Hilary Term
[2019] UKSC 11
On appeal from: [2017] EWCA Civ 316

JUDGMENT

Robinson (formerly JR (Jamaica)) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lady Hale, President
Lord Wilson
Lady Black
Lord Lloyd-Jones
Lady Arden

JUDGMENT GIVEN ON

13 March 2019

Heard on 15 November 2018

Appellant
Michael Fordham QC
Ronan Toal
Catherine Robinson
(Instructed by Duncan Lewis Solicitors)

Respondent
Sir James Eadie QC
David Blundell
Toby Fisher
(Instructed by The Government Legal Department)

LORD LLOYD-JONES: (with whom Lady Hale, Lord Wilson, Lady Black and Lady Arden agree)

Introduction

1. This appeal concerns the statutory right of appeal against decisions by the Secretary of State for the Home Department ("the Secretary of State") to refuse protection claims and human rights claims under Part 5 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") as amended. The particular question for decision is as follows: Where a person has already had a protection claim or a human rights claim refused and there is no pending appeal, do further submissions which rely on protection or human rights grounds have to be accepted by the Secretary of State as a fresh claim in accordance with rule 353 of the Immigration Rules if a decision in response to those representations is to attract a right of appeal under section 82 of the 2002 Act?

2. It is a conspicuous feature of litigation in the field of immigration and asylum in this jurisdiction that those whose protection claims or human rights claims have already been refused seek to make further applications adducing further submissions or evidence in support. It is necessary that provision be made for such renewed applications for which there is a sound basis, not least because circumstances may change significantly and unforeseeably following the rejection of a claim. In *R v Secretary of State for the Home Department, Ex p Onibiyo* [1996] QB 768 Sir Thomas Bingham MR noted (at pp 781-782) that, for example, it is not hard to imagine cases in which an initial claim for asylum might be made on insubstantial, or even bogus, grounds, and be rightly rejected, but in which circumstances would subsequently arise or come to light showing a threat of a kind requiring the grant of asylum. As he observed, a scheme of legal protection which could not accommodate that possibility would be seriously defective. In appropriate cases, it will be necessary to afford access to the statutory system of appeals when a second or subsequent submission is rejected. Nevertheless, it is necessary to protect such a scheme of legal protection from abuse. There is, therefore, a need to exclude from the statutory system of appeals second or successive applications which are made on grounds which have previously been rejected or which have no realistic prospect of success, and which are often advanced simply in order to delay removal from the United Kingdom. The challenge is to provide a system which can deal fairly and effectively with all such applications while also complying with the United Kingdom's international obligations.

The facts

3. The appellant, Mr Jamar Robinson, is a national of Jamaica who was born on 14 May 1991. He arrived in the United Kingdom on 9 October 1998 when he was seven years old. He was given leave to enter until 9 April 1999 and then remained in the United Kingdom without leave.

4. In 2005, at the age of 13, he applied for indefinite leave to remain in the United Kingdom as a dependant of his aunt who had made an application under a "one off exercise" to allow families who have been in the United Kingdom for three years or more to stay. His aunt was granted indefinite leave to remain on 13 May 2011. The appellant's application was refused as part of later deportation proceedings.

5. The appellant has a number of criminal convictions. The index offences which triggered deportation proceedings were two robberies for each of which he was sentenced on 20 April 2011 to 18 months' detention, to run concurrently. At sentence he was 19 years of age. On the same occasion he was convicted of failing to comply with the requirements of a previous community order. On 31 August 2011, aged 20, he was convicted of an offence of robbery and an offence of theft, in respect of which he was sentenced to terms of 40 months' detention and 16 months' detention respectively, to run concurrently. On 12 October 2012, aged 21, he was convicted of an offence of violent disorder, committed while he was an inmate at HMP Feltham, for which he was sentenced to 12 months' imprisonment.

6. On 10 June 2011 he was notified by the Secretary of State of his liability to deportation. His previous legal representatives responded on 16 August 2011. On 17 July 2013 a deportation order was signed in respect of the appellant. He appealed to the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT") against his proposed deportation. His appeal was based on his claimed right to respect for his private life in the United Kingdom. It was accepted that at that time there was no family life in play. His appeal was dismissed and he was refused permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber) ("UT") by the FTT and by the UT. He exhausted his rights of appeal on 1 May 2015.

7. On 13 May 2015 the appellant's previous solicitors made brief further submissions to the Secretary of State on his behalf. The focus of these submissions was that the appellant's then partner was pregnant and due to give birth on 28 July 2015. The application did not explicitly request that the deportation order be revoked, nor did it explicitly make reference to human rights.

8. The Secretary of State treated the further representations as an application to revoke the appellant's deportation order on the basis that deportation would breach article 8 of the European Convention on Human Rights. She responded to those submissions in a letter of 23 June 2015. She concluded that deportation would not breach article 8. She refused to revoke the deportation order, and she decided that his submissions did not amount to a fresh human rights claim under rule 353 of the Immigration Rules.

9. The appellant's son was born on 26 July 2015. He is a British citizen by birth because his mother is British. The appellant then made further submissions to the Secretary of State on 28 July 2015 regarding the birth of his son and providing some documentation from the hospital. The Secretary of State responded to these further submissions in a letter dated 31 July 2015. Once again, the Secretary of State concluded that deportation of the appellant would not breach article 8 and that his further submissions did not amount to a fresh claim under rule 353 of the Immigration Rules.

10. On 18 July 2015 the Secretary of State gave directions for the appellant's removal to Jamaica on 9 August 2015.

11. A request for temporary admission was made on 30 July 2015 in order to enable the appellant to visit his son. The enclosed documents included a statutory declaration from the appellant declaring that he is the child's father. The appellant was subsequently named as the father on the child's birth certificate.

12. On 5 August 2015 the appellant's solicitors gave notice of appeal to the FTT against the Secretary of State's decision of 31 July 2015. In a decision dated 7 August 2015, promulgated on 10 August 2015, the FTT declined jurisdiction on the basis that there was no right of appeal against the decision of 31 July 2015.

13. On 7 August 2015 the appellant made an application for permission to apply for judicial review of the Secretary of State's decisions of 23 June 2015 and 31 July 2015 not to accept the further representations as fresh claims and the removal directions given on 18 July 2015. After the proceedings were lodged the Secretary of State confirmed that removal of the appellant would be deferred.

14. The appellant applied to amend his grounds to include the FTT as second respondent and to challenge its decision of 7 August 2015 that the appellant had no right to appeal against the decision of 31 July 2015. UT Judge Allen granted the appellant permission to join the FTT and to amend his grounds.

