

## FRESH CLAIMS – JUDICIAL REVIEW IN THE UPPER TRIBUNAL

### **1. Background to the Upper Tribunal’s judicial review jurisdiction**

1. The Tribunals Courts and Enforcement Act 2007 (“the 2007 Act”) established the new tribunal regime with which we are all familiar. As part of this regime, the Upper Tribunal was granted a judicial review jurisdiction, with the power to determine claims for judicial review in specified cases, and a duty to apply the principles and caselaw of the High Court when doing so<sup>1</sup>.
2. Under the Act, as originally enacted, the High Court was required to transfer to the UT those JR claims specified in a direction by the Lord Chief Justice, and was granted a discretion to transfer all other claims for JR except where, *inter alia*, the application challenged an immigration-related decision.<sup>2</sup> The express exclusion of immigration-related decisions from the scope of the Upper Tribunal’s jurisdiction was explained by Baroness Ashton, on behalf of the government, who said at the Committee stage of the Tribunal Courts and Enforcement Bill that immigration judicial reviews were particularly sensitive and the government would want to review the progress of the new jurisdiction in the Upper Tribunal before transferring immigration related judicial reviews to the Upper Tribunal<sup>3</sup>.
3. In 2009, before any such review had taken place, but faced with a large backlog of immigration cases in the Administrative Court, the government changed its mind. Section 53 of the Borders Citizenship and Immigration Act 2009 (“the 2009 Act”), now amends the 2007 Act and the SCA 1981 so as to permit fresh claim immigration cases (alone) to proceed in the UT.

### **2. The scope of the UT’s judicial review jurisdiction**

#### **a. Legislative framework<sup>4</sup>**

4. The UT’s judicial review jurisdiction in immigration-related matters is limited by:
  - a. ss. 18 and 19 of the 2007 Act;

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<sup>1</sup> See section 15 of the 2007 Act

<sup>2</sup> See the original version of s.19 of the 2007 Act.

<sup>3</sup> Lords Hansard, Grand Committee, 13 December 2006;  
<http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61213-gc0004.htm>

<sup>4</sup> Materials include: Tribunals, Courts and Enforcement Act 2007; s.31 and 31A Senior Courts Act 1981; Direction of the Lord Chief Justice under s.18(6) of the Tribunals, Courts and Enforcement Act 2007

- b. s.31A Senior Courts Act 1981; and
  - c. the Direction of the Lord Chief Justice under 18(6) of the Tribunals, Courts and Enforcement Act 2007 (“the Transfer Direction”).
5. Section 18 of the 2007 Act specifies the classes of case that must be determined by the UT if an application for judicial review is made to the UT. It provides:

***“18 Limits of jurisdiction under section 15(1)***

*(1) This section applies where an application made to the Upper Tribunal seeks (whether or not alone)-*

*(a) relief under section 15(1), or*

*(b) permission (or, in a case arising under the law of Northern Ireland, leave) to apply for relief under section 15(1).*

*(2) If Conditions 1 to 4 are met, the tribunal has the function of deciding the application.*

*(3) If the tribunal does not have the function of deciding the application, it must by order transfer the application to the High Court.*

*(4) Condition 1 is that the application does not seek anything other than–*

*(a) relief under section 15(1);*

*(b) permission (or, in a case arising under the law of Northern Ireland, leave) to apply for relief under section 15(1);*

*(c) an award under section 16(6);*

*(d) interest;*

*(e) costs.*

*(5) Condition 2 is that the application does not call into question anything done by the Crown Court.*

*(6) Condition 3 is that the application falls within a class specified for the purposes of this subsection in a direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 (c. 4).*

*(7) The power to give directions under subsection (6) includes–*

*(a) power to vary or revoke directions made in exercise of the power, and*

*(b) power to make different provision for different purposes.*

*(8) Condition 4 is that the judge presiding at the hearing of the application is either–*

*(a) a judge of the High Court or the Court of Appeal in England and Wales or Northern Ireland, or a judge of the Court of Session, or*

*(b) such other persons as may be agreed from time to time between the Lord Chief Justice, the Lord President, or the Lord Chief Justice of Northern Ireland, as the case may be, and the Senior President of Tribunals.”*

