Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Ogilvy) v Secretary of State for the Home Department (Civil restraint orders) [2022] UKUT 00070 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 24 November 2021

Judgment

.....

Before

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

Between

THE QUEEN

on the Application of
LEONARD OGILVY
(ANONYMITY DIRECTION NOT MADE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

CELINE D. OKOU

Interested Party

Representation:
For the applicant: Mr A Khan, counsel instructed by C W Law Solicitors
For the respondent: Ms H Higgins, counsel instructed by the Government Legal Department

It is the High Court's inherent jurisdiction that enables it to make a civil restraint order which extends to the making of an application for judicial review in the Upper Tribunal, not the CPR.

JUDGMENT

1. We have both contributed extensively to this decision.

A. INTRODUCTION

2. This is an oral reconsideration of a decision by Upper Tribunal Judge Hanson dated 11 August 2021 refusing permission to bring judicial review proceedings. At the same time as refusing permission, Judge Hanson refused an application for interim relief.

3. The applicant's partner, Celine D. Okou is named by the applicant as an Interested Party. However, she has not taken any part in the proceedings.

4. The applicant's claim was lodged at a time when he was not legally represented. At section 3 of the claim form it gives details of the two decisions that he seeks to challenge. The first is a fresh claim decision dated 3 August 2021; the second is a decision dated 15 June 2021 being a refusal to grant him a Home Office Travel Document ("HOTD").

5. The respondent did not provide an acknowledgement of service as required by rule 29 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Procedure Rules"). That being the case, rule 29(3) of the Procedure Rules provides that the respondent may not take part in the application for permission "unless allowed to by the Upper Tribunal".

6. Having regard to the issues in the case, the fact that both parties have served skeleton arguments and hearing and authorities bundles, and there having been no objection on behalf of the applicant to the respondent taking part, we decided to allow the respondent to take part in this application for permission.

7. Before further consideration of the grounds of claim, we must first address the issue of the applicant being subject to a general civil restraint order made in the High Court.

B. THE CIVIL RESTRAINT ORDER

8. On 12 May 2021 Mostyn J, sitting in the Queen's Bench Division, made a general civil restraint order in respect of the applicant. Mostyn J used form N19B. This is one of the forms annexed to CPR Practice Direction 3C (Civil Restraint Orders).

9. Mostyn J's order recorded that the applicant had been found to be a person who "persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate".

10. The applicant was "ordered that you be restrained from issuing any claim or making any application in:

> "☒ Any Court
>
> ☐ The High Court or any county court
>
> ☐ County Court
>
> without first obtaining the permission of
>
> Name of Judge | Any full-time High Court Judge sitting in the Administrative Court
>
> **OR**
>
> If unavailable |
>
> …"

11. The order was expressed to remain in effect until 12 May 2023. The order also said:

> "**You must obey the directions contained in this order.** If you do not you will be guilty of contempt of court and you may be sent to prison".

12. Mostyn J made the general civil restraint order after considering, on the papers, an application for permission to apply for judicial review in case CO/313/2021. He certified that application as totally without merit.

13. At the beginning of paragraph 5 of his written reasons, Mostyn J noted that since 1997 the applicant had made 21 applications against state bodies (including CO/313/2021). All except one were refused permission. The exception was dismissed following a substantive hearing. Two applications had been certified as totally without merit, excluding CO/313/2021.

14. Mostyn J ended as follows:

> "6. In such circumstances it is incumbent on me to consider whether to impose a civil restraint order. In view of the very large number of applications, and their wide-ranging nature, I have decided that the time has come to impose on the claimant a requirement to obtain prior permission before he makes any application (including an application for permission to seek judicial review). I therefore make a general civil restraint order to last for two years in the terms of the schedule to this order [that being the general civil restraint order]. I have concluded that I must deploy my powers to their fullest extent in view of the high degree of vexatiousness of the numerous applications made previously by the claimant."

15. The applicant sought permission from the Court of Appeal to appeal against the general civil restraint order. On 26 July 2021, Macur LJ refused permission, certifying it as totally without merit. On the same day, she also refused permission against an order of Martin Spencer J, refusing interim relief to the applicant. In her order, Macur LJ stated:

> "The General Civil Restraint Order is extended to cover applications made to the Court of Appeal."

16. The applicant's present claim for judicial review was filed in the Upper Tribunal Immigration and Asylum Chamber on 10 August 2021. As we have already noted, Upper Tribunal Judge Hanson refused permission and interim relief on 11 August 2021.

17. On 19 August 2021, Ms Victoria Mascord of the Government Legal Department wrote to the Upper Tribunal to inform it that the respondent had not been served by the applicant with the judicial review claim, observing, "Regrettably, this is not the first time that the Applicant has failed to serve proceedings on the Respondent."

18. Ms Mascord's email requested that the applicant be directed to serve the claim on the respondent, or else the claim should be struck out. The email then said the following:

> "Furthermore, the Respondent wishes to draw the Tribunal's attention to the fact that the Applicant is subject to a General Civil Restraint Order, which was recently upheld by the Court of Appeal – see attached order and decisions by the Court of Appeal.
>
> The Tribunal is also invited to consider whether the GCRO prevents the Applicant from initiating proceedings in the Upper Tribunal without the requisite permission."

19. On 4 October 2021, Upper Tribunal Judge Kopieczek directed the parties in the present proceedings to file and serve written submissions on the question of whether the civil restraint order of Mostyn J applied to these proceedings. We received oral and written submissions from Mr Khan, on behalf of the applicant, and Ms Higgins, for the respondent. We wish to record our gratitude for their assistance.

20. CPR 2.3(1) defines a "civil restraint order" as follows:

> "'civil restraint order' means an order restraining a party –
>
> (a) from making any further applications in current proceedings (a limited civil restraint order);
>
> (b) from issuing certain claims or making certain applications in specified courts (an extended civil restraint order); or
>
> (c) from issuing any claim or making any application in specified courts (a general civil restraint order)."

21. CPR 3.11 reads as follows:

> "**Power of the court to make civil restraint orders**:
>
> 3.11.A practice direction may set out –
>
> (a) the circumstances in which the court has the power to make a civil restraint order against a party to proceedings;
>
> (b) the procedure where a party applies for a civil restraint order against another party; and
>
> (c) the consequences of the court making a civil restraint order."

22. Practice Direction 3C (hereafter PD3C) provides, at paragraph 1, that the practice direction applies where the court is considering whether to make *inter alia* "(c) a general civil restraint order, against a party who has issued claims or made applications which are totally without merit".

23. PD3C.3 provides for the making of an extended civil restraint order, where a party has persistently issued claims or made applications which are totally without merit. PD3C.3.2 provides that, unless the court otherwise orders, an extended civil restraint order requires the person against whom the order is made to obtain permission before issuing claims or making applications "concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made".

