THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of her family in connection with these proceedings.

[2021] UKSC 41
On appeal from: [2018] EWCA Civ 2838

JUDGMENT

R (on the application of TN (Vietnam)) (Appellant) *v* Secretary of State for the Home Department and another (Respondents)

before

Lord Lloyd-Jones
Lord Briggs
Lady Arden
Lord Sales
Lord Stephens

JUDGMENT GIVEN ON

22 September 2021

Heard on 30 November and 1 December 2020

Appellant
Lord Pannick QC
Stephanie Harrison QC
Anthony Vaughan
(Instructed by Duncan Lewis Solicitors LLP (Harrow))

Respondent (1)
Robin Tam QC
Natasha Barnes

(Instructed by The Government Legal Department)

Respondent (2)
Julie Anderson
(Instructed by The Government Legal Department)

Intervener (1)
Charlotte Kilroy QC
Shu Shin Luh
(Instructed by Freshfields Bruckhaus Deringer LLP (London))

Intervener (2)
Charlotte Kilroy QC
Jason Pobjoy
George Molyneaux
(Instructed by Islington Law Centre)

Respondents:-

(1) Secretary of State for the Home Department
(2) Lord Chancellor

Interveners:-

(1) Helen Bamber Foundation
(2) Detention Action

LADY ARDEN: (with whom Lord Briggs and Lord Stephens agree)

Overview and decisions below

1. The fast-track procedure for appeals from the rejection by the Secretary of State for the Home Department of certain asylum claims, set up under the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 (SI 2005/506) ("the FTR 2005") and continued in the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2014 (SI 2014/2604) ("the FTR 2014"), provided for an accelerated procedure for the preparation and hearing of certain appeals with the applicant remaining in detention. This system created a risk that the applicants would have inadequate time to obtain advice, marshall their evidence and properly present their cases. In this judgment, references to the "FTR" without a date are to the FTR 2005 and FTR 2014 collectively.

2. There was a series of cases in which the lawfulness of the procedure was challenged. Ultimately, in *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840; [2015] 1 WLR 5341 (known as "*DA6*"), the Court of Appeal held that the FTR 2014 were "structurally unfair, unjust and ultra vires", and that they fell to be quashed. Permission to appeal to this court against that decision was refused. Lord Dyson MR, with whom Briggs and Bean LJJ agreed, held:

> "An appeal is bound to seek to challenge the reasons given by the SSHD for refusing the asylum claim. As I have said, many refusals turn on adverse findings on the appellant's credibility. The focus of the preparation for an appeal will often, therefore, be on the search for evidence to corroborate the appellant's account in rebuttal of the adverse findings. The period of seven days between the date of the refusal decision and the hearing of the appeal is bound to be insufficient in a significant number of cases. I have referred to the difficulties facing legal representatives who have to take instructions from clients who are in detention. It may not be possible for them to say whether the further inquiries that they wish to make are likely to be fruitful. In such a situation, it may be difficult to persuade the tribunal that there are cogent reasons to transfer a case out of the fast track." (para 42)

3. This appeal is a consequence of the decision in *DA6*. TN, the appellant, lost her appeal against the Secretary of State's decision to reject her asylum claim under the FTR 2005. She brought a challenge by way of judicial review to that determination of her appeal, contending the FTR 2005 also fell to be quashed. Ouseley J, who heard her application, agreed on that issue, and there is no appeal from that part of his order: [2017] EWHC 59 (Admin); [2017] 1 WLR 2595. But, significantly, TN then contended that the decision of the First-tier Tribunal ("FTT") in her case also fell automatically to be quashed. Ouseley J rejected that contention and in addition held that she could not show that the FTT's decision was unfairly made in her case. The judge had to consider TN's long and complex immigration history.

4. The Court of Appeal upheld his decision and TN now appeals with permission to this court: [2018] EWCA Civ 2838; [2019] 1 WLR 2647. Singh LJ gave the leading judgment, with which Sharp and Peter Jackson LJJ agreed. He lucidly and succinctly explained why the decision in *DA6* did not automatically lead to the nullification of all orders made by the FTT under the FTR 2005. His principal reasons were as follows:

> "80. … The true position, in my view, is (as illustrated by the task performed by Ouseley J in the present two cases) that the court must engage in a close analysis of the sequence of events in order to determine whether subsequent decisions are indeed to be set aside.
>
> 81. Although I see force in Mr Tam's submissions based on cases such as *Percy v Hall* [1997] QB 924, in particular at pp 947-948, and *R (Draga) v Secretary of State for the Home Department* [2012] EWCA Civ 842, I consider that it is unnecessary to examine them in detail because they were decided in different contexts. For example, *Percy v Hall* was concerned with whether an innocent third party (in that case a police constable who arrested a person pursuant to a byelaw which was later found to be ultra vires) can be liable for damages, in that case for the tort of false imprisonment.
>
> 82. In my judgment, the straightforward argument made on behalf of the appellants by Ms Lieven must be rejected on its own merits in the present context and without the need for extensive reference to authority from other contexts.

83. The first and fundamental reason for this is that, in my view, there is a conceptual distinction between holding that the procedural rules were ultra vires and the question whether the procedure in an individual appeal decision was unfair.

84. The jurisdiction of the court to consider the lawfulness of a procedural regime, such as that in the 2014 Rules (which was quashed as a result of the Court of Appeal decision in *DA6*) … is an important one … In order to challenge the entire system of such rules it is not necessary to show that the rules will lead to unfairness in every case. Rather it is the creation by the rules of an 'unacceptable risk' of unfairness which founds the ability of the court to strike them down. This is because it is important that rules which are systematically capable of creating unfairness should not be allowed to stand and should be removed or amended.

85. However, that does not entail the necessary conclusion that in each and every case decided pursuant to the ultra vires procedural rules a particular decision was itself procedurally unfair. This is reinforced by the consideration that, in *DA6* itself, the Court of Appeal said that the 2014 Rules would inevitably lead to unfairness in a 'significant' number of cases. The court did not expand upon what that meant, for example whether it meant in a majority of cases or in a significant minority of cases. That was unnecessary. Similarly, it had been unnecessary in the *Refugee Legal Centre* case, which concerned a policy rather than secondary legislation but where the analysis was similar. It was for that reason that, in the *Refugee Legal Centre* case, the court did not feel it appropriate to consider evidence as to how the scheme had operated in practice. It was the fact that a scheme was capable of creating unfairness in an unacceptable way which would render the scheme unlawful.

