[2019] AACR 18

(R (Criminal Injuries Compensation Authority) v First-tier Tribunal (CIC) [2018] UKUT 439 (AAC))

Lady Carmichael
Judge Rowland
Judge Markus QC

20 December 2018 **JR/906/2017**

Judicial review – criminal injuries compensation – jurisdiction of Upper Tribunal – claimant injured in Scotland and living in Scotland – First-tier Tribunal decision made in Scotland – whether Upper Tribunal having jurisdiction – whether jurisdiction to be declined on *forum non conveniens* grounds

The claimant, who lived in Scotland, was assaulted in Scotland. His claim for criminal injuries compensation was rejected but the First-tier Tribunal (F-tT), sitting in Scotland, allowed his appeal. The Criminal Injuries Compensation Authority (CICA) brought judicial review proceedings in the Upper Tribunal (UT) but subsequently both CICA and the claimant argued that the UT did not have jurisdiction to consider the case but that the Court of Session did.

Held, striking out the application for judicial review, that:

1. "cases arising under the law of England and Wales" in which the UT has a judicial review jurisdiction pursuant to section 15(1) of the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act') are cases in which the High Court would have jurisdiction but for that Act (paragraph 19);
2. *Teharani v Secretary of State for Home Department* [2006] UKHL 47 was concerned with the jurisdiction of the Court of Session. The Court of Session would not have jurisdiction in the strict sense to determine a judicial review application in respect of a UK-wide or GB-wide tribunal unless there was a clear connection with Scotland in the underlying facts of the case (paragraph 34).
3. under the 2007 Act there is no reason for a presumption that the appropriate court is to be determined by reference to the part of the UK in which the F-tT made its decision. The test is simply one of appropriateness. However, *Tehrani* must be followed when considering the strict jurisdiction of the Court of Session on an application for judicial review of a decision of the F-tT or the UT (paragraphs 37 and 38);
4. (without deciding the point) the High Court might have jurisdiction in the strict sense to determine an application in respect of a UK-wide or GB-wide tribunal in a case with no connection with England and Wales (paragraph 51); but if the UT has jurisdiction in the strict sense, it should decline jurisdiction on *forum non conveniens* grounds (paragraphs 52 and 69-72);
5. general guidance on the approach to arguments on *forum non conveniens* in criminal injuries compensation cases given (paragraph 78).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Mr Chris Pirie (of the Scots Bar), instructed by Ms Eileen Grant of the Authority's Legal and Policy Team, appeared for the Criminal Injuries Compensation Authority.

The First-tier Tribunal did not appear and was not represented.

Ms Clare Connolly (of the Scots Bar), instructed by Ms Dominika Schmidtova of Thompsons solicitors, appeared for the injured person.

Decision: This application for judicial review is struck out on the ground that the Upper Tribunal does not have jurisdiction because, even if the Upper Tribunal has jurisdiction in the strict sense, it declines to exercise it.

REASONS FOR DECISION

1. This is an application, made by the Criminal Injuries Compensation Authority ("the Authority") with permission granted by Upper Tribunal Judge Markus QC, for judicial review of a decision of the First-tier Tribunal dated 15 December 2016, whereby it allowed an appeal brought by the Interested Party (the "injured person") against a review decision of the Authority dated 23 February 2016.

2. The Authority had decided that the injured person was not entitled to compensation under the Criminal Injuries Compensation Scheme 2012 ("the 2012 Scheme") because he had not suffered an injury described in the tariff at Annex E to the Scheme. The First-tier Tribunal decided that he had suffered such an injury. The Authority considers that that decision was made in error of law.

3. There arises, however, the question whether the Upper Tribunal should consider the Authority's application. There is no doubt that the Court of Session would have had jurisdiction to consider an application made to its supervisory jurisdiction had the Authority made such an application to that Court. The issue is whether the Upper Tribunal has concurrent jurisdiction and, if so, whether, applying the principle of *forum non conveniens*, it should decline to exercise it because the Court of Session is a more appropriate or suitable forum.

The facts and procedural history

4. The injured person lives in Edinburgh. On 30 May 2015, he was attacked by an unknown assailant in Edinburgh. Through his solicitors, he made, on 25 June 2015, a claim to the Authority under the 2012 Scheme, identifying his injuries as a deviated nasal septum, a bloody nose, grazing, lacerations and cuts to his upper limbs and scarring of his upper limbs and face. He said that he was waiting for reconstruction surgery on his nose.

5. The claim was refused on 21 December 2015 on the ground that the injuries were not "described in the tariff at Annex E", as paragraph 32(a) of the Scheme generally requires. The injured person applied under paragraph 101 of the Scheme for a review on the ground that he had suffered a broken nose and was therefore entitled to an award of £3,500 on the basis that his injury amounted to a fracture of his skull requiring surgery. That application was rejected on 23 February 2016. He appealed under paragraph 125 of the Scheme to the First-tier Tribunal, which allowed the appeal on 15 December 2016 at a hearing in Glasgow. The First-tier Tribunal pointed out that, from a medical point of view, the skull includes the nasal bones and, having analysed Annex E to the Scheme, concluded that a fracture of the nasal bones amounted to a fracture of the skull for the purposes of the Scheme. Indeed, it also said that, as the medical evidence showed that the fracture required to be elevated, the clear inference was that it was depressed. On that basis, it appears that the appropriate award would be £4,600, since a depressed fracture of the skull attracts a higher award than a simple one.

6. On 15 March 2017, the London office of the Administrative Appeals Chamber of the Upper Tribunal received an application made by the Authority for judicial review of the First-tier Tribunal's decision. The grounds were drafted by counsel in London. The Authority argued that the First-tier Tribunal had erred in its interpretation of the Scheme and it relied substantially on the consultation document that had preceded the making of the 2012 Scheme which, it submitted, showed that, whereas a fractured nose had attracted compensation under the previous scheme, it had been intended that such a fracture would not be compensated under the 2012 Scheme.

7. On 21 March 2017, the Senior Registrar of the Administrative Appeals Chamber issued case management directions and raised the question whether the "*forum non conveniens* doctrine" applied. He referred the parties to the decisions of a three-judge panel of the Upper Tribunal in *R.(MB) v First-tier Tribunal (CIC)* [2012] UKUT 286 (AAC); [2013] AACR 10 and *R.(NF) v First-tier Tribunal (CIC)* [2012] UKUT 287 (AAC); [2013] AACR 11 ("*MB*" and "*NF*").

8. In his acknowledgement of service, the injured person opposed the application, referring to the principle of *forum non conveniens* and arguing that the application should have been made to the Court of Session rather than the Upper Tribunal because the case had no material connection with England. He asked that the Upper Tribunal "defer to the jurisdiction of the Court of Session".

9. On the other hand, the Authority argued that the Upper Tribunal had jurisdiction under sections 15 and 18 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") and should not decline it on *forum non conveniens* grounds because the claim concerned the correct interpretation of a UK-wide scheme – actually, it is only GB-wide – that the Administrative Appeals Chamber of the Upper Tribunal was a specialised tribunal with significant experience in dealing with challenges arising out of decisions made in relation to the 2012 Scheme and that, by virtue of section 26 of the 2007 Act, the Upper Tribunal could hear the case in Scotland where the injured person lived.

10. When issuing further case-management directions on 30 June 2017, Upper Tribunal Judge Markus QC accepted the Authority's arguments. She considered that the application had been made in the correct forum and so made no order or direction in that regard. On 1

August 2017, having received submissions on the substantive point arising on the application, she gave permission to apply for judicial review.

