Neutral Citation Number: [2017] EWCA Civ 316

Case No: C2/2016/1013

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM Upper Tribunal (Immigration and Asylum Chamber)

JR95692015

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 04/05/2017

**Before :**

LORD JUSTICE JACKSON

LORD JUSTICE HAMBLEN
and

LORD JUSTICE FLAUX

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**Between :**

|  |  |  |
| --- | --- | --- |
|  | **R on application of Jamar Christoff Robinson** | Appellant |
|  | **- and -** |  |
|  | **Secretary of State for the Home Department & Anr** | Respondent |

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**Ronan Toal & Catherine Robinson** (instructed by **Lawrence Lupin Solicitors**) for the **Appellant**

**David Blundell & Toby Fisher** (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : Tuesday 28th March 2017

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Judgment Approved

**Lord Justice Jackson :**

1. This judgment is in seven parts, namely:

|  |  |
| --- | --- |
| Part 1 – Introduction | Paragraphs 2 – 13  |
| Part 2 – The facts | Paragraphs 14 – 24 |
| Part 3 – The judicial review proceedings | Paragraphs 25 – 28 |
| Part 4 – The appeal to the Court of Appeal | Paragraphs 29 – 32 |
| Part 5 – The Law | Paragraphs 33 – 45 |
| Part 6 – Decision | Paragraphs 46 – 59 |
| Part 7 – Executive Summary and Conclusion | Paragraphs 60 – 63 |

**Part 1 – Introduction**

1. This is an appeal by a foreign criminal against a decision that his additional submissions were not “fresh claims” and that he had no right to a second appeal before the First-tier Tribunal.
2. The principal issue in this appeal is the correct interpretation of section 82 of the Nationality, Immigration and Asylum Act 2002 in the light of recent case law, in particular *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6; [2009] 1 WLR 348, *BA (Nigeria) v Secretary of State for the Home Department* [2009] UKSC 7; [2010] 1 AC 444 and *ZA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 926; [2011] QB 722.
3. In this judgment I shall refer to the UK Borders Act 2007 as “the 2007 Act”. I shall refer to the European Convention on Human Rights as “ECHR”. I shall refer to the Nationality, Immigration and Asylum Act 2002 as “the 2002 Act”.
4. Part 5 of the 2002 Act until 19th October 2014 provided:

“82 Right of appeal: general

(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.

(2) In this Part “immigration decision” means—

(a) refusal of leave to enter the United Kingdom,

(b) refusal of entry clearance,

(c) refusal of a certificate of entitlement under section 10 of this Act,

(d) refusal to vary a person’s leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,

(e) variation of a person’s leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,

(f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,

(g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom),

(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal),

(i)a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),

(ia)a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c. 77) (seamen and aircrews),

(ib)a decision to make an order under section 2A of that Act (deprivation of right of abode),

(j) a decision to make a deportation order under section 5(1) of that Act, and

(k) refusal to revoke a deportation order under section 5(2) of that Act.

…

84 Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—

…

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant’s Convention rights;

…

92 Appeal from within United Kingdom: general

(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.

…

(4) This section also applies to an appeal against an immigration decision if the appellant—

(a) has made an asylum claim, or a human rights claim, while in the United Kingdom, or

…

94 Appeal from within United Kingdom: unfounded human rights or asylum claim

(1)This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).

…

(2)A person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.

…

96 Earlier right of appeal

(1)An appeal under section 82(1) against an immigration decision (“the new decision”) in respect of a person may not be brought if the Secretary of State or an immigration officer certifies—

(a)that the person was notified of a right of appeal under that section against another immigration decision (“the old decision”) (whether or not an appeal was brought and whether or not any appeal brought has been determined),

(b)that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and

(c)that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision.

(2)An appeal under section 82(1) against an immigration decision (“the new decision”) in respect of a person may not be brought if the Secretary of State or an immigration officer certifies—

(a)that the person received a notice under section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision,

(b)that the new decision relates to an application or claim which relies on a matter that should have been, but has not been, raised in a statement made in response to that notice, and

(c)that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice.]

