder of General Masoud, leading the Secretary of State to consider:

> "...that you deliberately provided documents for individuals posing as journalists to gain access to [General Masoud]. It is considered that your knowledge that they were not genuine journalists yet wanted to gain access to him means that you were aware that they wished to

[3] See paragraph 84 below.
[4] Paragraph 75.

> cause him harm. Therefore, it is considered that you conspired with others to murder [General Masoud]."

ii) other evidence of YAS publishing and distributing texts in support of terrorism;

iii) documents found in YAS's possession potentially useful for supporting terrorism;

iv) associations with terrorists and known supporters of terrorism.

The FTT Decision

21. The FTT Decision was first promulgated on 17 March 2015, but the FTT listed a further hearing on 13 April 2015 for the Home Secretary to indicate whether her assessment of the risk to YAS on return to Egypt had changed. In the event it had not. The FTT Decision was repromulgated on 16 April 2015.

22. The FTT identified (at [88]) that the critical issue was whether YAS:

> "has...been shown to have been sufficiently involved in the assassination of General Massoud to show in turn that he fell to be excluded from the [Convention] under Article 1F(c) or, on the other hand, has such involvement not been shown and, further, may he be properly described as a person…innocently duped by the real actors in the plot?"

23. The FTT considered the evidence of YAS's involvement in the assassination, but considered that it fell short of showing that he was a conspirator rather than an innocent dupe. The FTT also considered the impact of documents, books and other publications found at the appellant's home and business address that might properly be described as "extreme, undoubtedly radical and would cause outrage to many", including;

i) 2,000 copies of a book which espoused the killing of Jews, containing a foreword written by YAS and printed by the Islamic Observation Centre ("the IOC"), an organisation established by him. The author was the leader of a proscribed terrorist organisation, Al-Gama'a al-Islamiyya. It appeared that YAS had distributed a further 1000 copies of the book;

ii) many press articles regarding an American military base in Saudi Arabia which was bombed in 1996 and documents relating to two suspects in that case, including passports, photographs and "legal items";

iii) "military manuals" including one relating to advanced improvised explosives and handwritten notes relating to roadblocks, patrols, recognisances and ambushes.

24. The FTT further referred to YAS's known associations, including that he had used the IOC as a platform to defend "the Blind sheikh", who was found guilty in the United Sates of seditious conspiracy in relation to the 1993 World Trade Centre bombing,

and a document found at YAS's home from the leadership of Al-Gama'a al-Islamiyya, in which YAS was criticised for countering calls to end violence.

25. The FTT concluded that such material and associations might very well be properly regarded as circumstantial evidence of YAS's sympathy for extremist views and support for jihad, but it did not overcome the absence of reliable evidence of his culpable involvement in the assassination of General Masoud.

26. The FTT therefore allowed YAS's appeal, finding that he was not excluded from the Convention under Article 1F(c) and that he was a refugee.

The Decision

27. The Home Secretary's rights of appeal against the FTT Decision were exhausted by 4 August 2017. Less than a year later the Home Secretary issued the Decision, again refusing to recognise YAS's refugee status, but this time relying on Article 33(2) rather than Article 1F. The Home Secretary referred to the following matters:

i) that in March 2015 YAS released a statement via his social media account in which he "advocated the use of violent jihad as an obligation for Muslims";

ii) that YAS posted on his social media accounts pictures of Islamic State suicide bombers in Libya;

iii) that on 4 March 2015 YAS posted a video to his Facebook account in which he appeared to encourage financing violent jihad, stating that it was "among the best deeds of charity" and "Jihad for the sake of Allah";

iv) that YAS released a statement on social media on 7 May 2015 referring to a drone strike that killed the leader of Al-Qaeda on the Arabian Peninsula.

v) that on 4 May 2015 YAS posted a highly sectarian statement on his Facebook page, stating that the Shia Ismali sect are "apostates from Islam", that they "are more infidel than the Jews and the Christians" and that they "are to be assigned to the lowest rank in Hell";

vi) that media reports in April 2016 stated that YAS had said that Osama Bin Laden "died an honourable death" and that the American soldiers' corpses should be "dragged in the streets". However, YAS pointed out (and the Home Secretary did not dispute) that the statements of YAS referred to had been made in 2003;

vii) that on 2 December 2017 YAS posted on Twitter that the President of Egypt should "end up like Ghaddafi";

viii) that YAS used social media accounts to disseminate his views, having 882 followers on Twitter. Further, the IOC's website historically contained campaigns in support of convicted terrorists, including the Blind Sheikh, and published statements by leaders of Al-Gama'a al-Islamiyya.

28. The Home Secretary concluded that:

> "The espousal of extremist views by the use of social media clearly foments, justifies and glorifies terrorist violence and fosters hatred which may lead to inter-community violence. It is considered that such behaviour clearly demonstrates that you are a danger to the security of the UK on grounds of extremism in line with Home Office policy."

YAS's challenges to the Decision

29. On 24 July 2018 YAS appealed to the FTT against the Decision, but on 23 August that appeal was adjourned *sine die* at his request pending the determination of his application for judicial review of the Decision.

30. These judicial review proceedings were commenced on 10 October 2018. Permission to proceed with the application was refused on paper on 22 January 2019 on the ground that YAS must exhaust his alternative remedy by way of statutory appeal, but permission was subsequently granted on 21 February 2019 following an oral hearing of his renewed application.

31. YAS's primary contention was that the Home Secretary was bound, as a matter of the rule of law and finality, to give effect to the FTT Decision by recognising him as a refugee. He submitted that a refusal to do so was, on the face of matters, unlawful and subject to challenge by way of judicial review. An exception to that general rule would arise if the Home Secretary relied on fresh evidence, but any such evidence would have to be "relevant, credible and not previously available with due diligence" in accordance with the *Ladd v Marshall*[5] principle. In this case, most of the matters pre-dated the FTT Decision (and could have been raised when the FTT reconvened on 13 April 2015) and the remainder added nothing to the state of affairs which existed at the date of the FTT Decision.