11. The substantive application for judicial review was to be heard in June 2018 but the hearing was postponed because, on further consideration, Judge Markus QC was concerned that the issue of the Upper Tribunal's jurisdiction had not been fully considered. She drew the parties' attention to passages in the opinions delivered by the House of Lords in *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47; [2007] 1 A.C. 521; 2007 SC (HL) 1. On 25 July 2018, the Acting Chamber President directed that the preliminary issue as to jurisdiction be listed before a three-judge panel. On 5 October 2018, Judge Markus QC directed the parties to file skeleton arguments on the issue of jurisdiction, observing –

> "2. … The reasoning of the Upper Tribunal in *MB* is unclear and the three-judge panel will be seeking to clarify it if possible. For the avoidance of doubt, the three-judge panel is not bound to follow the decision in *MB* and so, if the Upper Tribunal in this case considers that the decision is either wrong or unclear, it may decide afresh the correct principles applicable to the jurisdiction."

12. Apparently feeling liberated by those Observations, the Authority has radically altered its position. It now argues that the Upper Tribunal does not have jurisdiction in this case, but it asks the Upper Tribunal to express a hope that the Court of Session will extend time for an application to that court for judicial review. It also argues that part of the reasoning in *MB* and *NF* should not be followed. However, if it is wrong on the issue of jurisdiction, it continues to argue that the Upper Tribunal should exercise its jurisdiction in this case. The injured person supports the Authority's argument that the Upper Tribunal does not have jurisdiction.

The Upper Tribunal's jurisdiction

13. The jurisdiction of the Upper Tribunal is conferred entirely by statute and so is to be found in the terms of the statute. In a broad sense, both the First-tier Tribunal and the Upper Tribunal, which are constituted under section 3 of the 2007 Act, are United Kingdom tribunals, exercising jurisdiction in all parts of the United Kingdom, having offices in all parts of the United Kingdom and having among their members judges from all parts of the United Kingdom. However, the legislation conferring specific rights or powers to bring proceedings before the tribunals does not always extend to the whole of the United Kingdom, although there is the specific provision in section 26 of the 2007 Act for either tribunal to decide a case in a part of the United Kingdom even though the case does not arise under the law of that part.

14. The Criminal Injuries Compensation Act 1995 ("the 1995 Act"), under which the 2012 Scheme is made, is an Act of the United Kingdom Parliament that extends to Scotland but does not extend to Northern Ireland. The 2012 Scheme also extends to Scotland and in particular applies to injuries attributable to crimes of violence committed in Scotland (see paragraphs 4 and 8). Under the Scotland Act 1998, the Scottish Parliament now has competence as regards criminal injuries compensation but it has not yet legislated itself and so it and Sottish Ministers are presumably content for the Secretary of State to continue making schemes under the 1995 Act. Indeed, the preamble to the Transfer of Tribunal Functions Order 2008 (SI 2008/2833), which transferred the functions of adjudicators appointed under section 5 of the 1995 Act to the First-tier Tribunal, records that Scottish Ministers had given

their consent as required by section 30(7) of the 2007 Act. It is the 2012 Scheme that provides for the right of appeal to the First-tier Tribunal against review decisions made by the Authority's claims officers under that Scheme (see paragraph 125 and the definition of "the Tribunal" in Annex A) and so the First-tier Tribunal exercises a jurisdiction across Great Britain as regards such appeals. So would the Upper Tribunal if an appeal lay to it under section 11 of the 2007 Act.

15. However, a decision of the First-tier Tribunal "on an appeal made in exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1)(a) of the Criminal Injuries Compensation Act 1995" is excluded by section 11(5)(a) of the 2007 Act from the scope of the usual right of appeal to the Upper Tribunal under s.11(1) and any challenge to such a decision must therefore be by way of an application for judicial review.

16. Absent the 2007 Act, an application for judicial review of a decision of an inferior tribunal such as the First-tier Tribunal must be made to the High Court of England and Wales, the Court of Session or the High Court of Northern Ireland, each of which courts exercises in the relevant part of the United Kingdom an inherent, or common law, supervisory jurisdiction in respect of such tribunals.

17. Sections 15 to 21 of the 2007 Act, however, confer an additional, statutory, judicial review jurisdiction on the Upper Tribunal. Sections 19 and 21 provide that the Upper Tribunal has the function of determining cases transferred from, respectively, one of the High Courts or the Court of Session. This is not such a case. Relevant to this case is section 18(2), which confers an original jurisdiction of the Upper Tribunal. It provides that the Upper Tribunal has the function of deciding applications made to it for relief under section 15(1), which in turn applies to "cases arising under the law of England and Wales or under the law of Northern Ireland", subject to conditions imposed by section 18(4) to (8). Sections 15(1) to (4) and 18(1) to (8) provide –

> "**Upper Tribunal's 'judicial review' jurisdiction**
> **15.**—(1) The Upper Tribunal has power, in cases arising under the law of England and Wales or under the law of Northern Ireland, to grant the following kinds of relief—
> (a) a mandatory order;
> (b) a prohibiting order;
> (c) a quashing order;
> (d) a declaration;
> (e) an injunction.
> (2) The power under subsection (1) may be exercised by the Upper Tribunal if—
> (a) certain conditions are met (see section 18), or
> (b) the tribunal is authorised to proceed even though not all of those conditions are met (see section 19(3) and (4)).
> (3) Relief under subsection (1) granted by the Upper Tribunal—
> (a) has the same effect as the corresponding relief granted by the High Court on an application for judicial review, and
> (b) is enforceable as if it were relief granted by the High Court on an application for judicial review.

(4) In deciding whether to grant relief under subsection (1)(a), (b) or (c), the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.

…"

"**Limits of jurisdiction under section 15(1)**

18.—(1) This section applies where an application made to the Upper Tribunal seeks (whether or not alone)—

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

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

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

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

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

(a) relief under section 15(1);

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

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

(d) interest;

(e) costs.

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

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

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

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

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

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

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

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

…"

Section 31A of the Senior Courts Act 1981 and section 25A of the Judicature (Northern Ireland) Act 1978, inserted by section 19(1) and (2) of the 2007 Act, have the practical effect that the High Court must transfer to the Upper Tribunal any application made to it that would have satisfied conditions 1, 2 and 3 in section 18 of the 2007 Act had it been made to the Upper Tribunal, although those sections are not expressed in quite those terms.

18. Directions under Part 1 of Schedule 2 to the Constitutional Reform Act 2005, to which reference is made in section 18(6) of the 2007 Act, must be made by the Lord Chief Justice (or a judicial office holder nominated by him with the agreement of the Lord Chancellor) and, subject to certain exceptions, may be made only with the agreement of the Lord Chancellor. The Lord Chief Justice of England and Wales has made such a direction for the purposes of

section 18(6) which specifies, *inter alia*, "[a]ny decision of the First-tier Tribunal on an appeal made in the exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1) of the Criminal Injuries Compensation Act 1995 (appeals against decisions on review)" (*Practice Direction (Upper Tribunal: Judicial Review Jurisdiction)* [2009] 1 W.L.R. 327). However, by virtue of section 18(1)(a), that can apply only to cases within the scope of section 15(1) and therefore only to "cases arising under the law of England and Wales".

19. The Authority argues that such cases are cases in which the High Court would have jurisdiction but for jurisdiction having been conferred on the Upper Tribunal. This in our judgment is plainly right. It is obvious from the scheme of the legislation, including sections 15(5) to (5B), 16 and 17 which we have not considered it necessary to set out, that, where a case has been transferred by the High Court to the Upper Tribunal or where the conditions in section 18 are satisfied, the Upper Tribunal is intended to act in place of the High Court and generally to exercise the same powers to the same effect, subject only to specific limitations set out in the 2007 Act and to instances where the 2007 Act or other legislation has not conferred on the Upper Tribunal specific powers that have been conferred on the High Court by statute.

20. Moreover, this approach is consistent with that taken in two cases to which Mr Pirie, on behalf of the Authority, drew our attention: *R(B) v Secretary of State for the Home Department (Rule 33A JR amendments and transfers)* [2016] UKUT 182 (IAC), where Walker J said at [29] that the effect of the legislation was "to equate the Upper Tribunal's role in judicial review claims to that of the High Court" and *R.(Criminal Injuries Compensation Authority) v First-tier Tribunal* [2018] EWCA Civ 1175 where, at [6] and [7], particular emphasis was placed on section 15(4). It is also, in our view, consistent with the approach taken by the three-judge panel in *MB* and *NF*. (Mr Pirie submitted that the three-judge panel had decided, or at least might have decided, otherwise in *MB* and *NF*, but we will explain below why we do not accept that submission.)