15. On 19 November 2015 UT Judge Eshun granted the appellant permission to apply for judicial review. The application for judicial review was heard by UT Judge Southern on 16 February 2016 who held that:

> (1) the FTT had correctly decided that the appellant had no right of appeal to the FTT;
>
> (2) the Secretary of State's letters were not refusals to revoke the appellant's deportation order; and
>
> (3) the decisions of 23 June 2015 and 31 July 2015 were lawful with regard to rule 353 of the Immigration Rules.

He refused permission to appeal to the Court of Appeal.

16. On 9 March 2016 the appellant applied to the Court of Appeal for permission to appeal. The Secretary of State sought to deport the appellant to Jamaica on 13 April 2016. On 12 April 2016 Rafferty LJ granted the appellant a stay on removal. On 2 December 2016 Underhill LJ, on consideration of the papers, granted permission to appeal to the Court of Appeal.

17. On 4 May 2017 the Court of Appeal (Jackson, Hamblen and Flaux LJJ) dismissed the appellant's appeal and refused permission to appeal to the Supreme Court. The appellant was granted a stay on removal pending final determination of his appeal. The Supreme Court granted permission to appeal by order dated 10 April 2018.

The relevant legislation

18. Part 5 of the 2002 Act in force immediately prior to the commencement of the Immigration Act 2014 ("the 2014 Act") ie prior to 20 October 2014, provided in relevant part:

> "**82. Right of appeal: general**
>
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.

(2) In this Part 'immigration decision' means -

(a) refusal of leave to enter the United Kingdom,

(b) refusal of entry clearance,

(c) refusal of a certificate of entitlement under section 10 of this Act,

(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,

(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,

(f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,

(g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c 33) (removal of person unlawfully in United Kingdom),

(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c 77) (control of entry: removal),

(ha) a decision that a person is to be removed from the United Kingdom by

way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 (removal: persons with statutorily extended leave),

(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),

(ia) a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c 77) (seamen and aircrews),

(ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),

(j) a decision to make a deportation order under section 5(1) of that Act, and

(k) refusal to revoke a deportation order under section 5(2) of that Act.

…

84. Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds -

…

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c 42)

(public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

…

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

92. Appeal from within United Kingdom: general

(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.

…

(4) This section also applies to an appeal against an immigration decision if the appellant -

(a) has made an asylum claim, or a human rights claim, while in the United Kingdom, or

…

94. Appeal from within United Kingdom: unfounded human rights or asylum claim

(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or human rights claim (or both).

…

(2) A person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.

…

96. Earlier right of appeal

(1) An appeal under section 82(1) against an immigration decision ('the new decision') in respect of a person may not be brought if the Secretary of State or an immigration officer certifies -

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

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

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

(2) An appeal under section 82(1) against an immigration decision ('the new decision') in respect of a person may not be brought if the Secretary of State or an immigration officer certifies -

(a) that the person received a notice under section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision,

(b) that the new decision relates to an application or claim which relies on a matter that should have been, but has not been, raised in a statement made in response to that notice, and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice.

…

113. Interpretation

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

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

…

'human rights claim' means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c 42) (public authority not to act contrary to

> Convention) as being incompatible with his Convention rights,
>
> …
>
> 'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and its Protocol, …"

19. Part 5 of the 2002 Act was amended with effect from 20 October 2014 in a number of respects. Section 82(1) now provides:

> "**82. Right of appeal to 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.
>
> …"

Section 84 of the 2002 Act now provides:

> "**84. Grounds of appeal**
>
> (1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought under 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.

…"

20. There were consequential amendments to sections 85, 86, 92, 94 and 96.

21. Substantive changes were made to section 92 which now provides:

"**92. Place from which an appeal may be brought or continued**

(1) This section applies to determine the place from which an appeal under section 82(1) may be brought or continued.

(2) In the case of an appeal under section 82(1)(a) (protection claim appeal), the appeal must be brought from outside the United Kingdom if -

(a) the claim to which the appeal relates has been certified under section 94(1) or (7) (claim clearly unfounded or removal to safe third country), or

(b) …

Otherwise the appeal must be brought from within the United Kingdom.

(3) In the case of an appeal under section 82(1)(b) (human rights claim appeal) where the claim to which the appeal relates was made while the appellant was in the United Kingdom, the appeal must be brought from outside the United Kingdom if -

(a) the claim to which the appeal relates has been certified under section 94(1) or (7) (claim clearly unfounded or removal to safe third country) or section 94B (certification of human rights claims made by persons liable to deportation), or …

Otherwise, the appeal must be brought from within the United Kingdom.

(4) In the case of an appeal under section 82(1)(b) (human rights claim appeal) where the claim to which the appeal relates was made while the appellant was outside the United Kingdom, the appeal must be brought from outside the United Kingdom.

…"

22. Section 94 now provides in relevant part:

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

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

23. The definition of "human rights claim" in section 113 was amended by the 2014 Act and now provides as follows:

> "'human rights claim' means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry to the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c 42) (public authority not to act contrary to Convention)."

Immigration Rules, rule 353

24. The Immigration Rules have contained provisions in respect of previously refused applications since May 1994 (HC 395, rule 346). A rule in substantially the same form as the current rule 353 has been in force since it was introduced by HC 1112 in October 2004. (See para 36, below.) The current rule 353 of the Immigration Rules HC 1025, which has been in force since February 2015, provides:

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

The decision of the Court of Appeal

25. In the Court of Appeal Jackson LJ, with whom the other members of the court agreed, rejected a submission on behalf of the appellant that "human rights claim" in section 82(1)(b) of the 2002 Act as amended means any human rights claim and that its meaning is not confined to an original claim or a subsequent claim which constitutes a "fresh claim" within rule 353 of the Immigration Rules. He also rejected a submission that the Supreme Court considered precisely the same question in *R (BA (Nigeria)) v Secretary of State for the Home Department* [2009] UKSC 7; [2010] 1 AC 444 when construing the phrase "a human rights claim" in section 92(4)(a) of the 2002 Act as it then stood. The decision of the Supreme Court on the meaning of "human rights claim" in *BA (Nigeria)* did not apply to statutory provisions which determine whether a right of appeal exists at all. In his view, it would be an absurd reading of section 82, in either its previous or current form, to interpret it as permitting an applicant to make the same human rights claim over and over again, each time appealing to the FTT against the rejection of that claim. He concluded that "a human rights claim" in section 82(1)(b) of the 2002 Act must mean an original human rights claim or a fresh human rights claim which falls within rule 353 of the Immigration Rules.

Submissions of the parties

26. On this appeal the parties have made very detailed submissions orally and in writing for which the court is grateful. It seems to me, however, that Mr Michael Fordham QC on behalf of the appellant makes two essential submissions which lie at the heart of his case.