24. PD3C.4 deals with general civil restraint orders. It provides as follows:

> **"General civil restraint orders**
>
> **4.1** A general civil restraint order may be made by –
>
> (1) a judge of the Court of Appeal;
>
> (2) a judge of the High Court; or
>
> (3) a Designated Civil Judge or their appointed deputy in the County Court,
>
> where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate.
>
> **4.2** Unless the court otherwise orders, where the court makes a general civil restraint order, the party against whom the order is made –
>
> (1) will be restrained from issuing any claim or making any application in –

(a) any court if the order has been made by a judge of the Court of Appeal;

(b) the High Court or the County Court if the order has been made by a judge of the High Court; or

(c) the County Court identified in the order if the order has been made by a Designated Civil Judge or their appointed deputy, without first obtaining the permission of a judge identified in the order;

(2) may apply for amendment or discharge of the order provided he has first obtained the permission of a judge identified in the order; and

(3) may apply for permission to appeal the order and if permission is granted, may appeal the order.

4.3 Where a party who is subject to a general civil restraint order –

(1) issues a claim or makes an application in a court identified in the order without first obtaining the permission of a judge identified in the order, the claim or application will automatically be struck out or dismissed –

(a) without the judge having to make any further order; and

(b) without the need for the other party to respond to it;

(2) repeatedly makes applications for permission pursuant to that order which are totally without merit, the court may direct that if the party makes any further application for permission which is totally without merit, the decision to dismiss that application will be final and there will be no right of appeal, unless the judge who refused permission grants permission to appeal.

4.4 A party who is subject to a general civil restraint order may not make an application for permission under paragraphs 4.2(1) or 4.2(2) without first serving notice of the application on the other party in accordance with paragraph 4.5.

4.5 A notice under paragraph 4.4 must –

(1) set out the nature and grounds of the application; and

(2) provide the other party with at least 7 days within which to respond.

4.6 An application for permission under paragraphs 4.2(1) or 4.2(2) –

(1) must be made in writing;

(2) must include the other party's written response, if any, to the notice served under paragraph 4.4; and

(3) will be determined without a hearing.

4.7 An order under paragraph 4.3(2) may only be made by –

(1) a Court of Appeal judge;

(2) a High Court judge; or

(3) a Designated Civil Judge or their appointed deputy.

4.8 Where a party makes an application for permission under paragraphs 4.2(1) or 4.2(2) and permission is refused, any application for permission to appeal –

(1) must be made in writing; and

(2) will be determined without a hearing.

4.9 A general civil restraint order –

(1) will be made for a specified period not exceeding 2 years;

(2) must identify the courts in which the party against whom the order is made is restrained from issuing claims or making applications; and

(3) must identify the judge or judges to whom an application for permission under paragraphs 4.2(1), 4.2(2) or 4.8 should be made.

4.10 The court may extend the duration of a general civil restraint order, if it considers it appropriate to do so, but it must not be extended for a period greater than 2 years on any given occasion.

4.11 If they consider that it would be appropriate to make a general civil restraint order –

(1) a Master or a District Judge in a district registry of the High Court must transfer the proceedings to a High Court judge; and

(2) a Circuit Judge or a District Judge in the County Court must transfer the proceedings to the Designated Civil Judge."

25. The website gov.uk contains a list of general civil restraint orders. In each case, the name of the person concerned is followed by the court where the order was issued and the date when the order is "complete"; that is to say, when it expires.

26. The list is prefaced by the following words:

> "These orders are issued by a Judge and apply to all the County Courts and the High Court or both. They last 2 years but can be renewed for a further 2 years.

If the order is ignored, the person will be in contempt of court and may receive a prison sentence."

27. The list currently contains the following entry:

Ogilvy	Leonard	Administrative Court, Royal Courts of Justice	12 March 2023

28. Although we are concerned with civil restraint orders, it is necessary to mention section 42 of the Senior Courts Act 1981 (Restriction of vexatious legal proceedings), which provides as follows:

> "(1) If, on an application made by the Attorney General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground—
>
> (a) instituted vexatious civil proceedings, whether in the High Court or the family court or any inferior court, and whether against the same person or against different persons; or
>
> (b) made vexatious applications in any civil proceedings, whether in the High Court or the family court or any inferior court, and whether instituted by him or another, or
>
> (c) instituted vexatious prosecutions (whether against the same person or different persons),
>
> the court may, after hearing that person or giving him an opportunity of being heard, make a civil proceedings order, a criminal proceedings order or an all proceedings order.
>
> (1A) In this section—
>
> *"civil proceedings order"* means an order that—
>
> (a) no civil proceedings shall without the leave of the High Court be instituted in any court by the person against whom the order is made;
>
> (b) any civil proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and
>
> (c) no application (other than one for leave under this section) shall be made by him, in any civil proceedings instituted in any court by any person, without the leave of the High Court;
>
> …"

29. In **The Law Society of England and Wales v Otobo** [2011] EWHC 2264 (Ch**)**, Proudman J considered an application made by the Law Society for a civil restraint order to be made against Mr Otobo. The requested order

was to preclude Mr Otobo from bringing proceedings against the Law Society in the Employment Tribunal.

30. At paragraph 14, Proudman J posed the question, “does this court have jurisdiction to make a civil restraint order under the CPR restraining proceedings from being brought in the Tribunal?”

31. Proudman J held that, since PD3C provided that an order, if made by a Judge of the High Court, operates only on claims or applications in “the High Court or any County Court”, it was “therefore plain that a CRO made under the CPR by a High Court Judge cannot restrain claims or applications made in the Employment Tribunal. I do not accept the claim as originally made by the Law Society that “any County Court” should be interpreted to include any body exercising judicial powers of inferior jurisdiction such as the Employment Tribunal.” (para.16).

32. Proudman J continued as follows:

> “17. The CPR governs procedure in the Civil Division of the Court of Appeal, the High Court and County Courts only: see section 1(1) of the Civil Procedure Act 1977. It is therefore to be assumed that "court" in CPR 3.11 does not include a tribunal as it is outside the scope of the rules: see section 9(1).
>
> 18. I say this with some hesitation because of the observations of the Court of Appeal in ***Enfield London Borough Council v Sivanandan*** [2006] EWCA Civ 888, at [5] where Sedley LJ said:
>
> > "A civil proceedings order can be made by this court under the powers contained in CPR 3.11 and in the PD at 3 CPD 3 and 7… If made in this court, the protection of such an order may extend to any court, including an employment tribunal: see ***Peach Grey & Co v Summers*** [1995] ICR 549"
>
> Again, at [19], Peter Gibson LJ said:
>
> > "Although this application is made for the first time in this court, it is not in dispute that this court has the power to make the order sought."
>
> 19. There are several reasons why this court, the High Court, cannot rely on these statements to found jurisdiction in the High Court to restrain proceedings in the Employment Tribunal. First, and most importantly, the Court of Appeal has power to order a restraint effective in “any court”. Doubtless the Court of Appeal had in mind the three tests of what is a court propounded by the House of Lords in ***Attorney-General v British Broadcasting Corporation*** [1981] AC 303. A High Court Judge on the other hand is expressly restricted to restraints in the High Court and County Court.
>
> 20. Secondly, these observations were obiter as the Court of Appeal ultimately refused to make a CRO.