6. Section 31A of the Senior Courts Act 1981 specifies the classes of cases that may or must be transferred to the UT from the High Court where an application for judicial review is made to the High Court. It provides:

**31A Transfer of judicial review applications to Upper Tribunal**

*(1) This section applies where an application is made to the High Court—*

- (a) for judicial review, or*
- (b) for permission to apply for judicial review.*

*(2) If Conditions 1, 2, 3 and 4 are met, the High Court must by order transfer the application to the Upper Tribunal.*

*(2A) If Conditions 1, 2, 3 and 5 are met, but Condition 4 is not, the High Court must by order transfer the application to the Upper Tribunal.*

*(3) If Conditions 1, 2 and 4 are met, but Condition 3 is not, the High Court may by order transfer the application to the Upper Tribunal if it appears to the High Court to be just and convenient to do so.*

*(4) Condition 1 is that the application does not seek anything other than—*

- (a) relief under section 31(1)(a) and (b);*
- (b) permission to apply for relief under section 31(1)(a) and (b);*
- (c) an award under section 31(4);*
- (d) interest;*
- (e) costs.*

*(5) Condition 2 is that the application does not call into question anything done by the Crown Court.*

*(6) Condition 3 is that the application falls within a class specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007.*

*(7) Condition 4 is that the application does not call into question any decision made under—*

- (a) the Immigration Acts,*
- (b) the British Nationality Act 1981 (c. 61),*
- (c) any instrument having effect under an enactment within paragraph (a) or (b), or*
- (d) any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship.*

*(8) Condition 5 is that 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 within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered (whether or not it calls into question any other decision).”*

7. Section 19(4) of the 2007 Act provides that where an application for permission has been transferred to the UT under s.31A of the Senior Courts Act 1981, and the UT grants permission, “the Tribunal has the function of deciding any subsequent application brought under the permission or leave, even if the subsequent application does not fall within a class specified under section 18(6).”
8. In October 2011, under s.18(6) of the Tribunals Courts and Enforcement Act 2007, and in accordance with Part 1 of Schedule 2 of the Constitutional Reform Act 2005, the Lord Chief Justice made the Transfer Direction, which specified the following class of case (“fresh claim judicial reviews”, “FCJRs”):

*“applications calling into question a decision of the Secretary of State not to treat submission as an asylum claim or a human rights claim within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered.”*
9. The Transfer Direction continues:

*“An application also falls within the class specified in paragraph 1 if, in addition to calling into question a decision of the sort there described, it challenges*

  - (i) A decision or decisions to remove (or direct the removal of) the applicant from the United Kingdom; or*
  - (ii) A failure or failures by the Secretary of State to make a decision on submissions said to support an asylum or human rights claim;*

*Or both (i) and (ii); but not if it challenges any other decision”*
10. The Transfer Direction has the effect of satisfying condition 3 for the purposes of s.18(6) of the 2007 Act and s.31A(6) of the SCA 1981.

*b. What does it mean?*

11. The upshot of the 2007 Act, s.31 of the SCA 1981, and the Transfer Direction is as follows:
  - a. All FCJRs submitted to the UT must be determined by the UT, unless:
    - i. the JR also challenges another decision which is not a decision to remove or direct the removal of the applicant from the UK and is not a failure to make a decision on submissions said to support an asylum or human rights claim;
    - ii. the JR seeks a declaration of incompatibility under s.4 Human Rights Act 1998.

- b. All FCJRs submitted to the High Court must be transferred to the UT, unless:
  - i. the JR also challenges another decision which is not a decision to remove or direct the removal of the applicant from the UK and is not a failure to make a decision on submissions said to support an asylum or human rights claim;
  - ii. the JR seeks a declaration of incompatibility under s.4 Human Rights Act 1998.
  
- c. Age Dispute claims may be transferred to the UT, but need not be, as they are not specified in an order under s.18(6) of the 2007 Act or in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005. Nonetheless, in ***R (Z) v Croydon LBC*** [2011] EWCA Civ 59, the Court of Appeal gave a strong indication that transfer would ordinarily be appropriate in an age dispute case<sup>5</sup>.

