IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

R (on the application of Akber) v Secretary of State for the Home Department (paragraph 353; Tribunal's role) [2021] UKUT 00260 (IAC)

Field House,
Breams Buildings
London, EC4A 1WR

27 September 2021

Before:

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE SMITH

Between:

THE QUEEN
on the application of
ALI AKBER

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr M Biggs
(instructed by NR Legal Solicitors), for the Applicant

Mr D Blundell QC and Mr A Mills
(instructed by the Government Legal Department) for the Respondent

Hearing date: 6 July 2021

J U D G M E N T

Paragraph 353 of the Immigration Rules

1. *The importance of paragraph 353 of the Immigration Rules ("Paragraph 353") is as a "gate-keeping" function to shut out from the appeals system unmeritorious second or subsequent appeals. An appeal is generated under the current form of section 82 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") whenever a protection or human rights "claim" is made and refused. However, the Respondent is not obliged to treat repeat submissions as a "claim" leading to a "decision" generating a right of appeal in every case (Robinson v Secretary of State for the Home Department [2020] AC 942).*

2. *The words "if rejected" in Paragraph 353 specifically contemplate that the Respondent must form a view on the merits of the further submissions, in the sense that she may decide the submissions are such as to warrant the grant of leave to enter or remain (and to recognise the person as a refugee or otherwise entitled to international protection). It is only if she does not do so that Paragraph 353 requires her to determine if the (ex hypothesi) rejected submissions are a fresh claim, the refusal of which constitutes a decision falling within section 82 of the 2002 Act. It is artificial to separate the underlying merits of what is put forward from the question whether something "significantly different" is being advanced for the purposes of Paragraph 353. It is not the case, therefore, that the Respondent has "decided" a "claim" under section 82 of the 2002 Act in any case where she considers further submissions or a further application and concludes that the submissions or application do not merit the grant of leave.*

3. *The end-to-end process where Paragraph 353 applies is as follows:*

   Stage 1: The Applicant makes human rights or protection claim.
   Stage 2: That claim is refused by the Respondent, giving rise to a right of appeal under section 82 of the 2002 Act.
   Stage 3: The Applicant's appeal is unsuccessful; or the Applicant does not appeal or withdraws his appeal; or the refusal is certified under section 94 of the 2002 Act.
   Stage 4: The Applicant makes second or subsequent submissions by way of written submissions or application ("the Further Submissions").
   Stage 5: The Respondent considers whether to accept or reject the Further Submissions on their merits.
   Stage 6: If the Further Submissions are accepted on their merits, the Respondent grants leave/recognises Applicant's status.
   Stage 7: If the Further Submissions are rejected, the Respondent goes on to consider whether they nonetheless amount to a fresh protection or human rights claim; i.e. a categorisation decision is made.
   Stage 8: If the Respondent determines that the Further Submissions do not amount to a fresh claim, she rejects them as such. No refusal of a human rights or protection claim arises, within the meaning of section 82(1)(a) or (b) of the 2002 Act. If, however, she determines that they do amount to a fresh

claim, then a "decision" has been made to refuse a "claim" for the purposes of Section 82 (1)(a) or (b) of the 2002 Act and a right of appeal arises against that decision

4. *The guidance given in Sheidu (further submissions; appealable decisions; Sudan) [2016] UKUT 412 (IAC) is that if the effect of a decision is a refusal of a claim under section 82 of the 2002 Act, then there is a right of appeal even if the Respondent had intended to refuse further submissions applying Paragraph 353. That guidance turns on the interpretation of the particular decision letter under consideration in that case. In some (albeit extreme) cases such as Sheidu, the Upper Tribunal may conclude in the context of a judicial review challenge that what the Respondent actually did was not what she intended to do. Such cases are nevertheless likely to be rare.*

5. *Whether a decision of the Respondent is a decision to refuse to treat submissions as a fresh claim or the refusal of what is accepted to be a fresh claim is a matter of substance and not form. The nature of the decision does not depend where in the decision letter Paragraph 353 is raised. It is necessary to look at a Paragraph 353 decision under challenge as a whole. It must be interpreted objectively, considered fairly in the round and in substance.*

The Role of the Tribunal in Judicial Review Challenges to Paragraph 353 Decisions

6. *Balajigari and others v Secretary of State for the Home Department [2019] 1 WLR 4647 and R (oao BAA and Another) v Secretary of State for the Home Department (Dublin III: judicial review; SoS's duties) [2020] UKUT 00227 (IAC) did not involve fresh claim decisions. As such they are distinguishable from fresh claims cases. The case law in relation to fresh claims has consistently stated that the role of the Tribunal is only to consider whether the decision is Wednesbury unreasonable or involves other public law error: (WM (DRC) v Secretary of State for the Home Department [2007] Imm AR 337).*

7. *In a Judicial Review of a decision made under Paragraph 353, the Upper Tribunal is tasked with considering the Respondent's decision for rejecting the submissions as a fresh claim. The Tribunal is not required to reach a decision for itself whether the Respondent's decision breaches an applicant's human rights. The position in this regard is akin to that where an appellate court or tribunal is examining the legality of the mixed legal and factual conclusion reached by a fact-finding tribunal on whether a decision violates Article 8 rights.*

8. *In the event that further material comes to light, the remedy for an applicant is to make further submissions to the Respondent and not seek to place the Tribunal in the role of primary decision-maker.*

1. This is a judgment to which we have both contributed. The Applicant seeks judicial review of the Respondent's decision dated 27 July 2020 ("the Decision"). By the Decision, the Respondent refused the Applicant's application for indefinite leave to remain ("ILR") in the UK based on his long residence. The Respondent also decided that the application made did not amount to a fresh claim, applying paragraph 353 of the Immigration Rules ("Paragraph 353"). The effect of that conclusion is that the Applicant is unable to appeal the Decision. It is in this respect that the judicial review raises important points of principle which have implications for other cases. It is for that reason that a Presidential panel was convened with a view to providing guidance in other cases.

BACKGROUND

FACTUAL BACKGROUND

2. The Applicant is a national of Pakistan. He arrived in the UK on 14 October 2006 with leave as a student. He subsequently switched to remain as a Tier 1 migrant. He was given leave as a Tier 1 General migrant which expired, following extension, on 15 August 2016. On 2 August 2016, the Applicant applied for ILR based on five years' residence as a Tier 1 migrant. He subsequently varied that application to one for ILR based on ten years' lawful residence.

3. The application for ILR was refused on 23 February 2018. The Respondent refused the application on the basis that the Applicant had acted dishonestly by declaring a different income to HMRC for tax purposes from the earnings declared to the Respondent in the Tier 1 applications. The Respondent therefore refused the application on general grounds, under paragraph 322(5) of the Immigration Rules ("Paragraph 322(5)").