21. Thirdly, jurisdiction was assumed rather than addressed substantively in ***Sivanandan*** and the respondent appeared in person.

22. Fourthly, it is not entirely clear whether the Court of Appeal was dealing with a true civil restraint order or a civil proceedings order, that is to say an order under section 42(1A) of the 1981 Act: see the reference to "civil proceedings order" and to the ***Peach Grey*** case in the passage I have quoted. ***Peach Grey*** was a case of committal under RSC order 52, a provision which specifically referred to contempts in connection with proceedings "in an inferior court". I suspect that the reference to "civil proceedings order" in [5] is a simple mistake for "civil restraint order" not least because the Attorney-General was not the applicant in that case. However, as Warren J said in his judgment in this case, given on 22nd October 2009 at page 2, the decision is anyway of limited assistance on the facts of the present case.

23. At all events, the Law Society does not now rely on jurisdiction under the CPR but asks the court to make a CRO under the inherent jurisdiction."

33. Ms Higgins asks us not to follow paragraphs 17 *et seq* of Proudman J's judgment and to hold that the CPR do, in fact, give the High Court power to make a civil restraint order that applies to a tribunal, such as the Upper Tribunal. In order to be able to address this request, it is necessary to set out section 1(1) of the Civil Procedure Act 1997:

> "**Civil Procedure Rules:**
>
> (1) There are to be rules of court (to be called "Civil Procedure Rules") governing the practice and procedure to be followed in—
>
> (a) the civil division of the Court of Appeal,
> (b) the High Court except in relation to its jurisdiction under the extradition act 2003,
> (c) county courts."

34. In **<u>Nursing & Midwifery Council & Anor v Harrold</u>** [2015] EWHC 2254 (QB); [2016] IRLR 30, the defendant, a former nurse, contended that the High Court did not have jurisdiction to make a civil restraint order in respect of the Employment Tribunal.

35. Hamblen J noted at paragraph 13 that under the CPR the High Court can only make a civil restraint order in relation to the issue of claims or applications in the High Court and the County Court. He said that this was a reflection of the fact that the CPR only governs procedure in the Civil Division of the Court of Appeal, the High Court and the County Court: section 1(1) of the Civil Procedure Act 1997. Before him, the claimants accepted that: "tribunals are outside of the scope of the CPR since 'court' in CPR 3.11 does not include a tribunal – see s. 9(1) and *Law Society of England and Wales v Otobo* [2011] EWHC 2264 (Ch) …"

36. Hamblen J continued –

> "14. The ET is, however, generally regarded as being an inferior court. Thus, such tribunals have been treated as an "inferior court" for the purposes of s. 42 of the Senior Courts Act 1983 and for the purposes of making committal orders under RSC Order 52– see *Otobo* at [33].
>
> **The jurisdictional issue**
>
> 15. This was an issue considered with care by Proudman J in the *Otobo* case and, whilst that decision is not binding upon me, I consider its reasoning and conclusion to be highly persuasive. I recognise, however, that Mr Otobo was not represented in that case and that many of the arguments raised by Mrs Harrold before me were not considered."

37. At paragraph 16, Hamblen J noted the use made by Proudman J in *Otobo* of an article by Sir Jack Jacob in [1970] Current Legal Problems 23: "*The Inherent Jurisdiction of the Court*". Four principles could be derived from Sir Jack's article. First, the general jurisdiction of the High Court is unlimited save insofar as it has been taken away by statute. Second, that inherent jurisdiction derives from coercion, (that is to say, punishment for contempt of court) and regulation (that is to say regulating the practice of the court and preventing abuse of its process). Third, the High Court's inherent jurisdiction in respect of inferior courts is not to review the decisions of such courts, but to prevent interference with the due course of justice in them; and to assist them so that they may administer justice fully and effectively. Fourth, the powers of the High Court under its inherent jurisdiction are, in this respect, complementary to its powers under the CPR and are not replaced by the latter.

38. Despite criticism by Mrs Harrold of the reliance placed by Proudman J on the article by Sir Jack Jacob, Hamblen J plainly regarded the article as persuasive, as Proudman J had done. At paragraph 18, Hamblen J noted that in **Ebert v Venvil** [2000] Ch 484, the Court of Appeal had relied upon the article, finding it of "considerable assistance". Moreover, in **Al Rawi v Security Service** [2012] 1 AC 531 Lord Dyson had described the article as "seminal".

39. At paragraph 20, Hamblen J held that there is a need for inferior courts to be protected from vexatious proceedings, just as there is for the High Court to be so protected. He continued:

> "As is common ground, an inferior court, such as the ET, has no power itself to make a CRO or equivalent order. It is entirely consistent with the High Court's jurisdiction in matters of contempt for it to be able to make orders to protect the inferior courts in such circumstances. It can be regarded as another example of the High Court's power 'to prevent any person from interfering with the due course of justice in any inferior court'".

40. At paragraph 21, Hamblen J noted that one of the issues in **Ebert v Venvil** was whether the High Court had power to make a civil restraint order not merely in relation to proceedings in the High Court but also in relation to proceedings in the County Court. It was held that it did. In so finding, Lord

Woolf MR stated at p498B-D that the supervisory jurisdiction exercised by the High Court over the County Court was not restricted to judicial review. The County Court would give effect to the High Court order in the same way as it would give effect to an order made by a county court judge: "We still have a High Court and county courts with separate but overlapping jurisdictions. However both courts are part of the same civil justice system."

41. Although Hamblen J accepted that the High Court's inherent jurisdiction cannot be used in a way that is contrary to or inconsistent with the CPR, he held that there was no such inconsistency or conflict in making a civil restraint order that applied to the Employment Tribunal. At paragraph 30, he observed that the CPR does not apply to Tribunals because a Tribunal is not a court for the purposes of the Civil Procedure Act 1977. Accordingly the "CPR therefore can not and does not purport to apply to tribunal proceedings". The provisions of the CPR therefore could not be inconsistent or in conflict with the exercise of the Court's inherent jurisdiction. Nevertheless, he opined that, "the inherent jurisdiction to make CROs in relation to such proceedings would be exercised consistently with the principles and practices set out in the PD."

42. At paragraph 32, Hamblen J held that the powers of the Employment Tribunal to reject claims, strike out claims, and make "unless" orders and "deposit orders", could not be used to prevent proceedings being brought before the Employment Tribunal "and they all involve time and costs being incurred". Accordingly, he held that these powers "are not a substitute for a CRO nor do they satisfactorily address the considerations of justice, convenience and appropriate use of resources which underlie the need to make such orders to restrain vexatious litigants."