32. The Home Secretary did not accept that principles of finality and loyalty to judicial decisions applied to public law decisions. Further, to the extent that they did apply, the Home Secretary argued that such principles did not override the clear duty (arising from an application of "rule of law values") to reconsider Article 33(2) and paragraph 334(iii) at the time of any decision, regardless of any previous decision.

33. The Home Secretary further argued that, in any event, YAS could raise his challenge to the Decision by way of another appeal to the FTT, contending that, as YAS had that alternative remedy, the judicial review proceedings were inappropriate and should be dismissed. YAS rebutted that argument, submitting that the FTT could not make a mandatory order or enforce its own judgments, so an unlawful decision to ignore an FTT ruling was rightly challenged in the High Court, not by further appeal to the FTT.

The Judge's judgment

34. The Judge delivered judgment orally on 14 July 2019, two days after the hearing of the claim. There was a delay in production of the draft transcript of the judgment, followed by further submissions by both parties. The approved judgment was made available on 23 September 2019.

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[5] [1954] 1 WLR 1489.

35. At paragraph [24], the Judge recorded YAS's submissions (in part by reference to his skeleton argument) that (a) most of the matters relied upon by the Home Secretary in the Decision pre-dated the FTT Decision (in particular, items (i)-(iii) and (vi) above) and could have been discovered by the Home Secretary with due diligence; (b) the nature and extent of YAS' social media activity (item (viii)) was also well known to the Home Secretary in April 2015; and (c) the remaining matters were further examples of those considered by the FTT; they did not point to a change of circumstance or give the case a significantly different complexion. The Judge did not record any disagreement with those submissions. Although he did not state so expressly, it is plain that he accepted them.

36. At paragraph [32] the Judge further accepted YAS's contention, based on *R (TB (Jamaica)) v Home Secretary* [2008] EWCA Civ 977, that the Home Secretary must advance her factual case on Article 33(2) at the same time as Article 1F. He further stated that:

    i) the fact that the Home Secretary failed to advance Article 33(2) at one stage does not debar her from raising Article 33(2) at a further stage provided she relies upon facts which postdate the earlier appeal determination so that previous facts may remain relevant, for example, to illuminate the factual position now advanced; and

    ii) applying *R (Saribal) v Secretary of State for the Home Department* [2002] EWHC 1542 (Admin), whether the fresh evidence relied upon is sufficiently cogent is a matter for the court, not the Home Secretary and secondly, the evidence relied upon must be sufficiently cogent and also must comply with *Ladd v Marshall*, in other words it must be relevant, credible and not previously available with due diligence.

37. At paragraph [34] the Judge expressed his conclusion on YAS's claim that the Decision was unlawful as follows:

> "Applying these principles to this case, I find that the facts raised by [the Decision] were not sufficient to entitle him to insist [YAS] pursued his claim to the First Tier Tribunal. In other words, I hold that the claimant was entitled to properly challenge its case in judicial review proceedings."

38. Ground 3 of the Home Secretary's appeal is that the Judge thereby failed to make any decision on the question of whether or not the matters relied upon by the Home Secretary satisfied the tests the Judge identified, but confined himself to deciding that YAS was entitled to challenge the decision by way of judicial review. Whilst it is right that the Judge failed to express himself clearly, in my judgment there is no doubt that his intention was not only to find that YAS was entitled to challenge the Decision in judicial review proceedings, but also to hold that such challenge was successful due to the absence of sufficient fresh evidence to justify the Home Secretary departing from the FTT Decision. If that had not been his finding, the Judge would not have quashed the Decision not to grant refugee status to YAS.

39. The Judge then dealt with YAS's alternative case that, in any event, the conditions of his Restricted Leave to remain were unlawful as being inconsistent with his status as a

refugee under the Convention (even if Article 33(2) applied to him) and as being unnecessary and disproportionate. The Judge found, on the limited evidence available to him, that YAS's challenge succeeded and that the Home Secretary had acted unlawfully in imposing the conditions.

The appeal against the quashing of the refusal to grant refugee status to YAS

40. In addition to ground 3, which I would reject for the reasons set out above, the Home Secretary challenged the Judge's substantive decision on the following grounds:

    i) Ground 1: that there is no general principle that the Home Secretary must bring any case under Article 33(2) at the same time as resisting a claim to refugee status on any other basis: the Judge is said to have misapprehended the decision of this court in *TB (Jamaica)*;

    ii) Ground 2: that in any event the Home Secretary was making a fresh assessment of a new issue, namely, the application of Article 33(2), so it was not necessary for there to be fresh evidence which would pass the *Ladd v Marshall* test;

    iii) Ground 4: that the Judge accordingly erred in holding that the Home Secretary was not entitled, on the facts of YAS's case, to make a decision on Article 33(2) and paragraph 334.

41. As a further aspect of Ground 2, the Home Secretary also challenged the Judge's decision that YAS did not have an alternative remedy in the form of a statutory appeal to the FTT, contending that the merits of the Home Secretary's decision, on the facts, was properly a matter for determination in that forum. Whilst the question of the existence of an alternative remedy is, logically, a preliminary point, it is useful to consider the substantive issues first, so as to identify the nature of YAS' challenge to the decision, before turning to the issue of whether it could be brought by way of a statutory appeal. Further, as the Vice-President indicated during the course of argument, and Mr Tam QC (for the Home Secretary) accepted, there is merit in this court determining the substantive point of principle, even if the FTT has jurisdiction.