4. The Applicant was given a right of appeal against the 23 February 2018 decision which he exercised. Although his appeal was allowed by First-tier Tribunal Judge Bircher, following a successful appeal against that decision by the Respondent, the appeal was re-heard and dismissed by First-tier Tribunal Judge Fisher. Although Judge Fisher did not accept the Respondent's case that the Applicant had declared different earnings to HMRC and the Home Office, he found that the Applicant had acted dishonestly by not filing a tax return at all in the tax year 2010-11. He found that the Applicant must have been aware of this as he had not been asked to pay any tax but had done nothing about it. The Applicant's explanation at the time for the failure was that his accountants had been negligent. Judge Fisher concluded that the Respondent had been right to apply Paragraph 322(5).

5. On 20 February 2020, a matter of days after the Upper Tribunal had refused permission to appeal Judge Fisher's decision, the Applicant made a further application for ILR based on his long residence. For the first time, the Applicant said that the reason why no tax return was filed for 2010/11 was that he did not owe any tax as he was entitled to loss relief in relation to another business. That assertion was unsupported at that time by any evidence from the Applicant's accountants.

6. The Respondent again refused the application by the Decision. We will come to the detail of the Decision in due course. For the present, it is sufficient to note that the Respondent again applied Paragraph 322(5) when refusing to grant the Applicant ILR. The Respondent refused the Applicant leave to remain on human rights grounds, relying in large part on Judge Fisher's decision. She applied Paragraph 353, concluding that the further submissions did not amount to a fresh claim because they had all been considered by the previous Judge and/or did not give rise to a realistic prospect of success on further appeal.

PROCEDURAL BACKGROUND

7. The Applicant issued this application for judicial review on 27 October 2020. We do not need to say anything about the initial grounds as, following refusal of permission on the papers by Upper Tribunal Judge Plimmer, and shortly before the renewed permission hearing, the Applicant applied to amend his grounds. At the renewal hearing, Upper Tribunal Judge Blum permitted the amendment and adjourned the hearing (also ordering that the Applicant pay the Respondent's costs of the adjournment in any event).

8. At a resumed hearing on 18 February 2021, Upper Tribunal Judge Norton-Taylor granted permission on grounds one and two which can broadly be summarised as follows:
Ground one: the Decision, properly construed, gives rise to a right of appeal.
Ground two: the Decision breaches the Applicant's Article 8 rights.
Judge Norton-Taylor refused permission on ground three which was to the effect that the Decision was Wednesbury unreasonable. We are therefore no longer concerned with that ground.

9. On 24 March 2021, Upper Tribunal Judge Smith issued directions with a view to a hearing before a Presidential panel. So it is that the judicial review comes before us for hearing.

10. In relation to ground two, the Applicant applied on 17 June 2021 for permission to rely upon further evidence. The evidence is, in short summary, a statement from the Applicant setting out his case as it is now to explain why he did not file a tax return for 2010/11 and exhibiting various

documents in support of his case. It is common ground that the statement and annexed documents were not before the Respondent when she made the Decision. This application was initially refused by an Upper Tribunal Lawyer and came before Judge Norton-Taylor on renewal. He declined to make any order on the basis that it would be for the Tribunal to decide on the relevance of this evidence and whether it should be admitted at the substantive hearing.

11. The parties were agreed that the appropriate way forward in relation to this evidence was for us not to deal with the application to adduce further evidence at this hearing. If we were with the Applicant in relation to ground one, it was agreed that it would not be necessary for us to deal with ground two in any event as the further evidence and issues raised in that ground would be dealt with in an appeal. If we were not with the Applicant on ground one, depending on the view we reach on ground two, it might be necessary to issue a preliminary decision with a view to giving the Respondent the opportunity to respond to the further evidence. Whether that was necessary would depend on our view of the Applicant's case on ground two.

THE ISSUES

GROUND ONE

12. Ground one turns on the proper construction and application of Paragraph 353.

13. The Respondent says that the construction of Paragraph 353 and the way in which that applies in the appeals process is now put beyond doubt by the Supreme Court's judgment in Robinson v Secretary of State for the Home Department [2020] AC 942; [2019] Imm AR 877 ("Robinson").

14. The Applicant relies on two Tribunal decisions. The first decision is Sheidu (Further Submissions; Appealable Decision) [2016] UKUT 412 (IAC); [2017] Imm AR 179 ("Sheidu") which pre-dates Robinson. In that case, the Vice-President made some observations about the application of Paragraph 353 in relation to what was then a relatively new appeals process.

15. The second decision is R (Kamrul Islam) v Secretary of State for the Home Department (JR/8109/2018) ("Islam"). The Tribunal in Islam did not purport to lay down any wider guidance. However, since Islam post-dates Robinson, and decided that the guidance in Sheidu survived Robinson, we need also to deal with that decision. The case also raised arguments similar to those made by the Applicant in this case. The Tribunal in that case

accepted the arguments which were put forward to us by the Applicant in this case.

16. Ground one can be broken down into two questions which we have to answer:
Question one: Was Sheidu correctly decided and, even if it was, does the guidance there given survive the judgment in Robinson?
Question two: To some extent depending on our answer to question one, what is the impact of the current case-law on this case?

GROUND TWO

17. Given what we say above about the application to adduce further evidence and the course we were invited to follow in that regard, the parties were agreed that the only issue which arises is the proper role of the Tribunal when considering whether the Decision breaches the Applicant's Article 8 rights.

18. If we were with the Applicant that the role is one of fact-finder, we may find it necessary to consider the nature and extent of that role but we would not embark on any fact-finding in this case without convening a further hearing to deal with the additional evidence on which the Applicant seeks to rely.

19. In connection with this ground, the Respondent also says that the Applicant's application amounts to an abuse of process. As we understood the Respondent's submissions, we do not need to deal with the argument at this stage and not at all if we accept the Respondent's position that the Tribunal's role is one of review.

GROUND ONE

LEGAL FRAMEWORK

Paragraph 353 and the Statutory Appeal Scheme

20. Paragraph 353 reads as follows:

> "When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
> (i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas."

As we will come to, the Respondent places particular reliance on the words "if rejected".

21. We are here concerned only with a human rights claim. There is no protection context. A human rights claim is defined by section 113 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That provides that a human rights claim is "a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998".

