Neutral Citation Number: [2024] EWHC 1368 (Admin)

Case No: AC-2022-LON-003043

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LONDON

Thursday, 6th June 2024

Before:
FORDHAM J

- -

Between:	
THE KING (on the application of MD AYAZ KARIM)	**Claimant**
- and -	
UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)	**Defendant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

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Sonali Naik KC (instructed by Zyba Law) for the **Claimant**
John-Paul Waite (instructed by GLD) for the **Interested Party**
The **Defendant** did not appear and was not represented

- -

Hearing date: 16.5.24
Draft judgment: 23.5.24

- -

Approved Judgment

- -

FORDHAM J

FORDHAM J:

Introduction

1. This case is about the procedural implications of a statutory ouster of judicial review. It features a basic distinction between: (1) a what question (what does a judicial review claimant have to demonstrate in order to succeed); and (2) a who question (which judge or judges have the function of dealing with the case). The judicial review claim seeks to impugn an Upper Tribunal (UT) decision refusing permission to appeal from a decision of the First Tier Tribunal (FTT). The statutory right of appeal to the UT from the FTT is governed by s.11 of the Tribunals, Courts and Enforcement Act 2007. The bundle of authorities included this trilogy of recent cases: R (Oceana) v Upper Tribunal [2023] EWHC 791 (Admin) [2023] Imm AR 4; R (LA (Albania)) v Upper Tribunal [2023] EWCA Civ 1337 [2024] 1 WLR 1673; and Sooy v SSHD [2023] CSOH 93 2024 SLT 1. I am grateful to both Counsel for their written and oral submissions.

LA (Albania) §29

2. The judgment of Dingemans LJ in LA (Albania) says this (§29):

> ***In my judgment the objection made on behalf of the Secretary of State is not sustainable, and it is only fair to acknowledge that Ms Thelen did not pursue the objection in the oral submissions before the court. In his written reasons Sir Duncan Ouseley identified that the High Court did not have jurisdiction to hear the application for judicial review of the decision of the Upper Tribunal, because none of the exceptions set out in section 11A of the 2007 Act applied. If that conclusion was right, then the High Court was right to dismiss Ms LA's request to have a renewed hearing of the application for permission to apply for judicial review. This was because it did not have jurisdiction to hear the application for permission to apply for judicial review. This explains why CPR r 52.8(2) remains in the same terms. This is because, following the introduction of section 11A of the 2007 Act, if permission to apply for judicial review of a decision of the Upper Tribunal has been refused, the High Court will not have had jurisdiction to have an oral hearing of the renewed application for permission to apply for judicial review. The applicant may seek permission to appeal that conclusion from the Court of Appeal, as Ms LA has done here.***

To cut to the chase, my conclusion is that this passage governs the jurisdictional question in the present case: see §§14-15 below.

The Rules

3. There are three relevant rules. First, CPR 54.7A which provides as follows:

> ***54.7A.— Judicial review of decisions of the Upper Tribunal. (1) Where the Upper Tribunal has refused permission to appeal against a decision of the First-tier Tribunal, no application for judicial review of the Upper Tribunal's decision, or which relates to the First-tier Tribunal's decision, may be made except where the question in the judicial review application is— (a) whether the application for permission to appeal was validly made to the Upper Tribunal; (b) whether the Upper Tribunal when refusing permission to appeal was properly constituted; or (c) whether the Upper Tribunal is acting or has acted in bad faith or in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice (2) The claim form and the supporting documents must be filed no later than 16 days after the date on which notice of the Upper Tribunal's decision was sent to the applicant.***

Secondly, CPR 54.12 which provides as follows:

> ***54.12. Permission decision without a hearing. (1) This rule applies where the court, without a hearing – (a) refuses permission to proceed; or (b) gives permission to proceed – (i) subject to***

> ***conditions; or (ii) on certain grounds only. (2) The court will serve its reasons for making the decision when it serves the order giving or refusing permission in accordance with rule 54.11. (3) Subject to paragraph (7), the claimant may not appeal but may request the decision to be reconsidered at a hearing. (4) A request under paragraph (3) must be filed within 7 days after service of the reasons under paragraph (2). (5) The claimant, defendant and any other person who has filed an acknowledgment of service will be given at least 2 days' notice of the hearing date. (6) The court may give directions requiring the proceedings to be heard by a Divisional Court. (7) Where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with rule 23.12, the claimant may not request that decision to be reconsidered at a hearing.***