43. In *Jacobs: Tribunal Practice and Procedure* (5th Edition) at § 7.81, **JW v Secretary of State for Work and Pensions** [2009] UKUT 198 (AAC) is cited as authority for the proposition that a civil restraint order cannot apply to proceedings in the First-tier Tribunal or the Upper Tribunal.

44. We agree with Ms Higgins that **JW** is not, in fact, authority for any such proposition. In that case, the claimant had sought to invoke a civil restraint order made against him in the Torquay and Newton Abbot County Court, in order to contend that he could not take part in appeal proceedings relating to a claim for disability living allowance. The Upper Tribunal held that a civil restraint order had no application to the DLA appeal proceedings, not because a civil restraint order is conceptually incapable of applying to a First-tier Tribunal or the Upper Tribunal but simply because the terms of the order itself did not cover those Tribunals:

> "36. The claimant's participation in his DLA appeal is not affected in any way by the continuing extended civil restraint order. I am satisfied that the Order of the Torquay and Newton Abbot County Court dated 5 October 2007 does not stop the claimant from submitting evidence and appearing in person at an oral hearing of his appeal before the First-tier

Tribunal against the Secretary of State's decision dated 18 December 2007 on his claim to disability living allowance. The Order is by its terms plainly confined to legal proceedings in Devon and Cornwall concerning the installation of cavity wall insulation and an associated independent expert determination. That is also made clear by the Judgment of HH Judge Griggs. The separate section 42 application, which might have had some wider impact, has been discontinued in any event by the Attorney General.

37. On one view it was somewhat mischievous of the claimant to suggest that his DLA appeal might fall within the terms of the order dated 5 October 2007. In doing so, the claimant was ignoring Judge Griggs's statement that "if he attempts to issue new proceedings, applications or processes *which are within the scope of this order*, he is liable to be brought before the court and sentenced for contempt; he runs the real risk of a prison sentence" (emphasis added)."

45. The judgments in **Otobo** and **Harrold** constitute powerful authority for the proposition that the inherent jurisdiction of the High Court does enable that Court to make civil restraint orders, which cover tribunals.

46. The applicant nevertheless submits that the Upper Tribunal, which was established by the Tribunals, Courts and Enforcement Act 2007, is not subject to the inherent jurisdiction of the High Court so as to enable the High Court to make a civil restraint order that extends to the Upper Tribunal. Mr Khan advances two reasons in support of this submission. First, section 3(5) of the 2007 Act provides that the Upper Tribunal "is to be a superior court of record". As such, it is not to be regarded for present purposes as an inferior court. Secondly, section 25 (Supplementary powers of Upper Tribunal) provides that, in relation to the matters mentioned in subsection (2), "the Upper Tribunal … has, in England and Wales … the same powers, rights, privileges and authority as the High Court". Section 25 (2) specifies the matters as:

"(a) the attendance and examination of witnesses,

(b) the production and inspection of documents,

(c) all other matters incidental to the Upper Tribunal's functions."

47. The applicant argues that one of the matters incidental to the Upper Tribunal's functions must be protecting its processes and procedures from abuse, such as by making its own civil restraint orders.

48. We do not accept the applicant's first reason is a sound one. The fact that the Upper Tribunal is a superior court of record does not mean it is immune from the supervision of the High Court by means of judicial review: **R (Cart) v Upper Tribunal** [2012] 1 AC 663; [2011] Imm AR 704. Unlike the High Court, the Upper Tribunal is firmly a creature of statute. Its status as a superior court of record is not incompatible with it being within the ambit of the High Court's supervisory jurisdiction.

49. One of the hallmarks of being a superior court of record is, however, the ability to maintain respect for the integrity of the court's processes and procedures, by punishing those who demonstrate contempt for them. This brings us to the applicant's second reason which is, in effect, founded on section 25 of the 2007 Act (although Mr Khan's skeleton majored on sections 15 to 19). We accept the proposition that one of the matters which must be regarded as incidental to the Upper Tribunal's functions is preventing its limited resources being expended upon meritless applications. We are, accordingly, prepared to approach the matter on the basis that, at least in its judicial review jurisdiction, the Upper Tribunal has power to make an order that would require applications made to it to be submitted to a judge for permission, before being processed.

50. It is true that one of the factors which both Proudman and Hamblen JJ held to be relevant, in deciding whether a civil restraint order could cover the Employment Tribunal, was the fact that that Tribunal had no power itself to make a civil restraint order or an equivalent order.

51. We do not, however, consider that this consideration is determinative of the scope of the High Court's inherent jurisdiction over the Upper Tribunal. For present purposes, the key feature is not the existence or absence of a contempt jurisdiction, but the fact that the Upper Tribunal and the High Court are, at least in respect of judicial review, constituent parts of "the same civil justice system" identified by Lord Woolf MR in **Ebert v Venvil**.

52. As Ms Higgins points out, the "totally without merit" procedure was identified by the Court of Appeal in **R (Grace) v SSHD** [2014] 1 WLR 3432; [2015] Imm AR 10 as originating as part of the test for deciding whether a person should be made the subject of a civil restraint order. Although certification of an application for judicial review as "totally without merit" now also denies the applicant a right of oral renewal, following refusal on the papers, it still has a function in deciding whether a requisite threshold has been reached for making a civil restraint order. Thus, under PD3C 2.1, a limited civil restraint order may be made where a party has made two or more applications which are totally without merit.

53. The judicial review jurisdiction of the High Court of England and Wales and of the Upper Tribunal is highly inter-related. Section 15(4) of the 2007 Act provides that in deciding whether to grant relief in the form of a mandatory, prohibiting or quashing order, 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. Similarly, in deciding whether to grant a declaration or an injunction, the Upper Tribunal must apply the principles that the High Court would apply thereto.

54. By section 15(5A) of the 2007 Act, in cases arising under the law of England and Wales, section 31(2A) and (2B) of the Senior Courts Act 1981 apply to the Upper Tribunal when deciding whether to grant relief by way of judicial review, as they apply in the High Court when it is deciding whether to grant such relief.

55. Section 18(6) of the 2007 Act has the effect that, where a judicial review application falls within a class specified for the purposes of that subsection in a Direction given by the Lord Chief Justice of England and Wales in accordance with the Constitutional Reform Act 2005, then (provided other conditions are met) the Upper Tribunal has originating jurisdiction in the judicial review. As a result, any such application which is made to the High Court must be transferred to the Upper Tribunal by that court: section 31(A)(2) of the 1981 Act. Provisions also exist for the discretionary transfer of judicial review applications by the High Court to the Upper Tribunal in certain circumstances.