86. I agree with Mr Tam that 'jurisdiction' to determine the appeals in the pure or narrow sense of that word (the legal authority to decide a question) existed by virtue of the primary legislation (section 82 of the 2002 Act) and the FTT was not deprived of jurisdiction in that sense by reason of the fact that the 2005 Rules were ultra vires. I would also reject Ms Lieven's suggestion that the FTT's jurisdiction was created by the 2005 Rules themselves. She submitted that a valid appeal required a notice of appeal to be filed in accordance with rule 6 of the

> Principal Rules, applied to the fast track process by rule 6 of the 2005 Rules. In my view, that submission is misconceived. It is a commonplace feature of an appellate system that there will be procedural rules which require a notice of appeal to be filed in a certain form. That is not what creates the jurisdiction of a court or tribunal; it is merely a rule which regulates procedure and form. What creates the jurisdiction is the principal legislation, here the 2002 Act.
>
> 87. However, in my view, that would only go so far in meeting Ms Lieven's fundamental submission, which is that any appeal decision which was made under those Rules was necessarily infected by the fact that they were unlawful because they created an unacceptable risk of procedural unfairness. It is in that sense that she submits the FTT did not have jurisdiction, in other words a post-*Anisminic* understanding of jurisdiction: not in the pure or narrow sense of having the legal authority to determine a question, but that a body has acted in a way which is unlawful, including (for this purpose) in a way which is procedurally unfair. That said, it seems to me that the answer which Mr Tam gives to that contention is correct: there has to be shown to be procedural unfairness on the facts of the individual case. …
>
> 89. Finally, I would add that, as a matter of legal principle, if the appellants' submissions on the first issue were correct, it would necessarily follow that even appeal decisions where the appeal was allowed would fall to be set aside, because they would be a nullity. That cannot possibly be correct. At the hearing before us Ms Lieven submitted that this was a theoretical point and not a real one, since in practice individuals will have been granted leave to remain in the light of a successful appeal decision and this would not be curtailed. However, in my view, it is revealing that, if the logic of her submission were accepted, this would be the result as a matter of principle. That analysis of principle helps to test whether the submission can be correct."

5. Singh LJ then helpfully summarised the approach to be taken when there was a challenge to the fairness of a hearing under the FTR. He formulated a non-exhaustive list of four factors, which I will call the four *TN* factors:

"103. For the future I would recommend that a court which has to consider an application to set aside an earlier appeal decision made under the 2005 Rules should approach its task having regard to the following:

> (1) A high degree of fairness is required in this context.
>
> (2) What the Court of Appeal said in *DA6* … should be borne in mind: that the 2005 Rules created an unacceptable risk of unfairness in a significant number of cases. Depending on the facts it may be that the case which the court is considering is one of those cases.
>
> (3) There is no presumption that the procedure was fair or unfair. It is necessary to consider whether there was a causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.
>
> (4) It should also be borne in mind that finality in litigation is important. There may be a need to ask how long the delay was after the appeal decision was taken before any complaint was made about the fairness of the procedure. There may also need to be an examination of what steps were taken, and how quickly, to adduce the evidence that is later relied on (for example medical evidence) and whether it can fairly be said that in truth those further steps were taken for other reasons, such as a later decision by the Secretary of State to set removal directions. This may suggest that there is no causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.

104. The above should not be regarded as an exhaustive checklist. At the end of the day, there can be no substitute for asking the only question which has to be determined: was the procedure unfair in the particular case? That has to be determined by reference to all the facts of the individual case."

6. With that introduction I will describe next in more detail the history of TN's case.

TN's asylum claims: decision of the FTT

7. On 21 August 2014, the FTT (Designated Judge Appleyard) dismissed the appeal of the appellant, TN, from the determination of the Secretary of State that TN was not entitled to asylum. The appeal was heard under the FTR 2005.

8. TN was represented by counsel at the hearing and spoke through an interpreter. She gave evidence. She claimed religious persecution and claimed that in 2003, her mother, her priest and she had all been arrested by the Vietnamese authorities for fund-raising activities for the church. She left Vietnam in 2003 and came to the UK and, following an unsuccessful claim to asylum, she was removed from the UK back to Vietnam in 2012. She contends that she was then detained by the police and questioned about the money she had raised. She managed to escape, and she then returned to the UK. She contended that she had been raped several times by a man claiming to help her reach the UK. She became pregnant but suffered a miscarriage in July 2014, but this did not form any part of her claim to asylum.

9. Following her arrival in the UK, she became friendly with a Mr Quang Minh Dang and a Mr Quang Hai Tran who gave her food and accommodation. She contended that her mother had died in 2003. She said that she had no children but in 2003 she claimed that she had two children in Vietnam. She had made a fresh claim in 2011, but she did not then mention the difficulties that she and her mother had had in Vietnam. Mr Quang Minh Dang and Mr Quang Hai Tran gave evidence about their friendships with her in the UK.

10. The Secretary of State rejected her asylum claim in February 2012 on the basis that the truthfulness of her claim was not accepted.

11. The FTT also formed the view that TN's claim was not credible. There were discrepancies and inconsistencies in her evidence, and, although she knew about the immigration process, she had not made a claim to asylum until she was arrested, which was some months after arriving in the UK on the second occasion. The FTT rejected her claim to asylum, under the Refugee Convention, the EU Qualification Directive, under the European Convention on Human Rights ("the Convention") and under the Immigration Rules.

12. There was no appeal from this decision. As appears below, on 20 August 2015, TN made a fresh claim to asylum on the basis that she was trafficked on the journey to the UK and also in the UK. That claim is still outstanding.

TN's attempts to establish her asylum claim before and after her appeal to the FTT

13. The account which TN gave of her experiences may not be untypical of many asylum-seekers. Her first claim to asylum was in January 2004 when she claimed asylum because of religious persecution against Catholics in Vietnam. Her claim was refused for non-compliance and treated as withdrawn because she failed to report as required. She was arrested on suspicion of being an illegal entrant in 2007 and was granted temporary admission but again failed to report. In 2011 she made further submissions to the Secretary of State and claimed that she was entitled to asylum again on the basis of religious persecution in Vietnam. She was detained at a nail bar and found to have £1,000 in cash.

14. Her claim to asylum was refused and in March 2012 she was removed to Vietnam. She claims to have entered the UK clandestinely in about May 2014. On about 21 July 2014 she had a miscarriage and went to hospital. She was arrested on suspicion of illegally working while she was present in the nail bar, also in July 2014. She was again detained.

15. She then claimed asylum because of events which occurred after her removal. She contended that she could not be returned to Vietnam because of religious persecution. She also stated that her mother and the local priest caused a financial crisis in the community, which led people to complain to the Vietnamese authorities who arrested her.