22. Rights of appeal are governed by section 82 of the 2002 Act. Immediately prior to changes made by the Immigration Act 2014 ("the 2014 Act"), rights of appeal were generated by the making of certain "immigration decisions" which depended on the immigration status of the applicant. Now, the right of appeal is generated only by certain decisions in response to human rights or protection claims (or revoking protection status). For our purposes, we are concerned only with section 82(1)(b) of the 2002 Act which provides a right of appeal where the Respondent has decided to refuse a human rights claim.

The Case-law concerning Paragraph 353 and the Statutory Appeal Scheme

23. In order to understand how Paragraph 353 operates within the statutory appeal system, it is necessary to say something about the background to that provision.

24. The starting point is the Court of Appeal's judgment in R v Secretary of State for the Home Department ex parte Onibiyo [1996] QB 768; [1996] Imm AR 370. In that case, the Court was considering the previous provision of the Immigration Rules – paragraph 346. It was considering the issues in the context of a protection claim under the Refugee Convention. Of course, the Human Rights Act 1998 was not in force at the time.

25. The Court of Appeal accepted that a person whose first asylum claim had been rejected could always make a second or further claim. To prevent further claims would be contrary to the Respondent's duty not to return a refugee to his or her country of origin. Equally, however, the Court accepted that not every subsequent claim could give rise to another right of appeal. The Court framed three questions for determination. What

constitutes a fresh claim? How and by whom is that question to be determined? What are the procedural consequences of such a decision?

26. In response to the first question, the applicant accepted that a "fresh claim" could not be made "by advancing an obviously untenable claim or by repeating, even with some elaboration or addition, a claim already made". The Court concluded that the new claim must be "sufficiently different from the earlier claim to admit of a realistic prospect of success that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

27. As to the second question, the Court accepted that the claim had to be determined by the Respondent in the first instance. The applicant argued that whether there was a fresh claim was a matter of precedent fact. The Respondent argued that her decision as to the existence of a fresh claim could be impugned only on public law grounds. The Court expressed a tentative view that the Respondent's argument was correct but did not need to determine it. As we will come to when we look at ground two, since that time that latter view has been held to be correct in cases such as WM (DRC) v Secretary of State for the Home Department [2007] Imm AR 337 ("WM") (see [9] of the judgment).

28. The fresh claims issue came before the House of Lords in BA (Nigeria) v Secretary of State for the Home Department [2010] 1 AC 444; [2010] Imm AR 363 ("BA"). We do not need to dwell on the judgment in BA because the cases concerned the appeals regime prior to the 2014 Act amendments. The Respondent had been bound in those cases to make an "immigration decision" under section 82 of the 2002 Act in any case where she refused to revoke a deportation order. A majority of their Lordships (Baroness Hale dissenting), concluded that, since the decisions which were made were "immigration decisions" for the purposes of section 82, the right of appeal could only be curtailed by certification under sections 94 or 96 of the 2002 Act.

29. In the course of his judgment in BA, however, Lord Hope observed that "[r]ule 353 as presently drafted has no part to play in the legislative scheme". That observation led to subsequent challenges to "fresh claims" decisions asserting that a right of appeal would always arise absent certification. Those challenges culminated in the Court of Appeal's judgment in ZA (Nigeria) v Secretary of State for the Home Department [2011] QB 722; [2010] Imm AR 776 ("ZA"). The Court of Appeal distinguished the situation in BA. BA applied only where an "immigration decision" had to be made. Paragraph 353 continued to apply in all other cases. The Supreme Court refused permission to appeal the Court of Appeal's judgment.

30. BA and ZA were, as we have indicated, concerned with the appeals procedure prior to the changes made by the Immigration Act 2014. As we have already stated, rights of appeal are now generated by the refusal of either a human rights or protection claim (or the revocation of protection status).

31. In R (Waqar) v Secretary of State for the Home Department [2015] UKUT 169 (IAC) ("Waqar"), this Tribunal concluded that Paragraph 353 continued to apply under the new appeals regime. The Court of Appeal refused permission to appeal that decision (see [8] of the Tribunal's reported decision in R (oao MG) v First-tier Tribunal (Immigration and Asylum Chamber ('fresh claim'; para 353: no appeal) IJR [2016] UKUT 00283 (IAC) confirming this and agreeing with the decision in Waqar).

32. Turning then to the cases on which the parties rely in this case, we begin with Sheidu. We make the preliminary observation that the Tribunal in Sheidu did not purport to determine whether Paragraph 353 was of continued relevance in the appeals process following the changes brought about by the 2014 Act. It merely drew attention to the lack of Court of Appeal authority on the issue, which it considered left "room for a modest measure of doubt". The Tribunal determined that it did not need to resolve that issue because on the specific facts of the case before it, it reached the conclusion that there was a refusal of a claim. Although the Respondent had made a decision purportedly applying Paragraph 353, the Tribunal concluded that she had, on the face of the decision, refused the protection and human rights claims. Accordingly, there was a right of appeal.

33. The guidance given in Sheidu is only that "[i]f the SSHD makes a decision that is one of those specified in s 82(1), it carries a right of appeal even if the intention was not to treat the submissions as a fresh claim." The reasoning which lay behind the Tribunal's guidance is articulated at [16] and [17] of the decision as follows:

> "16. The terms of the decision letter in the present case show, we think, why we expressed the sentiments we did in paragraph 7 above. It is true that the part of the decision beginning at paragraph 66 purports to deal with the submissions made on the basis that they are not a 'fresh claim'. But it appears to us that the previous 65 paragraphs do something rather different. The heading of the letter, which we have set out, indicates that it contains a decision to refuse a protection claim and a human rights claim; so far as the latter is concerned, paragraph 58 appears to be, in terms, the refusal of a human rights claim. As it seems to us, this is ZT (Kosovo) and ZA (Nigeria) territory: there has been an appealable decision, and once there has been an appealable decision, paragraph 353 has no part to play.

> 17. Mr Deller's submissions are, effectively, under two heads. The first is that it is not for the First-tier Tribunal to determine whether submissions amount to a 'fresh claim' within the meaning of paragraph 353. We entirely agree. Nevertheless, the First-tier Tribunal does have to determine whether the decision before it is one which falls within the definition in s. 82 of the 2002 Act as amended. Mr Deller's second submission is that, because of the way paragraph 353 is considered in the decision letter, and following Waqar, the decision was that the submissions did not amount to a "fresh claim", and so their rejection carried no right of appeal. If those terms were applicable to the decision letter, that submission would certainly be consistent with Waqar; but it does not appear to us that those submissions are open to the Secretary of State in view of the terms of the decision letter. Whatever may have been the terms of the decision letters in the other cases, it appears to us that this decision letter starts with a human rights claim, substantively refuses it, and does so using wording in the heading and in the refusal itself which is so clearly that envisaged by s. 82 that the subsequent consideration under paragraph 353 cannot have the effect of removing the right of appeal engendered by the decision."

