



Neutral Citation Number: [2023] EWCA Civ 1337

Case No: CA-2023-001543

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
KING’S BENCH DIVISION,
ADMINISTRATIVE COURT
Sir Duncan Ouseley
CO/1307/2023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2023

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE DINGEMANS
and
LORD JUSTICE LEWIS

Between :

The King on the Application of LA (Albania)	<u>Appellant</u>
- and -	
The Upper Tribunal (Immigration & Asylum Chamber)	<u>Respondent</u>
- and -	
The Secretary of State for the Home Department	<u>Interested Party</u>

Benjamin Hawkin (instructed by **TNA Solicitors**) for the **Appellant**
The Respondent did not appear and was not represented
Jennifer Thelen (instructed by **the Government Legal Department**) for the **Interested Party**

Hearing date : 16 October 2023

Approved Judgment

This judgment was handed down remotely at 14.00 hrs on 16.11.23 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Dingemans:

Introduction

1. This application for permission to appeal against the refusal to grant permission to apply for judicial review of a decision of the Upper Tribunal raises questions about: the effect of section 11A of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) on the exercise of the supervisory jurisdiction of the High Court; and whether the decision of the High Court in *R(Oceana) v Upper Tribunal* [2023] EWHC 791 (Admin) (*Oceana*) was correctly decided.
2. There was a hearing of the application on 16 October 2023. At the conclusion of the hearing Lord Justice Underhill, Vice-President of the Court of Appeal, Civil Division, announced that the application would be dismissed because the Court of Appeal did not have jurisdiction to hear the proposed appeal. This judgment sets out the reasons for that decision.

Relevant background

3. The applicant Ms LA is a citizen of Albania. She entered the United Kingdom on the back of a lorry on 7 November 2018. She made a prompt claim for asylum on 8 November 2018. This was on the basis that she feared persecution in Albania because she was a lesbian Muslim. On 10 November 2018 the Secretary of State carried out a Screening Interview. Ms LA submitted a Preliminary Information Questionnaire and a witness statement in support of her asylum and human rights claim on 6 March 2019. Ms LA attended a full Asylum Interview on 2 May 2019. On 28 May 2019 the Secretary of State made a decision to refuse Ms LA's protection and human rights claim, and to certify it as clearly unfounded.
4. Ms LA applied for permission to apply for judicial review of that decision. Ms LA was granted permission to apply for judicial review, and the Secretary of State agreed to reconsider the decision. This led to the decision by the Secretary of State on 4 March 2020 refusing to grant Ms LA asylum, humanitarian protection or leave to remain in the United Kingdom on human rights grounds, but giving an in country right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) (FTT).
5. Ms LA did not appeal against the decision at that time. On 21 May 2021 Ms LA was detained and issued with removal directions. Ms LA retained new solicitors who obtained a medical report, concluding that Ms LA suffered from PTSD and depression.
6. On 28 September 2021 Ms LA appealed to the FTT and applied for an extension of time to do so on the bases that: she had misunderstood that she could not appeal in March 2020 because of the COVID-19 pandemic; and she had medical issues. The FTT granted an extension of time. By letter dated 20 December 2021 the Secretary of State maintained and supplemented the decision dated 4 March 2020.
7. By a decision dated 12 October 2022 the FTT (Judge Athwal) dismissed Ms LA's appeal against the Secretary of State's decision. The FTT Judge accepted that Ms LA was a lesbian and had been threatened by her girlfriend's family. In paragraph 63 of the FTT's decision Judge Athwal said: "She continued the relationship after her partner's family discovered the relationship and threatened her. She remained in

Albania for a significant period of time after the relationship ended. These facts do not demonstrate that the Appellant was at risk of persecution or faced a real risk of serious harm in Albania.” Ms LA’s protection and human rights claims were dismissed. Ms LA contends that her appeal should have succeeded and that the decision of the FTT was vitiated by errors of law.