56. Against this background, we consider it would be both anomalous and highly unsatisfactory if the High Court were unable to make a civil restraint order that covered judicial review applications made to the Upper Tribunal. In the absence of any legislative provision or case law pointing to a contrary conclusion, we are satisfied that the High Court's inherent jurisdiction does so extend.

57. Given the inter-relationship between judicial review in the Upper Tribunal and in the High Court, it is appropriate that the latter should be able to take account of "totally without merit" applications that have been made in either or both places, when deciding whether to make a civil restraint order covering applications made in either or both. In this regard, we note that at paragraph 26 of **Otobo**, Proudman J held that "any applications made totally without merit" in the Employment Tribunal:

> "may be relevant to the court's discretion to make a CRO, even under the CPR. For example the High Court or County Court could in my view take into account an application which the Court of Appeal has declared to be totally without merit. At the other end of the scale, persistent claims totally without merit made to a Tribunal would be a factor that the Court was entitled to take into account in deciding whether to make an order in the case before it."

58. For these reasons, we conclude that the inherent jurisdiction of the High Court does enable that court to make civil restraint orders that cover proceedings in the Upper Tribunal.

59. As we have earlier indicated, Ms Higgins urges us to find that, as well as having that power, the High Court can make a civil restraint order covering proceedings in the Upper Tribunal, pursuant to the CPR.

60. Although Proudman J in **Otobo** was deciding an application brought specifically under the court's inherent jurisdiction, it is evident from paragraphs 11 to 23 of her judgment that she gave careful consideration to the question whether the CPR might enable the High Court to make a civil restraint order covering the Employment Tribunal. Indeed, it appears that the considerations set out in this part of her judgment had persuaded the Law Society to abandon its earlier attempt to rely upon the CPR.

61. As we have seen, Hamblen J in **Harrold** was entirely content to follow Proudman J on this issue. As a result, the respondent faces serious difficulties in contending that we should depart from these aspects of the judgments of the High Court.

62. Ms Higgins' submissions on the scope of the CPR involve two propositions. The first is that the correct interpretation of section 1 of the Civil Procedure Act 1997 is that, whilst the CPR governs the practice and procedure to be followed in the Court of Appeal, High Court and County Court, the section does not preclude those rules from enabling such a court to make an order that has an effect on some other judicial body. Thus, the reference in CPR 3.11 to the power of "the court" to make civil restraint orders is not circumscribed by section 1 but, rather, by what might be meant by "any court" which, in the context, can bear the wider meaning discussed in the **BBC** case: see paragraph 32 above. In that case, the House of Lords had to consider whether a local valuation court was a "court" for the purpose of the High Court's powers relating to contempt. It held that a body which has a judicial function is a court, whereas if it has an administrative function, albeit carried out judicially, it would not be a court for this purpose.

63. It is, however, evident from paragraph 19 of her judgment in **Otobo** that Proudman J was aware of this line of argument, which she nevertheless rejected. Although the point may be arguable, it certainly cannot be said that Proudman J was clearly wrong on this point.

64. Secondly, Ms Higgins submits that the words "Unless a court otherwise orders" at the beginning of paragraph 4.2 of PD3C show that the remainder of that paragraph, in her words, "merely sets down a default rule as to the scope of the GCRO issued by a High Court Judge, which can be departed from by express language".

65. Ms Higgins relies upon the judgment of Leggatt J in **Nowak v Nursing & Midwifery Council & Anor [2013] EWHC 1932 (QB)** where, at paragraph 56, he held:

> "56. … These consequences of an extended or general civil restraint order are clearly not intended to be invariable, as the relevant provision is in each case prefaced by the words "unless the court otherwise orders". The effect of the practice direction, as I see it, is to establish default rules, which may be modified as appropriate in any particular case."

66. It does not appear that Leggatt J had in mind the proposition now being advanced by the respondent, in saying what he did at paragraph 56. On the contrary, he was at pains to point out that:

> "70. … because a civil restraint order represents a restriction on the right of access to the courts, any such order should be no wider than is necessary and proportionate to the aim of protecting the court's process from abuse. In accordance with this principle, the court should

> therefore approach this question by asking 'what is the least restrictive form of order shown to be required.' "

67. It seems to us that the words "Unless a court otherwise orders" fall to be read as permitting a relaxation of the form of civil restraint order which would otherwise result from the following words of paragraph 4.2. They are not to be interpreted as conferring upon the court the power to expand the order, so as to cover judicial bodies that are not identified by those following words.

68. We are fortified in this regard by PD3C4.3. As we have seen, this provides that where a party who is subject to a general civil restraint order issues a claim or makes an application without obtaining permission, the claim or application will automatically be struck out or dismissed, without the judge having to make any further order and without the need for the other party to respond to it.

69. Even if one were to conclude that section 1 of the 1997 Act enabled the High Court to make an order requiring an individual to obtain its permission before making an application to another court (read in its wide sense), it is difficult to see how the CPR can dictate the procedure to be adopted in that other court. On its face, there would be conflict between, on the one hand, the automatic strike out contained in PD3C4.3, and, on the other, the procedure rules of the other court: in our case, the Tribunal Procedure Rules for which provision is made by section 22 of the 2007 Act.

70. This point does not impact upon our conclusion that the High Court possesses an inherent jurisdiction. Under that jurisdiction, the extent of the High Court's supervision is to make the order and ensure that it is complied with, if necessary by invoking its contempt jurisdiction. The question of how (to take our case) the Upper Tribunal would address an application for judicial review which was made in breach of a civil restraint order would need to be decided by the Upper Tribunal under its own procedure rules, which provide for it to regulate its own procedure, in pursuance of the overriding objective (see rules 2 and 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

71. For these reasons, we find there is no justification for us to depart from the judgments of Proudman and Hamblen JJ. We therefore conclude that the High Court's power to make a civil restraint order in respect of the Upper Tribunal derives solely from the High Court's inherent jurisdiction.

72. How, then, are we to interpret the civil restraint order made by Mostyn J? Ms Higgins submits that, in the circumstances, the fact that Mostyn J marked the box "any court" on form N19B, rather than the box "the High Court or any county court", means that his order must be read as encompassing the Upper Tribunal. Ms Higgins draws assistance from paragraph 6 of Mostyn J's written reasons in refusing permission in claim CS/313/2021. As we have seen, Mostyn J said that the time had come to impose a requirement to obtain permission before the applicant "makes

any application" and that Mostyn J concluded that, "I must deploy my powers to their fullest extent".

73. The fact that the High Court possesses an inherent jurisdiction to make civil restraint orders covering the Upper Tribunal lends force to this interpretation. We have, however, concluded that the proper interpretation to be given to the order of Mostyn J is that it extends only to the High Court or any County Court, notwithstanding that the relevant box was not marked. Our reasons are as follows.