The Tribunal's reasoning turns on the structure of the decision. Significantly, the decision there under challenge began with a heading "Consideration of Further Submissions. Decision to Refuse a Protection Claim and Human Rights Claim".

34. Next in time is the Supreme Court's judgment in Robinson. Having summarised the history of Paragraph 353 in previous cases (which is broadly as we have already set out), and agreeing with the Court of Appeal's judgment in ZA, the Court reached the following conclusions concerning the continued relevance of Paragraph 353 to the post-2014 Act appeals regime:

> "60. …. Mr Fordham relies on the fact that the 2014 amendments remove the former requirement of an 'immigration decision' to which the 'human rights claim' and its rejection needed to have a nexus. He submits that the effect of the simplified scheme is that any submission that removal would breach a relevant obligation will amount to a human rights or protection claim, the rejection of which will give rise to a right of appeal. Once again, I am unable to accept this submission. The appellant is not assisted by the fact that under the amended section 82 there is no longer a requirement to establish an 'immigration decision' within the list previously set out in section 82(2). In fact, the contrary is the case. A decision to refuse to revoke a deportation order was formerly an 'immigration decision' under section 82(2)(k) and therefore gave rise to an in-country right of appeal, subject to the possibility of certification, but this is no longer the case. The 2014 amendments limit immigration appeals to circumstances in which there has been a refusal of a protection claim or a human rights claim, or where protection status has been revoked. (For present purposes I will concentrate on human rights claims.) However, the structure and operation of section 82

> remain unchanged. Under the amended section 82(1) a person may appeal to the tribunal where the Secretary of State has decided to refuse a human rights claim made by him, but this does not relieve that person of the burden of establishing that the refusal was in response to a valid claim. The definitions in Part 5 do not address this question and the answer will depend on the application of the *Onibiyo* line of authority. *Onibiyo [1996] QB 768*, *Cakabay [199] Imm AR 176*, *ZA (Nigeria) [2011] QB 722* and *VM (Jamaica) [2017] Imm AR 1237* establish that there will only be a human rights claim to be determined if further submissions are considered to amount to a fresh claim. Rule 353, in turn, is directed at the manner in which a court should approach that prior question. Under the post-2014 provisions it remains the case that if there is no claim, there is no appealable decision.
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> …
>
> *Conclusion*
>
> 64. For these reasons I consider that the Court of Appeal was correct to conclude that 'a human rights claim' in section 82(1)(b) of the 2002 Act as amended means an original human rights claim or a fresh human rights claim within rule 353. More generally, where a person has already had a protection claim or a human rights claim refused and there is no pending appeal, further submissions which rely on protection or human rights grounds must first be accepted by the Secretary of State as a fresh claim in accordance with rule 353 of the Immigration Rules if a decision in response to those representations is to attract a right of appeal under section 82 of the 2002 Act."

35. The Tribunal's decision in Islam post-dates Robinson. The Tribunal was obviously bound by Robinson. Nonetheless, following consideration of the guidance in Sheidu, and apparently based on the wording of the decision under challenge in that case, the Tribunal concluded that the Respondent had made a decision refusing a claim. Paragraph 353 was therefore of no consequence. A right of appeal had arisen. The Tribunal considered that the observations made in Sheidu concerning the importance of the structure of the decision letter survived Robinson.

DISCUSSION AND CONCLUSIONS

36. The first question for us to determine is whether Sheidu was rightly decided. As we have already observed, the Tribunal in Sheidu did not purport to offer guidance more generally on the statutory appeals scheme and Paragraph 353 in that context. We consider it appropriate to begin our consideration with observations about that scheme and Paragraph 353 in context as we consider it important properly to understand the role of Paragraph 353.

37. We begin by emphasising the need for caution in relation to the terminology used when dealing with Paragraph 353. The importance of Paragraph 353 is as a "gate-keeping" function to shut out from the appeals system unmeritorious second or subsequent appeals. An appeal is generated under

the current form of section 82 of the 2002 Act whenever a protection or human rights "claim" is made and refused. Whether the matters put forward amount to a claim or merely further submissions is the central issue which the Respondent has to decide applying Paragraph 353. If she concludes that the matters raised amount to a fresh "claim", she makes a "decision" to refuse that claim, so generating a right of appeal. Obviously in the ordinary meaning of the word "decision", the Respondent can be said to make a decision every time that she refuses any application, claim or set of further submissions. In the context of section 82 of the 2002 Act, however, "decision" has a specific meaning: see MY (refusal of human rights claim) Pakistan [2020] UKUT 89 (IAC); [2020] Imm AR 906. A "decision", if it refuses a (human rights or protection) "claim" gives rise to a right of appeal. If, however, the Respondent considers that the further matters raised are not a fresh "claim" for those purposes, she rejects those and refuses to treat the further submissions as a protection or a human rights claim.

38. Mr Biggs does not go so far as to say that Paragraph 353 no longer has a part to play in the post-2014 Act appeals regime. Nor could he do so in light of the judgment in Robinson. His argument is, in short, that whether a decision gives rise to a right of appeal depends on the substance and structure of the decision under challenge. He relies on what is said in Sheidu and Islam in that regard.

39. Mr Biggs argues that, in any case where the Respondent engages with the merits of further submissions (or application) and makes a decision in that regard, she has made a "decision" to refuse a "claim" which gives rise to a right of appeal. His submission is perhaps a little more nuanced than that as he has to accept that the wording of Paragraph 353 requires the further submissions to be rejected prior to consideration whether they amount to a fresh claim.

40. The Respondent relies squarely on the words "if rejected" in Paragraph 353 as an indication that she is required to engage with the merits of further submissions and to reach conclusions on the substance prior to determining whether the further submissions amount to a fresh claim.

41. Mr Biggs submits that what the Respondent has to determine are the merits of the further submissions and not the human rights claim. As he put it, the requirement first to consider whether to reject the submissions "does not require a full evaluation of the merits because otherwise the substantial advantage of Paragraph 353 to the Respondent falls away". In our view, that discloses a misunderstanding of the purpose of Paragraph 353.

42. Paragraph 353 is, as we have indicated, aimed at preventing cases re-entering the appeals system and not at reducing the burden of decision-

making for the Respondent. Whilst we accept that the Respondent is not required to consider in detail submissions which merely repeat what was said in the initial claim, it is difficult to see how the Respondent could form a view whether further submissions are or are not a fresh claim without first addressing the merits of what is said. It is artificial to separate the underlying merits of what is put forward from the question whether something "significantly different" is being advanced. Indeed, we doubt whether the latter can properly be assessed until the former is considered.