16. The Secretary of State contended that there were no reasonable grounds to believe that TN was a potential victim of trafficking and made it clear that she had not been referred for assessment as a victim of human trafficking. The background to this decision-making is that the Home Office is one of the UK's competent authorities for the purposes of the Council of Europe Convention on Action against Trafficking in Human Beings 2005, and it is responsible for making conclusive decisions on whether a person has been trafficked. (Human trafficking is also known as Modern Slavery.) The "reasonable grounds" decision is the first step in that process. The National Referral Mechanism is responsible for ensuring that victims of trafficking receive appropriate support. Where there is a credible suspicion that an individual has been trafficked, article 4 of the Convention requires that the competent authority should assess whether they are a victim of trafficking as part of the state's duty to protect them: see *Rantsev v Cyprus and Russia* (2010) 51 EHRR

1 and *VCL and AN v United Kingdom* (Application Nos 77587/12 and 74603/12, judgment of 16 February 2021: *The Times* 17 March 2021).

17. TN was found to be fit when she arrived at the detention centre. She said at one interview that she had not been tortured. She did, however, contend that she had been raped many times on the journey to the UK. At her substantive asylum interview, she claimed that on her return to Vietnam in 2012 she had been detained in a detention centre where she was subject to torture. She further contended that her persecution was because of her mother's political activities and because she had been involved in raising funds for the local church. She said that she had been beaten and ill-treated by the Vietnamese authorities. She said that that was the cause of scars on her head and finger. She said that she had become pregnant because of rape and had suffered the miscarriage, which I have already mentioned, and that that had caused her distress.

18. The Secretary of State refused her asylum claim. On 16 August 2014, TN appealed to the FTT. The Secretary of State determined that her case was suitable for determination under the FTR 2005.

19. In preparation for those proceedings TN made a witness statement claiming detention by the Vietnamese authorities in her own house. She explained that she had escaped and as a result had come to the UK in 2013. She said she was living in the UK with Mr Dang, whom I have already mentioned, whom she described as her boyfriend. She said that he had provided her with free food and accommodation and that she had returned to the UK to be with him. There was another gentleman involved, Mr Tran, whom I have also already mentioned. TN said that she felt safe in the UK. Both Mr Dang and Mr Tran gave evidence before the FTT, but their evidence was not accepted.

20. TN also filed additional grounds of appeal for the hearing of her appeal in which she said that the Home Office had failed to consider that she had been a victim of rape. She said that she had also been a victim of a sex trafficker when she was brought back to the UK, but it is apparent that her real claim to asylum was fear of ill-treatment by the Vietnamese authorities. She did not allege that she was a victim of ongoing human trafficking in the UK. At the hearing of the appeal, she withdrew any reliance on the allegations of rape.

21. In a determination dated 22 August 2014, the FTT concluded that TN's account was not credible and contained discrepancies and inconsistencies. It also drew attention to other matters affecting her credibility.

22. In August 2015, a year after TN's appeal had been rejected, TN's new solicitors filed further submissions with the Secretary of State claiming that she was a victim of human trafficking both on her journey to the UK and also while in the UK, and that she had been sexually exploited. They sought the cancellation of the removal directions which had by then been made against her. By this stage TN had a witness statement from Dr Rachel Bingham of Medical Justice, a general practitioner with extensive experience of assessment of victims of torture and other serious abuse. Dr Bingham's evaluation, based on what TN had told her, was that TN's presentation, including her scars and injuries, was highly consistent with her history of trafficking, imprisonment, multiple rapes and forced prostitution.

23. The Secretary of State considered that TN's further submissions did not amount to the making of a fresh claim and determined that there were no reasonable grounds to believe that TN was a potential victim of trafficking. This rejection of her fresh claim was challenged within these proceedings by way of judicial review (outlined in para 3 above). Those proceedings were in due course heard by Ouseley J. As part of his thorough and impressive judgment, Ouseley J quashed the rejection of the new submissions. He considered that the Secretary of State was wrong not to treat her further submissions as a fresh claim, but that that step did not entitle the appellant to a retrial of the issues which the FTT had decided, which was the principal reason for the judicial review proceedings. The fresh claim has yet to be determined.

24. In 2016, TN also obtained a witness statement from Ms Zahra Kellaway-Payne, formerly a Community Engagement Officer of the Poppy Project, a charity which provides support for women trafficked into the UK. Ms Kellaway-Payne notes that the Home Office Guidance to Front Line Staff (Victims of Modern Slavery: Frontline Staff Guidance Version 2) also recognises that "Potential victims of modern slavery may be reluctant to come forward with information, may not recognise themselves as having been trafficked or enslaved and may tell their stories with obvious errors." Ms Kellaway-Payne's evaluation was that the marks on TN's body and various elements of her account of her time in Vietnam, her journey to the UK and her experiences in the UK were "sufficient objective indicators" of human trafficking to suggest that TN may have been a victim of human trafficking. TN wishes to adduce her evidence at a new hearing before the FTT.

The issues argued on this appeal

25. TN seeks to establish on this appeal: (i) that the systemic unfairness inherent in the FTR 2005 meant that the determination of her appeal was automatically also of no legal effect; (ii) alternatively that the Court of Appeal should at least have recognised that in TN's case the features which made the system unfair were present and established unfairness, or at least should have applied a presumption of

unfairness; and (iii) that the structural unfairness identified in *DA6* applied to her appeal and that there was also unfairness on the facts of her case.

26. Lord Pannick QC presents TN's appeal on issues (i) and (ii). Ms Stephanie Harrison QC presents her appeal on issue (iii). Robin Tam QC presents the Secretary of State's case in response, and Ms Julie Anderson presents the Lord Chancellor's case in response.

27. There are two interveners, the Helen Bamber Foundation and Detention Action. The Court is grateful for the assistance given by their joint written and oral submissions. Charlotte Kilroy QC presented helpful oral submissions.

TN's submissions

28. Lord Pannick QC properly accepts that an application needs to be made in order to quash an adverse asylum decision: see *Smith v East Elloe Rural District Council* [1956] AC 736, 769 per Lord Radcliffe:

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

29. Lord Pannick also accepts that it is not an inevitable consequence of an ultra vires regulation that decisions taken pursuant to it are necessarily themselves always unlawful, so it is unnecessary for me to address the various authorities on that point. Lord Pannick properly accepts that it all depends on the legal context.

30. He also points out that, as one would expect, the FTR 2005 were required to be fair. Thus, the FTR 2005 were made under section 106 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), which stipulates (section 106(1A)(a)) that:

> "the Lord Chancellor shall aim to ensure … that the [asylum appeal] rules are designed to ensure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible."