21. Thus, as it is accepted that the conditions imposed by section 18 of the 2007 Act are satisfied in this case, the question whether the Upper Tribunal has jurisdiction is to be answered by answering the question whether the High Court would have jurisdiction had it not been for sections 15 to 18 of the 2007 Act and section 31A(2) of the Senior Courts Act 1981.

22. The Authority argues that the High Court would not have jurisdiction both as a matter of common law and by virtue of article XIX of the Treaty of Union, as ratified by the Union with Scotland Act 1706 passed by the Parliament of England (and also by the Union with England Act 1707 passed by the Parliament of Scotland, which actually preceded the English Act despite the dates in the short titles that were subsequently conferred on the Acts).

23. It is necessary to refer to the common law because, by virtue of section 17 of, and paragraph 4 of Schedule 5 to, the Civil Jurisdiction and Judgments Act 1982, "proceedings on appeal from, or for review of, decisions of tribunals" do not fall within the scope of section 16 and Schedule 4. That "review" in paragraph 4 of Schedule 5 encompasses judicial review is clear from consideration given in *Tehrani* (at [46] and [82], with agreement at [110]), to the equivalent provision in Schedule 9.

24. Indeed, it is the decision in *Tehrani* upon which the Authority relies for the common law and we now turn to that decision.

Tehrani v Secretary of State for the Home Department

25. It is important to bear in mind from the outset that the House of Lords was concerned primarily with the Court of Session's jurisdiction, rather than the High Court's which was not put in issue by the parties in that case.

26. Mr Tehrani had claimed asylum on his arrival in the United Kingdom at City Airport in London. He was accommodated in Glasgow while his case was considered. The Secretary of State rejected his claim and he appealed unsuccessfully to an adjudicator, who held an oral hearing in Durham. His application to the Immigration Appeal Tribunal for permission to appeal was refused, on paper, in London. He applied to the Court of Session for judicial review of both the adjudicator's decision and the Immigration Appeal Tribunal's refusal of permission to appeal. The Secretary of State entered a plea to the jurisdiction of the court, but he did not enter an alternative plea of *forum non conveniens*.

27. The plea to the jurisdiction was sustained by the Lord Ordinary 2003 SLT 808 on the ground that, having regard to the personal nature of judicial decisions, the Court of Session would be unable to enforce its judgment against either the adjudicator or the Immigration Appeal Tribunal sitting in England. A reclaiming motion was refused by an Extra Division of the Inner House 2004 SLT 461, but on different grounds. It found it "difficult to envisage that a situation could arise in practice where the Tribunal would refuse to give effect to an order made by the Court of Session" even if it was sitting in London. It considered that the question of jurisdiction had to be determined in the context of the Immigration and Asylum Act 1999 ("the 1999 Act"), which gave the adjudicator, and on appeal the Immigration Appeal Tribunal, jurisdiction across the United Kingdom but provided, by paragraph 23 of Schedule 4, that a further appeal from an Immigration Appeal Tribunal lay to the Court of Session only if the decision of the adjudicator had been made in Scotland. In the light of that legislation and in the interests of certainty, it held that the supervisory jurisdiction of the Court of Session extended to determinations of adjudicators or the Immigration Appeal Tribunal only in cases where the adjudicator's decision had been made in Scotland. It added that, if it was wrong about that and the Court of Session and the High Court in England and Wales had concurrent jurisdiction, the appropriate court for the purposes of determining a plea of *forum non conveniens* would be the court in the territory where the adjudicator had made his or her decision and so the result would be the same.

28. The House of Lords allowed Mr Tehrani's appeal, holding that the Court of Session had had jurisdiction and also explaining why it would have repelled any plea of *forum non conveniens*. Although their Lordships were unanimous in their conclusion on both points and were agreed as to the reason why the Court of Session was the *forum conveniens* on the facts of the case, there were differences in their approach to the question of jurisdiction. Moreover, as it was not in dispute in that case that the High Court of England and Wales had jurisdiction, there was little discussion of the principles lying behind their Lordships' acceptance that that was so.

29. Lord Nicholls of Birkenhead held (at [21] to [24]) that the Court of Session and the High Court of England and Wales (and, inferentially, also the High Court of Northern Ireland) had concurrent jurisdiction in the strict sense simply because the adjudicator and the Immigration Appeal Tribunal (IAT) were United Kingdom tribunals and were implementing laws and exercising powers applicable throughout the United Kingdom.

> "24. …Once it is recognised that adjudicators and the IAT are properly to be characterised as United Kingdom tribunals, there can be no occasion for attempting to confine the supervisory jurisdiction of the courts of England or Scotland by rigid rules or, even less, by rules whose bounds are vague. In respect of decisions of these tribunals the Court of Session and the High Court have concurrent jurisdiction. Decisions of the Court of Session and the High Court made in exercise of this concurrent jurisdiction are binding throughout the United Kingdom."

30. On the other hand, for Lord Hope of Craighead the crucial factor was that Mr Tehrani lived in Scotland when the decisions being challenged were made, and when he was liable to experience the consequences of them. He was relatively circumspect in expressing a view as to the basis of the High Court's jurisdiction in the matter. He said –

> "52. It cannot be said on these facts that the exercise by the appellate authorities of their functions under the 1999 Act in this case was carried out under a system of law that applied in one part of the United Kingdom only. Furthermore, the appellant was at all relevant times living in Glasgow. So the adverse consequences to him of the decisions that were taken by the appellate authorities in England under a jurisdiction that was exercisable throughout the United Kingdom were liable to be felt by him in Scotland. I would hold that this was a sufficient connection with Scotland to bring their decisions within the supervisory jurisdiction of the Court of Session. But, as the appellate authorities were sitting in England when these decisions were taken, it appears that they were subject also to the concurrent jurisdiction of the High Court in England and Wales. …"

> "60. …In my opinion the facts (1) that the petitioner was resident in Scotland at the time when the determinations were made, (2) that their harmful effects were liable to be felt by him in Scotland and (3) that the determinations were made in the exercise of a statutory jurisdiction which extends throughout the United Kingdom, taken together, indicate that there is a sufficient connection with Scotland for the supervisory jurisdiction to be exercised. I would repel the plea of no jurisdiction."

31. Lord Scott of Foscote emphasised the difference between rules as to jurisdiction and rules of practice that limit the circumstances in which a court will exercise jurisdiction and he doubted whether the plea was really based on a lack of competence at all. If it was, he too held that the Court of Session had jurisdiction by virtue of Mr Tehrani's residence in Scotland. He said –

> "66. When issues are raised as to whether or not a court of law has jurisdiction to deal with a particular matter brought before it, it is necessary to be clear about what is meant by "jurisdiction". In its strict sense the "jurisdiction" of a court refers to the matters that the court is competent to deal with. Courts created by statute are competent to deal with matters that the statute creating them empowered them to deal

with. The jurisdiction of these courts may be expressly or impliedly limited by the statute creating them or by rules of court made under statutory authority. Courts whose jurisdiction is not statutory but inherent, too, may have jurisdictional limits imposed on them by rules of court. But whether or not a court has jurisdictional limits (in the strict sense) there are often rules of practice, some produced by long-standing judicial authority, which place limits on the sort of cases that it would be proper for the court to deal with or on the relief that it would be proper for the court to grant. The distinction was referred to by Pickford LJ in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563. He said:

> "The word 'jurisdiction' and the expression 'the court has no jurisdiction' are used in different senses which I think often leads to confusion. The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, *i.e.* that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."