> (1) First, he submits that the *Onibiyo* line of authority - which established that in the case of a second or successive submission it was for the Secretary of State to decide whether this constituted a fresh claim giving rise to a right to appeal - did not survive the decision of the Supreme Court in *BA (Nigeria)*, and that, accordingly, there is no longer any role for rule 353 of the Immigration Rules. In this regard he submits that this court should reject the reading of *BA (Nigeria)* favoured by Lord Neuberger of Abbotsbury MR in the Court of Appeal in *R (ZA (Nigeria)) v Secretary of State for the Home Department* [2010] EWCA Civ 926; [2011] QB 722.
>
> (2) Secondly, he submits that the amendments to Part 5 of the 2002 Act effected by the 2014 Act abrogate the control mechanism established by the *Onibiyo* line of authority and rule 353 of the Immigration Rules and that the words "human rights claim" as they appear in section 82(1)(b) of the 2002

Act following amendment by the 2014 Act are to be interpreted without reference to rule 353.

27. On this basis he submits that any second or subsequent submission which is a "human rights claim" under section 113(1) attracts a right of appeal under section 82, notwithstanding that the individual has made a previous claim that removal would breach a relevant obligation, whether the same relevant obligation or a different one, whether on the same basis or a different one, whether with the same or different submissions and evidence, but subject however to the certification provisions in sections 94 and 96.

28. In response on behalf of the Secretary of State, Sir James Eadie QC submits:

(1) *BA (Nigeria)* does not establish that the words "human rights claim" as they appear in Part 5 of the 2002 Act are to be interpreted without reference to the *Onibiyo* line of authority or rule 353 of the Immigration Rules. The actual decision in *BA (Nigeria)* was that rule 353 had no further part to play for the purposes of section 92(4)(a) once there was an appeal against an immigration decision. It did not determine that the Secretary of State was no longer entitled to decide the prior question as to whether a second or subsequent submission constituted a claim at all. In his support he relies on the analysis of *BA (Nigeria)* by Lord Neuberger MR in *ZA (Nigeria)*.

(2) The amendments to the 2002 Act effected by the 2014 Act have not changed the position. It remains the case that there will only be an asylum or human rights claim to be determined if, in relevant cases, further submissions are considered to amount to a fresh claim.

The Onibiyo line of authority

29. In order to address the issues raised by this appeal it is necessary to consider in some detail the way in which a line of authority concerning second or subsequent submissions to the Secretary of State has developed. It starts in 1996 with the decision of the Court of Appeal (Sir Thomas Bingham MR, Roch and Swinton Thomas LJJ) in *Onibiyo*. The applicant had made an application for asylum under the Asylum and Immigration Appeals Act 1993 ("1993 Act"), based on the political activities of his father. The Secretary of State refused his application and his appeal under section 8(3)(b) of the 1993 Act was dismissed. The applicant then indicated that he was making a fresh claim for asylum based on

his own association with the opposition in Nigeria. Rule 346, Statement of Changes in Immigration Rules (1994) (HC 395), which was then current, provided:

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

The Home Office stated in a letter that it was of the view that the representations did not constitute a fresh claim for asylum and had been treated as further information to the original claim. The request for revocation of the deportation order against him was refused on the ground that there had not been any material change in circumstances since the previous refusal decision sufficient to justify revocation. The applicant's solicitors took issue with this letter and submitted a notice of appeal to a special adjudicator under section 8(3)(b) of the 1993 Act. The Secretary of State maintained his position and in a subsequent letter explained that the first letter had not constituted a refusal of asylum but a consideration and dismissal of the further information provided. In the circumstances the Secretary of State had not made a fresh decision and the appeal was invalid. The applicant applied for judicial review.

30. A preliminary question was whether a person may during a single uninterrupted stay in the United Kingdom make more than one claim for asylum within the 1993 Act. The Master of the Rolls, with whom the other members of the court agreed, rejected the submission of the Secretary of State that once a person had made a "claim for asylum", been refused by the Secretary of State and unsuccessfully exercised his rights of appeal, that exhausted his legal rights. The obligation of the United Kingdom under the Refugee Convention not to return a refugee to a county where his life or freedom would be threatened for a Convention reason remained binding until the moment of return. Accordingly, three questions arose for consideration. First, what constitutes a fresh claim? Secondly, how and by whom is it decided whether a claim is a fresh claim or not? Thirdly, what are the procedural consequences of a decision that a claim is or is not a fresh claim?

31. In response to the first question, it was not controversial that there had to be a significant change from the claim as previously presented, such as might reasonably lead a special adjudicator to take a different view.

> "The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on

> which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim." (at pp 783H-784B)

In response to the second question, rule 328 of the Statement of Changes in Immigration Rules made clear that all asylum applications would be determined by the Secretary of State in the first instance. In response to the third question, no particular difficulty arose where the Secretary of State treated the submission as a fresh claim, whether asylum was then granted or refused. In the latter case, the same consequences should follow as on a refusal of an initial claim. A problematic situation arose, however, where, as on the facts of that case, the Secretary of State did not recognise the submission as a fresh claim and, therefore, declined to take or omit to take any action which would trigger a right of appeal. It would clearly be open to the asylum seeker, in those circumstances, to have resort to the court to challenge that decision. However, a question of "considerable difficulty" was whether the court should approach this as a question of precedent fact or whether the decision should be susceptible to challenge only on *Wednesbury* principles. As the answer to the question was not determinative of the appeal, the Master of the Rolls proffered "a tentative answer" in favour of the latter view. (at pp 784D-785D)

32. Following the decision in *Onibiyo*, rule 346 was amended to reflect the judgment in that case. The amended version provided:

> "Where an asylum applicant has previously been refused asylum … the Secretary of State will determine whether any further representations should be treated as a fresh application for asylum. The Secretary of State will treat representations as a fresh application for asylum if the claim advanced in the representations is sufficiently different from the earlier claim that there is a realistic prospect that the conditions set out in para 334 will be satisfied. In considering whether to treat the representations as a fresh claim, the Secretary of State will disregard any material which:
>
> (i) is not significant; or
>
> (ii) is not credible; or

> (iii) was available to the applicant at the time when the previous application was refused or when any appeal was determined." (CM 3365)

33. In *Cakabay v Secretary of State for the Home Department (Nos 2 and 3)* [1999] Imm AR 176, after the appellant's appeals against the refusal of asylum had been dismissed, he had submitted further evidence which the Secretary of State concluded did not constitute a fresh claim. The appellant purported to appeal against this decision. The Secretary of State successfully applied for a declaration that the appellate authorities had no jurisdiction in the matter. The judge, reviewing the decision on *Wednesbury* principles, also concluded that the Secretary of State's decision could not be held to be unreasonable. The Court of Appeal (Peter Gibson, Schiemann and Potter LJJ) upheld the decision. Schiemann LJ explained that the statute made no express provision as to what is to be done in the case of repeated claims for asylum by the same person. Nevertheless, there was a need for categorisation and to distinguish between what he termed "a repetitious claim" and "a fresh claim":