…

113 Interpretation

(1)In this Part, unless a contrary intention appears—

“asylum claim” means 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 would breach the United Kingdom’s obligations under the Refugee Convention,

…

“human rights claim” means 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 would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights,”

1. Part 5 of the 2002 Act was amended with effect from 20th October 2014 in a number of respects. Section 82(1) now provides:

“(1) A person (“P”) may appeal to the Tribunal where –

* + - 1. the Secretary of State has decided to refuse a protection claim made by P,
			2. the Secretary of State has decided to refuse a human rights claim made by P, or
			3. the Secretary of State has decided to revoke P’s protection status.”
1. Section 84 of the 2002 Act now provides:

“(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds –

* + - 1. that removal of the appellant from the United Kingdom would breach the United Kingdom’s obligations under the Refugee Convention;
			2. that removal of the appellant from the United Kingdom would breach the United Kingdom’s obligations in relation to persons eligible for a grant of humanitarian protection;
			3. that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
		1. An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.”
1. There are consequential amendments to sections 92, 94 and 96 which I need not set out. The definition of “human rights claim” in section 113 is the same as before.
2. Paragraph 353 of the Immigration Rules formerly provided:

“When a human rights or asylum claim has been refused … 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.”

1. Since April 2015 paragraph 353 of the Immigration Rules has provided:

“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:

* + - 1. had not already been considered; and
			2. taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.”

I will use the phrase “repetitious claim” to describe a second or subsequent claim, which is not a “fresh claim” within the meaning of paragraph 353.

1. The change in wording in the first line of paragraph 353 is intended to mesh in with the amendments made to Part 5 of the 2002 Act.
2. On 11th April 2017 (which was after I had drafted this judgment, but before hand down) the Court of Appeal gave judgment in *VM (Jamaica) v Secretary of State for the Home Department* [2017] EWCA Civ 255. I can see no inconsistency between that judgment and the conclusions which I have reached in the present case.
3. After these introductory remarks, I must now turn to the facts.

**Part 2 – The Facts**

1. The claimant is a citizen of Jamaica, born in 1991, who came to the UK in October 1998 as a visitor with leave to remain for six months. He lived with his aunt and never returned to Jamaica.
2. Unfortunately the claimant turned to crime. On 20th April 2011, for the offence of robbery, he received a sentence of 18 months detention in a young offenders’ institution. In June 2011, for two further offences of robbery, the claimant received a sentence of 40 months detention in a young offenders’ institution. Regrettably, he did not behave while serving those sentences. On 12th October 2012 he received a sentence of 12 months imprisonment for an offence of violent disorder committed inside HMP Feltham.
3. On 27th July 2013 the Secretary of State made a deportation order against the claimant in accordance with her duties under section 32 of the 2007 Act. The claimant appealed against that decision to the First-tier Tribunal, on the grounds that deportation would be a breach of his rights under ECHR Article 8.
4. The First-tier Tribunal heard oral evidence from the claimant and his aunt. The tribunal held that the claimant had established a private life in the UK, but he was a recidivist offender. He had relatives in Jamaica. The claimant could not bring himself within the exempting provisions of rule 398 - 399A of the Immigration Rules. Accordingly the claimant’s appeal against the Secretary of State’s decision failed.
5. The claimant applied for permission to appeal to the Upper Tribunal. The Upper Tribunal refused that application on 1st May 2015.
6. On the 13th May 2015 the claimant’s solicitors wrote to the Secretary of State, stating that the claimant’s partner Ms Godson-Charles was 30 weeks pregnant and requesting that the claimant be permitted to remain here for the next few months. They enclosed a recent ultrasound scan report.
7. The Secretary of State replied on 23rd June 2015 refusing that request. The gist of her letter was as follows:
	1. The new information was not sufficient to establish a right to remain in the UK under rules 398 - 399A of the Immigration Rules or ECHR Article 8.
	2. Therefore there were no grounds to revoke the deportation order.
	3. For those reasons the solicitor’s representations did not amount to a fresh human rights claim under paragraph 353 of the Immigration Rules.
	4. This letter was not an immigration decision. Therefore the claimant had no right of appeal under section 82 of the 2002 Act.
8. Events moved on. During July 2015 Ms Godson-Charles gave birth to the claimant’s son. On 28th July 2015 the claimant wrote a letter to the Secretary of State, stating that his partner had given birth to baby boy, K. He enclosed a copy of a letter from the midwife as supporting evidence. The claimant requested that he should be allowed to remain in the UK as the father of K.
9. The Secretary of State replied on 31st July 2015 rejecting that request. The gist of her letter was as follows:
	1. The new evidence did not establish that the claimant had a right to remain in the UK under ECHR Article 8.
	2. For that reason the claimant’s letter did not amount to a fresh claim under paragraph 353 of the Immigration Rules.
	3. This letter was not an immigration decision. Therefore the claimant had no right of appeal under section 82 of the 2002 Act.
10. The claimant was aggrieved by the Secretary of State’s latest decision and sought to appeal to the First-tier Tribunal. By a decision dated 10th August 2015, the First-tier Tribunal held that the claimant had no right to appeal. This was because the claimant’s letter to the Secretary of State dated 28th July 2015 did not constitute a “fresh claim” under paragraph 353 of the Immigration Rules.
11. The claimant did not accept that he had reached the end of the road. Accordingly, he commenced proceedings for judicial review.