8. Ms LA applied for permission to appeal the decision of the FTT but was refused permission to appeal on 20 December 2022 by the FTT (Judge Evans). Ms LA applied to the Upper Tribunal (Immigration and Asylum Chamber) (Upper Tribunal) for permission to appeal the decision of the FTT dated 12 October 2022. On 22 March 2023 the Upper Tribunal (Upper Tribunal Judge Sheridan) refused permission to appeal.
9. The application for permission to appeal to this Court is against the written decision of Sir Duncan Ouseley, sitting as a judge of the High Court, dated 29 June 2023. Sir Duncan Ouseley had refused Ms LA permission to apply for judicial review of the decision of the respondent Upper Tribunal dated 22 March 2023, on the basis that the High Court did not have jurisdiction. This was because it was hopeless to contend that section 11A of the 2007 Act was not effective to restrict the scope of judicial review of Upper Tribunal decisions, and because none of the exceptions set out in section 11A of the 2007 Act applied. Sir Duncan Ouseley also stated in paragraph 2 of his reasons that he doubted that permission to apply for judicial review would have been granted under the *Cart* test.
10. Ms LA sought permission to appeal to the Court of Appeal. A direction was made that there should be an oral hearing of the application for permission to appeal. This enabled the Court to determine whether it had jurisdiction to hear the appeal and whether *Oceana* was rightly decided.

The issues on the application

11. Mr Benjamin Hawkin appeared on behalf of Ms LA and Ms Jennifer Thelen appeared on behalf of the Secretary of State. It was apparent from the written and oral submissions that the following issues arose: (1) whether the wording of section 11A is effective to limit the grounds on which the High Court may exercise its supervisory jurisdiction over a decision by Upper Tribunal to refuse a party permission to appeal from a decision of the FTT; (2) if the wording of section 11A is effective, what test should be applied by the Court in determining whether a claim does fall within the exceptions set out in section 11A; (3) if the wording is effective, whether Ms LA’s claim for judicial review fell within the exceptions set out in section 11A.
12. Ms Thelen on behalf of the Secretary of State raised a preliminary issue in writing about whether the High Court, having decided that it did not have jurisdiction to hear the application, should have permitted Ms LA to have a renewed oral hearing of the application for permission to apply for judicial review and whether the Court of Appeal could hear this application in the absence of a renewed oral hearing. I am very grateful to Mr Hawkin and Ms Thelen for their helpful written and oral submissions.

Judicial review of a decision of the Upper Tribunal

13. It is necessary to set out a bit of background to the enactment of section 11A of the 2007 Act, and address the decision dated 22 June 2011 of the Supreme Court in *R(Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663 (*Cart*). The Upper Tribunal was designated as a “superior court of record” by section 3(5) of the 2007 Act. It had been submitted on behalf of the Secretary of State to the Divisional Court in *Cart* (heard in September and October 2009) that the effect of that designation of the Upper Tribunal in the 2007 Act as a superior court of record was to exclude the supervisory jurisdiction of the High Court. In a judgment dated 1 December 2009 Laws LJ rejected that submission and held that such a designation was incapable of excluding the supervisory jurisdiction of the High Court by means of judicial review. Laws LJ went on to hold that as the Upper Tribunal was for relevant purposes an “alter ego of the High Court” judicial review would only extend to the Upper Tribunal in a case that was beyond its statutory remit or where there had been a wholly exceptional collapse of fair procedure, see paragraphs 94-100 [2009] EWHC 3052 (Admin); [2011] QB 120.
14. In the Court of Appeal in *Cart* [2010] EWCA Civ 859; [2011] QB 120 Sedley LJ, giving the judgment of the Court, came to the same conclusion as Laws LJ in the Divisional Court, but by a different route, see paragraphs 36-37. Sedley LJ held that all courts other than the High Court, including the Upper Tribunal, were amenable to judicial review, but that the scope of judicial review of a body such as the Upper Tribunal was limited to outright excess of jurisdiction by the Upper Tribunal and denial of fundamental justice. This was because the 2007 Act required the Tribunal system to be autonomous but Parliament could not have authorised the Upper Tribunal to act in outright excess of jurisdiction or denial of fundamental justice.
15. This approach to the scope of judicial review was described by Baroness Hale in the Supreme Court in *Cart* as the “pre-*Anisminic* excess of jurisdiction and the denial of fundamental justice” test. It is only necessary for the purposes of this judgment to record that in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 the House of Lords had held that an ouster clause was ineffective to prevent a judicial review of the Compensation Commission’s error of law in taking into account a subsequent sale of the company when assessing what compensation was due. *Anisminic* was later interpreted to mean that any error of law meant that the decision of the Tribunal was a nullity, see *O’Reilly v Mackman* [1983] 1 AC 237 at 278 (*O’Reilly v Mackman*) although, as Lord Sumption pointed out in his dissenting judgment in *R(Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; [2020] AC 491 (*Privacy International*) at paragraph 181, there was room to debate before the decision in *O’Reilly v Mackman* whether that had been the intended effect of the judgments in *Anisminic*.
16. In the Supreme Court in *Cart* the only issue was the scope of the judicial review by the High Court of the Upper Tribunal. The Supreme Court decided that the scope of review of a decision of the Upper Tribunal, which was described as an artefact of the common law, the object of which was to ensure that within the bounds of practical possibility decisions were taken in accordance with the law, should mirror “the second appeals test”, namely where the proposed appeal raises some important point of principle or practice or there is some other compelling reason for the relevant appellate court to hear the appeal. It was implicit in the adoption of such a test that there would be some arguable legal errors which did not raise an important point of principle or practice