> "In the case of a repetitious claim no more is required to be done: the first decision has ensured that the United Kingdom has complied with its obligations under the Convention. Section 6 of the 1993 Act creates no inhibition on the claimant's removal: the Secretary of State has on the occasion of his decision on the first claim decided the repetitious claim. So far as the decision on the claimant's repetitious application for leave to enter is concerned, the claimant will be told that leave has already been refused and that there is no need for any new decision." (at p 181)

Despite the focus on "repetitious claims", it is clear that the reasoning of Schiemann LJ applies equally to any further submissions that failed to meet the test in rule 346. Similarly, Peter Gibson LJ (at p 193) considered that if the representations amounted to no more than the same claim as that which had already failed, or if the criteria of rule 346 were not met, there would be no claim for asylum within the statute and therefore no appeal would lie under section 8(1) of the 1993 Act against a determination adverse to the asylum seeker that there had been no fresh claim. Consistently with what the Court of Appeal in *Onibiyo* had assumed to be correct, the court went on to hold that no appeal lay under section 8(1) of the 1993 Act from the determination of the Secretary of State that fresh representations do not amount to a claim for asylum. Schiemann LJ accepted that a categorisation decision has potentially severe consequences and that, in such a context, arguments based on the possibilities of abuse should not weigh heavily in matters of construction. Nevertheless, Parliament had not provided for an appeal

on the merits against a categorisation decision (at p 185-186). (See also Peter Gibson LJ at p 194.)

34. In this way the courts imposed a gloss on the operation of the statutory scheme which made no express provision for the handling of second or successive submissions. The effect of these decisions was that it was for the Secretary of State to decide whether further submissions amounted to a fresh claim. Where the Secretary of State had taken a rational decision that further submissions did not amount to a fresh claim for asylum under rule 346 of the Immigration Rules, there was no asylum claim to determine and therefore no need to make any decision to refuse leave to enter. In these circumstances, no right of appeal arose under section 8 of the 1993 Act. A categorisation decision was, however, open to challenge by judicial review.

35. On 7 November 2002 Parliament enacted the 2002 Act, which effectively replaced the 1993 Act. The 2002 Act itself has subsequently been amended on a number of occasions. Part 5 of the 2002 Act concerns immigration and asylum appeals. Section 82 conferred a statutory right of appeal against an "immigration decision" and listed what constituted an immigration decision. The grounds of appeal included in section 84(1)(g) that removal would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights. Section 92 required an appeal to be out of country unless it concerned one of five of the immigration decisions listed in section 82(2) or the individual had made an asylum or human rights claim. Section 94 empowered the Secretary of State to issue a certificate that an asylum or human rights claim was clearly unfounded, in which case an appeal would be limited to an out of country appeal. Section 96 empowered the Secretary of State to issue a certificate relating to an earlier right of appeal in which a matter now relied upon could and should have been raised, in which case an appeal could not be brought at all.

36. In October 2004 rule 353 was introduced (HC 1112).

> "353. When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas."

Rule 353A was inserted by HC 82/2007.

"353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

This paragraph does not apply to submissions made overseas."

37. In *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495; [2007] Imm AR 337 the Court of Appeal (Buxton, Parker and Moore-Bick LJJ) confirmed (per Buxton LJ at paras 8-10) that there is no provision for appeal from a decision of the Secretary of State as to the existence of a fresh claim and, accordingly, the court was engaged only through the medium of judicial review. The Secretary of State's decision as to whether there was a fresh claim was not a fact, nor precedent to any other decision, but was the decision itself. The court could not take that decision out of the hands of the decision maker. The decision remained that of the Secretary of State, subject only to review on a *Wednesbury* basis, albeit applying anxious scrutiny.

38. In *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6; [2009] 1 WLR 348 the House of Lords by a majority extended the applicability of the *Onibiyo* approach. The Secretary of State had rejected the applicant's claims for asylum and protection on human right grounds and certified the claims as clearly unfounded under section 94(2) of the 2002 Act. As a result, the applicant had no in-country right of appeal and he was served with a decision to remove him as an illegal immigrant. He made two further submissions, but the Secretary of State maintained her certification of the claims as clearly unfounded. The House of Lords held by a majority (Lord Hope dissenting) that the Secretary of State had erred in applying section 94(2) of the 2002 Act rather than rule 353 to the further submissions. The words "any appeal relating to that claim is no longer

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

BA (Nigeria)

39. Some nine months after the House of Lords delivered its decision in *ZT (Kosovo)* on 4 February 2009, the Supreme Court delivered its decision in *BA (Nigeria)* on 26 November 2009. Mr Fordham's primary submission is that the *Onibiyo* line of authority did not survive the decision of the Supreme Court in *BA (Nigeria)* and that, accordingly, there is no longer any role for rule 353 of the Immigration Rules. *BA (Nigeria)* concerned two separate cases. BA, who had previously been granted indefinite leave to remain, was served with a decision that he would be deported on his release from prison on licence from a sentence of imprisonment of ten years. He appealed on human rights grounds against that decision and his appeal failed. He was served with a deportation order. BA then made further submissions as to why he should not be deported. The Secretary of State agreed to consider his reasons for seeking revocation of the deportation order but declined to revoke it. Directions were then given for his removal. The other case was that of PE who had entered the United Kingdom clandestinely. His application for asylum was rejected by the Secretary of State. It was decided that directions were to be given for his removal to Cameroon. He did not appeal against that decision. Before it was put into effect, however, he was convicted and sentenced to imprisonment for having a forged passport and using it to obtain work. The Secretary of State decided to make a deportation order against him. PE appealed unsuccessfully against that decision on asylum and human rights grounds. The deportation order was signed and served on him, following which his representatives made written representations for the decision to be reconsidered. In particular, it was claimed that he would be persecuted in Cameroon on account of his homosexuality. The Secretary of State declined to reconsider her decision; in her view the representations did not amount to a fresh claim within rule 353. PE purported to appeal against that decision but the tribunal held that it was not an appealable decision. Both BA and PE applied for judicial review.