12. There remains scope for argument in relation to a number of aspects of the legislative framework and Transfer Direction, for example:

- a. Is the High Court, or the UT, entitled to split a claim that includes together with the FCJR a challenge to another decision which is not a removal decision so that the FCJR is heard in the UT, while the other elements of the claim are heard in the High Court? On the face of the Transfer Direction, this does not appear possible, but what if the Court were persuaded that the additional element in the claim was included cynically to ensure that the claim was heard in the High Court rather than the UT? Similarly, how would the UT deal with a cynical application for a declaration of incompatibility? Might it use its strike out powers under rule 8(2)(a) or (b) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (“The UT Rules”)?

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<sup>5</sup> The Court said: “The Administrative Court does not habitually decide questions of fact on contested evidence and is not generally equipped to do so. Oral evidence is not normally a feature of judicial review proceedings or statutory appeals. We would therefore draw attention to the power which there now is to transfer age assessment cases where permission is given for the factual determination of the claimant's age to the Upper Tribunal under section 31A(3) of the Senior Courts Act 1981 , as inserted by section 19 of the Tribunals, Courts and Enforcement Act 2007 . The Upper Tribunal has a sufficient judicial review jurisdiction for this purpose under section 15 of the 2007 Act and by article 11(c)(ii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655). Transfer to the Upper Tribunal is appropriate because the judges there have experience of assessing the ages of children from abroad in the context of disputed asylum claims. If an age assessment judicial review claim is started in the Administrative Court, the Administrative Court will normally decide whether permission should be granted before considering whether to transfer the claim to the Upper Tribunal. The matter could be transferred for permission also to be considered, but the Administrative Court should not give directions for the future conduct of the case after transfer, and in particular should not direct a rolled-up hearing in the Upper Tribunal.”

- b. Secondly, what is the precise meaning of s.19(4) of the 2007 Act? It appears to enable the UT, once permission is granted for judicial review, to exercise the full jurisdiction of the High Court in relation to that claim. But it clearly does not authorise the UT to entertain post-permission “applications” that in reality amount to new claims (ie. it does not allow a challenge to detention to be made post permission on a FCJR): see s.16 of the 2007 Act and rule 33A of the UT Rules. Accordingly, there may be some argument over what amounts to an “application brought under the permission or leave”.

### **3. Procedure**<sup>6</sup>

#### *a. Issue of claim*

13. Claims which fall within the scope of the UT’s jurisdiction should be made to the Upper Tribunal rather than relying on transfer from the High Court. It is not clear that any sanction will apply if a claim is wrongly started in the Administrative Court, but such sanction is possible (under rule 10(3)(d) of the UT Rules?). In any case, it is advisable to do so in order to avoid unnecessary delay and to comply with the guidance.
14. The Practice Direction for Fresh Claim Judicial Reviews in the Immigration and Asylum Chamber of the Upper Tribunal (“Fresh Claim PD”) states that an application must be made using the designated form, currently a form T480.<sup>7</sup> That form is the equivalent of an N461 in the Administrative Court and contains largely the same information. The address for service of the claim form and accompanying documents is: Upper Tribunal, Immigration and Asylum Chamber, Room C315, Royal Courts of Justice, Strand, London WC2A 2LL. That is the same address as the Administrative Court Office, as the ACO remains responsible for administering and listing the UT’s judicial review caseload.
15. The claim form should be accompanied by any written evidence on which it is intended to rely, copies of any relevant statutory material and a list of essential documents for advance

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<sup>6</sup> Materials include: Tribunal Procedure (Upper Tribunal) Rules 2008; Practice Direction: Fresh Claim Judicial Review in the Immigration and Asylum Chamber of the Upper Tribunal; Practice Direction: Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal; The Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011

<sup>7</sup> Paragraph 3

reading by the Tribunal. Two copies of a paginated and indexed bundle containing all the documents should be filed with the Tribunal.<sup>8</sup>

16. Where the application contains a challenge to a decision to set removal directions, rule 28A(2)(b) of the UT Rules, and Part 5 of the Fresh Claims PD apply, and additional material must be submitted with the claim on Form T485.