31. The FTR 2014 were made under section 22(4)(a) of the Tribunals, Courts and Enforcement Act 2007, which went further. This required that the power to make Tribunal Procedure Rules be exercised so that "the tribunal system is accessible and fair." Furthermore, UK law places considerable importance on the right to have a fair trial. This is an uncontroversial proposition. In *R (Osborn) v Parole Board* [2014] AC 1115 at paras 67-72, Lord Reed mentioned three values served by procedural fairness. It is sufficient to mention the first:

> "The first was described by Lord Hoffmann (*ibid*) [*Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269, para 72] as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions." (para 68)

32. Lord Pannick submits that nullification of the FTT's decision should follow the decision in *DA6*. He contends that the connection between the hearing of the appeal and the systemic failures in the rules was sufficient of itself. Those failures gave rise to irremediable taint.

33. Lord Pannick relies on the judicial bias cases, that is, the cases which establish that orders made by a judge who should not have sat on the case because of some financial or other interest are automatically set aside. The principal authority is *Millar v Dickson* [2001] UKPC D4; [2002] 1 WLR 1615 (considered below). Lord Pannick submits that no distinction could be drawn between those cases and the present one where there is a lack of fairness in the trial. In *Millar*, the court did not inquire into the reasons why the trial was unfair.

34. The position was, on his submission, the same if the appellant had had no right to be heard at all.

35. Lord Pannick submits that Singh LJ was wrong to hold in para 89 of his judgment set out above that automaticity of nullification should be rejected on the basis that it would have the effect of making orders on which a party had been successful null and void. In that event, the party would rely on the doctrine that the order was valid unless an application was made to set it aside. A party would not appeal an order in his favour.

36. In the alternative, Lord Pannick submits that there should be a presumption of unfairness in cases heard under the FTR 2005 because of the inherent unfairness of the system.

37. It was not on Lord Pannick's submission appropriate to ask whether the application would have succeeded. For this proposition, Lord Pannick places particular reliance on the recent decision of this Court in *Pathan v Secretary of State for the Home Department* [2020] UKSC 41; [2020] 1 WLR 4506. He submits that the courts will not deny a remedy because the right to be heard makes no difference on the facts of the individual case. He argues in effect that fairness is such a fundamental aspect of the justice system that the courts will not decline to give relief in circumstances such as these simply because the appellant could not show that she would have succeeded on her appeal. The appellant had to submit to an unfair procedure and that was unfairness enough.

38. As an alternative approach Lord Pannick submits that if automatic nullification is not available, the decision of the FTT should be set aside if some or all of the features identified in *DA6* are present, and that the determination should be quashed. Those features were an accelerated timetable which made it difficult to obtain corroborative evidence; a large volume of tasks facing the legal representative; limited access to the legal representative; lack of legal representation and complexity of the case (present in many asylum appeals). In the further alternative, Lord Pannick submits that there should in this situation be a presumption to that effect.

39. I now turn to the submissions of Ms Stephanie Harrison QC, who has provided the court with the benefit of her expertise about human trafficking claims. She submits that the accelerated timetable imposed by the FTR 2005 was peculiarly prone to have a particular adverse impact on the victim of human trafficking. This is because a victim of human trafficking is likely to need more time to obtain medical reports and so on and the person is unlikely to be willing to disclose information that would give rise to such a claim at the outset. The Secretary of State had failed to pick up the indicators of human trafficking in TN's case, for instance, that she had been raped on her journey to the UK.

40. Therefore, submits Ms Harrison, TN should have been referred before the hearing of her appeal in the FTT to the National Referral Mechanism (see para 16 above) for assessment as a possible victim of human trafficking. The FTR 2005 were only for comparatively straightforward appeals and TN's case should not have been included in that system. Home Office guidance refers to factors which may make it difficult for a victim of trafficking to come forward; it provides:

> "Such factors may include, but are not limited to, the following: trauma (mental, psychological, or emotional), inability to express themselves clearly, mistrust of authorities, feelings of shame and painful memories (particularly those of a sexual nature)." (*Victims of modern slavery - Competent Authority guidance*, version 3.0, p 99)

41. *DA6* had identified the risks of unfairness at the appeal hearing and it was sufficient to show that those risks were present. The overriding risk was that TN would not have the time required to prepare and present her trafficking claim. Clear indicators of human trafficking were present. Such indicators included her physical injuries and that she presented as a vulnerable person. Dr Bingham had opined that TN's injuries were highly consistent with her account of beatings and rapes and that she exhibited signs of mental trauma. As Dr Bingham put it, persons who are trafficked do not self-identify.

The respondents' arguments

42. Mr Tam submits that, on the hearing of TN's appeal to the FTT, the FTT determined the issue that was placed before it and there was no application that further time was needed. TN was legally represented. Her original claim in January 2004 after she was first encountered was that she was subjected to religious persecution in Vietnam because of her faith. She was not believed and was subject to removal. There was no appeal to the FTT from the determinations of the Secretary of State.

43. When TN returned to the UK, she claimed that she and her mother had suffered torture and ill treatment at the hands of the Vietnamese authorities. She did not produce evidence of these allegations, but at the hearing of her appeal, two friends whom she claimed to have had during her trafficking were called on to give evidence. She did not explain in her witness statement used at the FTT hearing how it was that her story had changed so radically.

44. Later she changed this story to say that she had been trafficked and had been raped on the way to the UK. That claim was abandoned at the appeal hearing itself. In a yet further permutation when making her fresh claim, she claimed that she had been trafficked within the UK. These matters were the subject of the fresh claim which remains outstanding.

45. Mr Tam fairly accepts that if the Secretary of State cannot show fairness it is normally not enough that the unfairness made no difference to the outcome. The

view taken by English law is, he accepts, stricter than that taken by the High Court of Australia: see *Minister for Immigration v SZMTA* [2019] HCA 3.

46. Mr Tam submits that where there is systemic unfairness in a process of adjudication, it is the system that is struck down, leaving the separate question of whether the hearing was unfair in a particular case. To say that a whole process of adjudication is unfair is to declare that there is an inherent risk of unfairness: it does not mean that there was unfairness in every individual case. Moreover, the FTR 2005 provided for judicial discretion to extend time limits.

47. Mr Tam distinguishes the judicial bias cases by saying that where the system cannot produce a judge who does not have a conflict of interest, it follows that the whole system is unfair and that all cases decided under it must be reheard. It is not enough, as the appellant seeks to do, to rely on *R (DN (Rwanda)) v Secretary of State for the Home Department* [2020] UKSC 7; [2020] AC 698 where the order for deportation was held to be invalid where the statutory instrument under which it was made was held to be ultra vires. In that situation the deportation order depends directly on the validity of the statutory instrument.

48. Mr Tam opposes Lord Pannick's alternative approaches. In particular he submits that if regard were had to the presence of some or all of the features of unfairness identified in *DA6*, no regard would be paid to the extent to which unfairness arising from those factors had fructified in any individual case. There could be a range of reasons why corroborative evidence was not obtained which had nothing to do with the accelerated timetable. An event occurring in relation to a determination under the FTR 2005 should also not be capable of leading automatically to that determination being set aside if it would equally have occurred under the ordinary rules applying to appeals, which it is not contended were systemically unfair. A presumption was inappropriate when the decision in *DA6* had identified the risk of unfairness, not unfairness in individual cases, which would have to be the product of a multifactorial evaluation of the circumstances of the case.