74. Read literally, the words, "Any court" cover the Court of Appeal. It is, however, inconceivable that Mostyn J intended his order to extend to that Court. Faced with this difficulty, Ms Higgins submits that, when she came to make her order extending the general civil restraint order to the Court of Appeal, Macur LJ was doing so for the avoidance of doubt. We do not think this is right. If that had been the position, Macur LJ would have made it plain.

75. Secondly (and relatedly), the use of Form N19B, which is annexed to PD3C, and which is headed "General Civil Restraint Order", demonstrates that Mostyn J was making an order under PD3C rather than under his inherent jurisdiction. Although it would have been possible to use the form in the exercise of his inherent jurisdiction, the fact that it was being so used would require to find expression on the face of the order. In other words, by using the form, the inference must be that, absent specific words to the contrary, the Judge is to be regarded as operating under the CPR. We do not consider that merely putting a cross in the box marked "Any court" falls to be read as constituting such a contrary indication.

76. This finding is compatible with the gov.uk site, described earlier, which contains the current list of general civil restraint orders, including that of the applicant, and which describes the orders as applying "to all the county courts and the High Court or both".

77. Our conclusion on this matter is, therefore, that the order of Mostyn J of 12 May 2021 did not extend to the judicial review application made in the Upper Tribunal in the present proceedings. By making it, the applicant is not, therefore, in breach of that order.

78. The present proceedings have served to clarify the extent of the High Court's inherent jurisdiction as regards tribunals established by the Tribunals, Courts and Enforcement Act 2007; in particular, the Upper Tribunal. Given the extent of the inter-relationship between the High Court and the Upper Tribunal in judicial review, we believe that cases will be very likely to arise where it will be necessary for the High Court to consider making civil restraint orders, under its inherent jurisdiction, which expressly extend to the Upper Tribunal. If that is so, consideration will need to be given to the way in which any such civil restraint orders are publicised. Consideration will also need to be given to the procedure to be

adopted in the Upper Tribunal, where an application is made by a person subject to such a civil restraint order.

C. THE DECISIONS UNDER CHALLENGE

Fresh claim-paragraph 353

79. The paragraph 353 decision dated 3 August 2021 summarised the further submissions made by the applicant in a letter dated 6 April 2020, including in terms of Article 8 of the ECHR. The respondent set out the applicant's immigration history with reference to the earlier Home Office decision of 12 June 2018, being a deportation decision within the context of a refusal of human rights claim.

80. The decision also refers to his criminal offending, which goes back to 1990, culminating in convictions in 2015 in the Magistrates' Court for three offences of wilfully pretending to be a barrister, and fraud, and in 2017 for three counts of wilfully pretending to be a barrister and three counts of fraud. For the 2017 matters he received a sentence of two years' imprisonment. This resulted in the deportation decision dated 12 June 2018.

81. The fresh claim decision accepts that the applicant is in a genuine and subsisting relationship with his partner (the Interested Party).

82. The further submissions in relation to Article 8 in terms of family and private life were rejected. Likewise, in relation to Articles 12 and 14.

83. Reference was made to the applicant's claim to be stateless, the statelessness application having been refused on 24 May 2021.

84. In rejecting the further submissions, the respondent referred to paragraph 353 of the Immigration Rules ("the Rules"), noting that a previous human rights claim had been refused on 12 June 2018, and the subsequent appeal dismissed.

85. It was concluded that the further submissions were not significantly different from the material previously considered and did not create a realistic prospect of success before the hypothetical judge.

The HOTD refusal

86. This decision refers to an application for a Certificate of Travel ("COT") made on 2 December 2020.

87. The respondent's decision refers to HOTDs being normally available to people who have been accepted as refugees under the 1951 Convention or who have been accepted as stateless under the 1954 United Nations

Convention relating to the Status of Stateless Persons. The decision also refers to HOTDs being able to be issued to people who are permanently resident in the UK or who have been granted humanitarian protection or discretionary leave to enter or remain for a limited period following an unsuccessful asylum application, where they can show that they have been formally and unreasonably refused a passport by their national authorities. The decision points out that in all cases a person must have valid leave to remain in the UK or be settled here.

88. The HOTD decision goes on to state that the applicant's application for stateless leave had been refused and he did not have any valid leave to remain in the UK. Taken together with the reasons given in the letter refusing stateless leave, the application for an HOTD was refused.

D. THE GROUNDS OF CLAIM

89. There were originally eight grounds of claim. However, at the hearing before us Mr Khan sought to rely on the refined six grounds as set out in his skeleton argument dated 12 November 2021. Ground 1 contends that the respondent was wrong to hold that the applicant did not have a statutory right of appeal. Ground 2 contends that paragraph 353 itself "circumscribes or fetters unrestricted appeal rights" under section 82 of the Nationality, Immigration and Asylum act 2002 ("the 2002 Act") and is *ultra vires* section 82.

90. Ground 3 argues that there are errors "in the context of [the] proportionality assessment in Article 8".

91. Ground 4 is that the respondent failed to take into account that the applicant held a legitimate expectation that he would be issued with a travel document "as a person of unspecified nationality".

92. Ground 5 contends that the decision to refuse interim relief was wrong.

93. Ground 6 argues that the wrong test was applied in determining the application for permission on the papers.

Application to amend-Ground 2

94. It is convenient to deal first with ground 2 which was the subject of an application to amend the grounds of claim. In essence, ground 2 seeks to argue that paragraph 353 deprives the applicant of a right of appeal against the respondent's fresh claim decision and that paragraph 353 is "arguably" *ultra vires* sections 3 and 6 of the Human Rights Act 1998 in not affording a right of appeal.

95. The Lord Chief Justice's Direction concerning the jurisdiction of the Upper Tribunal in judicial review applications, dated 21 August 2013, by

paragraph 3i, provides that the Upper Tribunal does not have jurisdiction in relation to any application "which comprises or includes … a challenge to the validity of primary or subordinate legislation (or of immigration rules)".

96. As we indicated to Mr Khan, in order to rely on ground 2 there would need to be an application to amend the grounds of claim, this not being one of the original grounds. In this regard, rule 33A(2)(b) of the Procedure Rules provides that:

> "except with the permission of the Upper Tribunal, additional grounds may not be advanced, whether by an applicant or otherwise, if they would give rise to an obligation or power to transfer the proceedings to the High Court in England and Wales under section 18(3) of the 2007 Act or paragraph (3)."

97. Mr Khan accordingly made an oral application for the grounds to be amended to include the new ground 2.

98. We do not consider it necessary to explore in detail the basis of the argument in relation to ground 2. Suffice to say, it was submitted on behalf of the applicant that the various authorities referred to by Mr Khan in his skeleton argument at paragraph 40 in relation to the right of appeal point were not considered by the Supreme Court in **BA (Nigeria) v Secretary of State for the Home Department** [2009] UKSC 7; [2010] Imm AR 363 or **Robinson v Secretary of State for the Home Department** [2019] UKSC 11; [2019] Imm AR 877.