**Part 3 – The judicial review proceedings**

1. By a claim form issued in the Upper Tribunal on 7th August 2015, the claimant applied to quash the Secretary of State’s decisions dated 23rd June and 21st July 2015 and sought an order that he had a right of appeal to the First-tier Tribunal against those decisions.
2. The Secretary of State served an acknowledgment of service challenging every element of the claimant’s claim. Thereafter the claim proceeded to a full hearing before Upper Tribunal Judge Southern (“the judge”) on 16th February 2016.
3. The judge gave an oral judgment dismissing the claim. The judge reviewed the case law to which I shall be referring in Part 5 below. He then reached the following conclusions:
	1. The Secretary of State’s decisions dated 23rd June and 21st July 2015 were decisions that the letters from the claimant and his solicitors were not fresh claims within paragraph 353 of the Immigration Rules.
	2. Those decisions were rational and lawful.
	3. Under section 82 of the 2002 Act, as amended in 2014, the appellant had no right of appeal to the First-tier Tribunal against those decisions.
	4. Therefore the claimant’s claim failed.
4. The claimant was aggrieved by the judge’s decision. Accordingly he appeals to the Court of Appeal.

**Part 4 – The appeal to the Court of Appeal**

1. By a notice of appeal filed on 9th March 2017, the claimant appealed to the Court of Appeal on grounds which I would summarise as follows:
	1. On a proper application of *BA (Nigeria)*, the submissions which the claimant and his solicitors made on 13th May and 28th July 2015 were “human rights claims” within section 82(1)(b) of the 2002 Act. The Secretary of State by her letters dated 23rd June and 31st July 2015 rejected those claims. Therefore the claimant had a right of appeal to the First-tier Tribunal against the Secretary of State’s decisions dated 23rd June and 31st July 2015, even if the claimant’s submissions did not constitute “fresh claims” under paragraph 353 of the Immigration Rules.
	2. The Secretary of State’s two letters contained substantive decisions on human rights issues. They went beyond mere categorisation under paragraph 353 of the Immigration Rules. On that ground also, the claimant had a right of appeal under section 82 of the 2002 Act.
2. There was originally a third ground of appeal, but the claimant did not obtain permission to pursue that ground. So I say no more about it.
3. The appeal came on for hearing on the 28th March 2017. Mr Ronan Toal, leading Ms Catherine Robinson, appeared for the claimant. Mr David Blundell, leading Mr Toby Fisher, appeared for the respondent. I am grateful to counsel for their assistance.
4. Counsel’s submissions on both sides, like the judgment below, involved a close analysis of a small number of authorities. Before referring to the competing arguments, I must first review the law.