    <u>Ground 1: whether the Home Secretary must bring before the Tribunal any case under Article 33(2) when resisting a claim to refugee status under Article 1F(c).</u>

42. On the face of matters, and as the Judge held, this question was answered in the affirmative in *TB (Jamaica)*. In that case an Immigration Judge had found, in September 2005, that (contrary to the Home Secretary's case) TB's life would be in danger if he was deported to Jamaica as a foreign criminal, (having been convicted of a serious crime and been sentenced to more than two years' imprisonment) and upheld his claim to be a refugee. The Home Secretary did not challenge that decision, but did not grant TB the 5 years' leave to remain usually granted to refugees. Instead, in January 2006, the Home Secretary asserted that the same conviction gave rise to a rebuttable presumption (under s.72 of the NIAA) that TB constituted a danger to the community in the UK, bringing him within Article 33(2) of the Convention. TB responded that it was an abuse of process and power for the Home Secretary to raise an issue under Article 33(2) when it had not been raised before the Immigration

Judge, but in June 2006 the Home Secretary determined that Article 33(2) did apply to TB, refused him asylum and granted temporary leave only.

43. The Court of Appeal upheld Bean J's judgment that the Home Secretary's decision was an abuse of process and unlawful, Stanley Burnton LJ summarising Bean J's reasons as follows:

> "The principles requiring finality in litigation, and that a party should not be vexed twice, exemplified by *Henderson v Henderson* (1843) 3 Hare 100 and *Johnson v Gore Wood* [2002] 2 AC 1, are applicable in public law as in private law. Just as applicants in asylum and immigration cases are required to put forward all the matters on which they rely by the "one-stop" warning they are given, so must the Secretary of State bring forward his entire case when an applicant appeals to the AIT. Otherwise, the applicant is relegated to seeking judicial review of the Secretary of State's decision to invoke article 33.2…"

44. Stanley Burnton LJ (with whom the other members of the Court agreed) stated as follows:

> "30….it was open to the Secretary of State to seek to establish that Article 33.2 applied to TB on the hearing of his appeal; and it was open to the Secretary of State to seek to appeal the determination of the Immigration Judge on the ground that in failing to apply the statutory presumption she erred in law. She did not do so, and it is not easy to see why, if she is bound by the Immigration Judge's decision, she should be able to take the same point subsequently. I asked Mr Jay why, if she can take the Article 33.2 point after an adverse determination by an Immigration Judge, she could not take any other point under the Refugee Convention after an adverse determination, and I do not think he was able to provide a satisfactory answer. I see no basis on which it could be said that section 72 confers on Article 33.2 any special status that enables that provision to be relied upon when others cannot.
>
> ….
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> 32. As a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by administrative decision. If she could do so, the statutory appeal system would be undermined; indeed, in a case such as the present, the decision of the Immigration Judge on the application of the Refugee Convention would be made irrelevant. That would be inconsistent with the statutory scheme.
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> 33. The principle that the decision of the Tribunal is binding on the parties, and in particular on the Home Secretary, has been consistently upheld by the Courts. In *R (Mersin) v Home Secretary* [2000] EWHC Admin 348, Elias J said:

> In my opinion there is a clear duty on the Secretary of State to give effect to the Special Adjudicator's decision. Even if he can refuse to do so in the event of changed circumstances or because there is another country to which the applicant can be sent, there is still a duty unless and until that situation arises. It would wholly undermine the rule of law if he could simply ignore the ruling of the Special Adjudicator without appealing it, and indeed Mr. Catchpole [counsel for the Home Secretary] does not suggest that he can. Nor in my opinion could he deliberately delay giving effect to the ruling in the hope that something might turn up to justify not implementing it. In my judgment, once the adjudicator had determined the application in the applicant's favour, the applicant had a right to be granted refugee status, at least unless and until there was a change in the position.

34. In *R (Boafo) v Home Secretary* [2002] EWCA Civ, [2002] 1 WLR 44, Auld LJ said at [26] in a judgment with which the other members of the Court of Appeal agreed, "… an unappealed decision of an adjudicator is binding on the parties." In *R (Saribal) v Home Secretary* [2002] EWHC 1542 (Admin), [2002] INLR 596, Moses J said:

> 17. The decision in *ex parte Boafo* demonstrates an important principle at the heart of these proceedings. The Secretary of State is not entitled to disregard the determination of the IAT and refuse a claimant's right to indefinite leave to remain as a refugee unless he can set aside that determination by appropriate procedure founded on appropriate evidence.

35. Of course, different considerations may apply where there is relevant fresh evidence that was not available at the date of the hearing, or a change in the law, and the principle has no application where there is a change in circumstances or there are new events after the date of the decision: see Auld LJ in *Boafo* at [28]. But this is not such a case.

36. The judge described the attempt by the Secretary of State to raise the section 72 issue after the Immigration Judge's decision and to refuse leave to enter and to remain as an abuse of process. That is an expression normally reserved for abuses of the process of the courts. The Secretary of State's action might be castigated as an abuse of power, but I would prefer to avoid pejorative expressions of uncertain denotation and application and to hold simply that the Secretary of State was bound by the decision of the Immigration Judge and that her subsequent action was unlawful on the ground that it was inconsistent with that decision. It follows that the judge's conclusion was correct. The Home Secretary is bound to grant TB the leave to remain to which the Immigration Judge's decision entitled him."

45. Mr Tam nonetheless argued that:

i) as Article 33(2) (and Rule 334(iii)) raise issues of a different nature altogether to Article 1F(c), the Home Secretary is at liberty to mount a case under Article 33(2) subsequent to a decision that Article 1F(c) did not apply. Indeed, Mr Tam contended, the Home Secretary was under a continuing statutory duty to consider whether a refugee was a danger to the security of the country within Article 33(2), taking into account the most up to date information, regardless of a previous determination that the refugee had not committed a crime which would have excluded them altogether from the Convention under Article 1F(c). Mr Tam argued that this approach is consistent with the principle, confirmed by the Supreme Court in *R (TN (Afghanistan)) v Secretary of State for the Home Department* [2015] 1 WLR 3083, that asylum appeals should be determined on the basis of the factual position at the time of the appellate decision rather than the factual situation at the time of the decision under appeal;

ii) *TB (Jamaica)* recognised a limited exception to that broad entitlement. In that case, the Home Secretary was invoking the second limb of Article 33(2), based on the very same conviction which had been relied on, unsuccessfully, as engaging Article 1F(c). It was a simple case where both Article 1F(c) and Article 33(2) could and should have been argued at the same time on the basis of one conviction. The Judge was wrong to read the decision as requiring the Home Secretary to advance any case on Article 33(2) at the same time as Article 1F(c);

iii) in particular, if there were <u>any</u> new matters that post-dated the hearing of the issues raised under Article 1F(c), the Home Secretary was entitled to rely upon those (in conjunction with pre-existing matters if relevant) to found a case under Article 33(2), a position reflected (Mr Tam contended) in *TB (Jamaica)* at [35].