These comments were endorsed by Diplock LJ (as he then was) in *Garthwaite v Garthwaite* [1964] P 356. He referred with approval (at p 387) to what Pickford LJ had said and continued:

> "In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its 'jurisdiction' (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief which it has 'jurisdiction' (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances."

67. The doctrine of *forum non conveniens* is a good example of a reason, established by judicial authority, why a court should not exercise a jurisdiction that (in the strict sense) it possesses. Issues of *forum non conveniens* do not arise unless there are competing courts each of which has jurisdiction (in the strict sense) to deal with the subject matter of the dispute. It seems to me plain that if one of the two competing courts lacks jurisdiction (in the strict sense) a plea of *forum non conveniens* could never be a bar to the exercise by the other court of its jurisdiction.

68. In the present case, the Secretary of State's plea of no jurisdiction, taken as an objection to the Court of Session hearing the appellant's judicial review application, raises, in my opinion, the same ambiguity as was referred to by Pickford LJ and Diplock LJ in the cases cited. The ground of the objection is that the hearings before the adjudicator and the IAT took place in England but there has been some lack of clarity, in my respectful opinion, as to whether it is said that the Court of Session

> therefore lacks competence to deal with the application; or whether it is said that the circumstance that the hearings took place in England makes it improper for the Court of Session to entertain the application.
>
> 69. If the plea is indeed based on a lack of competence, a lack of jurisdiction in the strict sense, I would, for my part, have no hesitation and find no difficulty in rejecting it. …
>
> 70. …The appellant has the right, under the 1999 Act, not to be removed from the United Kingdom as a failed asylum seeker until his statutory rights of appeal have been exhausted. And, since he is resident in Scotland, he is surely entitled to look to the courts of Scotland for protection against unlawful removal. The Court of Session must, therefore, have jurisdictional competence to review the legality of any directions given by the Home Secretary for the removal of the appellant from Scotland. And it must, in my opinion, follow that the Court of Session has competence, ie jurisdiction in the strict sense, to review the legality of the IAT's refusal to grant the appellant leave to appeal against the adjudicator's decision."

It is implicit in Lord Scott's consideration of the principle of *forum non conveniens* that he accepted that the High Court of England and Wales also had jurisdiction, but he did not explicitly consider that issue.

32. Lord Rodger of Earlsferry expressly rejected the idea that either the Court of Session or the High Court might have jurisdiction simply because the decision being challenged was that of a tribunal that could sit and apply the same law in all parts of the United Kingdom, although he considered the nature of the tribunal nonetheless to be relevant. He held that the Court of Session had jurisdiction because Mr Tehrani was present in Scotland when he brought the judicial review proceedings but that the High Court also had jurisdiction because the decision of the Immigration Appeal Tribunal had been made in England –

> "100. In the present case, the mere fact that the Vice President of the Appeal Tribunal was sitting in London when he refused Mr Tehrani's application for leave to appeal does not mean that his decision is the decision of an English tribunal. The Appeal Tribunal was the creature of the 1999 Act which extends to the whole of the United Kingdom. Under paragraph 6(1) of Schedule 2 to that Act, the Tribunal had to sit anywhere that the Lord Chancellor directed. Until 2002, it was indeed in the habit of sitting outside London - in Cardiff and in Glasgow, for instance - when that was convenient to the parties and their advisers. In 2002, in order to save time and to improve the efficiency of its operations, the tribunal adopted the practice of sitting in London and using video links to take submissions from representatives in other centres, such as Glasgow. But, equally, in theory at least, the tribunal could have set up its main offices in, say, Aberystwyth or Aberdeen and conducted the bulk of its hearings by video link to centres in England. However, it arranged its operations and wherever it sat, the Appeal Tribunal remained the same and the law which it applied remained exactly the same. It was, in essence, a United Kingdom body, capable of sitting throughout the United Kingdom and applying exactly the same law throughout the United Kingdom based on a statute extending to the whole of the United Kingdom. Since the law applied by the Appeal Tribunal is just as much part of the law of Scotland as part of the law of England, when called upon to do so, the Court of

Session is fully equipped to carry out the core function of judicial review, which is to ensure that the decision-maker acts within, and in accordance with, his legal powers. In that situation it would be much too crude an approach for the Court of Session to regard the Appeal Tribunal as a foreign tribunal for purposes of judicial review simply because it took a decision in London or Cardiff, but as a Scottish tribunal, within the scope of the court's jurisdiction, simply because it took a decision in Glasgow.

101. If it would be wrong to rely simply on the place where the Appeal Tribunal took its decision as determining the jurisdiction of the Court of Session, it would be equally wrong to go to the opposite extreme and to assert that in all cases all the United Kingdom courts enjoy concurrent jurisdiction to review the decisions of the tribunal just because the tribunal could sit and apply the same law in all parts of the United Kingdom. So, for instance, where the asylum seeker was given limited leave to enter at an English port, was living in England, appealed to an adjudicator sitting in England, was refused leave to appeal by the Appeal Tribunal in England and was liable to be removed from England, there would be no basis for saying that the Court of Session had power to interfere in such wholly English proceedings by judicially reviewing the decision of the Appeal Tribunal. …Conversely, even leaving aside article XIX of the Treaty of Union, the High Court would have no power to interfere where all the relevant events had taken place in Scotland. The potential area of concurrent jurisdiction lies in the middle.

102. …

103. In principle, the Court of Session should have jurisdiction to review the decision of a United Kingdom body, such as the Appeal Tribunal, sitting in England in cases where there is no reason to believe that any decree pronounced by the court would be ineffective and where, at the time he commences the judicial review proceedings, the petitioner is someone in Scotland whose interests are materially affected by the decision and who can therefore legitimately seek the assistance of the Scottish, rather than the English, court. In the circumstances of *Struk v Secretary of State for the Home Department* 2004 SLT 468 the petitioner was such a person and, for that reason, the Court of Session had jurisdiction.

104. I would also regard Mr Tehrani as such a person. …

105. As I have indicated already, however, in these cases the Court of Session does not have exclusive jurisdiction. Since the Appeal Tribunal, a United Kingdom body, made its determination in England, the High Court must have jurisdiction to review that determination, if asked to do so, even though the proceedings are in substance Scottish and affect the interests of someone living in Scotland. … It follows that in cases such as the present and *Struk*, and in their mirror images, both the Court of Session in Scotland and the High Court in England can competently review the Appeal Tribunal's decision. I would add one caveat. In the unlikely event of the Appeal Tribunal having decided in Scotland to refuse leave to appeal from an adjudicator in England, any possible implications of article XIX of the Act of Union for the competency of judicial review proceedings in the High Court would have to be considered."

33. This reasoning differed from Lord Hope's in that, whereas Lord Hope's was based on Mr Tehrani's residence in Scotland at the times when the adjudicator and Immigration Appeal Tribunal had made their decisions, and when he was liable to experience the consequences of the decisions, Lord Rodger focused on his presence in Scotland when he brought the judicial review proceedings. Also, Lord Rodger expressly stated (at [101]) that the High Court would not have jurisdiction in a case like the present. Lord Hope did not go that far, although it is perhaps implicit in the way in which he approached the jurisdictions both of the Court of Session and of the High Court that he considered that there must be a factual connection of some kind in order to confer jurisdiction.

34. Nonetheless, Lord Carswell agreed (at [110]) with both Lord Hope and Lord Rodger and all three of their Lordships were in agreement that there had to be a clear connection with Scotland in the underlying facts of the case before the Court of Session could be said to have jurisdiction in the strict sense.

35. As to the approach to be taken to pleas of *forum non conveniens*, all five of their Lordships considered that, in the light of paragraph 23 of Schedule 4 to the 1999 Act, the Court of Session should normally decline jurisdiction unless the decision of the adjudicator had been made in Scotland but that that rule should not be applied inflexibly. In the circumstances of that case, where Mr Tehrani had acted reasonably in making his application to the Court of Session in the light of prevailing practice and would have been out of time for making an application to the High Court, a plea of *forum non conveniens* would have been repelled.