b. Time limits

17. Rule 28(2) of the UT Rules provides:

*“(2) Subject to paragraph (3), an application under paragraph (1) must be made promptly and, unless any other enactment specifies a shorter time limit, must be sent or delivered to the Upper Tribunal so that it is received no later than 3 months after the date of the decision, action or omission to which the application relates.”*

18. Accordingly, the time limits are the same as those imposed in the High Court by CPR 54.5. It is important to note that the time limit should not be thought of simply as three months. Promptness may require swifter action and the Administrative Court has recently made clear that even in the immigration context where the consequences of decisions may be severe, a claim may need to be issued well in advance of the three month period in order to be prompt: see **R (Khan) v Upper Tribunal** [2011] EWHC 2763 (Admin).

c. Fees

19. As in the Administrative Court, fees are liable to be charged on an application for permission in a FCJR, if permission is granted, and if any further applications are made during the claim. The levels of fee are in accordance with the Administrative Court and are set out in Schedule 1 to The Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011. The UT must not accept an application for permission to bring fresh claim proceedings unless it is accompanied by the required fee, or an undertaking is given to pay the fee (so in urgent cases, an undertaking will be acceptable). Fees are not payable if, *inter alia*, the Claimant is in receipt of certain benefits, or if his or her income falls below a specified threshold. Failure to pay the required fee after the grant of permission will lead to the automatic striking out of the claim<sup>9</sup>.

d. Urgent applications and interim relief

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<sup>8</sup> Fresh Claim PD paras 4-5

<sup>9</sup> Rule 8(1)(b)

20. In FCLRs, the most common urgent application will be for an injunction restraining removal pending resolution of the JR claim. There is no doubt that the UT has the power to order such an injunction and it has the same effect as if ordered by the High Court (see s.15 of the 2007 Act).

21. Urgent applications must be made on Form T483. The Fresh Claim PD sets out the procedure as follows:

**11. Request for Urgent Consideration**

*11.1 Where it is intended to request the Tribunal to deal urgently with the application or where an interim injunction is sought, the applicant must serve with the application a written "Request for Urgent Consideration", in the form displayed on the Upper Tribunal's website at the time the application is made, which states:*

*(a) the need for urgency;*

*(b) the timescale sought for the consideration of the application (eg. within 72 hours or sooner if necessary); and*

*(c) the date by which the substantive hearing should take place.*

*11.2 Where an interim injunction is sought, the applicant must, in addition, provide:*

*(a) the draft order; and*

*(b) the grounds for the injunction.*

**12. Notifying the other parties**

*12.1 The applicant must serve (by fax and post) the application form and the Request for Urgent Consideration on the respondent and interested parties, advising them of the application and that they may make representations.*

*12.2 Where an interim injunction is sought, the applicant must serve (by fax and post) the draft order and grounds for the injunction on the respondent and interested parties, advising them of the application and that they may make representations.*

**13. Consideration by Tribunal**

*13.1 The Tribunal will consider the application within the time requested and may make such order as it considers appropriate.*

*13.2 If the Tribunal specifies that a hearing shall take place within a specified time, the representatives of the parties must liaise with the Tribunal and each other to fix a hearing of the application within that time.*

22. The UT has indicated that it has an urgent "duty judge" to consider urgent applications.

Although the Fresh Claim PD confidently states that "The Tribunal will consider the application within the time requested", it may be advisable, in extremely urgent cases, to check with the Administrative Court Office that the UT will be able to deal with the claim in the time required, and if not, whether there is a High Court judge who can deal with the claim.

e. Bail

23. An UT judge considering a JR permission application has the power to grant bail. On a judicial review application in the High Court, it is not uncommon for a Claimant to seek bail from the High Court judge. The High Court has an inherent jurisdiction to grant bail. By contrast, as the UT is limited by statute, it has no such jurisdiction.
24. However, UT judges have jurisdiction to grant bail “by reason of being a First Tier Judge”<sup>10</sup>. FTT judges have jurisdiction to grant bail by virtue of Schedule 2 to the Immigration Act 1971. Schedule 2 bail powers are exercisable by a FTT judge, *inter alia*, pending removal after the setting of removal directions<sup>11</sup>. Accordingly, bail applications can be made alongside applications for permission for judicial review.
25. It remains to be seen but it may be that the UT will be more willing to consider a grant of bail in cases where it also grants permission to apply for judicial review in a fresh claim, bearing in mind that it is used to ruling on bail in the context of statutory appeals and that the argument that a separate application should be made to the FTT is less compelling when made to the UT instead of a High Court judge. See in this regard para 13.4 of the UT Practice Directions.