46. In my judgment the *ratio* of the decision in *TB (Jamaica)* was not restricted in the manner suggested by Mr Tam, but was (as the Judge held) a recognition of the broad principles of finality and proper use of process (or power), applicable in the public law sphere just as in the private law context: a party must bring before the court their entire case, will be bound by the resulting decision and will not be permitted to re-open that decision on the basis of matters which could have been raised, but which were not.

47. The fundamental importance of those principles was explained in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 HL by Lord Bridge of Harwich (with whom all other members of the House agreed) at p.289:

> "The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et eadem causa'. These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public

> law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.

48. In *Arnold v National Westminster Bank plc* [1991] 2 AC 93 HL, Lord Keith of Kinkel, giving the leading speech, emphasised that there was no logical difference between "a point which was previously raised and decided and one which might have been but was not" (p. 108), but recognised at p. 109 that:

> "…there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result …"

49. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 Lord Sumption JSC summarised the effect of *Arnold* in relation to issue estoppel as follows at [22]:

> "…Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

50. In *DN (Rwanda) v Secretary of State for the Home Department* [2020] UKSC 7, the claimant had been detained pending deportation pursuant to an Order made under the NIAA, having lost his appeal against such deportation before the AIT. It was subsequently determined that the Order was ultra vires, with the effect that the deportation order and the detention were unlawful. Lord Carnwath JSC, referring to the above authorities, expressed the view that, even in the case of illegal detention, the principles of res judicata and issue estoppel could have been invoked by the Home Secretary to debar the claimant from pursuing a claim for damages based on that illegality, the claimant having failed to challenge the validity of the Order before the AIT and being bound by its decision that his deportation was lawful.

51. In *TB (Jamaica)* the abuse was advancing a different argument for refusing refugee status based on the same conviction, but it is plain that the reasoning was that the taking of any further point under the Convention, which could have been taken at the first hearing, was unlawful. Further points could only be taken if there was fresh evidence or a change in position. The principle confirmed in *TN (Afghanistan)*

addresses the question of the approach to be taken on an asylum appeal to the up to date position, not the very different question of whether and in what circumstances the Home Secretary can refuse to act on a decision made following such an appeal. As Lord Toulson JSC expressly recognised in *TN (Afghanistan)* at [72], whilst it is for the Home Secretary to exercise any discretion as to granting leave at any point in time, that must be done lawfully.

52. Further, it is not clear, on proper analysis, that the Home Secretary ultimately was challenging the application of the principle of finality, even in relation to public law decisions. Mr Tam accepted that a new objection to refugee status could not be taken on the basis of exactly the same matters as were before the Tribunal on the previous hearing (such as the simple fact of a conviction), asserting only an entitlement to do so on the basis of new matters. The real dispute appeared to be as to the hurdle the Home Secretary must surmount, in terms of new matters, in order to justify re-opening the question of refugee status which had, on the face of matters, been determined in the refugee's favour. That is the issue raised by ground 2.

Ground 2: whether new matters must satisfy the *Ladd v Marshall* test before the Home Secretary can reconsider refugee status after an adverse Tribunal decision

53. The test in *Ladd v Marshall* for the admission of fresh evidence on appeal is so frequently summarised and applied that the decision itself and the context of the test are not often considered. The issue at trial was whether the plaintiff had handed the defendant £1,000 in cash. The plaintiff called the defendant's wife as a witness, but she professed to remember nothing. The judge found for the defendant. Thereafter the defendant's wife, now divorced, made a statement to the effect that she had lied at the trial. On the plaintiff's application for a new trial, Denning LJ stated at p. 1491:

> "It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

54. It has been recognised that the *Ladd v Marshall* test, and the principle of finality to which it gives effect (described as "a general rule of high importance" in the *Ampthill Peerage Case* [1977] AC 547), are broadly applicable, by analogy, in the public law context (including immigration cases). In *R (Momin Ali) v Secretary of State for the Home Department* [1984] 1 WLR 663 Sir John Donaldson MR stated:

> "Just as I think the doctrine of issue estoppel has, as such no place in public law or Judicial Review….so I think that the decision in Ladd v Marshall has, as such, no place in that context. However I think that the principles which underlay issue estoppel and the decision in Ladd v Marshall, namely there must be finality in litigation, are applicable,

> subject always to the discretion of the Court to depart from them if the wider interests of justice so require."

55. In *E & R v Secretary of State for the Home Department* [2004] EWCA Civ 49 this court emphasised (at [81]) that Sir John Donaldson's dictum above did not show that *Ladd v Marshall* principles have "no place" in public law. Rather it showed that they remained the starting point, but there was discretion to depart from them in exceptional circumstances.