Tehrani and the 2007 Act

36. There is a material difference between the 1999 Act and the 2007 Act. Whereas paragraph 23 of Schedule 4 of the 1999 Act provided that, where there had been an appeal from an adjudicator to the Immigration Appeal Tribunal, any further appeal from the Immigration Appeal Tribunal lay to the Court of Session only if the decision of the adjudicator had been made in Scotland, section 13(11) to (13) of the 2007 Act has the effect that, where there is an appeal from the First-tier Tribunal to the Upper Tribunal, any further appeal from the Upper Tribunal lies to whichever of the Court of Appeal in England and Wales, the Court of Session or the Court of Appeal in Northern Ireland "appears to the Upper Tribunal to be the most appropriate" court.

37. Paragraph 23 of Schedule 4 of the 1999 Act was central to the House of Lords' approach to the application of the principle of *forum non conveniens* in *Tehrani*. There is no equivalent provision to guide or influence the approach in a case challenging a decision of the First-tier Tribunal or Upper Tribunal. There is therefore no reason for any presumption that the appropriate court is to be determined by reference to the part of the United Kingdom in which the First-tier Tribunal made its decision. The test is simply the usual one of appropriateness. We will consider below what that means.

38. On the other hand, the scheme of the 2007 Act does not affect the approach of the majority in the House of Lords to jurisdiction in its strict sense. Accordingly, *Tehrani* must still be followed when considering the strict jurisdiction of the Court of Session on an application for judicial review of a decision of the First-tier Tribunal or the Upper Tribunal.

The High Court's jurisdiction

39. If the law of England and Wales as to the scope of the jurisdiction of the High Court is the same as the law of Scotland as to the scope of the jurisdiction of the Court of Session, the reasoning of the majority in *Tehrani* is determinative of the present case. Here, there is no connection whatsoever between the underlying facts of the case and England – even the relevant offices of the Authority and the First-tier Tribunal were, and are, in Glasgow – and so the Upper Tribunal could not have jurisdiction on the *Tehrani* approach and the application of the principle of *forum non conveniens* would not arise.

40. However, there is the question whether the law of England and Wales approaches the issue of jurisdiction in quite the same way as the law of Scotland, although we are quite certain that, as is necessary in the interests of comity, it would anyway reach the same practical result through the application of the principle of *forum non conveniens*.

41. As we have noted, only Lord Rodger clearly stated in *Tehrani* that the High Court would not have jurisdiction in its strict sense in a case like the present. We detect in Lord Scott's approach a reflection of the approach of the High Court of England and Wales more generally, in declining jurisdiction on *forum non conveniens* grounds without determining whether it has jurisdiction in the strict sense, unless it is clearly necessary to do so. At least in commercial cases, and particularly in admiralty cases, the High Court has tended to take a relatively expansive attitude to strict jurisdiction. That is then moderated by the operation of the sort of settled practice to which Pickford LJ and Diplock LJ referred in the passages that Lord Scott cited.

42. In *Spiliada Maritime Corporation v Cansulex Ltd* [1987] A.C. 460, Lord Goff of Chieveley explained that, although the principle of *forum non conveniens* had long been a part of Scots law, it had then only recently been adopted by the law of England and Wales.

43. At 475C, he identified *The Atlantic Star* [1974] A.C. 436 as the case in which there occurred the "breakthrough" in the development of the modern law. In that case, Lord Reid had observed caustically (at 453B-E) that the earlier authorities –

> "… support the general proposition that a foreign plaintiff, who can establish jurisdiction against a foreign defendant by any method recognised by English law, is entitled to pursue his action in the English courts if he genuinely thinks that that will be to his advantage and is not acting merely vexatiously. Neither the parties nor the subject matter of the action need have any connection with England. There may be proceedings on the same subject matter in a foreign court. It may be a far more appropriate forum. The defendant may have to suffer great expense and inconvenience in coming here. In the end the decisions of the English and foreign courts may conflict. But nevertheless the plaintiff has a right to obtain the decision of an English court. He must not act vexatiously or oppressively or in abuse of the process of the English court, but these terms have been narrowly construed."

The House of Lords rejected an invitation to adopt the principle of *forum non conveniens* in that case, but it did decide that the time had come to construe the terms "vexatiously, oppressively or in abuse of the process of the court" more liberally.

44. Change was then rapid. By the time *The Abidin Daver* [1984] A.C. 398 came to be decided a mere ten years later, Lord Diplock was able to say at 411 that –

> "… judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge frankly is, in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of *forum non conveniens*."

45. However, the adoption by the law of England and Wales of the principle of *forum non conveniens* does not necessarily affect the underlying approach of the law of England and Wales to the jurisdiction of the High Court in its strict sense. On the other hand, if it does not, the application of what may now be described even in England and Wales as the principle of *forum non conveniens* is likely to produce the same result, for reasons we will discuss below.

46. The present case is, of course, a public law case rather than an admiralty case and is concerned with the relationship between the legal systems of two constituent parts of the United Kingdom rather than between the legal system in England and Wales and that in a foreign country, but the English and Welsh courts have generally been reluctant to decide definitively that they do not have jurisdiction. It is not necessary to do so when they consider that, if they do have jurisdiction in the strict sense, it would anyway be appropriate to decline jurisdiction under the principle of *forum non conveniens* (see, for instance, *R (Majead) v Immigration Appeal Tribunal* [2003] EWCA Civ 615 and the cases cited therein). There is therefore a dearth of authority because tenable arguments that are raised against jurisdiction are very often arguments that show in the alternative that jurisdiction should be declined if it exists.

47. The only two public law cases to which we have been referred in which English and Welsh courts have held that they do not have jurisdiction in the strict sense solely because the matter was one that ought to be determined by a court in Scotland were decided, at least in part, under article XIX of the Treaty of Union, as incorporated into English law by the Union with Scotland Act 1706. Article XIX, as amended, provides –

> "That the Court of Session or Colledge of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same authority and privileges as before the Union subject nevertheless to such regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain … And that the Court of Justiciary do also after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same authority and privileges as before the Union subject nevertheless to such regulations as shall be made by the Parliament of Great Britain and without prejudice of other rights of ….. and that the heretable rights of Admiralty and Vice Admiralties in Scotland be reserved to the respective proprietors as rights of property subject nevertheless as to the manner of exercising such heretable rights to such regulations and alterations as shall be thought proper to be made by the Parliament of Great

> Britain And that all inferior Courts within the said limits do remain Subordinate as they are now to the supreme Courts of Justice within the same in all time coming And that no causes in Scotland be cognoscible by the courts of Chancery, Queen's Bench, Common Pleas or any other court in Westminster Hall and that the said courts or any other of the like nature after the union shall have no power to cognosce review or alter the acts or sentences of the judicatures within Scotland or stop the execution of the same…..".

48. In *R. v Commissioner of Police of the Metropolis, ex parte Bennett* [1995] Q.B. 313, a divisional court held that article XIX, and in particular the concluding words, precluded it from restraining the execution in England of a warrant issued in Scotland. That case does not assist us.