**Part 5 – The Law**

1. In *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6; [2009] 1 WLR 348, ZT claimed asylum and protection on human rights grounds. The Secretary of State certified that claim as “clearly unfounded” under section 92(4) of the 2002 Act, which meant that he could only pursue an out of country appeal. ZT then sent in two further submissions along the same lines as his original submissions. The Secretary of State certified both submissions as “clearly unfounded” under section 92(4). ZT sought judicial review of that decision. The House of Lords (by a majority) held that the Secretary of State ought to have dealt with the second and third submissions in accordance with the procedure under paragraph 353 of the Immigration Rules, rather than under section 92(4) of the 2002 Act. Nevertheless any such analysis would inevitably have led to the conclusion that the second and third submissions were not fresh claims. Therefore ZT’s claims for judicial review failed.
2. *BA (Nigeria) v Secretary of State for the Home Department* [2009] UK SC 7; [2010] 1 AC 444 involved two cases. In the first case the Secretary of State ordered that BA be deported following his conviction and sentence for importing Class A drugs. BA appealed unsuccessfully to the Asylum and Immigration Tribunal. BA subsequently sent submissions to the Secretary of State seeking revocation of the deportation order. The Secretary of State considered and rejected those submissions. BA applied for judicial review of the removal directions, contending that he had a further in-country right of appeal to the Asylum and Immigration Tribunal.
3. In the second case the Secretary of State ordered that PE be deported following his deportation and sentence for using a forged passport to obtain work. PE appealed unsuccessfully to the Immigration and Asylum Tribunal. His representatives then sent in further submissions as to why PE should not be deported. The Secretary of State refused to revoke the deportation order and did not regard the new submissions as a fresh claim. PE sought to bring a second appeal against the Secretary of State’s refusal to revoke the deportation order.
4. The claims of BA and PE failed before Blake J, but succeeded in the Court of Appeal and the House of Lords. Lord Hope identified the issue before the House of Lords in this way at paragraph 2 of his judgment:

“The question is whether the expression “an asylum claim, or a human rights claim” in section 92(4)(a) of the 2002 Act includes any second or subsequent claim that the asylum seeker may make, or only a second or subsequent claim which has been accepted as a “fresh claim” by the Secretary of State under rule 353 of the Statement of Changes in Immigrations Rules (1994) (HC 395).”

1. The House of Lords’ answer to that question appears to be that the phrase “an asylum claim, or a human rights claim” in section 92(4)(a) of the 2002 Act (as it then stood) included any second or subsequent claim, irrespective of whether or not it was a “fresh claim” under paragraph 353 of the Immigration Rules. I say “appears to be” for two reasons. First, the House of Lords did not overrule or qualify *ZT (Kosovo)*, but referred to it with apparent approval. Secondly, the question of what the House of Lords did or did not decide in *BA (Nigeria)* has been a matter of intense debate for the last eight years.
2. The most authoritative interpretation of *BA (Nigeria)* appears in *ZA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 926; [2011] QB 722. In *ZA* there were two claimants, ZA and SM. ZA was an illegal immigrant who claimed asylum. The Secretary of State rejected that claim, as did an adjudicator on appeal. ZA then made further submissions, which the Secretary of State rejected pursuant to paragraph 353 of the Immigration Rules, leaving ZA with no right of appeal. ZA sought judicial review of that decision.
3. SM was also an illegal immigrant, who claimed asylum. The Secretary of State dismissed the asylum claim, as did the Asylum and Immigration Tribunal. SM made further submissions, which the Secretary of State rejected pursuant to paragraph 353 of the Immigration Rules. SM applied for judicial review.
4. The Divisional Court dismissed the judicial review claims of ZA and SM. The Court of Appeal upheld that decision.
5. Lord Neuberger MR gave the leading judgment, with which Laws and Sullivan LJJ agreed. Lord Neuberger rejected the submission that paragraph 353 of the Immigration Rules was otiose because sections 94 and 96 of the 2002 Act enabled the Secretary of State to dispose of repetitious claims swiftly and effectively. He held that paragraph 353 operated as a gateway, which prevented repetitious claims from entering the territory of Part 5 of the 2002 Act.
6. Lord Neuberger then turned to the question whether the House of Lords’ decision in *BA (Nigeria)* precluded that conclusion. He held that it did not. Lord Neuberger’s analysis of *BA (Nigeria)* is at paragraphs 39 to 59 of his judgment. Although that lengthy passage merits reading in full, I shall simply set out the last section:

“51. Like the Administrative Court, I have not found it entirely easy to resolve the issue of whether the Supreme Court was saying (a) as the appellants contend, that rule 353 has no part to play at all following the introduction of Part 5 of the 2002 Act, or (b) as the Secretary of State argues, that rule 353 has no part to play where there has been an appealable immigration decision and the only issue is whether the appeal is of a kind to which section 92 applies. Ultimately, however, again like the Administrative Court, I have come to the conclusion that the Secretary of State's more limited interpretation is to be preferred.

52. Mr Tam is plainly right in his argument that the actual decision in *BA (Nigeria)* [2010] 1 AC 444 is not inconsistent with *ZT (Kosovo)* [2009] 1 WLR 348 or is not determinative of the present appeals in favour of the appellants. The actual decision was that rule 353 had no further part to play for the purposes of section 92 (4)(a) once there was an appeal against an immigration decision. The question therefore is whether, in the light of the passages in the judgment of Lord Hope relied on by the appellants, we should, as Mr Gill and Mr Jacobs contend, conclude that a wider interpretation of the reasoning in *BA (Nigeria)* [2010] 1 AC 444 is appropriate, so that the binding ratio is that rule 353 is effectively a dead letter. In my opinion, that contention, which I might very well otherwise have accepted, is one which should be rejected on the ground that it is plainly inconsistent with the reasoning and conclusion of the House of Lords in *ZT (Kosovo)* [2009] 1 WLR 348.

53. There is no statement in the judgments of *BA (Nigeria)* [2010] 1 AC 444 which says in terms that the reasoning in *ZT (Kosovo)* [2009] 1 WLR 348 is being effectively overruled or departed from, but that is the effect of the appellants' contention on the present appeals. I accept, of course, that the Supreme Court (an expression which for present purposes includes the House of Lords) can impliedly, as well as expressly, depart from and effectively overrule its previous decisions. However, in this case, I have great difficulty with the notion that the later case relied on by the appellants overruled the earlier case. i) Both decisions relate to a much litigated issue, and the earlier decision was given less than a year before the later decision; ii) The point at issue was directly addressed and decided in all five reasoned judgments in the earlier decision, and even the reasoning of the dissenter would have to be treated as overruled; iii) The earlier decision is expressly referred to three times in the leading judgment, and once in the only other reasoned judgment, in the later decision without apparent disapproval, and both judgments were given by judges involved in the earlier decision; iv) The actual outcome in the later decision can perfectly easily be reconciled with the earlier decision, namely on the basis that the later decision is limited to further submissions which have been treated as a fresh claim; v) This more limited interpretation of the later decision is consistent with the Court of Appeal's reasoning and conclusion in that case, which was specifically approved by the Supreme Court; vi) This more limited interpretation of the later decision is also consistent with a recent statute, whereas the wider interpretation, which would involve overruling the earlier decision, is not.

….

58. In all these circumstances, unless it is pellucidly clear from the judgments in *BA (Nigeria)* [2010] 1 AC 444, and in particular the passages relied on by the appellants in paragraphs 29-33 in the judgment of Lord Hope, as set out above, that the reasoning and conclusion in *ZT (Kosovo)* [2009] 1 WLR 348 was being overruled, it seems to me that we should dismiss this appeal. Those passages (and in particular the words I have emphasised) undoubtedly give support to the appellants' argument, if read on their own.