43. Mr Biggs sought to support his position in this regard by reference to case-law. He referred us to [47(4)] of Robinson as follows:

> "The fact that section 94 applies to both original and purported renewed claims does not deprive rule 353 of its utility in relation to the latter category. **In appropriate cases, rule 353 relieves the Secretary of State from taking a decision on the merits of the application and refusing it. It operates by enabling him to reject the submissions as not constituting a claim requiring decision. Section 94, however, comes into play only when the Secretary of State has considered a claim on its merits and refused it. At that stage, certification operates to block a right to an in-country appeal which would otherwise arise.**
>
> > 'Thus rule 353 can be operated as a sort of gatekeeper by the Secretary of State to prevent further submissions amounting to, or being treated as, a claim, therefore not getting into Part 5 territory at all.' (*ZA (Nigeria)* per Lord Neuberger MR at para 26.)
>
> With respect to Mr Fordham, it is not the case that this interposing function arose only because of the additional requirement of an 'immigration decision' in the pre-2014 statutory list in section 82(1) of the 2002 Act. On the contrary, it is founded on the need to identify what constitutes a claim for this purpose."
>
> [our emphasis]

44. Mr Biggs understandably draws our attention to the sentences which we have emphasised in that passage. His reliance however only serves to underline the need for care when considering how appeal rights function in the immigration context. As is made plain when that passage is read as a whole and as we have already alluded to, a "claim" has a specific meaning, particularly in the appeals regime following the Immigration Act 2014. Even prior to those changes, whether a (protection or human rights) "claim" had been made was of relevance to the determination of the forum of the appeal (in or out of country).

45. Similarly, a "decision" in the immigration appeals context has a specific meaning. As was made clear in BA, in cases where the Respondent was obliged to make a "decision" for the purposes of section 82 of the 2002 Act (prior to the amendments made by 2014 Act), a right of appeal would always arise absent certification.

46. With that terminology firmly in mind, we consider that the passage on which Mr Biggs places reliance says no more than that the Respondent is not obliged to treat repeat submissions as a "claim" leading to a "decision" generating a right of appeal in every case. That is consistent with the previous case-law in relation to Paragraph 353. It is only if she decides that the further submissions are a fresh claim that an appealable decision on the merits is taken which, if not certified, would lead to a second or further appeal. That is put beyond doubt by the Supreme Court's reference to the "gatekeeping function" of Paragraph 353 preventing the case re-entering the appeals process.

47. We observe in passing that it is difficult to see how the Respondent could accept that further submissions amount to a fresh claim (on the basis that they have a realistic prospect of success) and then certify them as clearly unfounded under section 94 of the 2002 Act as is suggested by the Supreme Court in this passage. However, that is not of any relevance to the issues we have to determine.

48. Similarly, Mr Biggs' reliance on [47(5)] of the judgment in Robinson concerning section 96 of the 2002 Act does not advance his case. The Supreme Court is merely pointing out the differences between section 96 where the Respondent accepts that a "claim" has been made but prevents the right of appeal arising by certification and "the converse of the situation" under Paragraph 353 where the Respondent does not accept that a "claim" has been made at all.

49. If the position needs to be made any clearer, we consider there is force in the Respondent's reference to [47(3)] of Robinson as follows:

> "As indicated above, where it applies rule 353 operates at a prior stage to section 94. In the case of a purported renewed claim there is a legitimate preliminary issue as to whether it constitutes a claim requiring a decision on the merits at all. Rule 353 addresses that issue. Section 94, on the other hand, proceeds on the basis that there is a valid claim which requires consideration on the merits and a decision. It creates a machinery of certification of the claim as clearly unfounded so as to prevent an in-country appeal."

50. We have set out paragraph 60 of Robinson at [34] above. Mr Biggs places reliance on the reference to "the burden of establishing that the refusal was in response to a valid claim". That comment however undermines the Applicant's case rather than assisting it. It makes plain that the focus is on whether there is a "claim" leading to "an appealable decision". The Supreme Court, in that passage, also rejected the submission made by the appellant that "any submission that removal would breach a relevant

obligation will amount to a human rights or protection claim, the rejection of which will give rise to a right of appeal."

51. Mr Biggs also places reliance on [21] of the decision in ZA. The reference there is to the Secretary of State being able to decide that submissions are not a fresh claim and then "[declining] to make a decision on whether or not to refuse leave to enter etc". That is not an indication that the merits of the submissions do not have to be considered. It is a recognition that, at the time, what generated the right of appeal was a decision as to immigration status (as is confirmed by the following part of that sentence). The reference to considering the merits of the "claim" there and at [26] of the judgment, properly understood, are a rejection of the argument that the Respondent is obliged to consider the merits of the further submissions as a "claim" and to certify in order to remove the right of appeal.

52. As those cases make clear, therefore, the Respondent does not have to engage with the merits of a "claim" by treating it as such until she has determined whether the further submissions are so different as to amount to a "claim" for the purposes of the statutory appeal scheme. That does not mean however that she is not required to consider the merits of the submissions put forward to decide whether to respond positively to them. On the contrary, the words "if rejected" specifically contemplate that the Respondent must form a view on the merits, in the sense that she may decide the submissions are such as to warrant the grant leave to enter or remain (and to recognise the person as a refugee or otherwise entitled to international protection). It is only if she does not do so that Paragraph 353 requires her to determine if the rejected submissions are a fresh claim, the refusal of which constitutes a decision falling within section 82 of the 2002 Act.

53. The process which is undertaken by the Respondent where Paragraph 353 applies is therefore as follows:

Stage 1: The Applicant makes human rights or protection claim.
Stage 2: That claim is refused by the Respondent, giving rise to a right of appeal under section 82.
Stage 3: The Applicant's appeal is unsuccessful; or the Applicant does not appeal or withdraws his appeal; or the refusal is certified under section 94 of the 2002 Act.
Stage 4: The Applicant makes second or subsequent submissions by way of written submissions or application ("the Further Submissions").
Stage 5: The Respondent considers whether to accept or reject the Further Submissions on their merits.
Stage 6: If the Further Submissions are accepted on their merits, the Respondent grants leave/recognises Applicant's status.