40. In each of these cases the refusal of the Secretary of State to revoke the deportation order following further representations was accepted to be an immigration decision within section 82(2)(k). It was common ground, accordingly, that each applicant had a right of appeal under section 82(1). It was also common ground that neither of the claims would have been certifiable under section 94 or

section 96 (although it appears that the Secretary of State took this position solely because, so far as section 94 was concerned, it applied only "where the appellant has made an asylum claim or a human rights claim (or both)"). The issue was whether the right of appeal could be exercised from within the United Kingdom. (See Lord Hope DPSC at para 14.) Section 92(1) precluded an appeal under section 82(1) by a person while he is in the United Kingdom, unless his appeal was of a kind to which section 92 applied. Section 92, by virtue of section 92(4)(a), applied to "an appeal against an immigration decision if the appellant … has made an asylum claim, or a human rights claim, while in the United Kingdom" so that in such a case there would be a right to an in-country appeal. Lord Hope encapsulated the issue (at para 2):

> "The question is whether the expression 'an asylum claim, or a human rights claim', in section 92(4)(a) of the 2002 Act includes any second or subsequent claim that the asylum seeker may make, or only a second or subsequent claim which has been accepted as a 'fresh claim' by the Secretary of State under rule 353 of the Statement of Changes in Immigration Rules (1994) (HC 395)."

41. The Supreme Court (Baroness Hale JSC dissenting) held that it was not open to the Secretary of State to rely on rule 353 and the *Onibiyo* reasoning to deny an in-country right of appeal in those circumstances. As Lord Neuberger MR observed in *ZA (Nigeria)* at para 52, the actual decision in *BA (Nigeria)* was that rule 353 had no further part to play for the purposes of section 92(4)(a) once there was an appeal against an immigration decision. However, the reasoning by which the Supreme Court reached that conclusion is open to different interpretations which were formulated by Lord Neuberger in *ZA (Nigeria)* in the following terms (at para 51).

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

42. In the present appeal, Mr Fordham has sought to persuade us that the broader reading of *BA (Nigeria)* is correct and that the narrower reading favoured by Lord Neuberger in *ZA (Nigeria)* is incorrect. Mr Fordham is able to point to certain passages in the judgment of Lord Hope in *BA (Nigeria)* (with which Lord Scott, Lord Rodger and Lord Brown agreed) which certainly lend support to the view that the new scheme introduced by the 2002 Act has rendered the reasoning in *Onibiyo* and rule 353 redundant. I draw attention, in particular, to the following passages.

(1) Lord Hope (at para 29), referring to section 94(2) and section 96, noted that the new system introduced by Part 5 of the 2002 Act contains a range of powers that enable the Secretary of State or an immigration officer to deal with the problem of repeat claims. It was common ground that the present cases were not certifiable under either of these two sections. Why then, he asked rhetorically, should they be subjected to a further requirement which is not mentioned anywhere in the 2002 Act. He continued:

> "It can only be read into the Act by, as Sedley LJ in the Court of Appeal put it, glossing the meaning of the words 'a … claim' so as to exclude a further claim which has not been held under rule 353 to be a fresh claim … The court had to do this in *Ex p Onibiyo* … But there is no need to do this now. … It is not just that there is no need now to read those words into the statute. As Mr Husain pointed out, the two systems for excluding repeat claims are not compatible." (at paras 29, 30)

(2) At para 31 Lord Hope observed:

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

(3) At para 33 Lord Hope observed:

> "There is no doubt, as I indicated in *ZT (Kosovo) v Secretary of State for the Home Department* …, para 33, that rule 353 was drafted on the assumption that a claimant who made further submissions would be at risk of being removed or required to leave immediately if he does not have a 'fresh claim'. That was indeed the case when this rule was originally drafted, as there was no equivalent of section 92(4) of the 2002 Act. But Mr Husain's analysis has persuaded me that the legislative scheme that Parliament has now put in place does not have that effect. Its carefully interlocking provisions, when read as a whole, set out the complete code for dealing with repeat claims. Rule 353, as presently drafted, has no part to play in the legislative scheme. As an expression of the will of Parliament, it must take priority over the rules formulated by the executive. Rule 353A on the other hand remains in place as necessary protection against premature removal until the further submissions have been considered by the Secretary of State."

43. Similarly, Lord Rodger (at para 37), rejecting the submission that the expression "an asylum claim" in section 92(4)(a) should be given the same meaning as Sir Thomas Bingham MR gave to the expression "a claim for asylum" in section 6 of the 1993 Act, noted that the contexts were significantly different since the 2002 Act contains a new scheme for dealing with abusive claims.

> "Given that new scheme, there is no longer the same need to adopt the former interpretation and, indeed, the one now adopted fits the new context better."

44. Lord Brown (at para 44) explained that he had reached his conclusion only on the basis that:

> "the statutory solution to the problem of abuse created by the making of repeat asylum claims lies not in construing 'an asylum claim' in section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 as the Court of Appeal in *R v Secretary of State for the Home Department, Ex p Onibiyo* … construed 'a claim for asylum' in section 6 of the Asylum and Immigration Appeals Act 1993 but rather in the Secretary of State issuing certificates where appropriate under sections 94 or 96 of the 2002 Act (no equivalent provisions having been available under the 1993 Act)."

45. Nevertheless, there are to my mind major difficulties inherent in this reading of *BA (Nigeria)*. Here I find myself in total agreement with the reasoning of Lord Neuberger on this point in *ZA (Nigeria)* which I gratefully acknowledge.

46. First, in principle there is no conflict between *Onibiyo* and rule 353 on the one hand and the statutory scheme in Part 5 of the 2002 Act on the other. I note that when *Onibiyo* was decided in 1996 there was in force a system of certification under paragraph 5 of Schedule 2 to the 1993 Act which established special appeal procedures for claims without foundation. With respect to Lord Hope, I do not consider that there is any incompatibility between what he described as "the two systems for excluding repeat claims". They operate at different stages of the response to a purported renewed claim. *BA (Nigeria)* establishes that, as the statutory provisions then stood, where the Secretary of State receives further submissions on which he makes an immigration decision within section 82 there will, in the absence of certification, be an in-country right of appeal. It decides that in those circumstances it is not then open to the Secretary of State to rely on the *Onibiyo* reasoning or rule 353 in order to contend that the submissions did not amount to a claim and that, as a result, there is no need for a decision and no entitlement to a statutory appeal. It is entirely understandable that in such a case there is no room for the operation of rule 353. *Onibiyo* and rule 353, by contrast, address a prior issue, namely whether there is a claim which requires a decision at all.

47. Secondly, I do not consider that the effect of the machinery introduced by Part 5 of the 2002 Act, in particular the powers of certification under sections 94 and 96, is to render the *Onibiyo* reasoning and rule 353 redundant. As Lord Neuberger observed in *ZA (Nigeria)* (at para 24), the issue should not be decided simply by seeing whether sections 94 and 96 can be interpreted so as to cover every application falling within rule 353, as it is equally valid to consider whether they can be construed consistently with rule 353 having an independent effect. In my view, rule 353 continues to perform a useful role notwithstanding the machinery introduced by Part 5 of the 2002 Act.