which, in the absence of some other compelling reason to hear the appeal, would remain uncorrected, a point recognised by Lord Dyson in paragraph 128 of his judgment. This was notwithstanding the analysis that a decision containing such an error was a nullity pursuant to *Anisminic* and *O'Reilly v Mackman*.

17. In obiter comments at the conclusion of her judgment, Baroness Hale suggested that the Civil Procedure Rule Committee (“CPRC”) might want to consider stream-lining the procedure for what became known as *Cart* judicial reviews so that there would not be a right to an oral renewal in the High Court and Court of Appeal. The CPRC later adopted the suggestion and CPR 54.7A was brought into effect. CPR 54.7A provided (until its amendment after the enactment of section 11A of the 2007 Act) that if permission to apply for judicial review of a decision of the Upper Tribunal was refused by the judge on paper, the applicant would not have the right to renew the application for permission to an oral hearing. The applicant could, however, appeal to the Court of Appeal seeking to renew the application for permission to apply for judicial review of the decision of the Upper Tribunal.

Section 11A of the 2007 Act

18. In July 2020 the Government established the Independent Review of Administrative Law (IRAL) to make recommendations for reform of judicial review. In IRAL’s final report dated March 2021 a recommendation was made that “the practice of making and considering” *Cart* judicial reviews should be discontinued. IRAL had considered an analysis of the number of *Cart* judicial reviews which had been “effective” to cause any change in the law, although Mr Hawkin referred us to an interesting commentary on whether the figures relied on by IRAL had identified all of the effective *Cart* judicial reviews, see “Putting the *Cart* before the Horse” UK Constitutional Law Association, 29 March 2021.
19. Section 11A of the 2007 Act is headed “Finality of decisions by Upper Tribunal about permission to appeal”. It was inserted into the 2007 Act by section 2 of the Judicial Review and Courts Act 2022 and came into force on 14 July 2022. The Explanatory Notes to what was then the Judicial Courts and Review Bill set out the effect of the provision and identified the exceptions set out in subsection 11A(4).
20. So far as is material section 11A of the 2007 Act provides:
 - “(1) Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b).
 - (2) The decision is final, and not liable to be questioned or set aside in any other court.
 - (3) In particular—
 - (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;

(b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.

(4) Subsections (2) and (3) do not apply so far as the decision involves or gives rise to any question as to whether—

(a) the Upper Tribunal has or had a valid application before it under section 11(4)(b),

(b) the Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or

(c) the Upper Tribunal is acting or has acted-

(i) in bad faith, or

(ii) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

...

(7) In this section—

"decision" includes any purported decision;

..."