Thirdly, CPR 52.8 which provides as follows:

> ***52.8. Judicial review appeals from the High Court. (1) Where permission to apply for judicial review has been refused at a hearing in the High Court, an application for permission to appeal may be made to the Court of Appeal except where precluded by section 18(1)(a) of the Senior Courts Act 198. (2) Where permission to apply for judicial review of a decision of the Upper Tribunal has been refused by the High Court on the papers or where permission to apply for judicial review has been refused on the papers and recorded as being totally without merit in accordance with rule 23.12, an application for permission to appeal may be made to the Court of Appeal. (3) An application under 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. (4) An application under paragraph (2) must be made within 7 days of service of the order of the High Court refusing permission to apply for judicial review. (5) On an application under paragraph (1) or (2), the Court of Appeal may, instead of giving permission to appeal, give permission to apply for judicial review. (6) Where the Court of Appeal gives permission to apply for judicial review in accordance with paragraph (5), the case will proceed in the High Court unless the Court of Appeal orders otherwise.***

This Judicial Review Claim

4. The target for judicial review is a decision by the UT on 6 October 2022, refusing permission to appeal from a decision of the FTT on 26 June 2022, dismissing the Claimant's appeal from the Home Secretary's refusal of indefinite leave to remain on 26 March 2021. No claim for judicial review has been made of the Home Secretary's March 2021 decision. That is because that decision attracted a right of appeal to the FTT. No claim for judicial review has been made of the FTT's June 2022 decision. That is because of the statutory right of appeal, with permission, to the UT. But that is the permission which has been refused. Permission for judicial review was refused on the papers on 23 August 2023, with no CPR 23.12 totally without merit certification. The standard form order contained a note informing the Claimant of the right to seek reconsideration. A Notice requesting reconsideration, pursuant to CPR 54.12(3) was filed the same day. On 9 January 2024 an Administrative Court Lawyer, acting under delegated powers (CPR 54.1A) made directions for an oral hearing of the requested reconsideration. Because it was an own-initiative order (CPR 3.3), any party had a right to apply within 7 days to set it aside (CPR 3.3(7)(b)) at an oral hearing (CPR 3.3(7)). The Home Secretary applied on 25 January 2024 to set aside the directions order, with an extension of time. On 27 February 2024 the Claimant's representatives filed an application to amend the judicial review grounds. On 28 February 2024 I adjourned the case, for reasons I explained at [2024] EWHC 438 (Admin).

Cart

5. On 22 June 2011, in R (Cart) v Upper Tribunal [2011] UKSC 28 [2012] 1 AC 663, the Supreme Court grappled with the scope of judicial review of an UT refusal of permission

to appeal. The claimant in that case said the full scope of judicial review should be available. The Home Secretary said no judicial review should be available, because designating the UT as a superior court of record had been designed to exclude judicial review. The Divisional Court had rejected that, reasoning that Parliamentary sovereignty required judicial review, so that public authorities are held to the statutory limits of their powers (see Lady Hale at §30). As encapsulated by the law reporter, the Supreme Court decided that:

> ***In order to keep important errors to a minimum and to provide the level of independent scrutiny outside the tribunal structure required by the rule of law while recognising that the enhanced tribunal set up under the 2007 Act deserved a restrained approach to judicial review and that the best use should be made of the courts' limited judicial resources, on an application for permission to proceed with a claim for judicial review of a refusal by the Upper Tribunal of permission to appeal to itself the court should adopt the criteria upon which applications for permission to make a second-tier appeal to the Court of Appeal were determined.***

Those second-tier criteria were (§27): (a) the proposed appeal would raise some important point of principle or practice; or (b) there is some other compelling reason for the relevant appellate court to hear the appeal. The Supreme Court rejected the following more restricted alternative (Cart §33): outright excess of jurisdiction by the Upper Tribunal or denial by it of fundamental justice.

The 2012 Rules

6. In the light of Cart, the Rules Committee introduced CPR 54.7A and CPR 52.15(1A) with effect from 1 October 2012. The new CPR 54.7A addressed claims for judicial review of UT refusals of permission to appeal. It introduced the 16 day time limit (54.7A(3)), recorded the Cart second-tier criteria (54.7A(7)) and expressly provided (54.7A(8)):

> ***If the application for permission is refused on paper without an oral hearing, rule 54.12(3) (request for reconsideration at a hearing) does not apply.***

The new CPR 52.15(1A) provided:

> ***Where permission to apply for judicial review of a decision of the Upper Tribunal has been refused by the High Court – (a) the applicant may apply to the Court of Appeal for permission to appeal …***

From 3 October 2016, this was replaced by equivalent provision within CPR r.52.8(2).