Stage 7: If the Further Submissions are rejected, the Respondent goes on to consider whether they nonetheless amount to a fresh protection or human rights claim; ie a categorisation decision is made.
Stage 8: If the Respondent determines that the Further Submissions do not amount to a fresh claim, she rejects them as such. No refusal of a human rights or protection claim arises, within the meaning of section 82(1)(a) or (b) of the 2002 Act. If, however, she determines that they do amount to a fresh claim, then a "decision" has been made to refuse a "claim" for the purposes of Section 82 (1)(a) or (b) of the 2002 Act and a right of appeal arises against that decision

54. The foregoing is consistent with what is said by this Tribunal in R (oao Sharif Hussein) v First-tier Tribunal (Para 353: Present Scope and Effect) (IJR) [2017] Imm AR 1 ("Hussein") (see [50] of the decision). The reference at [51] of the decision in Hussein regarding a "discretion to grant leave…if on a re-assessment, it is thought appropriate to do so" is merely a recognition that the Respondent, when deciding whether to grant leave to remain, is acting in accordance with her duties under the Immigration Act 1971. It does not indicate that there is no consideration of the merits in a Paragraph 353 case.

55. The foregoing analysis is also consistent with what is said at [54] and [55] of the decision in Hussein. The reference to the categorisation decision is what we have referred to above as stage 7. The reference to the distinction between the process of categorisation and a decision to refuse a claim for the purposes of section 82 of the 2002 Act again shows the need carefully to consider the language in context. As the Tribunal there makes clear, the Paragraph 353 process involves determining whether the further submissions amount to a fresh claim "although [they are] not such as to give rise to the grant of leave". That reference makes plain that the prior stage is to consider whether leave should be granted.

56. We therefore reject the Applicant's argument that the Respondent has "decided" a "claim" under section 82 of the 2002 Act in any case where she considers further submissions or a further application and concludes that the submissions or application do not merit the grant of leave etc.

57. We now return then to the first question posed in ground one concerning the correctness of the guidance given in Sheidu and whether that survives Robinson.

58. As we have already observed, Sheidu did not purport to give guidance on the application of Paragraph 353 in the post-2014 Act context. That guidance is now authoritatively given by the Supreme Court in Robinson.

59. In relation to his argument that Sheidu still applies following the judgment in Robinson, Mr Biggs relies on the decision in Islam. Islam was not a reported case and did not offer guidance for other cases. We do not therefore need formally to decide whether to follow it. Nor is this an appeal against the decision in that case. We are of course not bound by it.

60. Islam is in any event a problematic decision. As emerged in the course of the hearing before us, the decision under challenge in that case was one applying Paragraph 353 in the context of an earlier decision certifying a claim under section 94 of the 2002 Act. Moreover, it was the applicant's case that he had not received the earlier certification decision. If that were so and were accepted, the Tribunal would have been dealing with an argument that the application/claim as made was an initial one requiring a decision which, if negative, would generate a right of appeal (unless again certified). In those circumstances, Paragraph 353 would be of no application. Those arguments were not considered by the Tribunal but indicate the difficulties with placing reliance on that decision in any event.

61. As we have indicated, the guidance given in Sheidu turns on the structure of the decision letter there under challenge. We have set out [16] and [17] of the decision at [33] above.

62. Both parties accept therefore that, ultimately, the guidance given in Sheidu turns on questions of interpretation of the decision letter. Both parties accept that it is necessary to look at a Paragraph 353 decision under challenge as a whole. It must be interpreted objectively, considered fairly in the round and in substance.

63. Although we do not have the decision letter in Sheidu set out in full, the conclusions of the Tribunal which form part of the guidance given turn on the heading in which the decision was described as a "Decision to Refuse a Protection Claim and Human Rights Claim" (albeit in the context of "consideration of further submissions") and the fact that the Respondent had refused leave to remain before referring to Paragraph 353.

64. In relation to the Decision here (and in Islam), Mr Biggs says that, because an application for ILR under paragraph 276B of the Rules ("Paragraph 276B") is recognised by the Respondent to be an implied human rights claim, if the application is rejected on its merits before the Respondent engages with the categorisation decision under Paragraph 353, she has already reached a "decision" on a "claim" and has generated a right of appeal. However, as we have already concluded at paragraph 52 above, the Respondent has to consider the merits of any further submissions put to her in order to decide whether they merit a positive response. That she does so and concludes a positive response is not warranted does not indicate that she has recognised

the further submissions as a "claim" still less that she has made a "decision" for the purposes of Section 82.

65. A decision letter may contain a number of different elements. It is, however, the refusal of the human rights or protection element of the further submissions which, if recognised as a "claim", generates the right of appeal. Whilst, here, the application for ILR formed part of the human rights case as long residence is part of the Applicant's private life, that does not alter the fact that any appeal would be against the refusal of the human rights claim itself.

66. As both parties accept, when searching for the intention of the decision letter, one has to look at it holistically. Whilst the heading used in the decision letter in Sheidu was perhaps unfortunate, we do not consider that this alone could influence the nature of the decision, which followed at least unless the impact of the decision read as a whole was that the Respondent was recognising the further submissions as a "claim" and making a "decision" to reject that claim. In this case, Mr Biggs accepted that he would not be able to argue the Applicant's case as he has if Paragraph 353 had been put at the forefront of the Decision or, rather, if the application for ILR had been considered "through the prism" of Paragraph 353. However, whether it was considered in that context has to be looked at in substance not based on where in a decision letter Paragraph 353 is mentioned. There can be no benefit to anyone – be it the parties or Tribunal – of the uncertainty generated by such an approach.

67. As we indicate at [33] above, the guidance given in Sheidu is confined to a general statement that if the effect of a decision is a refusal of a claim under section 82 of the 2002 Act then there is a right of appeal even if the Respondent had intended to refuse further submissions applying Paragraph 353. As we have also noted at [61] above, that guidance turns on interpretation of the decision letter under consideration in that case. It is therefore limited to the facts of that case.

68. We make it clear that we are not saying that a court or tribunal could never decide that the impact of a decision properly interpreted was a decision refusing a human rights claim rather than rejecting further submissions. The Respondent is not the sole or ultimate arbiter of how her decisions are to be interpreted. In some (albeit extreme) cases such as Sheidu, this Tribunal may conclude in the context of a judicial review challenge that what the Respondent actually did was not what she intended to do. Such cases are nevertheless likely to be rare.

69. In light of the foregoing, we can answer the second question in ground one more shortly. We are here concerned with the impact of our earlier conclusions for the Decision in this case.

70. We accept that an application for ILR under Paragraph 276B includes consideration of an applicant's human rights and is therefore an implied human rights claim (see in that regard [23] to [25] of the Tribunal's decision in R (oao Mujahid) v First-tier Tribunal (Immigration and Asylum Chamber) and the Secretary of State for the Home Department (refusal of human rights claim) [2020] UKUT 00085 (IAC); [2020] Imm AR 856). However, the application for ILR was only part of the Respondent's consideration of the Applicant's human rights.