The decision in *Oceana*

21. The effect of section 11A of the 2007 Act was considered by Saini J. in *R(Oceana) v Upper Tribunal (Immigration and Asylum Chamber)* [2023] EWHC 791 (Admin) (*Oceana*).
22. In *Oceana* Saini J. rejected the submissions that section 11A was an impermissible ouster of the inherent supervisory jurisdiction of the High Court, and that the Courts had power at common law to ignore what was agreed to be a clear statutory exclusion.
23. So far as is material, Saini J stated: "In *Cart*, the Supreme Court expressly acknowledged the right of Parliament to oust or exclude judicial review with the use of clear language ... Parliament did that in the present case by way of section 11A. The section does not amount to a full ouster but a partial one which restricts judicial review to the particular circumstances referred to in section 11A(4) ... in my judgment, the legal position under the law of England and Wales is clear and well-established. The starting point is that the courts must always be the authoritative interpreters of all legislation including ouster clauses. That is a fundamental requirement of the rule of law and the courts jealously guard this role. However, the rule of law applies as much to the courts as it does to anyone else. That means that under our constitutional system, effect must be given to Parliament's will expressed in legislation ... The most fundamental rule of our constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. The common law supervisory jurisdiction of the High Court enjoys no

immunity from these principles when clear legislative language is used, and Parliament has expressly confronted the issue of exclusion of judicial review, as was the case with section 11A”.

24. Mr Hawkin submitted that Saini J. was wrong to find that section 11A was effective to limit the *Cart* supervisory jurisdiction of the High Court. Ms Thelen submitted that Saini J. was right to find that section 11A had been effective to restrict the scope of judicial review of decisions of the Upper Tribunal.

The procedural issue

25. It is necessary to address first the point made by Ms Thelen in writing to the effect that because Sir Duncan Ouseley refused permission to apply for judicial review, the next step was an oral hearing of a renewed application for permission to apply for judicial review in the High Court, and because that had not happened, the Court of Appeal could not hear the current application.
26. CPR 54.12 has, at all material times, provided that if permission to apply for judicial review has been refused without a hearing then, subject to two exceptions, the claimant may not appeal but may request the decision to be reconsidered at a hearing. The first exception was if the application had been certified to be totally without merit, and the second exception was if the application was a judicial review of a decision of the Upper Tribunal. In both these cases the claimant had no right to request an oral hearing, but could seek permission to appeal from the Court of Appeal. As to the exception for a judicial review of the Upper Tribunal, after the decision of the Supreme Court in *Cart*, the CPRC had introduced CPR 54.7A which removed the right to a renewed oral hearing in the High Court in a *Cart* judicial review. CPR 52.8(1) and (2) gave effect to these provisions in the Court of Appeal. CPR 52.8(1) provided that where permission to apply for judicial review had been refused at a hearing in the High Court, an application for permission to appeal could be made to the Court of Appeal. CPR 52.8(2) provided that where permission to apply for judicial review had been refused on the papers an application for permission to appeal could be made to the Court of Appeal if the application had been certified to be totally without merit or it was a judicial review of a decision of the Upper Tribunal.
27. On 6 April 2023 CPR 54.7A was amended by the Civil Procedure (Amendment) Rules 2023 SI 2023/105 to repeat the effect of section 11A of the 2007 Act. It provides that where the Upper Tribunal has refused permission to appeal against a decision of the FTT “no application for judicial review of the Upper Tribunal’s decision ... may be made except where the question in the judicial review application is” and the exceptions set out in section 11A(4) are then set out. The bar on a renewed hearing of the application for permission to appeal has been removed from CPR 54.7A. It seems very likely that this bar was removed because if a judge had determined on paper that no application for judicial review of the decision of the Upper Tribunal might be made, then there would not be a right to a renewed hearing, because the Court would have no jurisdiction to hear the proposed claim for judicial review.
28. CPR 52.8(2) remains in the same terms, providing that where permission to apply for judicial review had been refused on the papers an application for permission to appeal could be made to the Court of Appeal if the application had been certified to be totally without merit or it was a judicial review of a decision of the Upper Tribunal.