> (1) Section 94 applies to claims which are clearly unfounded, whether they are original claims or purported renewed claims. By contrast, rule 353 applies only to supplemental submissions which purport to be claims.
>
> (2) The effect of certification under section 94 is to limit an appeal to an out of country appeal. Certification under section 96 has the effect that an appeal under section 82(1) may not be brought. The effect of rule 353 is that no right of appeal ever arises.

(3) As indicated above, where it applies rule 353 operates at a prior stage to section 94. In the case of a purported renewed claim there is a legitimate preliminary issue as to whether it constitutes a claim requiring a decision on the merits at all. Rule 353 addresses that issue. Section 94, on the other hand, proceeds on the basis that there is a valid claim which requires consideration on the merits and a decision. It creates a machinery of certification of the claim as clearly unfounded so as to prevent an in-country appeal.

(4) The fact that section 94 applies to both original and purported renewed claims does not deprive rule 353 of its utility in relation to the latter category. In appropriate cases, rule 353 relieves the Secretary of State from taking a decision on the merits of the application and refusing it. It operates by enabling him to reject the submissions as not constituting a claim requiring decision. Section 94, however, comes into play only when the Secretary of State has considered a claim on its merits and refused it. At that stage, certification operates to block a right to an in-country appeal which would otherwise arise.

> "Thus rule 353 can be operated as a sort of gatekeeper by the Secretary of State to prevent further submissions amounting to, or being treated as, a claim, thereby not getting into Part 5 territory at all." (*ZA (Nigeria)* per Lord Neuberger MR at para 26)

With respect to Mr Fordham, it is not the case that this interposing function arose only because of the additional requirement of an "immigration decision" in the pre-2014 statutory list in section 82(1) of the 2002 Act. On the contrary, it is founded on the need to identify what constitutes a claim for this purpose.

(5) Section 96(1) addresses a different aspect of renewed claims from rule 353. Section 96(1) applies where a person seeks to rely on a matter that could have been raised in an earlier appeal against an immigration decision and the Secretary of State or the immigration officer considers that there is no satisfactory reason for the failure to do so. It is, in a sense, the converse of the situation addressed by rule 353.

(6) Part 5 as originally enacted included a subsection 96(3) which provided:

> "(3) A person may not rely on any ground in an appeal under section 82(1) if the Secretary of State or an immigration officer certifies that the ground was considered in another appeal under that section brought by that person."

This provision was much closer to rule 353 than is section 96(1) as both rule 353 and section 96(3) address similar situations. However, section 96(3) did not achieve its effect by denying the existence of a claim requiring a decision on the merits, but by requiring such a renewed claim to be treated as a fresh claim and enabling the Secretary of State to block an appeal on the particular ground which had been raised previously. In any event, section 96(3) is no longer in force, having been repealed by section 30 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 with effect from 1 October 2004.

48. Thirdly, there are features of the regulatory scheme which are difficult to reconcile with an intention on the part of Parliament that provisions in Part 5 of the 2002 Act should provide a comprehensive and exclusive code for dealing with repeat claims and that rule 353 should no longer be effective.

(1) When the 2002 Act was enacted there was no attempt to repeal or amend rule 346, the predecessor to rule 353.

(2) Parliament has approved subsequent amendments to the Immigration Rules which have not included the deletion of rule 353 which remains in force.

(3) Section 53 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") amended section 31A of the Senior Courts Act 1981 to permit transfer from the High Court to the Upper Tribunal of judicial review applications where:

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

As Lord Neuberger observed in *ZA (Nigeria)* (at para 19), here Parliament has plainly legislated on the basis that rule 353 is still in force and section

53 of the 2009 Act would have been positively meaningless if rule 353 had no further function.

(4) Following the amendment of the 2002 Act by the 2014 Act, rule 353 was amended so as to ensure that it applies to human rights claims and protection claims (HC 1025). Once again, this is inconsistent with the suggestion that rule 353 had become ineffective.

These features strongly suggest that rule 353 continues to perform an important function.

49. Fourthly, I am persuaded that the broad reading of *BA (Nigeria)* for which the appellant contends is inconsistent with *ZT (Kosovo)* where the House of Lords held (Lord Hope dissenting) that the Secretary of State had erred in applying section 94(2) of the 2002 Act rather than rule 353 in considering the applicant's further submissions. By contrast, there is no difficulty in reconciling the two decisions if the *ratio decidendi* of *BA (Nigeria)* is merely that rule 353 has no part to play where there is an appealable immigration decision. If the Supreme Court did decide in *BA (Nigeria)* that rule 353 is entirely redundant following the introduction of Part 5 of the 2002 Act, it must have intended to overrule or to depart from the decision of the House of Lords some nine months earlier in *ZT (Kosovo)*. However, *BA (Nigeria)* contains no express statement to that effect. Moreover, while an earlier decision may be impliedly overruled, it is extremely improbable that this was the intention here, for reasons summarised by Lord Neuberger in *ZA (Nigeria)* as follows (at para 53):

> "… I have great difficulty with the notion that the later case relied on by the claimants overruled the earlier case. (i) Both decisions relate to a much litigated issue, and the earlier decision was given less than a year before the later decision; (ii) the point at issue was directly addressed and decided in all five reasoned judgments in the earlier decision, and even the reasoning of the dissenter would have to be treated as overruled; (iii) the earlier decision is expressly referred to three times in the leading judgment, and once in the only other reasoned judgment, in the later decision without apparent disapproval, and both judgments were given by judges involved in the earlier decision; (iv) the actual outcome in the later decision can perfectly easily be reconciled with the earlier decision, namely on the basis that the later decision is limited to further submissions which have been treated as a fresh claim; (v) this more limited interpretation of the later decision is consistent with the Court of Appeal's reasoning

> and conclusion in that case, which was specifically approved by the Supreme Court; (vi) this more limited interpretation of the later decision is also consistent with a recent statute, whereas the wider interpretation, which would involve overruling the earlier decision, is not."