Section 11A of the 2022 Act

7. By the Judicial Review and Courts Act 2022, with effect from 14 July 2022, Parliament amended the 2007 Act to include this new s.11A:

> ***11A. Finality of decisions by Upper Tribunal about permission to appeal. (1) Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b). (2) The decision is final, and not liable to be questioned or set aside in any other court. (3) In particular – (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision; (b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision. (4) Subsections (2) and (3) do not apply so far as the decision involves or gives rise to any question as to whether – (a) the Upper Tribunal has or had a valid application before it under section 11(4)(b), (b) the Upper Tribunal***

> ***is or was properly constituted for the purpose of dealing with the application, or (c) the Upper Tribunal is acting or has acted – (i) in bad faith, or (ii) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice. (5) Subsections (2) and (3) do not apply so far as provision giving the First-tier Tribunal jurisdiction to make the first-instance decision could (if the Tribunal did not already have that jurisdiction) be made by – (a) an Act of the Scottish Parliament, or (b) an Act of the Northern Ireland Assembly the Bill for which would not require the consent of the Secretary of State. (6) The court of supervisory jurisdiction is not to entertain any application or petition for judicial review in respect of a decision of the First-tier Tribunal that it would not entertain (whether as a matter of law or discretion) in the absence of this section. (7) In this section – "decision" includes any purported decision; "first-instance decision" means the decision in relation to which permission (or leave) to appeal is being sought under section 11(4)(b); "the supervisory jurisdiction" means the supervisory jurisdiction of – (a) the High Court, in England and Wales or Northern Ireland, or (b) the Court of Session, in Scotland, and "the court of supervisory jurisdiction" is to be read accordingly.***

8. After s.11A came into force on 14 July 2022 through to 4 April 2023, CPR 54.7A(8) (§6 above) was retained. The current CPR 54.7A (§3 above) came into effect on 5 April 2023.

Oral Reconsideration and s.11A Cases

9. Ms Naik KC submits that this Court has jurisdiction to entertain oral reconsideration when requested pursuant to CPR 54.12(3). She makes the following key points. (1) First, there is no longer, since 5 April 2023, the express restriction previously found in CPR 54.7A(8), from 1 October 2012 to 4 April 2023. (2) Secondly, on the proper interpretation of the rules, there is a right to request reconsideration at an oral hearing in the High Court (CPR 54.12(3) and (4)), alongside the right to apply to the Court of Appeal (CPR 52.8(2) and (4)). (3) Thirdly, the s.11A what question (whether a claim cannot by virtue of s.11A be brought within the scope of judicial review) is distinct from the who question (which Court can consider whether a claim can, in the light of s.11A, be brought within the scope of judicial review). (4) Fourthly, the Court only lacks "jurisdiction", by reference to s.11A, if the provisions of s.11A have been correctly applied. Such a question can, in principle, be revisited at an oral reconsideration in the High Court; just as it can be revisited in the Court of Appeal. The fact of an adverse paper determination does not deprive the High Court of jurisdiction. The conclusion in the paper determination must be "correct". This is reflected in the proviso at §29 of the judgment in LA (Albania) (§2 above): "If that conclusion was right …" (5) Fifthly, insofar as §29 of LA (Albania) expresses the view that oral reconsideration is unavailable, that was obiter and does not bind this Court. (6) Sixthly, even if not generally available, there must be jurisdiction in exceptional circumstances to avoid a serious injustice, as in the present case given that amended grounds for judicial review were not and could not be considered by the judge on the papers.

The Rule of Law

10. Ms Naik KC makes the following concession. She accepts that the who question, so far as High Court reconsideration at an oral hearing is concerned, gives rise to no issue of potential collision with any necessary content of the rule of law. She accepts that a civil procedure rule, removing oral reconsideration in this context, involves no abrogation of any fundamental right or constitutional value, such as could justify a finding of 'ultra vires' applying the principle of legality. She accepts that oral reconsideration was excluded by the express rule in CPR 54.7A(8), from 1 October 2012 to 4 April 2023. This is obviously important. Constitutional implications of removing a right of

permission-stage appeal in judicial review were noted in 1985: see De Smith's Judicial Review §15-089. The value of oral hearings is known and understood: see R (Wasif) v SSHD [2016] EWCA Civ 82 [2016] 1 WLR 2793 at §17(3). But this case involves the special context of refusals by the UT of permission to appeal. In such cases, from 1 October 2012, it was already the important responsibility of the paper permission judge in the High Court to decide whether to adjourn a case into open court for an oral hearing.