29. In my judgment the objection made on behalf of the Secretary of State is not sustainable, and it is only fair to acknowledge that Ms Thelen did not pursue the objection in the oral submissions before the Court. In his written reasons Sir Duncan Ouseley identified that the High Court did not have jurisdiction to hear the application for judicial review of the decision of the Upper Tribunal, because none of the exceptions set out in section 11A of the 2007 Act applied. If that conclusion was right, then the High Court was right to dismiss Ms LA's request to have a renewed hearing of the application for permission to apply for judicial review. This was because it did not have jurisdiction to hear the application for permission to apply for judicial review. This explains why CPR 52.8(2) remains in the same terms. This is because, following the introduction of section 11A of the 2007 Act, if permission to apply for judicial review of a decision of the Upper Tribunal has been refused, the High Court will not have had jurisdiction to have an oral hearing of the renewed application for permission to apply for judicial review. The applicant may seek permission to appeal that conclusion from the Court of Appeal, as Ms LA has done here.

The effect of the wording of section 11A

30. I therefore turn to deal with Mr Hawkin's submission that the words of section 11A are not sufficiently clear to oust the supervisory jurisdiction of the High Court. Mr Hawkin also referred to the judgment of Lord Carnwath in *Privacy International*. In that judgment Lord Carnwath gave two reasons for finding that the supervisory jurisdiction of the High Court was not excluded by the wording of section 67(8) of the Regulation of Investigatory Powers Act 2000 which provided "the decisions of the Tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court". The first reason was that the words were not sufficient to overcome the fundamental common law presumption that the supervisory role of the High Court over other adjudicative bodies should only be excluded by clear and explicit words. This reason was agreed by the majority of the Court (Baroness Hale, Lord Kerr and Lord Lloyd-Jones). The second reason given by Lord Carnwath in *Privacy International* was that, even if clear words had been used, binding effect could not be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court. Baroness Hale and Lord Kerr agreed with this reason, but Lord Lloyd-Jones did not express any view on the second reason, and Lord Reed, Lord Wilson and Lord Sumption did not agree with either of the reasons given by Lord Carnwath for his judgment. Mr Hawkin submitted that the words in this case were inadequate to overturn the decision of the Supreme Court in *Cart* as to the scope of judicial review, and that the Court might ignore the wording because it purported to exclude review of errors of law.
31. In my judgment the wording of section 11A of the 2007 Act is sufficiently clear to change the scope of judicial review from the second appeals test adopted by the Supreme Court in *Cart* to the test set out in section 11A of the 2007 Act and the Court is bound to apply the wording in section 11A for a number of reasons. First it is essential to note that the supervisory jurisdiction of the High Court has not been excluded. The effect of section 11A has been to reduce the scope of the judicial review by setting out the exceptions on which the Upper Tribunal decision can be reviewed. The Upper Tribunal is a judicial tribunal, with decisions made by expert Upper Tribunal judges.

32. Secondly, the effect of the wording is, in effect, to restore the “pre-*Anisminic*” excess of jurisdiction and fundamental denial of justice tests which were adopted by the Divisional Court and the Court of Appeal in *Cart*. Lord Dyson had noted in his judgment in the Supreme Court in *Cart* that the reason that the courts had had to determine the scope of judicial review was because Parliament had not done so. As Saini J pointed out in *Oceana*, Parliament had now chosen the test.
33. Thirdly, although the decisions of the Divisional Court and the Court of Appeal in *Cart* as to the scope of review were overturned by the Supreme Court, there was no suggestion in the judgment of the Supreme Court in *Cart* that either of the Courts below had failed to have regard to the importance of the supervisory jurisdiction of the High Court. Indeed Baroness Hale, at paragraph 30 of the judgment, referred to the “subtle and erudite” judgment of Laws LJ in the Divisional Court which had “demolished” the constitutional solecism that a designation of the Upper Tribunal as a “superior court of record” could exclude the supervisory jurisdiction of the High Court.
34. Fourthly, although the effect of the test as to the scope of judicial review means that some errors of law made by the Upper Tribunal might not be corrected if they do not fall within the exceptions set out in section 11A(4) of the 2007 Act, and the effect of an error of law is to render the decision of the Upper Tribunal a nullity in the *O’Reilly v Mackman* sense, the second appeals test adopted by the Supreme Court in *Cart* expressly contemplated that some errors of law would not be corrected. It might be noted that section 11A(3) expressly provides that “the Upper Tribunal is not to be regarded as having exceeded its powers by reasons of any error made in reaching the decision”.
35. Fifthly, the issue of nullity was tackled head on by the definition of “decision” in section 11A(7) to include a decision or purported decision. This point was made in the explanatory notes to the Judicial Courts and Review Bill.
36. In my judgment therefore, the wording of section 11A is effective to limit the grounds on which the High Court may exercise its supervisory jurisdiction over a decision by Upper Tribunal to refuse a party permission to appeal from a decision of the FTT. It is the duty of the Courts to give effect to the clear words used by Parliament, because no one, including a Court, is above the law. The decision by Saini J in *Oceana* was right.