49. Of more possible relevance, both as regards article XIX and more broadly, is *R. v Secretary of State for Scotland, ex parte Greenpeace Limited* (24 May 1995, unreported), in which Popplewell J held that the High Court had no jurisdiction to consider an application for judicial review of a decision of the Secretary of State for Scotland to grant a licence under the Food and Environment Protection Act 1985 to Shell UK Ltd for the disposal of an oil terminal buoy and also a decision of the Chief Inspector of the Industrial Pollution Inspectorate for Scotland to authorise the disposal of related radioactive waste. He said –

> "… the Secretary of State for Scotland says this is a Scottish case and it is a Scottish administrative decision not different from a decision made in a country not immediately adjacent to England, such as France or Belgium, where no one would have any doubt that an English court would have no jurisdiction over an administrative decision made by the Secretary of State for the Environment in Paris or Brussels.
>
> …
>
> The other aspect of the argument put forward by the Secretary of State is this. By the Union with Scotland Act 1706 the position of the English courts in their relations with Scottish courts was regularised by article XIX. It was intended in operation that the English courts would not seek to exercise jurisdiction over Scottish cases and vice versa, and that the English courts would not interfere with decisions of the Scottish courts. The relevant words of article XIX are:
>
>> '... and that no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other court in Westminster Hall; and the said courts, or any other of the like nature, after the union, shall have no power to cognosce, review, or alter the acts or sentences of the judicatures within Scotland, or stope the execution of the same.'
>
> It seems to me that envisages two situations: first, that those who have a right of action in Scotland shall not bring their case in an English court; if a person has a right of action in Scotland, the English courts will not deal with it; if there is a case brought in Scotland and dealt with by a Scottish court, the English courts will have nothing to do with it.

> I believe that this is, indeed, properly described as a Scottish case; that this administrative decision is a decision of a Scottish administration and that it would be quite improper for an English court to seek to review the making of what is essentially a foreign administrative decision. I believe that article XIX is an additional matter which supports that view. I think they are two separate arguments and they go hand in hand. A right of action in Scotland is not to be tried by an English court.
>
> ... I am quite satisfied that this is a case in which I do not have jurisdiction to deal with the matter."

50. We are not required to consider whether we would approach the question of jurisdiction in the strict sense in the same way as Popplewell J did. In relation to article XIX there is, it seems to us, a question as to whether "causes in Scotland" means causes of action arising in Scotland, as Popplewell J concluded, or whether it means cases brought before the "judicatures within Scotland". But what is more important for present purposes is that it was not necessary for Popplewell J to consider the question of the jurisdiction of the High Court, either at common law or in the light of article XIX, in the context of a challenge to a decision made by a tribunal exercising functions throughout Great Britain or the United Kingdom on appeal from a public authority also exercising functions throughout Great Britain or the United Kingdom.

51. It is arguable that such a public authority or tribunal must be taken to have a presence in all the constituent parts of Great Britain or the United Kingdom. According to the approach taken by Lord Nicholls in *Tehrani*, which was held by the majority not correctly to state the law of Scotland as to the jurisdiction of the Court of Session, that would be sufficient to give the courts of any one of those constituent parts jurisdiction. We remind ourselves that Tehrani did not determine what was the law of England and Wales, or the jurisdiction, in the strict sense, of the High Court of England and Wales. That being so we cannot exclude the possibility that Lord Nicholls' approach might represent the approach to be taken under the law of England and Wales to the jurisdiction of the High Court.

52. We are not required to determine that matter for the disposal of this application. Likewise, we are not required to determine the effect of article XIX where the First-tier Tribunal has sat in Scotland in a case like the present that has no connection with England and Wales. We can proceed in that way because we are quite certain that, even if the Upper Tribunal does have jurisdiction, comity requires that it should decline it in this case under the principle of *forum non conveniens*.

The High Court's approach to the principle of forum non conveniens

53. In *Spiliada* at 474E, Lord Goff, having referred to *Société du Gaz de Paris v Société Anonyme de Navigation "Les Armateurs Français"* 1926 S C (HL) 13, said –

> "I feel bound to say that I doubt whether the Latin tag *forum non conveniens* is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction."

54. He went on to consider how the principle of *forum non conveniens* should be applied in civil suits in the High Court, where "jurisdiction has been founded as of right", because the defendant could be served within the jurisdiction (or, now, where permission to serve outside the jurisdiction is not required), but the defendant sought a stay on the ground that England and Wales was not the appropriate forum. At 477E to 478B, he said –

> "(c) …..In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see *MacShannon*'s case [1978] A.C. 795, per Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.
>
> (d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon's* case [1978] AC 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case, 1926 SC (HL) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver* [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v. James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business."

55. He then turned to the application of the principle where the High Court was exercising its discretionary power to permit service out of the jurisdiction and cited, at 478F, Lord Diplock in *Amin Rashid Shipping Corporation v Kuwait Insurance Co.* [1984] A.C. 50, 65-66 where he said that –

> "… the jurisdiction exercised by an English court over a foreign corporation which has no place of business in this country, as a result of granting leave under R.S.C., Ord. 11, r.1(1)(f) for service out of the jurisdiction of a writ on that corporation, is an exorbitant jurisdiction, i.e., it is one which, under general English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition. Comity thus dictates that the judicial discretion to grant leave under this paragraph of R.S.C., Ord. 11, r.1(1) should be exercised with circumspection in cases where there exists an alternative forum, viz.

> the courts of the foreign country, where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules."

The effect of that and other authorities was, Lord Goff concluded at 481D –

> "… not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right."

56. It is to be noted that both Lord Goff and Lord Diplock considered comity to be a matter to be taken into account when applying what can now be regarded as the principle of *forum non conveniens*. Comity is, after all, an aspect of appropriateness. The fact that comity requires a court or tribunal to decline jurisdiction does not mean that it does not have jurisdiction in the strict sense but it has the same practical effect. Judicial chauvinism no longer being acceptable, it will generally be inappropriate for a court or tribunal that applies the law of one territory to assert jurisdiction (in its wider sense) over a case that has only a technical connection with that territory. Such a case will have a connection with one or more other territories and it should be dealt with by a court or tribunal of such another territory.

57. That is not to say that comity is important in all contexts. Thus, the Rules of Court governing service out of the jurisdiction in C.P.R. rr 6.36 and 6.37 and the modern development of the jurisdictional gateways in the related Practice Direction 6B largely remove the need to consider comity when applying the principle of *forum non conveniens*. It was in this context that Lord Sumption said in *Brownlie v Four Seasons Holdings Inc.* [2017] UKSC 80; [2018] 1 W.L.R. 192 at [31] –

> "…..The jurisdictional gateways and the discretion as to *forum conveniens* serve completely different purposes. The gateways identify relevant connections with England, which define the maximum extent of the jurisdiction which the English court is permitted to exercise. Their ambit is a question of law. The discretion as to *forum conveniens* authorises the court to decline a jurisdiction which it possesses as a matter of law, because the dispute, although sufficiently connected with England to permit the exercise of jurisdiction, could be more appropriately resolved elsewhere. The main determining factor in the exercise of the discretion on *forum conveniens* grounds is not the relationship between the cause of action and England but the practicalities of litigation. The purpose of the discretion is to limit the exercise of the court's jurisdiction, not to enlarge it and certainly not to displace the criteria in the gateways. English law has never in the past and does not now accept jurisdiction simply on the basis that the English courts are a convenient or appropriate forum if the subject-matter has no relevant jurisdictional connection with England….."

58. On the other hand, as Lady Hale pointed out in that case at [40] and [43], Civil Procedure Rules, rule 6.37(3) still provides that "[t]he court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim", reflecting principles derived from *Spiliada*. Even where they apply, the jurisdictional gateways do not always eliminate the need to consider comity when applying the principle of *forum non conveniens* for the purpose of deciding whether England and Wales is the proper place in which to bring the claim. Where the basis upon which strict jurisdiction is founded does not

pay much regard to the need for a real connection with England and Wales, the need to consider comity when applying the principle of *forum non conveniens* is that much more likely.