11. In my judgment, Ms Naik KC's rule of law concession is plainly correct, in the context of judicial review of an UT refusal of permission to appeal from the FTT. There is certainly a question – in the context of s.11A – about a potential constitutional collision. But it plainly relates to the what question and not the who question. I will explain:

    i) The identifiable constitutional collision question is as follows. On the premise that the Courts identify a core irreducible minimum scope of judicial review required by the rule of law, which a clear statutory ouster would operate to reduce, is the Court's constitutional duty (a) to apply or (b) to disapply the ouster? This question engages the constitutional touchstone to which I referred in R (Exolum Pipeline System Ltd) v Great Grimsby Crown Court [2023] EWHC 2811 (Admin) at §11. The question comes into its clearest focus when positing a complete ouster of judicial review. This is the controversial question identified in Cart (see Lord Phillips at §§73, 89) and in Sooy (at §§74 and 77). Suppose Parliament purported to exclude all judicial review of decisions of the Home Secretary. The Divisional Court in Cart reasoned that Parliamentary sovereignty itself requires judicial review (Lady Hale at §30). The disapplication of ousters dates back, long before Anisminic, to "no certiorari clauses" (De Smith §4-125) and it has never been necessary to make a "declaration" (cf. Sooy §§75-76). Now, suppose that Parliament purported to exclude judicial review of all decisions of the Home Secretary on all grounds except bad faith; or in all cases lodged more than 24 hours after the impugned decision. The identifiable constitutional question can be engaged by partial ousters too.

    ii) The analysis will always be highly contextual. Judicial review of UT refusals of permission to appeal is a special context. In Oceana it was emphasised (at §47) that s.11A is a "partial" ouster. In LA (Albania) it was emphasised (at §31) that this is an "essential" point. The judgments in the Supreme Court in Cart did identify – in the second-tier criteria – the scope of judicial review required by the rule of law (§§61, 89, 100, 102, 133). But the argument that this endured as a 'core irreducible minimum' stands rejected by LA (Albania). Cart is replete with statements about the scope of scrutiny required by the rule of law. These cannot be taken to have been overlooked in recent judgments summarising arguments based on Cart: see Oceana §45; and LA (Albania) §24. That makes LA (Albania) §36 a binding answer as to the what question, so far as this Court is concerned.

    iii) One possible explanation would be that Courts do not ever – and could not ever – identify a 'core irreducible minimum' scope of judicial review required by the rule of law. But there is a more nuanced explanation. It is this. There is a "partnership between Parliament and the judges", as identified by Lord Phillips (Cart §89). It allows for intercommunication and dialogue. Parliament has now spoken, in enacting s.11A; in the task described by Lord Dyson (§120); having "chosen the test" (LA (Albania) §32). The Courts may see in the second-tier criteria in Cart what – albeit characterised as the scope of judicial review necessary in rule of law

terms when the Supreme Court spoke first – now sits alongside what Parliament has spoken; and which yields, because the Courts are satisfied that this involves surrendering no 'core irreducible minimum'. This, rather than simply because the provision is clear and in a statute, would be a nuanced explanation for why "section 11A is not inconsistent with the rule of law" (to use the phrase in Sooy at §78, referring to observations in Oceana at §49).

iv) Of course, there remain the questions about the legally correct interpretation of s.11A. As to that, the Court of Appeal has held that the effect of s.11A restores the tests in the Divisional Court and Court of Appeal in Cart: see LA (Albania) at §32. And it should be borne in mind that, pre-Anisminic jurisdictional error and the second-tier criteria are different. Some cases could meet one test; some cases the other test; some could meet neither; and some could meet both.

v) The who question is distinct. Cart was identifying the level of independent scrutiny required by the rule of law in terms of the scope of judicial review: the grounds on which it could be sought and the criteria that needed to be met. All of that is the what question. The Supreme Court did not say – on the who question – that the level of independent scrutiny required by the rule of law involved reconsideration of permission for judicial review at an oral hearing. Quite the contrary. The Supreme Court, in recognising the scope of judicial review required by the rule of law, expressly encouraged the very streamlining of the who question which the Rules Committee then introduced. This was addressed in all of the judgments: see §§58, 93, 101, 106, 132 (and LA (Albania) §17). Cart acknowledged that procedural curtailment of the who question could be justified, consistently with the rule of law. Nor is there a problem with the when question, with the 16-day time limit introduced by the rules from 2012 onwards.