f. Costs

26. By rule 10(3)(a) of the UT Rules, the UT may make an order for costs in a judicial review claim. It is not clear that the same principles apply as they would in the High Court. Section 15 of 2007 Act (which requires the UT to take into account the principles and caselaw of the High Court) does not apply to the UT’s discretion to award costs. Accordingly, it is arguable that representatives are not bound to make submissions in accordance with the caselaw of the High Court. However, it seems unlikely that the UT will develop its own jurisprudence on costs.
27. Notable is the requirement in rule 10(5) that an application for costs must be made in writing. It is probably sufficient to record in the grounds of claim that an award of costs is sought.

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<sup>10</sup> Paragraph 13 of Practice Direction: Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal

<sup>11</sup> Paragraph 34 and 22 of Schedule 2 to the Immigration Act 1971

28. It is likely to be in the interests of claimants to argue that the approach to costs currently adopted in the Administrative Court should apply also in the UT (whether on FCJRs or in age assessment cases). There are two aspects of that practice worthy of note here.
29. *First*, there is the approach to costs of oral permission hearings as laid down in *R (Mount Cook Land Ltd) v Westminster City Council* [2004] 1 PLR 29, by which Claimants who find that permission is refused are generally required to pay (the relatively small) costs of the Acknowledgement of Service, but generally not required, subject to exceptional circumstances, to pay the likely more extensive costs of the oral permission hearings. This provides claimants with a measure of protection against heavy costs orders at the permission stage albeit for those who are legally aided this protection will be unnecessary.
30. *Second*, and likely to be of considerable importance to Claimant lawyers, it is to be hoped that the recent successes in *R (Bahta) v SSHD* [2011] EWCA Civ 895 and, very recently, *R (M) v London Borough of Croydon* [2012] EWCA Civ 595, in relation to costs where claims are conceded without a hearing, will carry over into the UT's approach. This will mean, contrary to the old practice laid down in *R (Boxall) v Waltham Forest LBC* (2001) 4 CCL Rep 258, that a claimant should generally be entitled to costs if the relief sought in the claim is conceded, whether pre- or post- permission. In *Bahta*, Pill LJ explained the approach as follows:
- 65. When relief is granted, the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party and that the burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol. I regard that approach as consistent with the recommendation in paragraph 4.13 of the Jackson Report.*
31. This is re-affirmed by Lord Neuberger MR in *M v Croydon*:
- 60. Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.*
- 61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that*

*is one of the main points of the pre-action protocols. Ultimately, it seems to me that Bahta was decided on this basis.*

32. See now also *AL (Albania) v SSHD* [2012] EWCA Civ 710, the Times 22 August 2012. The approach may be less generous where it is less clear that the concession corresponds to the relief sought in the claim (see paragraphs 62-63). However, the carry over of the *Bahta* and *M* approach cannot, perhaps, be assumed, given that CPR 44.3(2) does not seem to have an analogue in the UT rules.

*g. Renewal and Appeal rights*

33. Where an application for permission is refused on the papers, an application to renew must be made so that it is received within 9 days of the Tribunal's decision (in the case of a FCJR), and within 14 days of the Tribunal's decision (in the case of an age dispute JR)<sup>12</sup>. The rationale between these different time limits is unclear.