The test to be applied in determining whether the exceptions in section 11A(4) apply

37. It was common ground that if the wording of section 11A was effective to change the scope of the judicial review by requiring a claimant to show that the exceptions in section 11A(4) of the 2007 Act applied, then a mere assertion that the exception applied was not sufficient to establish the jurisdiction of the Court.
38. In my judgment a party needs to show a genuinely disputable question that the exception applies. This is not dissimilar from the approach taken by the Privy Council when considering whether an appellant has an appeal as of right from certain jurisdictions where the appeal concerns an issue of constitutional interpretation. This has been interpreted to mean a genuinely disputable issue of constitutional interpretation, see *Frater v The Queen* [1981] 1 WLR 1468 at 1470 and *Alleyne-Forte v Attorney General of Trinidad and Tobago* [1998] 1 WLR 68 at 72. A party cannot

bring an appeal as of right by simply asserting that it raises an issue of constitutional interpretation. In the same way a party cannot establish jurisdiction to apply for judicial review of a decision of the Upper Tribunal simply by asserting that the claim falls within the exceptions set out in section 11A(4) of the 2007 Act.

Whether Ms LA's claim for judicial review falls within the exceptions in section 11A(4)

39. Mr Hawkin relied on the exception in section 11A(4)(c) to the effect that "the Upper Tribunal is acting or has acted ... (ii) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice". It is important to record that this subsection focuses on the actions of the Upper Tribunal, because it is the decision of the Upper Tribunal which is the subject of the claim for judicial review.
40. In my judgment in this case, Sir Duncan Ouseley was right to find that there was no disputable question about whether the Upper Tribunal had acted in "such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice". Upper Tribunal Judge Sheridan refused permission to appeal on the papers, and expressly recorded that he considered that the application for permission to appeal could be considered properly on the papers. He addressed the 13 grounds of appeal advanced on behalf of Ms LA against the decision of the FTT and gave reasons in respect of each of them explaining why they were not arguable.
41. Mr Hawkin relies now on grounds 7, 8 and 11(ii) to show that the Upper Tribunal acted in such a procedurally defective way as to amount to a fundamental breach of the principles of natural justice. Ground 7 referred to the fact that the FTT had failed to take account of the sister's evidence that Ms LA was obligated to leave her parents' house. Ground 8 referred to the fact that although the FTT found that Ms LA would experience harassment and discrimination, the finding that she would not face a real risk of persecution or serious harm ignored her medical evidence about PTSD, severe depression, severe anxiety, neurofibromatosis and ADHD. Ground 11(ii) was to the effect that the judge referred to a care plan to minimise the risk of self-harm and suicide but this was not raised during the hearing and was not explained further.
42. Upper Tribunal Judge Sheridan had found that: ground 7 was not arguable because the FTT Judge had, on the consideration of the evidence as a whole, reached a sustainable conclusion about whether Ms LA could live with her family; ground 8 was not arguable because the FTT Judge gave clear reasons why Ms LA would not face a risk of persecution which was based on a consideration of the objective evidence; and ground 11 was not arguable because the FTT Judge had regard to the expert evidence and reached a conclusion open to her about the degree of risk.
43. In my judgment, Sir Duncan Ouseley was right to find that none of these complaints about the approach of the Upper Tribunal showed that the Upper Tribunal had acted in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice. Indeed the FTT Judge had noted the many inconsistencies in Ms LA's account, even acknowledging that mental health issues may have contributed to them. One of these inconsistencies was Ms LA's own reports about her parents' attitude to her and the FTT Judge specifically recorded at paragraph 6 of the decision that Ms LA "could continue to rely on that support if she returned". The FTT Judge recorded