No Reconsideration under the Rules

12. Since there is no rule of law issue, we can turn straight to the rules themselves. What do they mean? CPR 52.8(2) makes express provision, within 7 days, for an application to that Court for permission to appeal against a High Court refusal of permission for judicial review of a decision of the UT. CPR 54.12(3) says "the claimant may not appeal" but "subject to (7)". In a UT case, the phrase "may not appeal" in CPR 54.12(3) would clash with CPR 52.8(2), unless the rules are read sensibly, side by side. The rules cannot sensibly be interpreted as conferring two simultaneous rights: reconsideration in the High Court by request within 7 days (CPR 52.8(2)(4)); and application for permission to appeal to the Court of Appeal by request within 7 days (CPR 54.12(3)(4)). Such an interpretation could not give effect to the overriding objective (CPR 1.2). CPR 54.7A does not therefore need to spell the position out; even though it did until 5 April 2023; and even though CPR 54.12(7) does so for totally without merit certified cases. And the Rules Committee did not think it needed to do so, in the light of s.11A.

LA (Albania)

13. What happened in LA (Albania) was that the UT refused permission to appeal on 22 March 2023. The claimant applied for judicial review, on 11 April 2023, pursuant to the new CPR 54A. Permission for judicial review was refused on the papers by Sir Duncan Ouseley, on the basis that none of the statutory exceptions (s.11A(4)) was met. The claimant applied to the Court of Appeal for permission to appeal, pursuant to CPR

52.8(2), arguing that the s.11A ouster should be disapplied or, on its legally correct interpretation, an exception was met (§11). The Court of Appeal refused permission to appeal, on the basis – agreeing with Sir Duncan Ouseley – that none of the statutory exceptions was applicable.

14. I have set out §29 (§2 above). As can be seen, it includes the sentence: "If that conclusion was right, then the High Court was right to dismiss Ms LA's request to have a renewed hearing of the application for permission to apply for judicial review." But reading §29 as a whole it is, in my judgment, clear that it is the fact of the adverse paper determination that is the end for High Court consideration at an oral hearing. Whether the paper Judge "was right" becomes a question for the Court of Appeal (see §47). The contingency – so far as the High Court's jurisdiction is concerned – is this. If the Court of Appeal overturns the paper permission judge as wrong, the High Court's jurisdiction in the case is then restored for any substantive hearing in that Court (see CPR 52.8(6)).

15. In my judgment, it is not open to me to depart from LA (Albania) §29. True, this issue was not listed as one of the issues being decided (§11). True, it was not pursued orally (§29). But it is specifically identified as an issue and addressed (§25). It was not withdrawn. The fact that High Court reconsideration had not been sought was an argument, put forward by the Home Secretary, as a reason why "the Court of Appeal could not hear the current application" (§25). The Court dismissed that "objection" as "not sustainable" (§29). A necessary step in its chosen reasoning path was that there was no High Court "jurisdiction" for reconsideration of permission for judicial review, after an adverse decision on the papers finding the s.11A criteria unmet. In my judgment, the analysis was part of the ratio of the decision and so is binding. But nor would I depart from LA (Albania) even if I could. First, the Court of Appeal was plainly intending to provide clarity on an important procedural issue. That is itself enough. Secondly, free from authority, I would have seen the rules (§3 above) as clearly (§12 above) and lawfully (§11 above) producing this outcome. I accept the submissions of Mr Waite.

Other "Jurisdictional" Questions and Oral Reconsideration

16. So, there is no jurisdiction of oral reconsideration in a s.11A case. But I do not think it follows that, wherever there is an issue which engages the judicial review Court's "jurisdiction", a paper Judge's adverse decision becomes final with no oral reconsideration. Take these examples. The case may involve an exclusive statutory remedy. It may involve an issue about whether the claim is impugning a decision of the High Court. It may be said to trespass on proceedings in Parliament. It may involve interpreting or applying a time-limit ouster. As I read them, the observations of Dingemans LJ about "jurisdiction" and reconsideration (LA (Albania) at §27) are specifically in the context of s.11A.