59. However, as with any observations contained in a judgment, one cannot properly interpret the passages other than in their factual and juridical context. Given all the factors I have mentioned, I have reached the conclusion that what was said in those passages can, and therefore should at any rate in this court, be read as being confined to cases where there is an appealable immigration decision. Once there is such a decision, the complete code contained in the legislative scheme applies and rule 353 has no part to play. However, as decided in *ZT (Kosovo)* [2009] 1 WLR 348, rule 353 still has "a part to play": the Secretary of State can decide that the further submissions are not a "fresh claim", in which case one does not enter the territory governed by the "complete code" of "the legislative scheme".”

1. As noted in Part 1 above, the 2002 Act has been subject to recent amendment. *ZT (Kosovo)*, *BA (Nigeria)* and *ZA (Nigeria)* were all decided under the old version of Part 5 of the 2002 Act. The events in issue in the present case occurred after the new version of Part 5 came into force. In the new version of Part 5 the terminology has changed. Section 82 specifies fewer appealable decisions. Nevertheless, the structure and approach are the same as before. There are consequential amendments to sections 92, 94 and 96.
2. Although the language of sections 82 to 84 has changed, those provisions still enable a foreign criminal to appeal to the First-tier Tribunal against a deportation decision, on the grounds that deportation would be a breach of his rights under ECHR. Under the new provisions, his appeal would fall within section 82(1)(b) and his grounds would fall within section 84(1)(c). Furthermore paragraph 353 of the Immigration Rules remains in place, subject to a modification to the opening words, to accommodate the amended statutory regime.
3. Having reviewed the law, I must now consider counsel’s submissions and reach a decision.

**Part 6 – Decision**

1. Mr Toal submits that the word “human rights claim” in section 82(1)(b) of the 2002 Act means any human rights claim. Its meaning is not confined to an original claim or a subsequent claim which constitutes a “fresh claim” within paragraph 353 of the Immigration Rules.
2. This submission, if correct, has some very odd consequences. It means that if the Secretary of State refuses P’s human rights claim and P’s appeal to the First-tier Tribunal fails, P can then make the same human rights claim again. He can appeal to the First-tier Tribunal on successive occasions and thereby prolong the process indefinitely.
3. Mr Toal did not shrink from that proposition. He pointed out that the remedy lies in the Secretary of State’s hands. The Secretary of State could bring into force section 12 of the Immigration, Asylum and Nationality Act 2006, which has not yet been implemented. That section provides that section 113(1) of the 2002 Act shall be amended as follows:

“human rights claim—

(a)means a claim made by a person that to remove him from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights, but

(b)does not include a claim which, having regard to a former claim, falls to be disregarded for the purposes of this Part in accordance with immigration rules.”