99. In addition, Mr Khan applied for a grant of a certificate to appeal to the Supreme Court pursuant to section 14A(4)(b) or (5) of the 2007 Act.

100. The Supreme Court in **Robinson** decided that "a human rights claim" in section 82(1)(b) of the 2002 Act means an original human rights claim or a fresh human rights claim within paragraph 353 and that:

> "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." (paragraph 64).

101. As we pointed out to Mr Khan, and as he acknowledged, we are bound by the decision in **Robinson**. Ms Higgins submitted that the applicant's argument following **Robinson** was hopeless as was the contention that a 'leapfrog certificate' could lead to the Supreme Court deciding that it was wrong in its decision made so recently.

102. In the circumstances, we declined to permit the grounds of claim to be amended to include ground 2. That being the case, the application for a

certificate to appeal to the Supreme Court pursuant to section 14A(4)(b) or (5) of the 2007 Act requires no further consideration.

E. SUBMISSIONS ON THE GROUNDS

Applicant's submissions

103. As regards ground 1, reflected in particular at paragraphs 37 and 38 of his skeleton argument, Mr Khan pointed out that the previous submissions on behalf of the applicant proceeded on the basis that he was not in a genuine and subsisting relationship. However, it was now acknowledged that he is in such a relationship, as can be seen from paragraph 22 of the fresh claim decision. We also note that at paragraph 53 of the decision it is accepted that the applicant's relationship with his spouse would have been formed when he was in the UK lawfully and his immigration status was not precarious, the relationship having started in 2010 after he had been granted settled status.

104. Similarly, Mr Khan argued, the applicant was previously regarded as a person of unspecified nationality. It is said in the skeleton argument at paragraph 38 that a person of unspecified nationality cannot be removed from the UK and, as the applicant was referred to as such a person in the travel documents, and identified in them as Leonard Ogilvy, he held an identity within Article 12 of the ECHR and it was discriminatory to remove him from the UK contrary to Article 14, taken in conjunction with Article 8. On that basis, so the argument runs, there were real prospects of success in any fresh appeal.

105. Ground 3 takes issue with the respondent's analysis in the fresh claim decision, firstly in terms of the assessment of the impact of deportation on the applicant's wife, and secondly in terms of its consideration of the risk that the applicant would reoffend. Both arguments are advanced in the context of the respondent's proportionality assessment.

106. In relation to the applicant's wife and the application of paragraph 399(b)(ii) of the Immigration Rules ("the Rules") (unduly harsh for her to accompany the applicant to Nigeria), it is argued that contrary to what is said in the decision letter it would in fact be unduly harsh for her to do so because she has established her family and private life in the UK. There was, it is said, no independent assessment of the impact that the applicant's deportation would be likely to have on her private life, including her commitments in the UK and relationships with others. Thus, it is said that the decision in effect amounts to her enforced exile.

107. As to proportionality in the context of the risk of the applicant reoffending, it was argued that the respondent did not assess the risk of reoffending based on the probation report dated 26 July 2019 which was before the

respondent. Likewise, the remarks of the judge refusing a confiscation order on the basis that the applicant did not have a criminal lifestyle was a relevant consideration in determining whether the applicant's presence in the UK was conducive to the public good.

108. The applicant relies on what was said in **OA v Secretary of State for the Home Department** [2017] EWHC 486 (Admin), a decision of Karen Steyn QC, as she then was, sitting as a Deputy High Court Judge; in particular at paragraphs 39–41, which constitute a non-exhaustive list of relevant factors to be considered when assessing the proportionality of deporting a settled migrant. It was pointed out that at paragraph 78 the decision refers to the "exile" point.

109. It was also said that in the case of this applicant, his previous convictions have become spent, save for the last.

110. The applicant relies on what was said at paragraph 85 of **OA** in relation to a Memorandum of Understanding ("MOU") between Nigeria and the UK, which, to summarise, is to the effect that the Nigerian High Commission needs to be satisfied of proof of citizenship, and in relation to those have been in the UK for more than 15 years, proof of friends and relations as well as a capacity to reintegrate in Nigeria. It was argued that there is no evidence from the Nigerian High Commission that it accepts the applicant as Nigerian, quite apart from the issue of integration, the applicant having spent over 39 years in the UK.

111. As regards ground 4 (legitimate expectation), the applicant relies on a decision of Lang J in a case involving him, **Ogilvy v Secretary of State for the Home Department** [2020] EWHC 3338 (Admin), in particular at paragraphs 38 and 42. At paragraph 38 Lang J refers to the HOTD that was issued to the applicant and which described him as "stateless" and not as a "person of unspecified nationality". At paragraph 42 she found that the evidence demonstrated that the applicant had not applied for a stateless person's travel document and that the Secretary of State had intended to grant an HOTD to him on the basis that he was a person of unspecified nationality.

112. The applicant subsequently applied for a certificate of travel on 2 December 2020 on the basis that he was a person of unspecified nationality, that being the application which resulted in the refusal of 15 June 2021, the second of the decisions challenged by the applicant in these proceedings. The applicant argues that the 15 June 2021 decision was wrong as the applicant had not applied for a COT on the basis that he was stateless, but on the basis that he was a person of unspecified nationality, as accepted in the judgment of Lang J.

113. Furthermore, it is argued that the statelessness application was entirely independent from the application for a COT and the statelessness application was subject to a Home Office administrative review which was still pending on 15 June 2021 (the date of the refusal of the HOTD). The email dated 12 July 2021 (page 66 of the applicant's bundle) refers to that administrative review.

114. The argument in relation to Ground 5 (refusal of the interim relief by Judge Hanson) is based on the contention that an appeal could be brought within section 82 of the 2002 Act.

115. Ground 6 is again directed at Judge Hanson's decision refusing permission on the papers.

Respondent's submissions

116. Ms Higgins, in her submissions, placed significant reliance on the decision of Upper Tribunal Judge Pitt, promulgated on 9 January 2020, following a two-day hearing. That decision was in relation to the applicant's appeal against the respondent's 12 June 2018 decision refusing a human rights claim in the context of the deportation decision,

117. It was pointed out that in her decision, Judge Pitt concluded that even if the applicant's relationship with his wife, Ms Okou, was genuine and subsisting, it would not be unduly harsh for her to go to Nigeria with the applicant, or unduly harsh for her to remain in the UK without him. It is clear from her decision, for example at paragraph 175, that she considered all relevant circumstances in relation to Ms Okou. She also concluded there were no very compelling circumstances outweighing the public interest in his deportation.

118. In terms of the argument in relation to Articles 12 and 14 of the ECHR, given that the applicant was already married, Ms Higgins suggested it was difficult to see what point was being advanced.