Exceptional Injustice

17. Ms Naik KC's resort to exceptional circumstances and injustice, and reliance on amended grounds for judicial review, cannot in my judgment assist the Claimant. What I have decided is that there is no right to request reconsideration pursuant to CPR 54.12. If there is any residual jurisdiction at all, it would have to focus on the paper judge who made the determination. Suppose, for example, the permission-stage reply which Lang J directed in this case had been filed and served but it did not make its way to the Judge who thought the opportunity had not been taken. If that is an exceptional basis to reopen a decision in

this context – or for that matter in a totally without merit certified case – that would still not give me jurisdiction to hear a request for reconsideration. I think the answer is the one given by Mr Waite: the Claimant has the right to apply to the Court of Appeal. That is also where any attempt to expand the judicial review grounds would need to be pursued.

Legal Merits

18. Both Counsel have specifically asked that I go on – if I find there is no jurisdiction – to deal with the legal merits, on the alternative basis that this proves to have been wrong. I will do so, but I do so only because of that joint request.

19. What happened in this case is as follows. The Claimant filed a tax return in the sum of £11,266 in 2010. He subsequently sought leave to remain by reference to 2010 earnings of £35,765. On 16 March 2018 the FTT dismissed an appeal, finding that he had acted dishonestly. His ILR application (15.1.20) relied on fresh evidence, in particular about the handling of the 2010 tax return by accountants. The ILR refusal (26.3.21) conferred appeal rights, on a fresh claim basis. The FTT judgment (Judge Black 26.6.22) accepted that there was "new material not considered by the previous Tribunal and which has a real prospect of success", but concluded that none of the new evidence led the Judge to alter the clear findings of deception made in 2018. The grounds for judicial review claim that there were two material errors of law in the FTT judgment. The first is that in law the burden had to be on the Home Secretary to establish that the Appellant's "plausible innocent explanation" was to be rejected (Shehzad [2016] EWCA Civ 615 §3), whereas the Judge said the Appellant had "not provided evidence of any innocent explanation". The second is that prior diligent adducibility ("PDA") – that the fresh evidence "could have easily been obtained earlier" – was wrongly treated as determinative.

20. Like Dingemans LJ in LA (Albania) at §§44-45, I will consider whether it is arguable that Judge Black made any error of law. I recognise that there is no settled picture as to (a) whether that is the correct approach (§§49, 56) and (b) under which s.11A exception. I have been unable to see any arguable material error of law. As to onus, immediately before the phrase which is criticised, the Judge had said this. Having considered the citations set out in the Appellant's skeleton argument regarding the approach to deception – which included Shehzad §3 – and having considered all the evidence in the round, "the respondent has shown that the appellant was dishonest". As to PDA, the Judge identified this as a relevant feature and a "starting point", having said "I accept that there is considerable flexibility". She went on to discuss all the oral and documentary evidence, explaining why it was not – in substance – reliable or plausible. The "considerable flexibility", and "only a starting point", were from the Appellant's skeleton argument before the Judge (discussing Devaseelan fairness, and cases including BK [2019] EWCA Civ 1358 and Patel [2022] EWCA Civ 36). In Patel, there was an error of law because PDA was treated as determinative. It is not arguable that in this case (a) the Judge treated PDA as determinative or (b) the Judge should have treated PDA as legally irrelevant.

21. That is the end of it. In those circumstances – even if I had jurisdiction – I would not need to grapple with the difficult question of pre-Anisminic jurisdictional error (Cart §§40, 94, 110-111) and how it has been reintroduced by s.11A (LA (Albania) §32). But what if I thought it was arguable – and in s.11A terms "genuinely disputable" (LA (Albania) §38) – that the FTT Judge had made an error of law? I think, depending perhaps on the FTT reasoning, errors as to burden or standard of proof would go uncorrected (LA

(Albania) at §34). But suppose it were arguable that Judge Black had made the same error of law as did the judge in Patel. She would arguably have treated PDA as determinative. She would not have enquired into all the circumstances as legally required. Had I jurisdiction as the permission-stage judge, faced with that situation, I would have wanted to address with Counsel the idea of the FTT 'failing altogether to enquire or adjudicate upon a matter which there was an unequivocal duty to address' (seen most recently in R (Bryce) v MOJ [2023] EWHC 2778 (Admin) at §§15-16). I would have invited submissions on whether: (a) that idea is properly characterised as a pre-Anisminic jurisdictional error; and if so (b) what follows for the purposes of s.11A and judicial review.