1. I see the force of that argument. Nevertheless it would even now be strange if Part 5 of the 2002 Act, properly construed, permits an indefinite series of claims and appeals all based upon the same unsuccessful argument.
2. Mr Toal submits that the reasoning of the House of Lords in *BA (Nigeria)* should drive this court to reach that surprising conclusion. He places reliance upon paragraphs 29 to 32 of the judgment of Lord Hope, with whom Lord Scott, Lord Rodger and Lord Brown agreed.
3. Mr Toal submits that this argument gains traction as a result of the amendments made to Part 5 of the 2002 Act. What is appealable now is not an “immigration decision” as under the old wording. Instead, what is appealable now is the Secretary of State’s decision to refuse a human rights claim. Section 82(1)(b) uses the bare phrase “human rights claim” without any reference to it being an original claim or a fresh claim. Mr Toal submits that the House of Lords were considering precisely the same question in *BA (Nigeria)*, when they were construing the phrase “a human rights claim” in section 92(4)(a) in the old version of Part 5 of the 2002 Act. The House of Lords interpreted that phrase broadly to mean any claim, irrespective of whether it was an original claim, a “fresh claim” or a repetitious claim.
4. In the course of argument the court pressed Mr Toal with the narrow interpretation which the Court of Appeal placed on *BA (Nigeria)* in *ZA (Nigeria)*. Mr Toal submitted that ZA is a decision about the procedure to be followed by the Secretary of State. The Court of Appeal did not, indeed could not, modify what the House of Lords held to be the meaning of “human rights claim” in Part 5 of the 2002 Act. That interpretation of “human rights claim” holds true in both the old and the new versions of Part 5.
5. I am afraid that I cannot accept this argument. It is part of the ratio of *ZA (Nigeria)* that the narrow interpretation on *BA (Nigeria)* is correct. The House of Lords in *BA (Nigeria)* was considering the operation of section 92(4) of the 2002 Act, as it then stood. That section only applied where (i) the Secretary of State had made an appealable decision on an asylum claim or a human rights claim and (ii) the issue was whether P should pursue his claim in this country or from overseas.
6. The decision which the House of Lords gave on the meaning of “human rights claim” does not apply to statutory provisions which determine whether a right of appeal exists at all. It would be an absurd reading of section 82 of the 2002 Act, in either its old form or its current form, to interpret it as permitting P to make the same human rights claim over and over again, each time appealing to the First-tier Tribunal against the rejection of that claim.
7. Paragraph 353 of the Immigration Rules was in force when Parliament amended Part 5 of the 2002 Act. Indeed the wording of paragraph 353 has been amended slightly to fit in with the amended wording of section 82. In my view the phrase “a human rights claim” in section 82(1)(b) of the 2002 Act must mean an original human rights claim or a fresh human rights claim which falls within paragraph 353 of the Immigration Rules.
8. I would therefore reject the claimant’s first ground of appeal.
9. I turn now to the second ground of appeal. Mr Toal did not mention this ground of appeal in opening, but he did briefly seek to raise it during his reply.
10. The Secretary of State’s letters dated 23rd June and 31st July 2015 did address the substantive question whether the claimant’s Article 8 claim could succeed. They necessarily did this as part of the process of determining whether the new material “created a realistic prospect of success”, which was the test under paragraph 353 of the Immigration Rules. Ultimately, however, the conclusion of both letters was that the claimant’s first submissions did not constitute a “fresh claim” under the rules. Both letters made it abundantly plain that they were not reaching any decision within section 82 of the 2002 Act.
11. In the result, therefore, I would reject the second ground of appeal.

**Part 7 – Executive Summary and Conclusion**

1. The Secretary of State decided to deport the claimant, a foreign criminal, to Jamaica. The claimant appealed to the First-tier Tribunal on ECHR Article 8 grounds. The First-tier Tribunal dismissed that appeal. The claimant and his solicitors subsequently put forward further submissions, alleging that the birth of the claimant’s son strengthened his right under Article 8 to remain in the UK. The Secretary of State concluded that the further submissions did not give the claimant’s Article 8 claim any realistic prospect of success. Accordingly the Secretary of State, by letters dated the 23rd June and 31st July 2015, pursuant to paragraph 353 of the Immigration Rules declined to treat the claimant’s further submissions as a fresh claim.
2. The claimant commenced proceedings for judicial review, contending that he had a further right of appeal to the First-tier Tribunal. This was because the words “a human rights claim” in section 82 of the Nationality, Immigration and Asylum Act 2002 meant any such claim, regardless of whether it was mere repetition of an earlier claim. In advancing this argument, he relied upon passages in the House of Lords’ judgment in *BA (Nigeria) v Secretary of State for the Home Department* [2009] UKSC 7; [2010] 1 AC 444.
3. The Upper Tribunal rejected the claimant’s claim. Upper Tribunal Judge Southern held that *BA (Nigeria)* should be narrowly interpreted, in accordance with the analysis contained in the Court of Appeal’s decision in *ZA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 926; [2011] QB 722.
4. The claimant now appeals to the Court of Appeal. I agree with the reasoning and the conclusion of the Upper Tribunal. I would therefore dismiss this appeal.

**Lord Justice Hamblen :**

1. I agree.

**Lord Justice Flaux :**

1. I also agree.