49. As to unfairness on the facts, the sequence of events in Mr Tam's submission shows that TN's case involved a last-ditch attempt to resist removal.

50. Miss Julie Anderson adopts Mr Tam's submissions on behalf of the Lord Chancellor.

Discussion

51. The question that arises on this appeal stems from the unfairness which the Court of Appeal found in *DA6* to be systemic in the FTR 2014. For instance, there was a shortened timetable (two days for serving a notice of appeal from the date of the decision, which the FTT could only extend in limited circumstances: see rule 8, with the hearing potentially to follow as soon as possible after the date on which the respondent provided certain documents: rule 12), and the limited power of the FTT to permit an adjournment of the hearing (rule 28). These elements of the FTR 2014 are capable of impacting very adversely on the asylum-seeker's preparation of his case. Ouseley J reasoned back from the ruling in *DA6* regarding inherent unfairness in the FTR 2014 to conclude that there was similar unfairness inherent in the FTR 2005, which had similar features.

52. The appellant has essentially two ways of putting her case. She firstly contends that her appeal should be allowed because the system created by the FTR 2005 was unfair and the consequence is that the determination of her appeal was automatically null and void or should be declared or presumed to be null and void because it possessed some of the features of unfairness identified in *DA6*. Her second argument is that it operated unfairly in her case.

53. I reject the first submission for several reasons. The fact that the FTR 2005 were held to be structurally unfair does not mean that the hearing was unfair when the rules are applied to her particular case. The position is analogous to saying that an institution is institutionally unfair or biased. An institution can be institutionally unfair or biased without every single person within it having the same approach or attitude or every single person who comes into contact with the institution being treated in an unfair or biased way.

54. Lord Dyson MR observed in *DA6* that he was in no doubt that tribunal judges would "do their best to comply with the overriding objective of dealing with appeals justly" (para 38). In at least a proportion of cases, that objective will have been achieved. TN had a right to a fair hearing, certainly, but not an additional and separate right to a hearing conducted under a set of rules that was not systemically unfair.

55. In his concurring judgment, with which I agree, Lord Sales emphasises a point which I gratefully adopt and which on analysis completely undermines the appellant's case: that, because the hearing by the FTT could still be fair even if the FTR 2005 were ultra vires, the FTT had jurisdiction in a case where the hearing was shown to be fair. Both Ouseley J (at paras 73 to 75 of his judgment) and Singh LJ (at paras 86 and 87 of his judgment, referring to jurisdiction in its post-*Anisminic*

sense) made the point that the FTT had jurisdiction despite the invalidity of the FTR. The appellant's case in this court did not challenge these paragraphs, and in his oral submissions Lord Pannick implicitly accepted that the FTT had jurisdiction but submitted that its decision was inextricably linked to the FTR 2005 and so ought to be set aside (see *DN (Rwanda)*, especially para 19).

56. The FTT's jurisdiction is set out in the 2002 Act, and, as Lord Sales points out, in the events which happened its jurisdiction was solely governed by its obligation to act judicially, that is in this case, to act fairly. Provided that the FTT was fair in its conduct of the appeal, its decision was accordingly valid. In turn if, because of following the rules, its determination was unfair, the FTT would have no jurisdiction, and the resultant determination should be set aside. On this analysis, there is no automatic nullification of the FTT's decision and it is for the appellant to establish that it ought to be set aside. As to Lord Pannick's submission on *DN (Rwanda)* referred to in the preceding paragraph, I accept Mr Tam's submission for the reason he gives (para 47 above) and reject the argument based on inextricable link.

57. Lord Radcliffe considered that a court order (in this case, that would be the tribunal's decision determining TN's appeal) is valid and binding until it is set aside (see para 28 above). This principle has been acted on for many years. In relation to judicial decisions, the rationale of the principle must be to bring litigation to an end and to promote certainty, especially in property and status matters. The principle and its rationale would be undermined if the consequence of the systemic failings in the FTR were that tribunal decisions were automatically null and void.

58. In this connection, Mr Tam submits that automatic nullification would create great uncertainty for many years to come, which may in some cases affect not just the appellant but third parties. I accept that submission and hold that it supports the conclusion to which I have come. It would undermine confidence in the legal system if automatic nullification were the result, which is one of the reasons why it is in the public interest that there should, at an appropriate stage, always be finality in litigation.

59. In so far as Lord Pannick's submission on automatic nullification rests on judicial bias cases, I would hold that these cases are not on all fours with the present one. I can explain my reason for this conclusion by reference to *Millar v Dickson*, on which Lord Pannick principally relied. In that case the Privy Council, in exercise of its devolution jurisdiction in relation to Scotland, held that temporary sheriffs, whose contracts were subject to control by the Lord Advocate, were not independent for the purposes of article 6 of the Convention, and, therefore, that there was apparent bias. I accept that this was also a systemic issue. The remedy given was to set aside judgments in cases in which the temporary sheriffs had appeared. Another

example, but not of a systemic issue, would be *Serafin v Malkiewicz* [2020] UKSC 23; [2020] 1 WLR 2455, a recent decision of this court, where it was held that the decision of the judge who had intervened unfairly in a trial should be set aside in its entirety irrespective of the quality of the judgment on any particular point. In that case, however, the interventions had occurred throughout the hearing.

60. I do not find the analogy with judicial bias cases convincing. It is not always the case that bias on the part of the judge will result in the trial being declared unfair. It may be that the party waived its right to object, or the defect complained of may be cured by an appeal hearing (neither of those points of course applies here). The reason for a strict rule in relation to apparent bias is that there was no way in which the defect could be cured, and it was one that persisted throughout the hearing. It would be wrong to require the parties to show that there was an actual lack of independence. In other words, the apparent bias of the temporary sheriffs was a defect which could not be purged. As Lord Clyde cogently put it in *Millar* at para 83: "The independence of the judiciary is not an empty principle which can be forgotten simply because one thinks that a correct conclusion has been reached. Rightly or wrongly, there is always room for an uneasy fear that there might have been some improper influence affecting the mind of the judge where he lacks independence." By contrast, it is possible in this instance for the party who wishes to say that the hearing, attended by both parties, was unfair, to identify the particular respect in which the trial was not fair to him or her.

61. Mr Tam has further challenged whether the Secretary of State would be prevented from rejecting a decision made under unfair rules for which the State was responsible, but in the light of my other conclusions it is unnecessary for me to pursue this point.