that Ms LA's sisters were living in the UK at the time and could not give first hand evidence of what occurred in Albania.

44. The FTT Judge identified the lower standard of proof applying to Ms LA's claim in paragraphs 29 and 30 of the decision. The FTT Judge stated that Ms LA had continued living in Albania for a significant period of time after the relationship had ended, and it was those facts that did not demonstrate that she was at risk of persecution or faced a real risk of serious harm.
45. The FTT Judge also referred to the decision in *LM (Albania) v Secretary of State for the Home Department* [2022] EWCA Civ 977 and country information in paragraph 9 of the decision which established that Ms LA would have access to adequate treatment. Mention was made of a care plan when the FTT Judge referred to the expert report adduced on behalf of Ms LA and said that "the report does not consider what the risk would be if the appellant was returned to her parents, with whom she was living previously and why a care plan to manage the appellant's mental health when moving from the UK to Albania could not be effectively implemented to minimise the risk of self-harm and suicide". None of this shows an error on the part of the FTT, let alone that the Upper Tribunal acted in such a procedurally defective way as to amount to a fundamental breach of the principles of natural justice.
46. I have been unable to discern any genuinely disputable basis for showing that Ms LA's claim for judicial review fell within the exceptions set out in section 11A(4).

Conclusion

47. For the detailed reasons given above, in my judgment Sir Duncan Ouseley was right to find that the High Court did not have jurisdiction pursuant to section 11A of the 2007 Act to entertain the claim for judicial review against the Upper Tribunal. For similar reasons the Court of Appeal does not have jurisdiction to hear an appeal against that decision. This is because the wording of section 11A is effective to limit the grounds on which the High Court may exercise its supervisory jurisdiction over a decision by Upper Tribunal to refuse a party permission to appeal from a decision of the FTT; and because there is no genuinely disputable basis for showing that Ms LA's claim for judicial review falls within the exceptions set out in section 11A(4) of the 2007 Act. The fact that there is no jurisdiction to hear the proposed appeal means that no issue of granting or refusing permission to appeal to the Court of Appeal arises.

Lord Justice Lewis:

48. I agree that this application should be dismissed for the reasons given by Dingemans LJ. I agree both with Dingemans LJ and Underhill LJ that the wording of section 11A of the 2007 Act, read in context, is clear. Parliament intended that the supervisory jurisdiction of the High Court, exercisable by way of judicial review, was not to extend to decisions by the Upper Tribunal refusing permission to appeal from decisions of the First-tier Tribunal unless the decision of the Upper Tribunal involved or gave rise to a genuine question within the scope of section 11A(4) of the 2007 Act.
49. In the present case, the relevant provision is section 11A(4)(c)(ii). The focus of that subsection is upon the process by which the Upper Tribunal considered an application for permission to appeal. The issue in this case, therefore, is whether the Upper

Tribunal acted in such a procedurally defective way in considering Ms LA's application for permission to appeal as amounted to a fundamental breach of the principles of natural justice. For the reasons given by Dingemans LJ at paragraphs 40 to 42 of his judgment, the High Court was correct to conclude there was no question of the Upper Tribunal having acted in such a way in this case. Strictly, this Court is not required to consider for itself the substantive reasoning of the First-tier Tribunal in order to decide if it, arguably, made any error of law. That is the exercise that the Upper Tribunal performs. I do not, therefore, consider that it is necessary to review the reasoning of the First-tier Tribunal as set out in paragraphs 43 to 45 of Dingemans LJ's judgment.