59. There is some flexibility in the application of the principle of *forum non conveniens* to allow justice to be done. Thus, even if there is a clearly more appropriate forum, the High Court will accept jurisdiction if the party bringing the proceedings will not obtain justice in the foreign jurisdiction (*per* Lord Goff in *Spiliada* at 478D) and it may also do so if the party acted reasonably in bringing the proceedings in the High Court and would be out of time in the alternative forum (which was the approach applied in *Tehrani*) although in that circumstance it might instead make a stay or a grant of permission to serve out of the jurisdiction conditional on the other party not pleading the time bar in the other forum (*per* Lord Goff in *Spiliada* at 483H to 484D). Neither circumstance is likely to arise often. As to the first, it will obviously be a rare case in which it can plausibly be argued that a person will not obtain justice in Scotland although, in the *Greenpeace* case, Popplewell J said that, had he accepted that the High Court had jurisdiction in the strict sense, he would not have declined it despite the case's lack of connection with England and Wales because it appeared that Greenpeace would not have had title and interest to bring proceedings in Scotland. That particular argument would be unlikely to arise today: *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; [2012] 1 A.C. 868; 2012 SC (UKSC) 122. As to the second, given that it must be shown "clearly or distinctly" that the High Court is not, or is, the appropriate forum, it will be rare for a person to bring proceedings wrongly but reasonably and the cases suggest that this is likely to lead to jurisdiction being accepted only when the courts themselves have changed their practice or otherwise misled the party bringing the proceedings.

MB and NF

60. We have not found *MB* and *NF* to be helpful in determining this case, mainly because neither was a case with as little connection with England or Wales as the present case, but we ought to explain why, contrary to Mr Pirie's submissions, we do not consider that we are disagreeing with anything that was decided in those cases.

61. In those cases, as in this case, applications for judicial review of decisions of the First-tier Tribunal on claims for criminal injuries compensation had been made to the Upper Tribunal in cases where the injured person was currently living in Scotland but, unlike in the present case, in both those cases, the final decision of the First-tier Tribunal had been made in England and the application for judicial review had been made by the injured person. The important difference between the two cases was that, in *MB*, the crime of violence had been committed in England, whereas, in *NF*, the crime of violence had been committed in Scotland. By the time the cases came to be argued before the Upper Tribunal, it was common ground that, in the light of *Tehrani*, the Court of Session had jurisdiction in the strict sense in both cases. However, while it was also common ground that the Upper Tribunal had concurrent jurisdiction in *MB* and that it was the appropriate forum, there was disagreement as to why the Upper Tribunal had jurisdiction. Moreover, it was not accepted by the Authority that the Upper Tribunal had jurisdiction in *NF* at all, although it had become common ground that, if it did, it was not the more appropriate forum.

62. The Authority's argument in both cases was that it was only if the crime of violence had been committed in England and Wales that a criminal injuries compensation case arose "under the law of England and Wales" for the purposes of section 15(1) of the 2007 Act, so as to give the Upper Tribunal jurisdiction in the strict sense (see the Upper Tribunal's summary of the Authority's argument at [28]). As the Upper Tribunal observed at [30(2)], the implication was that, in so far as the High Court might have had jurisdiction in the light of *Tehrani* in relation to cases where the crime had been committed in Scotland but a decision of the First-tier Tribunal had been made in England or Wales, such jurisdiction had not been conferred on the Upper Tribunal by the 2007 Act but had been retained by the High Court. The Upper Tribunal rejected the Authority's argument, concluding at [29] in each decision that –

> "… the section 15(1) condition should be construed and applied as referring to cases or applications 'which seek' the review of decisions under the law of England and Wales, as was asserted by the applicant".

Thus, the Upper Tribunal and the Court of Session exercised concurrent jurisdiction in both cases and the question whether the cases should be heard in the Upper Tribunal was to be determined by applying the principle of *forum non conveniens*.

63. It is not immediately obvious exactly what the three-judge panel was seeking to express in paragraph [29] of each decision, and, hence, the relation of that paragraph to the reasoning that follows in paragraph [30]. It is, however, clear that it rejected the Authority's argument on jurisdiction. It did not need to go further because it was clear that the consequence of its decision was that the Upper Tribunal and the Court of Session had concurrent jurisdiction so that the question whether the Upper Tribunal should exercise its jurisdiction was to be determined under the principle of *forum non conveniens*, as to which there was no dispute.

64. Mr Pirie said, correctly in our view, that in paragraph [29] of each decision, by "review" the three-judge panel meant "judicial review". He also submits that in that paragraph the three-judge panel meant that the section 15(1) condition was satisfied whenever a claimant applied to the Upper Tribunal. He has read the words "which seeks"– or at least suggests that that word could be read – as meaning that, in the three-judge panel's judgment, the Upper Tribunal had jurisdiction in any case brought before it, which would imply that the applicant had a complete choice of forum and that the Upper Tribunal had a greater jurisdiction than the High Court would have had. As Mr Pirie says, that would plainly be wrong.

65. We do not consider that that is what the three-judge panel can have meant. As we have said above, the structure of the Act, which (as is apparent from its reasoning) the three-judge panel had well in mind, suggests that, where an application for judicial review is made directly to the Upper Tribunal, its jurisdiction is the same as the High Court would have had but for sections 15 to 18 of the 2007 Act and section 31A(2) of the Senior Courts Act 1981. It certainly cannot have any greater jurisdiction because the Lord Chief Justice could not properly make a practice direction specifying a class of cases for the purposes of section 18(6) if such cases would not otherwise fall within the jurisdiction of the High Court. We also agree with the three-judge panel that the Upper Tribunal's jurisdiction is no narrower than the High Court's would have been. That is all it had to decide and, in our view, is all it did decide.

66. The word "which seeks" was perfectly appropriate because the functions conferred on the Upper Tribunal under section 18(2) include the function of determining whether to give permission to apply for judicial review and must also include the function of determining any dispute as to the Upper Tribunal's jurisdiction to hear the claim. That is what the three-judge panel was asked to do in those cases and it is what we are being asked to do now in the present case. In that sense, the Upper Tribunal does indeed have the function of determining any application made to it and we are quite certain that that is all that the three-judge panel meant. In our view, the three-judge panel's language does not imply that it thought its jurisdiction was greater than that of the High Court. Such a conclusion would have been absurd and is not, as far as we can see, supported by any of the three-judge panel's reasoning.

67. We are reinforced in this view by the fact that the three-judge panel said that its construction of section 15(1) was "as asserted by the applicant" and, although the precise way in which the case was argued on behalf of the injured persons is not apparent from the decisions, the Authority has provided us with a copy of the skeleton argument submitted by counsel for *NF* in which he argued for the construction of section 15(1) that we have adopted (although he did submit that the question whether the Upper Tribunal had jurisdiction at all was problematic).

68. We also note that, in *NF*, the Upper Tribunal adjourned the proceedings, having accepted that the Upper Tribunal did have concurrent jurisdiction but that the Court of Session was the more appropriate forum. The circumstances were slightly unusual in that the applicant herself, having made an application to the Upper Tribunal, then argued, without opposition from the Authority, that the Court of Session was the more appropriate forum. It is apparent from the skeleton argument that her case was that the guidance published by the First-tier Tribunal had misled her into making the application to the Upper Tribunal at a time when she was representing herself and was suffering from mental illness. In that light, the adjournment is readily understandable – presumably, in a case where it would have been prepared to accept jurisdiction, the Upper Tribunal wished to protect her position should the Court of Session regard delay as fatal to her case – and so too are the three-judge panel's comments on the need for the guidance notes to be altered, although that does not appear to have happened.

Applying the principle of forum non conveniens in this case

69. If the Upper Tribunal has jurisdiction in the strict sense in this case, it is clear that, applying the approach of the High Court, jurisdiction must be declined under the principle of *forum non conveniens*.

70. This case has no connection whatsoever with England or Wales save that the First-tier Tribunal determined an appeal from a body that exercised powers under a Scheme that applied across Great Britain. The injured person has at all material times lived in Scotland and all the possibly material events occurred in Scotland. In these circumstances, the Court of Session is clearly the appropriate or natural forum for this case.

71. Apart from any other consideration, it is clear that the Court of Session would hold that it did not have jurisdiction at all if the roles were reversed and the case had only "English" features. Comity requires that the courts and tribunals in the different parts of the United Kingdom should take the same practical approach to the exercise of jurisdiction in cases with a connection with one or more other part, even if they do not necessarily get there by the same legal route. Moreover, even if article XIX of the Treaty of Union does not prohibit the Upper Tribunal from exercising jurisdiction in a case where the natural forum is the Court of Session, it certainly reinforces our view that the Upper Tribunal should act with circumspection in such a case. The grounds advanced by the Authority completely fail to address this issue.