56. The finality principle has been considered and applied in the immigration context in a number of cases. In *R (Boafo) v Secretary of State for the Home Department* [2002] 1 WLR 1919 the claimant had appealed successfully to an adjudicator against the Home Secretary's refusal to grant her indefinite leave to remain, but the adjudicator did not give directions to implement the appeal decision, as then required by s.19(3) of the Immigration Act 1971. The Home Secretary made a fresh decision refusing leave to remain, contending that he could ignore the adjudicator's decision. That argument was rejected by this court on the ground that an unappealed decision of the adjudicator was binding on the parties, notwithstanding the absence of directions. The Home Secretary was required to grant indefinite leave to remain. Auld LJ (with whom Ward and Robert Walker LJJ agreed) said at [28]:

> "There may be circumstances in which the executive may reopen a decision without appealing a determination of an adjudicator, for example, because there is fresh evidence, say of deception of the adjudicator about the facts on which the challenged decision was based, or where, as in the entry clearance case of *Ex p Yousuf* [1989] Imm AR 554 the very nature of the second decision calls for decision on contemporaneous facts. But even in such cases, it would be wrong, in my view, for the Secretary of State, as a generality, to regard the matter as hinging on the presence or absence of directions."

57. In *Saribal v Secretary of State for the Home Department* [2002] EWHC 1542 (Admin) the Immigration Appeal Tribunal determined that the claimant was entitled to asylum, but the Home Secretary thereafter refused to grant him refugee status and decided to deport him, asserting that the favourable IAT decision was obtained by fraud. On the claimant's application for judicial review, Moses J cited the cases referred to above as "emphasising the importance of the fundamental principle of finality exemplified in *Ladd v Marshall*" and in particular, after setting out passages from *Boafo*, stated at [17]:

> "The decision in ex parte Boafo demonstrates an important principle at the heart of these proceedings. The Secretary of State is not entitled to disregard the determination of the IAT and refuse a claimant's right to indefinite leave to remain as a refugee unless he can set aside that determination by appropriate procedure founded on appropriate evidence."

58. Moses J held that the appropriate procedure founded on appropriate evidence meant that the Home Secretary had to consider whether any new matters satisfied the *Ladd v Marshall* test, stating at [19]:

> "The Secretary of State has not sought to appeal the IAT decision in the Court of Appeal on the basis of the evidence before the IAT at the time of its determination. Thus he can only impugn the IAT decision on the basis of fresh evidence of fraud which is relevant, credible and not previously available without due diligence in accordance with the well known principles enunciated in *Ladd v Marshall*…"

59. The Home Secretary argued that relief by way of judicial review was inappropriate because the claimant had a right of appeal to an adjudicator against the Home Secretary's new decision, a hearing before an adjudicator being the appropriate place to determine disputed issues of fact. Moses J rejected that submission, stating at [36-37] as follows:

> "I do not think that this case turns on the appropriate forum for setting aside the determination of the IAT. But, to my mind it does turn on whether the Secretary of State asked himself those questions which are appropriate to the issue as to whether the determination can successfully be set aside. The acceptance, on behalf of the Secretary of State, that some questions as to that issue must be asked, carries with it the acceptance that it is not sufficient merely to form a view that there are grounds for issuing a Notice of Intention to Deport; he must also consider whether the evidence for supporting those grounds satisfies the principles underlying *Ladd v Marshall*. If it were merely sufficient to issue the Notice and then hope that the evidence will emerge by the time of the hearing of the appeal, then there would be no need for the Secretary of State to consider any question as to setting aside the existing determination. But, rightly, the Secretary of State has not adopted so insouciant a stance. To do so would be to ignore the determination.
>
> I start, accordingly, from the position that, in the light of the existence of the IAT's determination, the Secretary of State must consider the question as to whether the *Ladd v Marshall* tests are satisfied."

60. Moses J concluded that the Home Secretary had not applied the principles in *Ladd v Marshall* to the evidence of fraud before deciding to deport the claimant in a case where there had been an earlier decision of the Tribunal. The decision was quashed.

61. *Boafo* and *Saribal* were cited with approval in *TB (Jamaica)* in the passages I have cited above in relation to the question of whether the Home Secretary is obliged to bring any case on Article 33(2) at the same time as a case under Article 1F(c). At [35] of his judgment, Stanley Burnton LJ referred to the fact that "different considerations may apply where there is relevant fresh evidence that was not available at the date of the hearing…" and "the principle has no application where there is a change in circumstances or there are new events after the date of the decision".

62. The authorities referred to above were reviewed comprehensively in *Ullah v Secretary of State for the Home Department* [2019] EWCA Civ 550, a case in which the Home Secretary cancelled the appellant's indefinite leave to remain, granted after he had successfully appealed to the FTT, on the grounds that the appellant's case that he had been in the UK had been fraudulent. The issue before the Court of Appeal was

whether there was an inconsistency between (i) those authorities which had applied the *Ladd v Marshall* test to the question of whether new matters justified ignoring a Tribunal decision and (ii) paragraph 35 of the judgment of Stanley Burnton LJ in *TB (Jamaica)*.

63. McCombe LJ, with whom Hamblen and Haddon-Cave LJJ agreed, considered that there was no such inconsistency, summarising the effect of *Saribal* at [31] as follows:

> "…in cases where there has been an antecedent Tribunal decision that an immigrant is entitled to ILR, in considering whether to take action which has the effect of revoking the leave, the SSHD must give proper attention to principles akin to those identified for the admission of fresh evidence on appeals in legal proceedings, as set out in *Ladd v Marshall*. If he does not do so, his decision is liable to be set aside on judicial review."

64. At [43], McCombe LJ re-stated the principle, found that it had been approved in *TB (Jamaica)*, and stated that it should be followed:

> "In *Saribal*…Moses J decided that if the SSHD wanted to take a decision of that character [to cancel leave], after a decision of a Tribunal importing a right to ILR, his decision making process would have to apply by analogy the principles for the admission of fresh evidence on appeals in legal proceedings (essentially applying the principles in *Ladd v Marshall*). Otherwise, the SSHD's decision would be open to challenge on public law grounds. That decision has the approval of this court in *TB* and, in my judgment, we should follow it."