62. The appellant has not complained of any particular act in the course of the hearing or about the way the judge handled the appeal. Likewise, there has been no complaint about the quality of the reasoning in the decision. As Lord Dyson said, tribunal judges could be relied on to conduct the trials fairly within the rules. TN, therefore, must show a particular respect in which the rules impacted adversely on her in terms of the conduct of the hearing. There was no application for any adjournment, and she was represented by counsel. I do not consider that it is enough to say that features were present in her appeal which were also identified in *DA6*: she must show that those factors impacted upon her so as thereby to render the hearing of her appeal unfair. It follows that I would also reject a presumption that the trial was as a result unfair. The information to show that it was unfair must be in the appellant's hands.

63. I turn next to *Pathan*, a case on which Lord Pannick placed heavy reliance. In *Pathan*, the appellant applied for leave to remain under Tier 2 of the points-based

immigration system, which allows UK employers to recruit skilled workers to fill a particular vacancy if it cannot be filled with a UK worker. But the employer must be a licensed sponsor and, if his licence is withdrawn, leave to remain will be refused. The applicant in this case made his application using a valid certificate of sponsorship, but the Secretary of State revoked the licence to give such certificates before making a decision on Mr Pathan's application and without informing him that his application was bound to fail. Thus, he had no opportunity to find another sponsor. Mr Pathan did not seek to show that he would have succeeded in finding a new sponsor. Nonetheless, the court, Lord Briggs dissenting, held that the Secretary of State should have informed Mr Pathan of its revocation of the licence. It did not matter that it was unlikely that Mr Pathan could have found another sponsor in the short time available.

64. I accept that *Pathan* is relevant. The same rules of natural justice can apply to administrative decisions as well as judicial decisions. But the circumstances are not the same. Mr Pathan could show that he lost an *opportunity* to seek a fresh sponsor. If TN could show that, because of the unfairness of the FTR 2005, she lost the opportunity to develop some part of her then case that she will now be unable to pursue, she would be similarly placed. But she cannot show that that was so. She has since made what she contended was a *fresh* claim "regarding her sex trafficking matter" (letter dated 19 August 2015 from Linga & Co to the Yarl's Wood Detention Centre). That is not the claim that she advanced at the appeal hearing.

65. In determining whether the appellant has shown that the trial was unfair, the court must bear in mind the need for anxious scrutiny of any asylum claim. It is well established that the decision-maker is not constrained by rules of evidence and has to consider all material considerations when making an assessment about the future (see *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449). Bingham LJ observed in *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402, 414:

> "It is … plain that asylum decisions are of such moment that only the highest standards of fairness will suffice."

66. It is important to analyse carefully whether there was unfairness in the course of the hearing and, if so, whether that was caused by the FTR 2005 and what the effects of that unfairness were. In this analysis it may be helpful to follow the methodology in *The Right to a Fair Trial in International Law*, Clooney and Webb, (Oxford, 2021) which disaggregates the right to a fair trial into a number of separate elements, such as the right to an independent tribunal, the right to prepare a defence, the right to adequate time and facilities to prepare a defence, the right to be present, the right to examine witnesses, the right to an interpreter and so on. A disaggregated analysis may assist the court to form a clearer view as to the causes, and causative

effect, of any departure from what fairness required. Of course, at the end of the day, the court must look at the matter in the round and determine whether the hearing, as a whole, was unfair because of the FTR 2005. In that regard the courts can follow the "overall" approach of the European Court of Human Rights, which was explained by the Grand Chamber of that court in *Al-Khawaja and Tahery v United Kingdom* (Application Nos 26766/05 and 22228/06) (2011) 32 BHRC 1 in these terms:

> "Traditionally, when examining complaints under article 6(1), the court has carried out its examination of the overall fairness of the proceedings by having regard to such factors as the way in which statutory safeguards have been applied, the extent to which procedural opportunities were afforded to the defence to counter handicaps that it laboured under and the manner in which the proceedings as a whole have been conducted by the trial judge (see, for example, *Murray v United Kingdom* [1996] ECHR 18731/91)." (para 144)

67. A careful analysis is called for, remembering always that the asylum claimant does not have to establish his or her claim to the same standard of proof as a civil claimant (see *Karanakaran*, above). But the system is not inquisitorial but adversarial. The trial takes place at the hearing, and it is not a continuous fact-finding process which goes beyond that hearing. The appellant must bring forward his case at the hearing, not subsequently. If he is prevented from doing so, he should apply for an adjournment.

68. So even where the alleged unfairness stems from the provision of a defective system the court will look at the impact of the system, and not simply set aside the order without considering the impact.

69. In this case, the judge thought that the appellant was really trying to resist the removal directions. Although he was prepared to annul the Secretary of State's adverse decision on her fresh claim that she had been trafficked on her second journey to the UK, a claim that still has to be dealt with, he did not consider that the fairness of the hearing was infected by the defects in the rules.

70. I turn to the question whether there was unfairness in the way her case was dealt with. I agree with what has been said in this regard by Ouseley J and by the Court of Appeal, who considered the facts in great detail. For TN to succeed on this part of her appeal she would have to show that they were wrong in law, and in my judgment this plainly cannot be shown. There were many inconsistencies in her evidence including the date of the death of her mother, to whom she was clearly

close. She had originally said at the time of her first asylum claim that her mother had died in 1999, but on her second claim she contended that her mother had died in 2003 in prison. She falsely claimed to have two children in Vietnam, and so on. It is not appropriate for the court to say anything about her fresh claim.

71. There is a further reason why unfairness in part is not shown. She has a fresh claim that she was trafficked on her second journey to the UK and in the UK. That claim has yet to be determined and, if she wishes to challenge the determination of the Secretary of State of that claim, she will be able to do so under a procedure outside the FTR. In my judgment, that fresh claim operates (if the procedure runs its course) as a rehearing would have done to remedy any defect in the handling of her trafficking claim. Any defect in the handling of the claim which is reheard falls by the wayside and is therefore cured by that process: there is no need to set aside the FTT's determination to allow her to bring her trafficking claim.

72. This case is to my mind an illustration of *TN* factor 4, as formulated by Singh LJ (see para 5 above). There is no causal link between the unfairness, which as I see it surrounded the trafficking claim and only that claim, and the persecution and maltreatment claims. That being so, the determination of the latter should stand. I would also endorse the non-exhaustive list of *TN* factors as giving helpful guidance for future cases. I would also endorse Singh LJ's summation of the ultimate issue in para 104 of his judgment. At the end of the day the question is, subject always to *TN* factor 1 (which requires a high standard of fairness to be shown: see *Thirukumar* per Bingham LJ): was the FTR procedure unfair in the particular case? I consider that this test is less open to the risk of ambiguity than that proposed by Mr Tam, namely whether the outcome would have been the same under the ordinary rules applying to appeals, which it is not contended were systemically unfair: what the appellant is entitled to is a fair hearing appropriate to her claim and it is no answer that the appeal would have failed even if not unfair to her. If, applying the anxious scrutiny required of any asylum claim, the court or tribunal is satisfied that the hearing of an appeal was fair to the appellant, it is its duty to say so and dismiss the application to set aside the determination of any appeal.