72. This is not a case where justice might require the Upper Tribunal to accept jurisdiction even though the Court of Session is clearly the more appropriate forum. We accept that there is a considerable degree of uncertainty as to whether the Upper Tribunal has jurisdiction in the strict sense in a case such as the present, but nothing in the case law or practice of the courts or tribunals can have misled the Authority into believing that, if the Upper Tribunal did have jurisdiction, the Court of Session would not nonetheless clearly or distinctly be the more appropriate forum. As Ms Connolly argued on behalf of the injured person, neither the guidance issued by the First-tier Tribunal on its decision notice nor its Practice and Guidance Statement (CI-6) suggested that an application could be made to the Upper Tribunal in a case where both the crime of violence was committed in Scotland and the hearing before the First-tier Tribunal took place in Scotland. The guidance may not have been entirely accurate, but it was not misleading on the facts of this case.

General guidance on the application of the principle of forum non conveniens in the Upper Tribunal

73. Although this is a clear case, we consider that it may be helpful if we give some general guidance in relation to judicial review proceedings before the Upper Tribunal. The guidance given by Lord Goff in *Spiliada* on the application of the principle of *forum non conveniens* in commercial cases in the High Court requires some adaptation, because applications for judicial review require permission and because proceedings before the Upper Tribunal are less adversarial.

74. Notwithstanding that applications for judicial review may be brought only with permission, we consider that they should be equated to civil proceedings in the High Court brought "as of right", so that jurisdiction should not be declined unless there is another available forum which is "clearly or distinctly more appropriate". To avoid uncertainty, an applicant needs to be given a margin of appreciation as to the preferable forum. On the other hand, whereas the High Court normally stays proceedings brought "as of right" when it declines jurisdiction under the principle of *forum non conveniens*, the consequence of declining jurisdiction in judicial review proceedings will often be that permission will be refused. There will seldom be any reason to keep alive even a theoretical possibility of the case being reopened and so, if permission is not refused, the alternative approach will normally be for the Upper Tribunal to strike the proceedings out under rule 8(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) on the basis that the word "jurisdiction" in that rule is used in its wider sense so as to include cases where the Upper Tribunal has jurisdiction in the strict sense, but has declined it. The approach taken in *NF* of

adjourning the case rather than simply accepting jurisdiction should generally be confined to cases where the applicant wishes to apply to the Court of Session but has made a "protective" application to the Upper Tribunal.

75. The issue of *forum non conveniens* may be raised by the interested party but the Upper Tribunal may also raise the issue of its own motion, as it did in this case, in which case we consider that a willingness on the part of the interested party to submit to the jurisdiction should carry considerable weight if the case has more than a technical connection with England and Wales. This is to reflect the position in the courts, where jurisdiction is normally accepted in the absence of any objection raised in a plea by a defendant or interested party.

76. In a criminal injuries compensation case like the present, the relevant factors to be taken into account in considering whether the Court of Session, rather than the Upper Tribunal, is the "natural forum" are likely to be where the crime of violence took place, or is alleged to have taken place, and the place or places where the injured person lived then and has lived since. The power of the Upper Tribunal to sit in Scotland even though the case arises under the law of England and Wales means that mere practical convenience will be less important to the Upper Tribunal than it would be to the High Court. We do not consider that it can be of much significance where the authority has its office or that, by itself, the place where the First-tier Tribunal sat (which is likely either merely to reflect where the injured person lived at that time or else to be mere happenstance) will carry much weight, even if the place where the First-tier Tribunal sat is important in establishing jurisdiction in its strict sense. But, on the other hand, this is not simply a balancing exercise to find the more natural forum. Once an application has been made to the Upper Tribunal, the Upper Tribunal will accept jurisdiction unless the Court of Session is "clearly or distinctly" the more appropriate forum.

77. There is the question whether article XIX of the Treaty of Union might preclude the Upper Tribunal from having jurisdiction in the strict sense in any case where the First-tier Tribunal made its decision in Scotland, but we give our guidance on the basis that it would not if, unlike in the present case, the case had a connection with England and Wales. If article XIX did preclude the Upper Tribunal from having jurisdiction, there would be the odd situation that the Court of Session would, in the light of *Tehrani*, have jurisdiction where an essentially Scottish case was decided in England but the Upper Tribunal would not have jurisdiction where an essentially English or Welsh case was decided in Scotland. We acknowledge that, in *Tehrani*, Lord Rodger expressly left open the effect of article XIX in these circumstances but the reasons he gave for suggesting at [105] that, in a case like *Tehrani* and its "mirror image", both the Court of Session and the High Court of England and Wales have jurisdiction is compelling and we do not consider that article XIX can affect it. In their context, the terms "inferior Courts" and "judicatures within Scotland" in article XIX plainly refer to Scottish courts and, adapting Lord Rodger's reasoning at [100], a tribunal exercising functions throughout the United Kingdom cannot be regarded as a Scottish court for these purposes. Moreover, if Popplewell J was right to consider, in the *Greenpeace* case, that the term "causes in Scotland" means causes of action arising in Scotland, rather than cases brought before the "judicatures within Scotland", we consider that it does not include cases where the First-tier Tribunal, in the exercise of functions that it has throughout Great Britain, has decided in Scotland a case with an English or Welsh connection. In such a case, the cause of action can be said to arise in both Scotland and England and Wales because, again, the First-tier Tribunal cannot be regarded as a purely Scottish tribunal.

78. Against that background, we can give the following guidance –

- If either–

  (a) the crime of violence was committed in England or Wales; or
  (b) the decision of the First-tier Tribunal was made in England or Wales at a time when the injured person lived in England or Wales; or
  (c) the injured person lived in England or Wales when the application for judicial review was made,

the Upper Tribunal is likely to accept jurisdiction even if the interested party objects.

- If there is a lesser connection with England and Wales because, for example, none of the above conditions is satisfied but, say –

  (a) the injured person lived in England and Wales either when the claim for compensation was made or when the First-tier Tribunal made its decision; or
  (b) the decision of the First-tier Tribunal was made in England and Wales,
  the Upper Tribunal is likely to accept jurisdiction if the interested party does not object but, if the interested party does object, will decline jurisdiction if the Court of Session is clearly or distinctly the more appropriate forum. (The implication is that, if the Upper Tribunal does not appear to be the more appropriate forum, the applicant should consider either submitting a protective application in the Court of Session or else obtaining the interested party's agreement to accept the Upper Tribunal's jurisdiction.)

- If there is no connection with England and Wales other than the fact that the Authority and the First-tier Tribunal exercise functions throughout Great Britain, the Upper Tribunal will (if it has jurisdiction at all) decline jurisdiction, unless to do so would give rise to unfairness of the limited type identified in paragraph 59 above.

Conclusion

79. We are satisfied that either the Upper Tribunal lacks jurisdiction in its strict sense or, if it does have jurisdiction in that sense, it should decline to exercise it under the principle of *forum non conveniens*.

80. Accordingly, we strike out this application.

81. We also consider that we should not express a view as to whether the Court of Session should extend time for making an application to its supervisory jurisdiction. It would be inappropriate to do so. The Authority refers to *Majead*, but in that case the Court of Appeal at paragraph 21 merely expressed a hope "that no point on delay is taken *by the Crown*" (our emphasis). In this case, there is no reason why the Interested Party, who has consistently argued against the Upper Tribunal accepting jurisdiction since he submitted his acknowledgment of service, should not take a point on delay if an application is now made to

the Court of Session. If he does take such a point, it will be a matter for the Court of Session whether or not to accept it and it would be inappropriate for us to comment other than to acknowledge that the Authority may have been lulled into a false sense of security after 30 June 2017. We indicated as much to the parties at the hearing and so did not hear in detail the points that might be made to the Court of Session.