65. In the context of the above authorities, Mr Tam contended as follows:

i) that the Judge had misapprehended the decision in *Saribal*, failing to recognise that in that case the Home Secretary was contending that the Tribunal decision had been obtained by fraud, where a high standard was to be expected. *Momin Ali* and *Ullah* were also cases where the Tribunal decision was being impugned on the basis of deception. Mr Tam further pointed out that *Ladd v Marshall* was itself a case where a plaintiff sought to impugn a judgment on the basis it has been obtained by fraudulent evidence;

ii) that there may be a threshold that new matters relied upon by the Home Secretary must cross, but there was no justification (save in fraud cases) for requiring that those matters satisfy the *Ladd v Marshall* test. The proper test was the usual one applicable to a public law decision, namely, rationality: whether the Home Secretary's decision to reopen an issue decided by a Tribunal on the basis of new matters was rational. Mr Tam submitted that paragraph [35] of *TB (Jamaica)*, which was not a case of fraud or deception, reflected such an approach, requiring no more than a change in circumstances or new events.

66. In my judgment the Home Secretary's arguments again focus far too closely on the specific facts of certain of the authorities rather than the reasoning adopted and the principles defined and applied. The starting point is that an unappealed Tribunal

decision is final and binding and must be accepted and implemented by the Home Secretary, unless there is a good basis for impugning that decision. Both the binding nature of the decision and the high hurdle for re-opening it are aspects of the principle of finality. As appears from the authorities, that principle underlies the test (*Momin Ali)* and the test exemplifies the principle (*Saribal):* they are two sides of the same coin. The high hurdle is the test in *Ladd v Marshall*.

67. It follows that the *Ladd v Marshall* test applies (by analogy in public law cases) to attempts to overturn final decisions on the basis of new material, not because the challenge is based on fraud or deception, but because of the high importance ascribed to finality in litigation. Indeed, although *Ladd v Marshall* was a case of an appeal seeking to challenge a judgment based on an allegation that it had been obtained by fraud, Lord Denning made plain that the test was one generally applicable to the admission of fresh evidence on appeal.

68. As Stanley Burnton LJ explained in *TB (Jamaica*), it would undermine the statutory appeal system if the Home Secretary could circumvent a decision of a Tribunal by administrative decision, qualified only by a test of rationality. I would add that, although Stanley Burnton LJ did not expressly refer to *Ladd v Marshall* in paragraph [35] of his judgment, the language he used strongly indicated that that was what he had in mind, a conclusion fortified by the fact that he had just cited, with approval, the decision of Moses J in *Saribal*.

69. I should add that Mr Tam criticised the Judge for stating at [33] that fresh evidence must be sufficiently cogent and must *also* comply with the *Ladd v Marshall* test. I accept his submission that "cogency" may be another way to express the third limb of the *Ladd v Marshall* test and does not represent a further or different requirement. However, the Judge's misstatement does not cause me concern that he intended to apply a test more stringent than that stipulated in *Ladd v Marshall*, nor that he did in fact do so.

70. I therefore see no merit in ground 2 of the Home Secretary's appeal. The Judge was right to apply the *Ladd v Marshall* test.

Ground 4: application to the facts of YAS's case

71. Mr Tam pointed out that the new matters identified in the Decision all arose after the FTT hearing in May 2014 and at about the time that, or after, the FTT Decision was first promulgated in March 2015. Those matters demonstrated that YAS continued to hold unacceptable extremist views. They were considered, together with the pre-existing material, by Mr Huw Davies of the specialist immigration casework team at the Home Office from August 2017, in the light of the then current version of the guidance issued to caseworkers on Article 1F exclusion and Article 33(2) in July 2016. According to Mr Davies's witness statement, the ultimate decision to apply Article 33(2) to YAS's case was taken at "Ministerial level" in recognition of its seriousness. Mr Tam contended that, in the above circumstances, it was not irrational for the Home Secretary to regard the circumstances of YAS's case as changed and to make a fresh decision as to the danger he posed to the security of the country as at July 2018.

72. Mr Tam did not contend, however, that the new matters would also pass the *Ladd v Marshall* test (which I consider to be applicable by analogy, for the reasons set out above), and for good reason. The matters identified in the Decision were no more than further examples of YAS's activity in publishing extremist views, ample evidence of such activity having been fully deployed before the FTT. Indeed, the new material was limited to such matters and did not include documents (of the type referred to in the FTT Decision) indicating a direct interest in how past terrorist attacks had been perpetrated and how future violence might be perpetrated. Further, Mr Tam did not suggest that there was no guidance as to the application of Article 33(2) in place prior to 2016 and did not identify any significant change brought about in the version introduced that year. Accordingly, it could not sensibly have been suggested that the additional matters (or the revised guidance) would have had an important influence on the result of an Article 33(2) case, had it been argued before the FTT. The new matters therefore did not satisfy the second limb of the test in *Ladd v Marshall*.

73. In my judgment the "new" matters identified in (i)-(iii) in paragraph 27 above (those post-dating the May 2014 hearing but pre-dating the 13 April 2015 further hearing) also failed to satisfy the first limb of the *Ladd v Marshall* test. The further hearing was fixed by the FTT so that the Home Secretary could consider the up to date position in relation to YAS's case. There is no doubt (and Mr Tam did not dispute) that matters (i)-(iii) were readily ascertainable by the Home Secretary and could have been put before the Tribunal during that hearing.

74. Indeed, in my judgment a decision to make a fresh decision based on the new matters does not even surmount a threshold of rationality. As Irwin LJ put it in the course of argument, there must be something different or of significance in the new material to trigger a new decision, but in this case the new material was, as Mr Husain submitted, "less of the same".

75. I therefore see no merit in the Home Secretary's challenge to the Judge's substantive decision.

Alternative remedy

76. The Home Secretary contended that, notwithstanding the above conclusion, YAS should have brought his challenge to the Decision by way of an appeal to the FTT, and therefore these judicial review proceedings should have been dismissed as he has an alternative remedy which he has not exhausted. She contended that the Decision raised factual issues which should be determined, at least initially, by the FTT, the body best suited for such an exercise.