119. As regards the argument in relation to the respondent's failure to take into account the probation report, that was not new material. It was considered by Judge Pitt at paragraph 90, including the fact that the applicant continued to maintain his innocence in relation to the latest offences for which he was convicted.

120. The decision letter of 3 August 2021 refers at paragraph 42 to the applicant's criminal convictions and at paragraph 44 refers to his lack of responsibility for his actions because of his reoffending. Risk of reoffending is assessed at paragraphs 31 and 32 of the decision letter.

121. As to his nationality, this was a matter that was conclusively determined by Judge Pitt, who found that the applicant was a Nigerian citizen (paragraph 148). It was submitted that the MOU between Nigeria and the UK does not assist the applicant at all in that respect.

122. As regards the contention of legitimate expectation of being granted a travel document, it was submitted that there is no basis for a travel document to be granted to the applicant as a person of unspecified nationality, or indeed as a stateless person. It was pointed out that at paragraph 45 of Lang J's judgment in **Ogilvy** she considered that Judge Pitt's decision of 9 January 2020 was now the authoritative ruling on the applicant's nationality and immigration status.

123. In reply, Mr Khan said that the Article 12/14 point relates to discrimination against the applicant on the basis that he is someone who can not be removed, being a person of unspecified nationality. The further submissions dated 6 April 2020 (upon which the paragraph 353 decision was based) contend at paragraph 37 that it is discriminatory (Article 14 in conjunction with Article 8) to remove someone of unspecified nationality.

124. The further submissions at paragraph 45 are that the applicant's marriage is being discriminated against in terms of the right to live together, and taking into account the lack of recognition of the marriage undertaken in accordance with the applicant's religious beliefs.

F. CONCLUSIONS ON THE RENEWED APPLICATION FOR PERMISSION

125. Paragraph 353 of the Rules provides as follows:

> "**353**. 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…"

126. The test to be applied in deciding whether further submissions amount to a fresh claim is set out at paragraph 11 of **WM (DRC) v Secretary of**

State for the Home Department [2006] EWCA Civ 1495; [2007] Imm AR 337 at 11 as follows:

> "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 of 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."

127. It is clear from authority (see **Robinson**) that if the further submissions are not accepted as a fresh claim, no right of appeal arises.

128. So far as the respondent's para 353 decision is concerned, there is no doubt but that the respondent applied the correct test to the assessment of whether the further submissions amount to a fresh claim.

129. There is no arguable merit in the contention in ground 1 that the outcome ought to have been that the further submissions were accepted as a fresh claim because it was now accepted that the applicant was in a genuine relationship with his wife. Not only is it evident from the respondent's decision that the relevant issue of undue harshness was considered within the framework of the Rules, but the issue of the applicant's relationship with his spouse was considered at its highest by Judge Pitt in her decision of 9 January 2020. She concluded from paragraph 170 that even taken at its highest, the relevant requirements of the Rules and the Exceptions to deportation provisions in section 117C of the 2002 Act could not be met.

130. That the respondent's paragraph 353 decision took into account Judge Pitt's comprehensive assessment of the applicant's appeal is clear from, amongst others, paragraphs 76-79.

131. The foregoing is also the answer to the proportionality argument advanced under ground 3 in relation to paragraph 399(b)(ii) in terms of the impact of deportation on the applicant's wife.

132. As regards the risk of reoffending, raised as part of ground 3, we agree with Ms Higgins' submission whereby she pointed out that the risk of reoffending was a matter considered in Judge Pitt's decision, in detail, for

example at paragraph 90. The probation progress report dated 26 July 2019 which the applicant relies on in relation to this aspect of the grounds is specifically referred to at paragraph 90 of Judge Pitt's decision.

133. It is worth reiterating that Judge Pitt's decision was referred to in the respondent's paragraph 353 consideration.

134. Likewise, in the light of Judge Pitt's emphatic conclusion that the applicant is a Nigerian citizen and Lang J's finding in **Ogilvy** that this was an authoritative statement of the applicant's nationality, the argument in relation to the MOU is without arguable foundation.

135. We would also add that the applicant's reliance on **OA** in relation to the MOU fails to take into account that what was said in **OA** at paragraph 85 about the MOU was in the context of the issue of unlawful detention.

136. We are similarly not satisfied that there is any arguable merit in ground 4 (legitimate expectation). Regardless of the contention that the applicant applied for an HOTD on the basis that he was someone of unspecified nationality, the fact remains that Judge Pitt emphatically concluded that that he is a Nigerian citizen. The applicant could have had no expectation at all of being issued with a travel document on the false premise that he was of unspecified nationality. Again, paragraph 45 of Lang J's decision in **Ogilvy** is pertinent here.

137. As regards ground 5, this is in fact not a ground of claim in relation to the respondent's decisions but an attack on Judge Hanson's decision to refuse interim relief. In any event, we are entirely satisfied that his decision was correct in this respect. The decision that the applicant was liable to removal was entirely justified on the basis that he is subject to deportation and has no right of appeal against the decision to refuse his further submissions as amounting to a fresh claim.

138. Ground 6, again a response to Judge Hanson's decision, does not call for further separate consideration in the light of our conclusions in respect of the other grounds.

139. We are not satisfied that there is any arguable merit in any of the grounds and this application for judicial review is refused. In addition, notwithstanding the vigour with which the applicant has pursued this application for judicial review, we consider the claim to be totally without merit. It is readily apparent from a consideration of the arguments advanced on behalf of the applicant that none of the grounds could on any view succeed. They are, regrettably, yet a further example of his propensity for bringing hopeless legal challenges to decisions of the respondent.

140. The day after the hearing before us the applicant contacted the Upper Tribunal by email to ask that certain emails which had not previously been put before us be taken into account in our consideration of the issues. They are dated 24 and 25 November 2021 and relate to the position of the Nigerian High Commission as to its acceptance of the applicant as a Nigerian citizen. They include an email from the Government Legal Department dated 25 February 2020 which relates, in the main, to the applicant's nationality and the issue of the HOTD.

141. As regards this post-hearing correspondence, the first thing to point out is that there was no request on behalf of the applicant for permission to submit post-hearing documents or submissions, and no invitation from us to do so. Secondly, quite apart from whether at the time of their submission the applicant was still legally represented, the post-hearing correspondence adds nothing significant to what was before us at the hearing.

142. Accordingly, even were we to accept that this material should be admitted in evidence, which we do not, we are not satisfied that it adds anything material to the evidence already before us and does not affect our conclusions on the grounds of claim.

143. At the handing down of this judgment, which neither party need attend, we will consider any ancillary applications, in relation to appeal to the Court of Appeal and costs.

144. The parties may make written submissions in relation to those two issues, limited to two sides of A4 in respect of each issue, to be filed and served no later than 7 days before the date given for the handing down.

Mr Justice Lane

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

22 February 2022