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Introduction

1. For many, 2020 is a year they would prefer be a closed matter, never to be re-opened again. In this spirit, two Court of Appeal cases this year have considered the law of *res judicata* in the public law context. This article covers key case law on the doctrine more generally, its introduction into the public law sphere, and culminates with a discussion of two key cases: *Abidoye v Secretary of State for the Home Department*[1] and *Hillside Parks Ltd v Snowdonia NPA*.[2] It adopts the following structure:

   (1) The general principles of *res judicata*
   (2) *Res judicata* in private law
   (3) *Res judicata* in public law
   (4) Key cases in 2020

The general principles of *res judicata*

2. The general principles of *res judicata* were summarised by Lord Sumption JSC in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited*,[3] in which he stated:

> Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.
>
> The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.
>
> Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336.

[1][2020] EWCA Civ 1425.
[2][2020] EWCA Civ 1440.
[3][2013] UKSC 46, [2014] AC 160.

> Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982.
>
> Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State Tr 355 . "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197–98.
>
> Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.
>
> Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.[4]

3. This article focuses, in particular, on two of Lord Sumption's identified principles: the fourth, which is the doctrine of "issue estoppel", and the fifth, which is the rule in *Henderson v Henderson*. The procedural rule against abusive proceedings applies to both of these.

Res judicata in private law

4. The starting point is Wigram V-C's statement of principle in *Henderson v Henderson*[5] in which it was said that:

> the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time … [6]

5. It has always been clear from the rule's inception that it was never an absolute rule and special circumstances could absolve a party from the consequences of its operation.

[4]ibid [17].
[5]67 ER 313.
[6]ibid 319.

Wigram V-C's rule is the most common form of *res judicata* to come before the English courts.

6. Prior to *Virgin Atlantic*, there was some debate as to whether the rule in *Henderson v Henderson* was separate from or a subset of the principle of *res judicata* and how it all interacted with abuse of process. In *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*,[7] Lord Kilbrandon, giving the decision of the Privy Council, distinguished between *res judicata* and abuse of process:

> The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMullin J that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no 969, any formal repudiation of the pleas raised by the appellant in no 534. Nor was Choi Kee, a party to no 534, a party to no 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.[8]

7. The narrower sense is a reference to "issue estoppel". However, this statement is authority for the "wider sense" of *res judicata* as incorporating the rule in *Henderson v Henderson* as part of the law of abuse of process.

8. The rule was fully considered again by the House of Lords in *Arnold v National Westminster Bank plc*,[9] which was an issue estoppel case. Lord Keith of Kinkel first distinguished between cause of action estoppel and issue estoppel:

> Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened … [10]

> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue.[11]

9. However, this was not the critical distinction in the *Arnold* case. Instead the critical distinction was "between a case where the relevant point had been considered and decided in the earlier occasion and a case where it has not been considered and decided but arguably should have been".[12] *Arnold* was not a case where the relevant

[7][1975] AC 581.
[8]ibid 589–90.
[9][1991] 2 AC 93.
[10]ibid 104D–E.
[11]ibid 105D–E.

party had failed to bring his whole case forward at first instance. Rather, he now wished to raise again a point which he had already argued and had been decided against him. As such, the rule in *Henderson v Henderson* was not engaged.

10. Instead this was a case about whether the flexibility in the doctrine of *res judicata*, as described at paragraph 5 above, also applied to the situation where the relevant point had already been considered but where there was a material change in circumstances. Lord Keith of Kinkel, with whom the rest of the committee agreed, determined that it did.

11. He stated that cause of action estoppel was "*absolute in relation to all points decided unless fraud or collusion is alleged*".[13] However, where an issue had not been decided in the earlier litigation, the rule in *Henderson v Henderson* meant that it was possible

> that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action.[14]

12. In cases where there had been an earlier determination of the relevant point, the extent of flexibility in relation to the scope of the rule differed between cause of action estoppel and issue estoppel:

> there is room for the view that the underlying principles on which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different.[15]

13. The substance of the difference was that in cause of action estoppel it was only possible to challenge the earlier decision as to whether the cause of action existed or not by introducing a new point which could not reasonably have been taken during the earlier proceedings; however, in issue estoppel, the party was permitted to go much further. In addition to what was possible under cause of action estoppel, it could also reargue in materially different circumstances, an old point, which had previously been decided against it. He described the latter exception as follows:

> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result.[16]

[12] *Virgin Atlantic* (n 3) [20].
[13] *Arnold* (n 9) 104D–E.
[14] ibid 105B.
[15] ibid 108G–H.
[16] ibid 109.