77. YAS's original response to this contention (and the one accepted by the Judge) was that, where the Home Secretary was unlawfully refusing to give effect to a decision of the FTT, a further appeal to the FTT was no real remedy. The FTT had no power to compel the Home Secretary to grant refugee status (by order of mandamus or otherwise), no power to quash the Decision, no power to remit the Decision for reconsideration and no power to grant a declaration. If her contention was correct, the Home Secretary could, in theory, continue to ignore decisions of the FTT, with YAS having no remedy other than to launch a series of ineffectual appeals, to no end. The only effective remedy for the unlawful failure of the Home Secretary to abide by the FTT Decision was by way of judicial review, the proper route for a public law

challenge to the lawfulness of the making of the Decision, not to the merits of the Decision itself.

78. During the hearing of this appeal YAS contended, for the first time, that he in any event has no right of appeal to the FTT on the ground that the Decision was unlawful because it was inconsistent with the FTT Decision, such an appeal being excluded by the present provisions of the NIAA, following amendments introduced in 2014. As that contention raises an issue as to the FTT's jurisdiction to hear an appeal at all, it is necessary to address it first. Further, in order to understand and consider the merits of the argument, it is necessary to set out in some detail the changes made.

79. As originally enacted, section 82 of the NIAA provided for a right of appeal from immigration decisions, including those as to removal or deportation, but did not deal expressly with asylum claims. Appeals in relation to asylum claims were provided for in section 83 as follows:

> "(1) This section applies where a person has made an asylum claim and—
>
> (a) his claim has been rejected by the Secretary of State, but
>
> (b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate).
>
> (2) The person may appeal to an adjudicator against the rejection of his asylum claim."

80. Where persons claiming asylum did not have a right of appeal under section 83 (as they had not been granted leave for a period exceeding one year), their opportunity to argue for asylum on appeal would arise when directions were given for their removal: see the explanation in *TN (Afghanistan)* at [4-5].

81. Section 84(1) set out the grounds of appeal in relation to immigration decisions (including at subsection (1)(e) that "the decision is otherwise not in accordance with the law"). Section 84(3) provided that:

> "An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention."

82. Section 86 provided that, in relation to appeals under section 82 or section 83:

> "(3) The adjudicator must allow the appeal in so far as he thinks that—
>
> (a) decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules) …"

83. Adjudicators were replaced by the Asylum and Immigration Tribunal in 2005, which was in turn replaced by the FTT in 2010. It was under section 83 that YAS's first appeal was brought in 2006 and was allowed by the FTT in 2015.

84. The Immigration Act 2014 repealed section 83 of the NIAA and amended section 86, replacing its provisions (including subsection 3(a) set out above) with the simple instruction that the FTT "must determine any matter raised as a ground of appeal" (including matters arising after the decision, raised in accordance with amended section 85). Sections 82 and 84 were replaced in their entirety with the following:

> **"82. Right of appeal to the Tribunal**
>
> (1) A person ("P") may appeal to the Tribunal where—
>
> (a) the Secretary of State has decided to refuse a protection claim made by P,
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P, or
>
> (c) the Secretary of State has decided to revoke P's protection status.
>
> (2) For the purposes of this Part—
>
> (a) a "protection claim" is a claim made by a person ("P") that removal of P from the United Kingdom—
>
> (i) would breach the United Kingdom's obligations under the Refugee Convention, or
>
> (ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
>
> (b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions—
>
> (i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;
>
> (ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
>
> (c) a person has "protection status" if the person has n 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.
>
> **84. Grounds of Appeal**
>
> (1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds—

> (a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;
>
> (b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
>
> (c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
>
> (2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.
>
> (3) An appeal under section 82(1)(c) (revocation of protection status) must be brought on one or more of the following grounds—
>
> (a) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention;
>
> (b) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection."

85. The effect of the change in the statutory appeal regime was considered, in the context of human rights claims, in *Charles (Human Rights Appeal: Scope)* [2018] UKUT 00089 (IAC). Lane J stated as follows:

> "45...The former ability of the Tribunal to conclude that a decision of the Secretary of State was unlawful, with the result that a lawful decision remained to be made by her, depended upon the fact that under the version of section 86 of the 2002 Act as it was, prior to its amendment by the 2014 Act, the Tribunal was required to allow an appeal insofar as it thought that a decision against which the appeal was brought or was treated as being brought was not in accordance with the law (including immigration rules). That requirement has been removed from the legislation. In this regard, therefore, Parliament has most definitely "taken the opportunity to interfere".
>
> 46. The correct approach to adopt in a human rights appeal under section 82(1)(b) is as follows. As section 84(2) makes clear… the decision being appealed is the decision to refuse the claimant's human rights claim. Section 84(2) provides that the only ground upon which that decision can be challenged is that "the decision is unlawful under section 6 of the Human Rights Act 1998". Section 6(1) of the 1998 Act provides that it "is unlawful for a public authority to act in a way which is incompatible with the Convention rights".
>
> 47. The definition of "human rights claim" in section 113(1) of the 2002 Act involves the making of a claim by a person that to remove

> him or her from or to require him or her to leave the United Kingdom would be unlawful under section 6.
>
> 48. The task, therefore, for the Tribunal, in a human rights appeal is to decide whether such removal or requirement would violate any of the provisions of the ECHR. In many such cases, including the present, the issue is whether the hypothetical removal or requirement to leave would be contrary to Article 8 (private and family life)."

86. Lane J accordingly concluded as follows:

> "53. In the circumstances, Judge Malone was, we find, wrong in law to purport to allow the appeal on the freestanding basis that the decisions to make the deportation order, and to refuse to revoke it, were in each case unlawful. To repeat, neither of those decisions was the decision under appeal. The judge was therefore compelled to treat the section 7 issue as going to the determination of the sole ground of appeal; namely, whether refusal of the claim would violate the United Kingdom's obligations under the ECHR, by reference to Article 8."