22. Ms Naik KC had further arguments to fit within s.11A. She advanced three core propositions. (1) A serious inadequacy in the UT's reasons for refusing permission to appeal could, in principle, constitute a "question as to whether … the Upper Tribunal … has acted … in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice" (s.11A(4)(c)(ii)). (2) A failure by the UT to have an oral hearing to address permission to appeal (Cart §123) could also in principle meet this test, if that failure were incompatible with common law principles as to when oral hearings are required. (3) The context, meaning that UT refusals of permission to appeal are the 'end of the road' for arguments based solely on material error of law, is in principle relevant in informing the UT's approach to (a) the giving of reasons and (b) the convening of oral hearings. Of these, proposition (1) was accepted by Mr Waite.

23. At the level of principle, I would accept all three propositions. But I cannot agree with Ms Naik KC that they, or her point about reasons for not having an oral hearing, can lead anywhere in s.11A terms in the present case. There is no arguable error of law by the FTT judge. An oral hearing was requested, but no specific argument was directed as to why it was necessitated. No duty to give fuller reasons for not convening an oral hearing were – in the circumstances of this case – even arguably required. When the FTT refused permission to appeal (2.8.22), the FTT judge (Judge Komorowski) gave clear reasons why it was unarguable that there was a material error of approach as to burden of proof or PDA. When the UT refused permission to appeal (6.10.22), UT Judge Macleman specifically referred to the clear and detailed reasons of Judge Black and Judge Komorowski; and added – cogently – that Judge Black's judgment "took a flexible and pragmatic approach to the evidence".

24. Finally, what if the Cart second-tier criteria prevailed as a core irreducible minimum requirement of the rule of law? There is no arguable material error of law. Even if there were, the relevant law on proof and PDA seems to me to be settled and any error – even if it is a pre-Anisminic error of law – would be an individualised misapplication. I do not see that the Cart second-appeal criteria would be met. This illustrates a point I made earlier. A claim where the error of law might now get through on the pre-Anisminic test of jurisdictional error, might not have got through on the Cart second-appeal criteria.

Conclusions

25. My conclusions are as follows. The High Court has no jurisdiction to further consider this claim for judicial review, absent an Order of the Court of Appeal granting permission for judicial review (CPR 52.8(6)). The High Court has no jurisdiction to reconsider the refusal of permission for judicial review at an oral hearing. Even if that were wrong, I

would have dismissed the claim for permission for judicial review. Given the nature of the jurisdictional issue with which I have dealt, I certify that this judgment may be cited.

Substantive Order

26. My substantive Order is as follows: "upon the Claimant having by a Form 86B Notice of Renewal dated 23 August 2023 requested oral reconsideration in the High Court of the application for permission for judicial review (the Application)", "it is ordered that, for the reasons set out in this judgment, the High Court has no jurisdiction to hear the Application". This is more precise than "no jurisdiction in this case". For example, it is common ground that I am still seized of "proceedings" (Senior Courts Act 1981 s.51) and can deal with the disputed costs issue (§27 below). And, to take another example, the High Court would remain "the court" for dealing with permission for a third party to access to documents filed by the parties, from the court records (CPR 5.4C(2)).

Costs

27. As to costs, I will order that: (1) the costs order in paragraph 2 of the Order made by Sweeting J on 23 August 2023 stands (ie. costs of the acknowledgment of service, summarily assessed in the sum of £1,759.50); (2) the Home Secretary's application for costs of the hearing on 28 February 2024 is refused; (3) the Claimant shall pay the Home Secretary's costs of the hearing on 16 May 2024, and the necessary preparation, summarily assessed in the sum of £1,600. As to (2), the Home Secretary was entitled to take the robust position of opposing the adjournment in February, but was unsuccessful having declined to accept the justification which I identified: see [2024] EWHC 438 (Admin) at §18. As to (3), the Home Secretary's costs were said to be £2,736 for both hearings. The preparation work was necessary; it preceded the first hearing and the adjournment request. The Home Secretary has prevailed in a jurisdictional dispute, not a standard Mount Cook permission hearing, where the Claimant and his team pressed on in the face of LA (Albania) §29. The sum of £1,600 is a broad brush assessment, based on all the circumstances; where costs are not ordered in respect of the first hearing; nor on an indemnity basis.