34. Where permission is once again refused at an oral hearing, the procedure for appeal is unnecessarily complex. From the Administrative Court, the procedure for appealing a refusal of permission to the Court of Appeal is set out in CPR52.15 which provides:

*“(1) Where permission to apply for judicial review has been refused at a hearing in the High Court, the person seeking that permission may apply to the Court of Appeal for permission to appeal.*

*(2) An application in accordance with paragraph (1) must be made within 7 days of the decision of the High Court to refuse to give permission to apply for judicial review.*

*(3) On an application under paragraph (1), the Court of Appeal may, instead of giving permission to appeal, give permission to apply for judicial review.*

*(4) Where the Court of Appeal gives permission to apply for judicial review in accordance with paragraph (3), the case will proceed in the High Court unless the Court of Appeal orders otherwise.”*

35. The Court of Appeal has now confirmed (as was common ground between the parties) that this rule as it stands does not cover appeals from decisions of the Upper Tribunal: *R (NB (Algeria)) v SSHD* [2012] EWCA Civ 1050. The court did express the hope that that would be reformed. In the meantime, section 13(5) of the 2007 Act and rule 44 of the UT Rules combine to require a *written* application for permission to appeal to be made to the UT, *before* any application can be made to the Court of Appeal. This is inconvenient for both parties. From the point of view of the applicant, it slows the process and prevents access to

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<sup>12</sup> Paragraph 30 of the UT Rules

interim relief pending a decision of the UT which may take months. From the point of view of the SSHD, this in turn may delay removal. In *NB(Algeria)*, the Court of Appeal recognised that it had an inherent jurisdiction to grant interim relief even where the lack of a decision on permission to appeal from the UT meant that it had no jurisdiction to entertain an appeal. It further held that in the ordinary case, it would be right for it to do so without entering into the merits. This approach reflected in part that it lies in the power of the SSHD, but not claimants, to ensure that the rules are changed to avoid the current problem.

36. Where a Claimant is granted permission for judicial review, but loses the claim after a substantive hearing, the provisions in rule 44 of the UT apply and an application for permission to appeal must be made first to the UT. In theory this throws up similar problems but in practice they will not arise, since the SSHD's practice in such cases is not to progress removal until such time as the Court of Appeal has decided the question of permission to appeal.

*h. Rolled-up hearings?*

37. It seems that there is no provision for a rolled-up hearing in the UT, but the UT's case management powers, set out in rule 5 of the UT Rules, are likely to be sufficient to confer power to order a rolled up hearing, provided that permission is considered by the UT first, in order to comply with s.16 of the 2007 Act.

**4. Substantive law and the role of the court in an FCJR**

38. Rule 353 of the Immigration Rules will be familiar to the court:

*353. When a human rights or asylum 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.*

39. For many years the lead authority was *WM (DRC) v SSHD* [2006] EWCA Civ 1495, which establishes the following propositions:

- (i) The fresh claim rule establishes a “somewhat modest test”, a low threshold in relation to which the only issue is whether, in light of material not previously considered, the new representations are *capable* of succeeding. Provided that on a possible view of the law and the facts as a whole, the claim might succeed, the fresh claim criteria will be met, and the applicant entitled to, at the very least, an appeal to the FTT and a stay on removal pending that appeal.
- (ii) Once the Defendant has made a decision on the fresh claim, the court’s function is to review that decision on public law grounds. Unlike in certification cases, the court does not stand in the shoes of the decision maker but
- (iii) The court’s “anxious scrutiny” in the context of human rights and asylum claims means that the intensity of its review will be such that it will only “rarely” produce a different result than would be achieved than that which would be arrived at where the court itself took the decision (see especially paragraph 18).

40. This last point is important. It is more fully explained by Buxton LJ in *WM (DRC)* as follows:

*18 Third, it is with deference too simple to assume, as did this court in Razgar and Tozhlukaya , that the approach in those cases will necessarily lead to the same answer as a review informed by the need for anxious scrutiny. In view of the demands of the latter there may not be many cases where a different result is achieved, but in borderline cases, particularly where there is doubt about the underlying facts, it would be entirely possible for a court to think that the case was arguable (the formulation used in Razgar), but accept nonetheless that it was open to the Secretary of State, having asked himself the right question and applied anxious scrutiny to that question, to think otherwise; or at least that the Secretary of State would not be irrational if he then thought otherwise*

41. So the intensity of the court’s scrutiny is such that it will only be in borderline cases that the court will itself consider that the fresh claim has a real prospect of success, but nevertheless that the Defendant was entitled to reach a different view.