87. Mr Husain contended that the amendment to section 86 had the same effect in relation to asylum claims: it was no longer possible to appeal on any basis other than that removal of the appellant would be a breach of the Convention. It would not therefore be possible for YAS to appeal on the ground (nor for the FTT to find) that the Decision was unlawful by reason of a previous FTT Decision.

88. Mr Tam did not dispute Mr Husain's interpretation of the statutory regime, as amended, but contended that YAS should nevertheless be required to mount an appeal to the FTT first, so that the facts could be examined in that forum and the merits determined. He further suggested that the FTT, having considered the merits of "fresh evidence", could give effect to the principles of finality by preventing the Home Secretary from adducing evidence to defend the appeal, pursuant to an inherent power to prevent an abuse of process.

89. It is of course the case that YAS has a right of appeal to the FTT against the Decision on the grounds that it is a breach of Convention obligations, a right he in fact exercised (albeit that the appeal was stayed). The question is whether such an appeal provides him with an alternative forum in which to mount his argument (which in my judgment is well founded) that the Decision is unlawful by reason of the previous FTT Decision.

90. In my judgment, the amendment to the statutory regime in 2014 does not provide as simple an answer in the case of asylum appeals as Mr Husain suggests. In relation to immigration appeals/human rights claims (considered in *Charles*), it was not only the powers of the Tribunal in section 86 that were altered. Section 84 was amended to remove as a ground of appeal that the decision was "not otherwise in accordance with the law". The removal of that ground of appeal could not have been a clearer indication of Parliament's intention. But no such ground of appeal existed in relation to asylum appeals, even prior to the 2014 amendments, the sole ground of appeal being that removal would be a breach of Convention obligations. There has been no change in that regard. Nevertheless, the amendment does appear to have clarified that

asylum appeals may not be brought on the grounds that a decision was unlawful (rather than simply a breach of Convention obligations), whatever the position was before the 2014 amendment: such appeals have undoubtedly been brought into line with human rights appeals, and the former power to allow an appeal on the grounds that a decision was otherwise unlawful has been removed.

91. In those circumstances, where there is no ground of appeal available, I am not persuaded that YAS can effectively challenge the lawfulness of the Decision by way of an appeal to the FTT, nor should he be required to mount a merits appeal before that Tribunal before making such a challenge by way of judicial review, for the following reasons:

i) an appeal to the FTT would be on the basis that the Decision, on its own terms, breached the United Kingdom's obligations under the Convention, and the Home Secretary's resistance would necessarily be directed to addressing that ground of appeal. Mr Tam's proposed solution would require the FTT to be persuaded to consider the challenge to the lawfulness of the Decision as a preliminary point, not of substance, but as to what case the Home Secretary would be permitted to run or evidence she would be permitted to adduce;

ii) however, if the consequence of success on such a preliminary point were that the Home Secretary could not resist the appeal, the result would, in reality, be exactly the same as allowing an appeal on the grounds of unlawfulness. There is no real distinction between finding that a decision is unlawful and ruling that it is not one the SSHD is allowed to defend before the Tribunal because it is unlawful. To permit the challenge on the latter (procedural or evidential) basis so as to circumvent the restriction on permitted grounds of appeal would be to put form before substance and to undermine the will of Parliament. Whilst parties may sometimes be prevented from relying on strict provisions where it would be an abuse for them to do so, it is unnecessary and inappropriate to invent a way of "running around" the statutory restriction on the grounds of appeal when it is merely a question of proper forum;

iii) in any event, I doubt that the FTT has power, either substantively or procedurally, to debar the Home Secretary from resisting an appeal by adducing evidence on the merits. As regards the substance, Stanley Burnton LJ pointed out in *TB (Jamaica)* at [36] that an administrative decision which flies in the face of a previous Tribunal decision might be described as an abuse of power, but it is not an abuse of process. It would have to be argued that resisting the appeal was an abuse of the Tribunal's process, but that strikes me as difficult when the appeal is, on its face, against the merits of the new Decision in terms of the Convention: why is it an abuse for the Home Secretary to resist an appeal on its merits, when Parliament has provided that that is the only ground of appeal? As for procedure, the First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014 (Consolidated version as in effect from 21 July 2020) provide for the FTT to regulate its own procedure and to determine preliminary issues, but there is no express power to exclude otherwise admissible evidence, nor to debar a party from advancing their case;

iv) if the FTT does not have jurisdiction to determine the question of unlawfulness of a decision, I see no point or purpose in requiring that an appeal be pursued

and determined in the FTT before the challenge to lawfulness is determined by way of judicial review. The appeal would consider the merits of the decision on the evidence as a whole, not the crucial question of whether there were new matters which justified a fresh decision.

92. Even if I am wrong about the availability of the FTT as a forum for determining YAS's challenge to the lawfulness of the Decision, I agree with the Judge that an appeal to the FTT does not provide a satisfactory alternative remedy. The result of a successful appeal on the basis discussed above would be a second decision of the FTT, effectively duplicating the original FTT Decision (as the Home Secretary would not have been permitted to advance a new case). Why, one might ask, would the Home Secretary grant refugee status following that second decision when she did not do so following the first decision? What would stop her from waiting until she had yet further new material, making a third decision and requiring YAS to appeal once more to the FTT? At some point, as a matter of upholding the rule of law, a failure to comply with the determination of the FTT must be capable of enforcement by order of the High Court: it is unclear to me why that should not be at the point when the Home Secretary first ignores such a determination.

93. I would therefore dismiss the Home Secretary's appeal against the Judge's finding that YAS did not have an alternative remedy.

The appeal against the imposition of conditions

94. If my Lords agree that the Home Secretary's appeal on grounds 1-4 should be dismissed, the further grounds of appeal (against the Judge's finding that the imposition of conditions on YAS's leave to remain was unlawful) do not arise for determination.

Conclusion

95. For the reasons set out above, I would dismiss the Home Secretary's appeal.

Sir Stephen Irwin:

96. I agree.

Lord Justice Underhill:

97. I also agree.