71. The application for ILR was submitted under cover of a letter dated 20 February 2020 ([AB/C/57-64]. That letter dealt with the Applicant's length of residence which was an integral part of the application under the Immigration Rules ("the Rules"). The covering letter also put forward further arguments in relation to the deception alleged previously (as found to be made out by the previous Tribunal). The letter went on to refer to Article 8 more generally and to make points about the Applicant's human rights in that context by reference to his private and family life. There was obviously some overlap with the application itself, but the covering letter included other points about the proportionality of a refusal to grant leave which went beyond the application.

72. The first part of the Respondent's consideration for that reason dealt with the application made under the Rules. The Applicant had of course made payment for this application and would no doubt have rightly been aggrieved had the Respondent not engaged with the application being made.

73. The Respondent rejected that application on the basis she had before, namely that the Applicant had exercised deception and Paragraph 322(5) applied. In order to reach that conclusion, the Respondent was required to consider the further evidence and submissions made about the deception which had previously been alleged. Again, had she not done so, the Decision would no doubt have been challenged for that reason.

74. Having also set out the findings of the previous First-tier Tribunal Judge in that regard, the Respondent concluded that section of the decision with the following paragraph:

> "For the reason outlined above, your application for indefinite leave to remain on the grounds of long residence is refused, as you have failed to meet the requirements of the Immigration Rules under Paragraph 276D with reference to Paragraph 276B(i)(a) and (v) of HC 395."

75. That paragraph does no more than to conclude that the Applicant was not entitled to a grant of ILR within the Rules because he was considered to have exercised deception and nothing he had said in or with the further application led to any different conclusion. We do not here need to consider the substance of that conclusion as the Applicant was refused permission to challenge the substance of the Decision on rationality grounds (see [8] above). It was precisely the kind of decision, which Parliament has decided should no longer be subject to a right of appeal.

76. The second part of the Respondent's consideration related to the human rights case under Article 8 ECHR. The Respondent began her consideration by reference to Paragraph 353 in order to consider whether any of what was said in the covering letter or otherwise was significantly different to the case as previously advanced. The Respondent referred again to the previous appeal decision and concluded that it was not. Again, we do not need to consider at this stage the substance of what is there said.

77. As we have already noted, Mr Biggs argues that, by the time that Paragraph 353 was raised, the Respondent had already made a "decision" (refusing leave to remain) which, because the application for ILR was an implied human rights claim, amounted to a "decision" refusing a "human rights claim" and therefore generating a right of appeal. As we have already observed, we understood him to accept that if Paragraph 353 had been mentioned prior to the paragraph refusing the ILR application which we cite at [74] above, then the Applicant would have no case on ground one.

78. Whether a decision of the Respondent is a decision to refuse to treat submissions as a fresh claim or the refusal of what is accepted to be a fresh claim is, as Mr Blundell submitted, a matter of substance and not form. The nature of the decision does not depend where in the decision letter Paragraph 353 is raised. It makes sense for the Respondent to refer to Paragraph 353 at the point where she has to consider whether to apply it rather than earlier.

79. In this case, if the Respondent had been persuaded by the Applicant's arguments in relation to the deception alleged, she may well have reached the conclusion that ILR should be granted (since that is the only point taken about the Applicant's entitlement to ILR). It would be nonsensical for the Respondent to consider whether a decision to refuse submissions amounted to an appealable decision before deciding whether the submissions should lead to the grant of leave to remain. We refer again to what we say at paragraph 52 above. As we have already noted, it is also difficult to see how the Respondent could consider whether the submissions were significantly

different without engaging with what is said and expressing a view in that regard.

80. For completeness, we do not accept that our conclusions are impacted by the Vice President's decision in Yerokun (Refusal of claim; Mujahid) [2020] UKUT 00377 (IAC) ("Yerokun"). We do not disagree with the guidance given in Yerokun. We accept that an application and claim are different. We accept that "refusal of one does not imply or entail the refusal of the other, even where the application includes a claim". That is consistent with our view that a decision has to be read as a whole and not broken up into component parts. The point made at [12] of the decision (on which the Applicant relies) is merely that it is not inconsistent for the Respondent to grant leave in response to an application even if that forms part of the claim but then go on to refuse the claim itself (or vice versa). That is a different issue to the one we are considering. The point made is in any event consistent with what we say above about the need to interpret the decision based on all its component parts and as a whole.

81. For those reasons, we refuse the application for judicial review on ground one. It follows that the Respondent did not by the Decision generate a right of appeal. The Applicant can therefore challenge the Decision only by way of this judicial review.

GROUND TWO

82. The Applicant's case is that the Tribunal is required to consider the Applicant's Article 8 claim for itself. Mr Biggs submits that it is trite law that, where there is a challenge to a decision letter dealing with Article 8 ECHR in a judicial review, it is for the Tribunal to decide for itself whether Article 8 is breached by the refusal of leave. In this case, that involves, the Applicant says, a resolution of the factual dispute underlying the Applicant's case relating to the deception.

83. The Respondent on the other hand says that the Tribunal's role is one of review on public law grounds because of the nature of the Decision. The Respondent relies on what she says is binding authority in that regard.

LEGAL FRAMEWORK

84. Mr Biggs relies on the Court of Appeal's judgment in Balajigari v Secretary of State for the Home Department [2019] 1 WLR 4647; [2019] Imm AR 1152 ("Balajigari") as considered by the Tribunal in R (oao BAA and Another) v Secretary of State for the Home Department (Dublin III: judicial review; SoS's duties) [2020] UKUT 00227 (IAC) ("BAA") in particular at [59] to [63] as follows:

"59. The principle that issues of disputed fact may require to be decided in judicial review proceedings involving a human rights ground of challenge has been emphatically confirmed by the judgment of Underhill LJ in R (Balajigari) v Home Secretary [2019] 1 WLR 4647; [2019] EWCA Civ 673. The case involved the nature of a judicial review against a decision of the respondent that an individual had acted dishonestly in respect of financial information provided, respectively, to the respondent and to Her Majesty's Revenue and Customs. Where Article 8 was in play, and the issue involves the proportionality of the respondent's decision, Underhill LJ was in no doubt that the allegation (of dishonesty) had to be determined by the Tribunal, by means of its own factual investigation:-

> '104. If such an article 8 challenge does proceed by way of judicial review in the UT, and the claimant's article 8 rights are found to have been engaged, the tribunal will, as already noted, have to consider for itself whether the alleged dishonesty on the part of the claimant has been proved and whether removal is proportionate, which in most cases is likely to be determined by the question of dishonesty. It will not be confined, as would usually be the case and as in these proceedings thus far, to reviewing the facts only on the ground of irrationality. This is because, where a claim for judicial review includes a pleaded ground that the Secretary of State's decision either does or would violate article 8, that amounts to an allegation that there has been or will be unlawful conduct contrary to section 6 of the 1998 Act. That allegation has to be adjudicated by the tribunal on its merits: it is an argument based on illegality and not simply irrationality. For a recent summary of the law in this regard see *R (Caroopen) v Secretary of State for the Home Department* [2017] 1 WLR 2339, paras 68-83, per Underhill LJ.'