50. For these reasons I agree with the Court of Appeal in *ZA (Nigeria)* that what is said in *BA (Nigeria)* is limited to cases where there is an appealable decision. As Lord Neuberger explained:

> "Once there is such a decision, the complete code contained in the legislative scheme applies and rule 353 has no part to play. However, as decided in *ZT (Kosovo)* … , rule 353 still has 'a part to play': the Secretary of State can decide that the further submissions are not a 'fresh claim', in which case one does not enter the territory governed by the 'complete code' of 'the legislative scheme'." (*ZA (Nigeria)* at para 59)

51. For these reasons, I consider that Mr Fordham's primary case is not made out.

The 2014 amendments to the 2002 Act

52. Part 5 of the 2002 Act was substantially amended by the 2014 Act which restructured rights of appeal. The most relevant provisions as amended are set out at paras 19 to 23 above. Section 82 no longer restricts a right of appeal to an appeal against an "immigration decision" as formerly listed in section 82(2). In particular, there is no longer any right of appeal in respect of a decision to make a deportation order or a refusal to revoke such an order *per se*. Instead a person may appeal where the Secretary of State has decided to refuse a protection claim or a human rights claim made by that person or has decided to revoke that person's protection status.

Post-2014 authority

53. Before drawing conclusions as to the impact of the 2014 amendments to the 2002 Act on the present proceedings, it is convenient to consider the more recent decisions on this point.

54. In *Waqar v Secretary of State for the Home Department* [2015] UKUT 169 (IAC) the appellant contended that the Secretary of State's decision not to treat his further submissions as amounting to a fresh claim for the purposes of rule 353 amounted to a refusal of a human rights claim under section 82 as amended. The appellant maintained that rule 353 is now subsumed within the statutory provisions and that a right of appeal under section 82 as amended arises in all refused human rights claims, subject only to certification under sections 94 or 96. It was submitted that there is no longer a requirement for a categorisation step because the statutory framework now provides all necessary safeguards against repetitious or unmeritorious claims. In rejecting the submission, the Upper Tribunal (UTJ Coker, UTJ Kebede) held (at paras 18, 19, 20) that *BA (Nigeria)* is not authority for the proposition that submissions amount to a claim and that the response to those submissions is a decision within the meaning of Part 5. Submissions that purport to be a human rights claim do not without more trigger a right of appeal. There has to be an intermediate categorisation in which rule 353 provides the mechanism to determine whether they amount to a claim. If they do not, the decision is not a decision to refuse a human rights claim.

55. In *R (MG) v First-tier Tribunal (Immigration and Asylum Chamber)* [2016] UKUT 283 (IAC) the applicant had made a claim for asylum which had been rejected and his appeal had been dismissed. Further submissions on his behalf were rejected by the Secretary of State who maintained the earlier decision that he did not qualify for asylum and concluded that the further representations were not a fresh claim. The applicant lodged a notice of appeal with the First-tier Tribunal which rejected it because no notice of an appealable decision had been issued. On a challenge to that decision by way of judicial review it was submitted, without taking issue with the decision of the Upper Tribunal in *Waqar*, that as a result of Parliament's decision to grant a right of appeal from a refusal of a protection claim the judge in the First-tier Tribunal has jurisdiction to decide whether there had been a decision to refuse a protection claim. The Upper Tribunal (Blake J and UTJ Grubb) rejected the submission.

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

They further held that an assessment of whether a protection claim is a fresh claim is not a question of jurisdictional fact but a matter of assessment and evaluation for the Secretary of State subject to supervision by judicial review. Furthermore, when the Secretary of State concludes that the claim before her is not a fresh claim she does not refuse a protection claim.

56. In *R (Sharif Hussein) v First-Tier Tribunal (para 353: present scope and effect)* IJR [2016] UKUT 409 (IAC); [2017] Imm AR 84 the applicant's appeal against a deportation order had been dismissed. He made further submissions in support of a request to revoke the order which were rejected by the Secretary of State who also concluded that they did not amount to a fresh claim within rule 353. The First-tier Tribunal held that there was no exercisable right of appeal. The issue in the judicial review which followed was to what extent, if at all, the Secretary of State could utilise rule 353 to preclude the applicant from appealing to the First-tier Tribunal under section 82. The applicant, first, relied on the judgment of Lord Hope in *BA (Nigeria)* in support of the proposition that rule 353 had no part to play following the introduction of Part 5 of the 2002 Act. Secondly, he submitted that the effect of the 2014 amendments to the 2002 Act was that rule 353 no longer applied to the categorisation issue as to whether submissions were a "claim" within section 82 and was now relevant only to certification issues. The Upper Tribunal (Dove J and Peter Lane UTJ) rejected both submissions. It was bound by *ZA (Nigeria)* to reject the first submission. With regard to the second submission it considered that despite the changes made by the 2014 Act the concept of a "claim" remained central to the new section 82. It also noted that if Parliament had intended to limit rule 353 to certification decisions, it would have been amended to make that clear. In fact, the amendment to rule 353 made following the 2014 Act to ensure that it applies to human rights claims and protection claims demonstrated that it was intended to have continuing effect.

57. These matters have been considered recently by the Court of Appeal (Arden and Sales LJJ) in *Secretary of State for the Home Department v VM (Jamaica)* [2017] EWCA Civ 225; [2017] Imm AR 1237, a judgment delivered shortly before that of the Court of Appeal in the present case. Sales LJ described the relationship of section 82(1) and rule 353 in the clearest terms (at para 28):

> "Section 82(1) and paragraph 353 of the Immigration Rules operate in combination. If the Secretary of State decides that new representations in relation to some earlier decision (whether of her own or by the tribunal) which is now final and closed do not amount to a fresh claim under paragraph 353 she will simply reject the representations as matters which do not affect the position of the applicant within the regime of immigration law. In that sort of case, on the assessment of the Secretary of State the representations do not amount to a

> 'claim' by the applicant, so her decision is not a decision 'to refuse a human rights claim' (or any other sort of claim) within the scope of section 82(1). No right of appeal arises in relation to her decision that the new representations do not amount to a fresh claim. Such a decision can only be challenged by way of judicial review. On this point I agree with the decision of the UT in *Waqar v Secretary of State for the Home Department (Statutory Appeals/paragraph 353)* [2015] UKUT 169 (IAC) at paras 19-20."

The effect of the 2014 amendments

58. The second principal submission on behalf of the appellant is that the amendments made in 2014 to Part 5 of the 2002 Act have effected a fundamental change in the operation of the statutory scheme with the result that, whatever may have been the position after *BA (Nigeria)*, rule 353 no longer applies and accordingly no longer performs a gatekeeper function.