42. Following *WM (DRC)*, an issue about the approach taken to fresh claims went to the House of Lords in *R (ZT (Kosovo)) v SSHD* [2009] 1 WLR 348. That in turn prompted an argument that *WM (DRC)* was no longer good law, because the House had considered that the court stood in the shoes of the decision maker, and that has indeed been established to be the proper approach in judicial reviews of clearly unfounded certificates under section 94 of the Nationality, Immigration and Asylum Act 2002 (see *R (YH (Iraq)) v SSHD* [2010] 4 All ER 448). For fresh claims, the argument was later rejected in *R (MN) Tanzania v SSHD* [2011] 1 WLR 3200. But this must not be allowed to obscure the role of anxious scrutiny, and that this

means that in practice there is only the slenderest difference, in this context, between review and the court taking the decision for itself. In *ZT*, all five Law Lords agreed that the proper approach was public law review plus anxious scrutiny (see Lord Phillips at §21, Lord Hope at §§50-55, Lord Carswell at §65, Lord Brown at §72 and §75, and Lord Neuberger at §§82-83). However, two of them, Lord Phillips and Lord Brown, considered that there was no difference between that and the court making the decision for itself, because in practice the question of whether a claim did or did not have a real prospect of success was a wholly objective one as to which only one answer would be possible. The remaining three thought that there could be very rare cases in which a different outcome might be achieved, but that in the vast majority of cases the issue was a purely objective one which required the court simply to consider whether the case would succeed for itself. Thus, per Lord Neuberger:

*83 However, for the reasons given by Lord Phillips, it seems to me that, where there are no issues of primary fact, application of this test will, at least normally, admit of only one answer, and a challenge to the Secretary of State's decision will normally stand or fall on establishing irrationality. Accordingly, I agree that, if, in a case where the primary facts are not in dispute, the court concludes that a claim is not "clearly unfounded" or (which is, of course, the same thing) that a claim has some "realistic prospect of success", it is hard to think of any circumstances where it would not quash the Secretary of State's decision to the contrary. However, I would again be reluctant to suggest that there is a hard and fast rule to that effect.*

43. *MN (Tanzania)* does not discuss the importance of anxious scrutiny at great length, but nothing in that judgment, which simply affirms existing authority that the process is *formally* one of judicial review, does, or could, undermine these earlier authorities as to the role of anxious scrutiny and the largely objective nature of the question of whether a fresh claim has a real prospect of success.
44. It may be noted that in *MN (Tanzania)*, Maurice Kay LJ, whilst reaffirming that the approach in fresh claim cases was public law review, noted the contrast with "clearly unfounded" certificates, and observed that "I would also consider an assimilation of the tests to be justifiable but, on the authorities", not possible.
45. The role of the specialist Upper Tribunal *MN (Tanzania)* is conclusive, at any level below the Supreme Court, of the question of whether, in fresh claim cases, the court's approach is one of primary decision maker or public law review, but this conclusion tends to obscure a somewhat different issue, namely, "what does public law review, in this context, with heightened "anxious scrutiny", actually *mean*?". In *ZT (Kosovo)*, all judges thought that the

correct approach was indeed public law review, but two of them (Lords Phillips and Brown) thought that this was indistinguishable from the court itself being decision maker, and one of them (Lord Neuberger) thought that this was at best only barely distinguishable.

46. Furthermore, the transfer of fresh claim judicial reviews to the Upper Tribunal means that a fresh look at this scrutiny issue is needed. Writing in 2009, the Senior President of Tribunals, Carnwath LJ (now Lord Carnwath), wrote of the importance and benefits of “specialist” judges of the new tribunal system, and in particular the important functions that would be transferred to them in judicial review cases (“Tribunal Justice: A new start” [2009] Public Law 48). Having referred to recent *dicta* on the value of specialist judges, he went on, specifically in the context of judicial review in the Upper Tribunal:

*With that encouragement at the highest level, it is possible to consider how the Upper Tribunal might develop a role which goes beyond the traditional limits of judicial review, as practised by the courts. Even if the jurisdiction of the Upper Tribunal is limited to appeals on points of law, there is scope for it to develop a more extensive supervisory role, which may cross the traditional boundaries between law and fact as understood in the courts. ...*

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<sup>13</sup> This talks is substantially based upon a talk I gave jointly with Toby Fisher, also of Landmark Chambers, for ILPA in May 2012.