14. The effect of *Arnold* was that, avoiding the sting of issue estoppel was possible where a party could show materially altered circumstances such that an inflexible application of the principle would cause injustice. In that case, a subsequent development in the law had been sufficient.

15. Lord Sumption rejected the attempt by counsel in *Virgin Atlantic* to recategorise the rule in *Henderson v Henderson* as merely concerned with abuse of process and to take it out of the domain of *res judicata*, explaining that it

> has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before.[17]

16. In forming that conclusion, Lord Sumption looked back to the way the point had been taken in a number of earlier decisions, starting with *Johnson v Gore-Wood & Co*.[18] In that case, Lord Bingham made clear:

> *Henderson v Henderson* abuse of process … although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them.[19]

17. Lord Bingham went on to state:

> *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.[20]

18. With the exception of Lord Millett, the remainder of the committee agreed with Lord Bingham's speech on this issue. Lord Millett agreed in substance in a concurring

[17](n 3) [24].
[18][2002] 2 AC 1.
[19]ibid 30.
[20]ibid 31.

speech but provided additional analysis on the relationship between *res judicata* and the rule in *Henderson v Henderson*. He saw the critical distinction as a matter of human rights:

> It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression.[21]

19. In his view, this distinction explains the court's different approach to cause of action/issue estoppel and the rule in *Henderson v Henderson*. He referred to other decisions which have "doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it".[22] One such decision was *Barrow v Bankside Members Agency Limited*,[23] in which Sir Thomas Bingham explained the idea behind the rule as follows:

> The rule in *Henderson v Henderson* … requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the courts so that all aspects of it may be finally decided … once and for all. In the absence of special circumstances the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise. *The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel.* It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed. [emphasis added][24]

20. In Lord Millett's final determination, even though the rule is concerned with cases where the court has not decided the matter, rather than those where the court has (as with cause of action estoppel and issue estoppel), those

> various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.[25]

[21]ibid 59.
[22]ibid 58.
[23][1996] 1 WLR 257.
[24]ibid 260.
[25]*Johnson* (n 18) 59.

21. Lord Sumption's final view in *Virgin Atlantic* was that there is nothing in the speeches of either Lord Bingham or Lord Millett that suggests because the rule in *Henderson v Henderson* is concerned with abuse of process, it cannot also be part of the law of *res judicata*. He further repeated the point that

> Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.[26]

22. More recently, Pepperal J considered the rule again in the private law context in *Mansing Moorjani v Durban Estates Limited*[27] and described the approach to be taken to determining whether there has been an abuse of process:

> Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in Henderson v. Henderson where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:
>
> a) The onus is upon the applicant to establish abuse.
> b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.
> c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.
> d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.
> e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant.[28]

23. It is important to remember that the rule in *Henderson v Henderson* does not require the court to have determined the issue in previous litigation in order for an abuse to arise.

Res judicata in public law

24. The cases thus far have been private law cases. However, there are two cases that introduce the principles of *res judicata* to the public law field. The first is *Momin Ali v The Secretary of State for The Home Department*.[29] This Court of Appeal case considered an application for judicial review of the Secretary of State's decision to detain the applicant as an illegal immigrant, in circumstances where an adjudicator had previously determined the issue of identity in his favour and directed he be

[26] *Virgin Atlantic* (n 3) [25].
[27] [2019] EWHC 1229 (TCC).
[28] ibid [17.4].
[29] [1984] 1 WLR 663.

issued an entry certificate. Although the Home Office now claimed they had grave doubts about the correctness of the adjudicator's decision, they did not appeal.

25. The Master of the Rolls described the flexibility inherent in the application of the principle of *res judicata* to public law. He stated that

> the doctrine of issue estoppel has, as such, no place in public law and judicial review … However I think that the principles which underlie issue estoppel … namely that there must be finality in litigation, are applicable, subject always to the discretion of the court to depart from them if the wider interests of justice so require.[30]

26. In expressing this conclusion, the Master of the Rolls found himself in complete agreement with the judgement of the Divisional Court given by Gibson J in *re Tarling*,[31] when he held:

> First, it is clear to the court that an applicant for *habeas corpus* is required to put forward on his initial application the whole of the case which is then fairly available to him. He is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the court.
>
> The true doctrine of estoppel known as *res judicata* does not apply to the decision of this court on an application for habeas corpus … There is, however, a wider sense in which the doctrine of res judicata may be applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings … [32]