59. First, on behalf of the appellant, Mr Fordham points to the fact that section 82, as amended, now confers a right of appeal where the Secretary of State has decided to refuse "a human rights claim" (section 82(1)(b)). "Human rights claim" is defined by section 113(1) for the purposes of Part 5 unless a contrary intention appears. Mr Fordham submits that this is striking because the question of the Part 5 meaning of "human rights claim" is the same question that previously arose for decision in the Supreme Court in *BA (Nigeria)* which established that those words, as they appear in Part 5 of the 2002 Act, are to be interpreted without reference to rule 353. Thus, he submits, a second or subsequent human rights claim is a "human rights claim" for the purpose of those statutory provisions regardless of whether the Secretary of State accepts or refuses to accept that the claim is a fresh claim within rule 353. I am unable to accept this submission. In *BA (Nigeria)* the Supreme Court considered that there was, in each of the cases, a "human rights claim" within section 92(4)(a) and, therefore, an appeal would be an in-country right of appeal, subject to the possibility of certification which did not arise in that case. However, the reason there was an entitlement to appeal there was because the human rights claims had resulted, in each case, in a refusal to revoke a deportation order which was a qualifying immigration decision under section 82(2)(k). It was this which excluded the operation of rule 353. Consequently, the present issue is not the same issue that previously arose for consideration in *BA (Nigeria)*. The issue in the present case, as previously explained, is the prior question of whether there is a claim at all. For the same reason, it is not the case that rejection of Mr Fordham's submission results in the same words bearing different meanings in different sections within Part 5 of the 2002 Act.

60. Secondly, Mr Fordham relies on the fact that the 2014 amendments remove the former requirement of an "immigration decision" to which the "human rights claim" and its rejection needed to have a nexus. He submits that the effect of the simplified scheme is that any submission that removal would breach a relevant obligation will amount to a human rights or protection claim, the rejection of which will give rise to a right of appeal. Once again, I am unable to accept this submission. The appellant is not assisted by the fact that under the amended section 82 there is no longer a requirement to establish an "immigration decision" within the list previously set out in section 82(2). In fact, the contrary is the case. A decision to refuse to revoke a deportation order was formerly an "immigration decision" under section 82(2)(k) and therefore gave rise to an in-country right of appeal, subject to the possibility of certification, but this is no longer the case. The 2014 amendments limit immigration appeals to circumstances in which there has been a refusal of a protection claim or a human rights claim, or where protection status has been revoked. (For present purposes I will concentrate on human rights claims.) However, the structure and operation of section 82 remain unchanged. Under the amended section 82(1) a person may appeal to the tribunal where the Secretary of State has decided to refuse a human rights claim made by him, but this does not relieve that person of the burden of establishing that the refusal was in response to a valid claim. The definitions in Part 5 do not address this question and the answer will depend on the application of the *Onibiyo* line of authority. *Onibiyo*, *Cakabay*, *ZA (Nigeria)* and *VM (Jamaica)* establish that there will only be a human rights claim to be determined if further submissions are considered to amount to a fresh claim. Rule 353, in turn, is directed at the manner in which a court should approach that prior question. Under the post-2014 provisions it remains the case that if there is no claim, there is no appealable decision.

61. Thirdly, Mr Fordham makes a series of submissions relating to the intention of Parliament in enacting the 2014 amendments. In his submission, Parliament used straightforward language for the purposes of the section 82 statutory right of appeal. If, he submits, it had been the intention to maintain the structure for which the Secretary of State contends, Parliament would be expected to make that clear, but the contrary is the case. Parliament did not introduce Sir Thomas Bingham's "acid test" into the definition of "asylum claim" in Part 5 of the 2002 Act. Parliament did not provide that "claim" was to be construed in accordance with the Immigration Rules, as it did in the case of "humanitarian protection" in section 82(2)(d) of the 2002 Act introduced by amendment in 2014. It did not say that "claim" involved an act by the Secretary of State, giving the Secretary of State a gatekeeper function as to what constitutes a claim. It did not impose an exclusion by reference to the Immigration Rules in any statutory provision which is in force. Here Mr Fordham draws attention to the fact that section 12 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") has never been brought into force. It provides that "human rights claim" "does not include a claim which, having regard to a former claim, falls to be disregarded for the purposes of this Part in accordance with immigration rules". Parliament did not say that the Part 5

right of appeal is subject to exceptions or limitations specified in the Immigration Rules. Rather section 82(3) states that the right of appeal under subsection (1) "is subject to the exceptions and limitations specified in this Part". Mr Fordham submits that such clarification might have been expected in the light of *BA (Nigeria)*.

62. The difficulty with these submissions is that they fail to take account of the principle of informed interpretation and the judicial authorities on Part 5 as they stood at the date of the 2014 amendments. Parliament is normally presumed to legislate in the knowledge of and having regard to relevant judicial decisions. (See, generally, *Bennion on Statutory Interpretation*, 7th ed, (2017) section 24.6.) In the present context, the Court of Appeal in *ZA (Nigeria)* had provided an authoritative explanation of the effect of *BA (Nigeria)*. As Sir James Eadie put it in his submissions, Parliament can therefore be assumed to have legislated in the light of a consistent line of authority which established that a purported human rights claim that did not meet the threshold of a fresh claim under rule 353 was not a claim at all. Had Parliament intended to depart from this approach, it would surely have made express provision to that effect. On the contrary, there is nothing in the amendments made in 2014 which supports the view that Parliament intended to open the door so as to enable repeated claims raising human rights issues to generate multiple appeals. (See, in this regard, *Hussein* per Dove J and UTJ Lane at para 42.)

63. I should, for the sake of completeness, address two further matters arising from Mr Fordham's submissions in this regard. First, it would not be appropriate to speculate as to why section 12(3) of the 2006 Act has not been brought into force but, in any event, in seeking to ascertain the intention of Parliament the court must have regard to the legislation as enacted. (See *ZA (Nigeria)* per Lord Neuberger MR at para 57.) Secondly, the explanatory notes to the 2006 Act state that the amendments to the definition of "human rights claim" and "asylum claim" in section 113 of the 2002 Act were made to "clarify that further submissions which follow the refusal of an asylum or human rights claim but which do not amount to a fresh claim will not carry a further right of appeal".

Conclusion

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

the Immigration Rules if a decision in response to those representations is to attract a right of appeal under section 82 of the 2002 Act.

65. For these reasons I would dismiss the appeal.

66. Finally, I draw attention to two recent developments. First, in July 2018 Justice published a report on Immigration and Asylum Appeals by a Working Party chaired by Professor Sir Ross Cranston which highlights the pressures facing the current appeals system. Secondly, since the oral hearing on this appeal the Law Commission has published a consultation paper on the Immigration Rules which seeks to identify the underlying causes of their complexity, and to identify principles under which they can be redrafted to make them simpler and more accessible (Law Commission: Simplification of the Immigration Rules; CP 242, 21 January 2019). The Law Commission's initiative is timely and welcome. As will be apparent from this judgment, the structure of both primary and secondary legislation in this field has reached such a degree of complexity that there is an urgent need to make the law and procedure clear and comprehensible.