Conclusion

73. For the reasons given above, I would dismiss this appeal.

LORD SALES: (with whom Lord Lloyd-Jones, Lord Briggs and Lord Stephens agree)

74. I agree that the appeal should be dismissed. I am grateful to Lady Arden for her account of the facts of TN's case and the process by which Ouseley J came to hold that the Fast Track Rules 2005 ("the FTR 2005") were unfair and ultra vires the statutory power under which they were made.

75. In short summary, in *R (Detention Action) v First-tier Tribunal* [2015] EWCA Civ 840; [2015] 1 WLR 5341 ("*DA6*") the Court of Appeal held that the Fast Track Rules 2014 were ultra vires on the grounds that they were structurally unfair and unjust. Ouseley J concluded that the FTR 2005 were sufficiently similar in their effect as to fall within the scope of the reasoning of the Court of Appeal in *DA6* and therefore found them to be ultra vires on the same basis.

76. TN's asylum claim in 2014 was refused by the Secretary of State and she appealed to the First-tier Tribunal ("FTT"). TN was detained and her appeal was processed and heard within the framework for speedy consideration set by the FTR 2005. By its decision dated 22 August 2014 the FTT dismissed the appeal ("the FTT decision"). In its reasons, the FTT made various findings adverse to TN and found her account of the circumstances which she said gave rise to fear of ill-treatment if returned to Vietnam to be incredible. TN did not apply for permission to appeal against the FTT decision. Pursuant to that decision she remained in detention pending her removal from the UK.

77. In June 2016, TN was granted permission to apply for judicial review to quash the FTT decision. A claim she had brought for false imprisonment was stayed pending the outcome of those proceedings. Ordinarily, the way to challenge the lawfulness of a decision of the FTT is by an appeal to the Upper Tribunal, but that was not a viable route of challenge in this case because of the lapse of time. The authorities which gave rise to the argument that the FTR 2005 were ultra vires came after the FTT decision and it was fair that TN should have the opportunity to challenge that decision by reference to that argument, which meant that judicial review was the appropriate way to seek to do that.

78. It is common ground in this appeal that an application is necessary to set aside a decision of the FTT, if it is said to be a nullity and of no effect by reason of the impact of the FTR 2005 being ultra vires: ie in order to establish by a formal legal process that that is the case.

79. Although the background to this case is complicated, the issues for decision identified in the statement of facts and issues are within a narrow compass:

> (1) Whether the determination of an asylum appeal made under the FTR 2005, such as the FTT decision in this case, is a nullity and of no legal effect, so that it must on application be quashed for that reason alone;
>
> (2) If not, what is the correct approach to deciding on application to quash such a determination?; and
>
> (3) On the facts of TN's case, should the FTT decision be quashed?

Discussion

Issue (1): is a decision taken under the FTR 2005 automatically a nullity?

80. The jurisdiction of the FTT to hear and determine an immigration appeal of the kind brought by TN is conferred by section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), not by the FTR 2005. Section 82(1) provides: "Where an immigration decision is made in respect of a person he may appeal to the Tribunal." Section 86 of the 2002 Act sets out the functions of the FTT on an appeal to it: it is obliged to determine the appeal.

81. Singh LJ in the Court of Appeal rightly emphasised (para 83) the conceptual distinction between the question whether the FTR 2005 were ultra vires and the question whether a decision in an individual case was procedurally unfair. As he pointed out (paras 84-85), the first question turned on whether the FTR 2005 created an unacceptable risk of unfairness in a significant number of cases (not in *every* case). It does not necessarily follow that a decision taken under the FTR 2005 procedure would be unfair in any particular individual case.

82. Singh LJ set out the critical analysis in the next two paragraphs of his judgment:

> "86. I agree with Mr Tam [counsel for the Secretary of State] that 'jurisdiction' to determine the appeals in the pure or narrow sense of that word (the legal authority to decide a question) existed by virtue of the primary legislation (section 82 of the 2002 Act) and the FTT was not deprived of

> jurisdiction in that sense by reason of the fact that the 2005 Rules were ultra vires. I would also reject Ms Lieven's [counsel for TN] suggestion that the FTT's jurisdiction was created by the 2005 Rules themselves. She submitted that a valid appeal required a notice of appeal to be filed in accordance with rule 6 of the Principal Rules, applied to the fast track process by rule 6 of the 2005 [Fast Track] Rules. In my view, that submission is misconceived. It is a commonplace feature of an appellate system that there will be procedural rules which require a notice of appeal to be filed in a certain form. That is not what creates the jurisdiction of a court or tribunal; it is merely a rule which regulates procedure and form. What creates the jurisdiction is the principal legislation, here the 2002 Act.
>
> 87. However, in my view, that would only go so far in meeting Ms Lieven's fundamental submission, which is that any appeal decision which was made under those Rules was necessarily infected by the fact that they were unlawful because they created an unacceptable risk of procedural unfairness. It is in that sense that she submits the FTT did not have jurisdiction, in other words a post-*Anisminic* [*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147] understanding of jurisdiction: not in the pure or narrow sense of having the legal authority to determine a question, but that a body has acted in a way which is unlawful, including (for this purpose) in a way which is procedurally unfair. That said, it seems to me that the answer which Mr Tam gives to that contention is correct: there has to be shown to be procedural unfairness on the facts of the individual case."

I think this reasoning is impeccable.

83. In order for the FTT decision to be found to be a nullity, it would have to be established that it was ultra vires in the sense that it was taken by the FTT without jurisdiction in the wide *Anisminic* sense. That means that it would have to be established that it was a decision arrived at outside the jurisdiction conferred by section 82(1) of the 2002 Act. That provision includes as an implied condition that a decision should be arrived at fairly: that means, fairly in the circumstances of the individual case.

84. Therefore, Ouseley J and the Court of Appeal were right to hold that the FTT decision could not be held to be a nullity and of no legal effect merely because it had been made under the procedure set by the FTR 2005. They were right to examine

whether the process by which the FTT decision was arrived at was fair in the particular circumstances of TN's case.