27. The onus is on the Secretary of State to prove to the satisfaction of the court that, on the balance of probabilities, the applicant is an illegal entrant. This was a case in which the Secretary of State had detained the applicant based on evidence that had come into existence since the date of the adjudication. In considering the Secretary of State's decision to continue to detain the applicant, the Master of the Rolls went on to state that that standard of proof that the Secretary of State had to meet was higher, in cases where there has been a previous adjudication that amounted to

> a binding decision of an appropriate tribunal in favour of the applicant. That decision may not render the issue of his status *res judicata*, but it comes very close to it. If it is to be reversed, the Home Office must prove fraud to a standard appropriate to such an allegation.[33]

28. In setting out the proper approach of a judge when dealing with such a case, Fox LJ rejected Webster J's approach of simply considering the original determination of the issue as part of the balance in the assessment of the totality of the evidence. He held:

[30]ibid 669.
[31][1979] 1 WLR 1417.
[32]ibid 1422–3.
[33]*Momin Ali* (n 29), 671.

> it attaches insufficient importance to the decision of the adjudicator reached after an investigation on oral testimony. In my opinion the adjudicator's decision is not merely an element to be taken into account together with the new evidence. It is of more fundamental importance than that. Of course, all the evidence must be considered but I agree with the view expressed by Mr. Justice Woolf in Reg. v. Secretary of State, ex parte Anwah Miah (unreported) that, in such a case, the court has to come to a conclusion, in effect, whether or not it is satisfied that a fraud was practised on the adjudicator. He cannot have been innocently misled.[34]

29. The Master of the Rolls clarified later in the judgement that this was not fraud to the criminal standard but to the standard appropriate for the proof of fraud, which is higher than if trying to merely prove negligence, for example.

30. *Momin Ali* makes it clear that issue estoppel does not apply with its full rigour in the immigration context; however, the principles underlying can have a significant effect on the assessment of evidence used to determine the issue of an applicant's status, such that it comes very close to being *res judicata*.

31. The second case is *Thrasyvoulou v Secretary of State for the Environment*,[35] in which the House of Lords considered whether the doctrine of *res judicata* was confined to the private law sphere or whether it also applied to public law proceedings.

32. *Thrasyvoulou* was a planning case in which the owner appealed against the wording of a planning permission for an extension of a number of properties used predominantly for accommodation for homeless families. The owner further appealed against enforcement notices issued by the council alleging a material change of use of three other properties and requiring that use to be terminated. The Inspector determined that all four relevant properties were used as "hotels". A few years later, the planning authority subsequently issued enforcement notices alleging a material change of use to the properties from hotels to hostels. It was common ground that nothing had changed since the Inspector's determination.

33. Where the issue between the parties relates to a statutory provision, the question is whether on its true construction, that provision expressly or by necessary implication includes the principle of *res judicata*.

34. Lord Bridge determined that the twin principles on which the doctrine of *res judicata* rests, namely the public interest in the finality of litigation and avoiding the oppression of subjecting a defendant unnecessarily to successive actions are of

> such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject

[34]ibid 672.
[35][1992] AC 273.

> to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.[36]

35. This is subject to the important public law requirement that a statutory body cannot fetter its own freedom to perform its statutory duties or exercise its statutory powers. As Lord Bridge explained, it is for this reason that there can be no such fetter which arises from an estoppel by representation.

36. Given this, the House of Lords determined issue estoppel precluded the Secretary of State from asserting there was a material change of use in this case, where that expressly contradicted a finding made by his first inspector, which

> was not merely incidental or ancillary to his decision but was the essential foundation for his conclusion that no breach of planning control was involved in the use being made of the structure which was the subject of the first notice.[37]

37. The position following *Thrasyvoulou* was that, in principle, the doctrine of *res judicata* does apply to adjudications in the field of public law.

Key cases in 2020

38. In the spirit of giving, the Court of Appeal has handed down judgement in two cases this year, which shed further light on how the doctrine of *res judicata* applies in the public law context. The first is another immigration case: *Abidoye v Secretary of State for the Home Department*.[38]

39. The appellant in *Abidoye* had been convicted and sentenced to five years' imprisonment as a foreign national offender in 2005. On his release in 2009, the Secretary of State made a deportation order. In a 2012 decision, the Upper Tribunal concluded that the appellant's removal would be a disproportionate interference with his rights under ECHR, art 8. In 2014, the Immigration Act 2014 s19, which introduced the Nationality, Immigration and Asylum Act 2002 Pt 5A, came into force. Within Part 5A, there was now a new approach to weighing the public interest in the removal of foreign criminals against art 8 rights, establishing that the public interest required deportation unless there were "very compelling circumstances".