50. As Underhill LJ observes at paragraphs 53 to 56 of his judgment, the question of whether the exception in section 11A(c)(ii) applies in circumstances where the First-tier Tribunal had acted in a procedurally unfair way but the Upper Tribunal refuses permission to appeal does not arise in this case. I, too, would not express any view on how section 11A(c)(ii) operates in such circumstances nor on whether the Upper Tribunal could be said to have acted in a fundamentally procedurally unfair way in such circumstances.

Lord Justice Underhill:

51. I agree with Dingemans LJ's reasons for dismissing this application. It is in my view clear that section 11A of the 2007 Act is indeed effective to limit the judicial review jurisdiction of the High Court to questions of the kind specified in sub-section (4): the language is explicit, and there is nothing constitutionally improper in such a limitation. It is in my view also clear that none of the grounds of challenge in Ms LA's application to the High Court involved or gave rise to a question of the specified kind.
52. My only quibble with Sir Duncan Ouseley's order is that in its formal part it was expressed to be a refusal of permission to apply for judicial review. In a case where the Court's decision is that it has no jurisdiction to entertain the application in question the correct order is to dismiss it rather than to refuse permission, which implies an acceptance of jurisdiction. Dingemans LJ makes that point about our own decision at para. 47 above. But the point is of no substantive significance because it is clear from Sir Duncan's reasons that his decision was indeed that he had no jurisdiction. (That is also why, as Dingemans LJ explains at paras. 25-29, the Secretary of State's procedural objection was ill-founded.)
53. I wish to mention one other point. As appears from paras. 40-41 of Dingemans LJ's judgment, the challenges on which Ms LA relied as engaging the jurisdiction of the High Court under section 11A (4) (c) were all concerned with alleged failures in the reasoning of the First-tier Tribunal. However, subsection (4) is concerned on its face only with the conduct of the Upper Tribunal. In his skeleton argument in support of his application to the High Court Mr Hawkin addressed that potential difficulty by submitting that

“the ... test of whether the Upper Tribunal had acted ‘in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice’ must necessarily encompass grounds that arguably demonstrate that the First-tier Tribunal itself has so acted.”

(He claimed that that contention was supported by an observation in para. 33 of Saini J's judgment in *Oceana* that in considering whether a challenge falls within subsection (4) (c) (ii) "a court will need to consider the entire process" – though I have to say that I doubt whether he had this particular point in mind.)

54. Sir Duncan Ouseley did not in his reasons directly address that submission, but he may tacitly have accepted it because he did not dismiss the application on the basis that, whatever the criticisms of the First-tier Tribunal, the Upper Tribunal itself had not acted in a way that was caught by 11A (4) (c) (ii) (for which I will use the shorthand "fundamentally procedurally unfair", though without suggesting that that can be an all-purpose substitute for the statutory language). On the contrary, he based his conclusion on a careful analysis of each of the criticisms of the First-tier Tribunal Judge.
55. Mr Hawkin included the same submission in his skeleton argument before us: see paras. 53-54. Ms Thelen's skeleton argument in response did not directly address that submission, but she did make the point that Ms LA had failed to identify any defect in the conduct of the Upper Tribunal as opposed to the First-tier Tribunal: see para. 30. The point was not the subject of substantial argument at the hearing.
56. Since Sir Duncan Ouseley was clearly right to conclude that the decision of the First-tier Tribunal was not fundamentally procedurally unfair, I need not express a concluded view about whether he need have considered that question at all, and in circumstances where we did not hear full argument I prefer not to do so. However, I should say that I am not surprised that he thought it right to proceed in the way that he did. Of course the statutory focus is on the conduct of the Upper Tribunal – necessarily so, because it is its decision which is being challenged. But, in a case where the decision of the First-tier Tribunal was arguably vitiated by fundamental procedural unfairness but permission to appeal had been refused, I should take some persuasion that that unfairness had to be treated as irrelevant for the purpose of subsection (4) (c) (ii) as long as the Upper Tribunal had not itself acted with fundamental procedural unfairness of some discrete kind. As I have said, I express no concluded view, and the correct analysis may be sensitive to the facts of the particular case.