85. Like Lady Arden, I do not consider the analogy which Lord Pannick QC sought to draw with cases involving apparent bias on the part of judges to be valid or helpful. Every litigant has a right to determination of their dispute by a judge or tribunal which is impartial and unbiased, meaning free both of actual bias and of any appearance of bias. In terms of section 82(1) of the 2002 Act, this is a further implied condition for the valid exercise of the jurisdiction conferred by that provision. If the FTT in TN's case had been biased in fact or had given an appearance of bias, the FTT decision would fall to be quashed. But there is no suggestion that the FTT was biased or that it gave any appearance of a lack of impartiality. Quite simply, these points do not support Lord Pannick's contention that the mere fact that the FTT operated under the procedure set out in the FTR 2005 means that it acted outside its jurisdiction; rather, they support the alternative analysis set out by Singh LJ.

Issue (2): the correct approach to deciding whether to quash a determination like the FTT decision

86. As Singh LJ pointed out, there is no necessary connection between a determination being made under the FTR 2005 and that determination being arrived at unfairly. Whether a FTT acting under the FTR 2005 procedure acts unfairly in an individual case will depend upon the particular circumstances of that case.

87. On this issue I consider that the guidance given by Singh LJ later in his judgment is correct:

> "103. For the future I would recommend that a court which has to consider an application to set aside an earlier appeal decision made under the 2005 Rules should approach its task having regard to the following:- (1) A high degree of fairness is required in this context. (2) What the Court of Appeal said in *DA6* should be borne in mind: that [by parity of reasoning] the 2005 Rules created an unacceptable risk of unfairness in a significant number of cases. Depending on the facts it may be that the case which the court is considering is one of those cases. (3) There is no presumption that the procedure was fair or unfair. It is necessary to consider whether there was a causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court. (4) It should also be borne in mind that finality in litigation is important. There may be a need to ask how long the delay was

> after the appeal decision was taken before any complaint was made about the fairness of the procedure. There may also need to be an examination of what steps were taken, and how quickly, to adduce the evidence that is later relied on (for example medical evidence) and whether it can fairly be said that in truth those further steps were taken for other reasons, such as a later decision by the Secretary of State to set removal directions. This may suggest that there is no causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.
>
> 104. The above should not be regarded as an exhaustive checklist. At the end of the day, there can be no substitute for asking the only question which has to be determined: was the procedure unfair in the particular case? That has to be determined by reference to all the facts of the individual case."

88. These points flow from the analysis under issue (1) above. If any person wishes to contend that a decision of a tribunal, like the FTT, or an inferior court of limited jurisdiction, is unlawful and therefore void and of no effect, they have to bring forward a case to make good that contention. In the present context, depending on the circumstances of their case, they may gain some assistance in doing that by referring to the way in which the FTR 2005 had a practical impact on them and seeking to show that the reasoning in *DA6* (and as adopted in relation to the FTR 2005 in the present proceedings) indicates that this involved unfairness in the way in which they themselves were treated. But it is not helpful or appropriate to speak of there being a presumption of unfairness if a decision has been taken under the FTR 2005, as Lord Pannick sought to do.

89. In relation to the point about finality of litigation, I would emphasise that as in any judicial review proceedings the expectation is that a claimant will proceed with their case with reasonable promptness after they become aware or could reasonably be expected to have become aware of the grounds for the claim. TN appears to have done that, and so was granted permission to apply for judicial review. Claimants who delay without good reason may not be granted permission to proceed.

Issue (3): Fairness in the circumstances of TN's case

90. Ouseley J examined with utmost care the circumstances of TN's case and the way in which it was considered by the FTT and concluded that the FTT had acted

fairly in making the FTT decision. He summarised the position at paras 141-142 of his judgment:

> "141. I am not persuaded that the appeal decision was unfair. There was no real basis for contemplating that [TN] was a trafficked woman, in the light of her immigration history, the absence of any indication from her that she had been trafficked despite her knowledge of the asylum system and the risk of return on the story she had given. The fact that she had scarring did not, without more, mean that there was a need for a rule 35 report. She had been seen by the detention centre GP. I agree with Ms Barnes [counsel for the Secretary of State] that a number of indicators, such as evading authorities, are consistent with not wanting to be removed from the UK. Merely asking to be removed from the DFT [detained fast track] proves nothing. So I see nothing in her presentation in the DFT to show that she should not have been in it at all.
>
> 142. She was represented throughout by solicitors. She made no application for a rule 35 report. No adjournment was sought so that an appointment could be obtained with the Medical Foundation for example. Transfer out was not sought from the immigration judge. No adjournment was sought in order to obtain medical evidence of any sort. There was no indication either made expressly or noted by the immigration judge from observation, that the issues which were raised could not be dealt with in that time frame, or that further evidence, oral or documentary, was awaited or even obtainable. The possible relevance of what happened on the journey to the UK was not pursued. The immigration judge could assess the two men present who gave evidence, knowing that one was alleged to be a boyfriend. Such further evidence as came did not come within the time-frame that the application of the Principal Rules would have permitted, but was first presented over a year after the appeal decision. There is no basis for supposing that the evidence would have been relevant to whether her claim as advanced to the SSHD or on appeal was credible. There is no evidence that she would have presented a completely different claim if only she had had more time in which to produce medical evidence of the sort she did a year later. I note what is said in *DA2* [2014] EWHC 2525 (Admin) at para 8 that applicants' solicitors said that they were often preparing fresh claims before the substantive appeal was finally determined since they anticipated its receipt but not quickly enough for the

> DFT timetable. She made no complaint about the fairness of the appeal hearing or procedure in her first judicial review proceedings. The further representations leading to the August decision had provided no evidence that the appeal decision was unfair. It was only in these judicial review proceedings lodged on 20 August 2015 that the fairness of the appeal proceedings was raised. Accordingly, I would not have quashed the appeal decision. …"

91. The question for the Court of Appeal was whether he was "wrong" in the assessment he made in applying well known standards of fairness to the particular facts of TN's case: CPR Part 52.21 and para 129 in the judgment of Singh LJ. Singh LJ considered (para 130), rightly in my view, that it could not be said that the judge's assessment was "wrong" in the requisite sense. In arriving at that conclusion, Singh LJ (with the agreement of the other members of the court) himself reviewed the circumstances of the case with particular care (paras 131-150). As he pointed out (para 147):

> "… the fundamental difficulty for [TN's] appeal is that many of her reasons for not producing evidence are not attributable to the shortened timetable which was to be found in the 2005 Rules. Instead, they relate to the receipt of threats from alleged traffickers. It may also be (as the chronology appears to support) that representations were not made on her behalf until action was prompted by the imminence of removal directions."

92. In circumstances where the application of the relevant law to the facts has been examined with such care by the courts below, I do not think it is properly open to this court to reach a different conclusion on this aspect of the case. Neither Ouseley J nor the Court of Appeal can be said to have been wrong in their assessment. Indeed, I agree with what they say.

Conclusion

93. For these reasons, I would dismiss this appeal.