60. At paragraphs 68 to 83 of Caroopen, Underhill LJ undertook an analysis of the case law, including Denbigh High School, Naseri [sic], Bank Mellat No 2, Miss Behavin' and Lord Carlile's case, similar to that undertaken by the Upper Tribunal in MS. Indeed, as we have seen, at paragraph 204 of its judgment, the Upper Tribunal cited the passage at paragraph 73 of Caroopen, where Underhill LJ held that, in challenges of this kind, 'the Court cannot confine itself to asking whether the decision-making process was defective but must decide whether the decision was right'.

61. It is, therefore, established that in a judicial review which challenges a decision on the ground that it actually or potentially violates a person's protected human right, the court or tribunal must determine that issue for itself (albeit ascribing weight to the decision-maker's expertise and statutory or other relevant functions). Where there is a dispute as to the primary facts that must be ascertained before that issue can be determined, the court or tribunal must resolve that dispute.

62. The legal principle I have just stated is part of our domestic law of judicial review. It has been reached by the domestic courts applying section 6 of the Human Rights Act 1998, which prohibits a public authority from acting incompatibly with an ECHR right. Where an ECHR right is in play, this legal principle is not dependent on Article 27 of Dublin III or, indeed, any other piece of EU legislation regarding the availability of an effective remedy, even

where the challenged decision is made under EU law. Nor is the principle dependent upon there being some other public law error in the impugned decision.

63. The fact that a decision of the respondent, which is otherwise free from public law error, may fall to be quashed, as a result of a fact-finding exercise of the kind undertaken in MS and the present case, needs to be seen in context. In most instances, there is unlikely to be any dispute as to the primary facts. The issue in contention will, rather, be about what weight should be ascribed to particular factual elements in order to strike the proportionality balance. A decision which is free from public law error, where the evidence available to the respondent does not disclose a reason why the decision might be in breach of section 6 of the Human Rights Act 1998, will not get past the 'permission' stage on judicial review. Although there is no legal requirement for there to be an independent public law error, a genuine dispute as to primary facts is likely to arise only where there has, in practice, been some such error, such as a breach of procedural fairness (as in Balajigari)."

85. The Respondent relies on cases in the fresh claims context as authority for the proposition that the function of the court or tribunal is to review the decision applying ordinary public law concepts. That position is most clearly stated in WM as follows:

> "[10]…a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.
>
> [11] First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State or course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry but it is only a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

86. The position is re-stated by the Supreme Court in Robinson as follows:

> "37. In *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495; [2007] Imm AR 337 the Court of Appeal (Buxton, Parker and Moore-Bick LJJ) confirmed (per Buxton LJ at paras 8-10) that there is no provision for appeal from a decision of the Secretary of State as to the existence of a fresh claim and, accordingly, the court was engaged only through the medium of judicial review. The Secretary of State's decision as to

> whether there was a fresh claim was not a fact, nor precedent to any other decision, but was the decision itself. The court could not take that decision out of the hands of the decision maker. The decision remained that of the Secretary of State, subject only to review on a *Wednesbury* basis, albeit applying anxious scrutiny."

The Court of Appeal has also recently re-stated that as the correct approach in Akinola v Secretary of State for the Home Department [2021] EWCA Civ 1308 ("Akinola") (see [89] and [90] of the judgment).

DISCUSSION AND CONCLUSIONS

87. We accept that the judgments in Balajigari, WM and Robinson are all binding on us. The challenge for us is to seek to reconcile what is said in Balajigari (and BAA) on the one hand with what is said in WM and Robinson on the other.

88. What is said by the Court of Appeal in Balajigari is consistent with other cases involving certification or where there is no right of appeal. BAA was of course itself a case involving certification and where the applicant had no right of appeal. The same is true of Balajigari. Those cases were ones where there was a refusal of Tier 1 applications but no consideration of human rights so there was (and had been) no right of appeal.

89. The position is however different in fresh claims cases such as this. The case law in relation to fresh claims has consistently stated that the role of the Tribunal is only to consider whether the decision is Wednesbury unreasonable or involves public law error. The Tribunal does not consider for itself whether the decision breaches the applicant's human rights. Whilst we accept that WM is a judgment of some antiquity and concerned asylum rather than human rights submissions, Robinson is a very recent decision of the highest court in this jurisdiction and was concerned squarely with Article 8 ECHR. The Court of Appeal has also recently confirmed the position in Akinola.

90. There is good reason for the distinction between fresh claims cases and judicial review challenges in certification cases based on the existence of the earlier appeal. That is the forum for resolution of disputes of fact. It is only if an applicant puts forward material which shows that the earlier finding may be wrong (or in other words is significantly different or admits of a realistic prospect of success) that the Respondent's decision can be impugned. The Tribunal is therefore tasked with considering the Respondent's decision for rejecting the new material in light of the Tribunal's earlier findings but is not required to reach a decision for itself whether the Respondent's decision breaches an applicant's human rights. The position in this regard is akin to that where an appellate court or

tribunal is examining the legality of the mixed legal and factual conclusion reached by a fact-finding tribunal on whether a decision violates Article 8 rights.

91. In the event that further material comes to light, the remedy for an applicant is to make further submissions to the Respondent and not seek to place the Tribunal in the role of primary decision-maker.

92. The Balajigari cases did not involve fresh claim decisions. As such they are distinguishable from this and other fresh claims cases. BAA is similarly distinguishable. The case-law setting out the role of the Tribunal in Paragraph 353 cases has recently been re-stated in Robinson and is binding on us. We consider that it is in any event correct.

93. For those reasons, we also refuse the application for judicial review on the Applicant's ground two. We do not therefore need to convene a further hearing in relation to the fact-finding exercise which the Applicant argues we should conduct. Nor do we need to consider the Applicant's application to adduce further evidence. If the Applicant wants that further evidence to be considered, his remedy is to put it before the Respondent.

CONCLUSION

94. For the above reasons, we refuse this application for judicial review.

Signed: *L K Smith*
Dated: 27 September 2021