40. In 2015, the Secretary of State made a fresh decision to deport the appellant. The appellant made another human rights claim, which the Secretary of State refused in 2016 on the grounds that his case did not meet the new "very compelling

[36]ibid 288.
[37]ibid 297.
[38]*Abidoye* (n 1).

circumstances" test. In a 2017 decision, the tribunal dismissed the appellant's appeal against the refusal of his art 8 claim. The court accepted there was no challenge to the findings of fact made by the First-tier Tribunal (FtT) judge in the 2012 decision, and no changes to the appellant's family life, save that the relationships had become more entrenched.[39]

41. Andrews LJ considered Lord Bridge's statement in *Thrasyvoulou* (described at paragraph 34 above) – that the principles underlying *res judicata* apply in the field of public law as well as in the field of private law – and held this was a statement of general principle, rather than a definitive rule applicable in all public law cases.[40]

42. As is clear from *Momin Ali*, although, in principle, the desire for finality in litigation applies as equally to the context of immigration disputes as in any other case, the courts have oft repeated that the principles of *res judicata* are not applicable in immigration appeals, or at least they do not apply with their full rigour. Nonetheless, an earlier decision will be treated as final and binding on the parties to it unless there is some legal justification to departing from it.[41]

43. Moreover, Andrews LJ made clear:

> it is not open to the Secretary of State or the individual to raise fresh points that could and should have been raised before the original Tribunal, or on appeal in the proceedings that gave rise to the first decision, in order to justify such a departure. There must be fresh evidence which meets the *Ladd v Marshall* test, (see *Ullah*) or a material change in circumstances. If those conditions are not met, any attempt by either party to relitigate the same issues may be treated as an abuse of process, and any fresh decision taken by the Secretary of State which is inconsistent with the earlier decision will be susceptible to judicial review. This is mitigated to some extent by paragraph 353 of the Immigration Rules, since further evidence relied upon in support of a "fresh claim" cannot be disregarded by the Secretary of State simply on the basis that it could have been obtained with reasonable diligence prior to the hearing of the original claim before an immigration tribunal. The decision maker does, however, evaluate whether the claim now being put is substantially the same as the claim that has already been determined.[42]

44. For some, this may appear like a particularly harsh decision in light of the facts On this point, Andrews LJ empathised with the appellant and his family's situation, namely that he had obtained a judicial decision, following a contested hearing and was now facing a new deportation order, which counsel characterised as "mov[ing] the goalposts, notwithstanding the lack of any adverse factual change in circumstances". However, she determined that

[39]At [19]–[20]; [38].
[40]At [43].
[41]*Abidoye* (n 1) [44]–[45].
[42]ibid [46].

> Parliament is responsible for formulating immigration policy; it was entitled to make the changes that it did in terms of how Article 8 claims are to be evaluated in this context, and once it had done so, the Secretary of State was entitled to revisit the view she had already formed that the presence of the appellant in the jurisdiction was not conducive to the public good. However harsh the 2015 decision may have been, it was not unlawful. Since the new regime sets the bar higher than the previous regime did, it is bound to operate in some cases in a manner which many would regard as unfair, but that is no reason to disapply it.
>
> The point that I believe the learned judge was trying to make, with which I respectfully agree, is that if a statute arguably operates retrospectively to the disadvantage of an individual, from a legal perspective the type of unfairness that must be demonstrated in order to prevent it from being interpreted in that way is something more than just the removal of a temporal advantage conferred upon the individual by a finding made in his favour by a previous immigration tribunal. That is a high hurdle. Unfortunately for the appellant, even if he had been right in characterising the legislation as operating retrospectively, his case would have fallen short of establishing what was necessary to meet that legal test.[43]

45. The appellant raised an additional argument in these judicial review proceedings which he could have raised before the FtT and the Upper Tribunal on the substantive appeal against the 2016 deportation decision. Andrews LJ went on to make clear that

> although the doctrine of *res judicata* may not apply with full rigour in immigration proceedings, the rule in *Henderson v Henderson* does preclude an applicant from waiting until his appeal rights are exhausted, and then raising different legal arguments in a claim for judicial review of the same decision that was unsuccessfully appealed, or of a further decision taken to implement or enforce it, in an attempt to delay or prevent his lawful removal from the jurisdiction. Irrespective of the merits of the new arguments, that is an abuse of the process and the message needs to go out that this type of abuse will not be tolerated.[44]

46. The Court of Appeal rejected the argument that there were any special circumstances in human rights cases that meant the rule should not apply and set out the clear point of principle that human rights claims are subject to the same rules of procedure as any other claim, whether raised in a full appeal or by way of judicial review:

> Once those rights have been finally adjudicated upon by a competent tribunal or Court, there is no reason why an individual in this particular type of case should be able to re-open the issue and run new arguments in circumstances in which another person would not, merely by dint of the fact that Article 8 is engaged.[45]

47. As such, avoiding the consequences of the rule in *Henderson v Henderson* in immigration proceedings requires fresh evidence or a material change in the underlying factual circumstances. However, Andrews LJ went on to express that that the latter

[43]ibid [53]–[54].
[44]ibid [57].
[45]ibid [60].

scenario would generally be covered by Rule 353 of the Immigration Rules (as described at paragraph 43 above).[46]

48. The final case for discussion is a planning case: *Hillside Parks Ltd v Snowdonia NPA*.[47] In this case, the appellant developer appealed against a decision by the relevant planning authority that further development of a site in the Snowdonia National Park would no longer be lawful. The appellant's predecessor in title had originally been granted planning permission in 1967 to build 401 houses. This was based on a master plan. Variations on that permission were also granted. A dispute then arose between the former and current owners of the site, which reached the High Court. In 1987, Drake J concluded that the 1967 permission had been lawfully granted. The appellant became the owner of the site in 1988. In 1996 the respondent became the relevant local planning authority. Up to 2011, it granted additional departures from the master plan with additional building works taking place. However in 2017, the respondent authority ordered the appellant to cease all works as developments carried out under the later permissions had rendered implementation of the master plan under the 1967 permission impossible.

49. Before the Court of Appeal, one of the appellant's grounds was that the first instance judge had failed to deal with his arguments in relation to *res judicata*. Singh LJ concluded that the judge was right to approach his task on the basis that regardless of whether Drake J was correct to conclude in 1987 that it was possible to complete the remaining development in accordance with the 1967 permission, it was clear that conclusion could no longer be reached.

50. As such, the correctness of Drake J's decision was immaterial to the way in which the judge disposed of this case. He determined, that although much of the argument about *res judicata* was interesting, it was not to the point.[48] Issue estoppel did not arise because the issue with which the judge was dealing concerned developments since 1987. He was not concerned with anything that had already been subject to a judicial determination on the basis of the facts as they were up to that date.

51. However, Singh LJ did go on to consider whether the rule in *Henderson v Henderson*/abuse of process had the consequence that the judge was wrong to reason as he did. The respondent authority argued that although the line of authority beginning with *Pilkington v Secretary of State for the Environment*[49] was not presented to Drake J, it would not be an abuse of process for it to rely on it in these proceedings. It submitted that it was entitled to seek to prevent building in a National Park which could be against the public interest. Singh LJ accepted this submission and determined that

[46]ibid [58].
[47]*Hillside* (n 2).
[48]ibid [54].
[49][1973] 1 WLR 1527.

the rule in *Henderson v Henderson* did not prevent the respondent from arguing the *Pilkington* point in this case, despite the fact its predecessor (in whose shoes it stood) failed to do so before Drake J.[50] In his view:

> that would be too "dogmatic" an approach to take. The principle in Henderson /Abuse of Process is not an absolute one. It requires a merits-based assessment of all the facts, including the public and private interests concerned. In this context, there are undoubtedly important private interests, including the commercial interests of the Appellant. However, there are also important public interests at stake, including the public interest in not permitting development which would be inappropriate in a National Park.[51]

52. Furthermore, Singh LJ accepted the respondent's submission that

> there have been significant legal developments since the decision of Drake J in 1987. In particular, the decision of the House of Lords in *Sage* has placed greater emphasis on the need for a planning permission to be construed as a whole. It has now become clearer than it was before 2003 that a planning permission needs to be implemented in full. A "holistic approach" is required.[52]

53. Consequently, Singh LJ (with whom the rest of the court agreed), determined that the factual and legal developments that have taken place since the judgement of Drake J and having balanced the public and private interests at stake, it was not an abuse of process for the respondent authority to seek to argue the points which it has.

54. In comparing *Hillside* and *Abidoye*, the tone of the judgments suggests that the court is willing to be more "dogmatic" in preventing what it perceives to be abuses in the immigration context, where challenges and appeals can often last for many years and take up significant court time and resources. *Hillside* shows a slightly more flexible approach with a greater willingness to engage with the merits, even where the key legal development was available to the predecessor respondent authority at an earlier adjudication.

[50] *Hillside* (n 2) [63].
[51] ibid [64].
[52] ibid [65].