JR-2023-LON-002505

# Upper Tribunal
# Immigration and Asylum Chamber
# Judicial Review Decision Notice

The King on the application of
**LLOYD TOMLINSON**

**Applicant**

v

**ENTRY CLEARANCE OFFICER**

**Respondent**

**Before Upper Tribunal Judge Smith**

**Application for judicial review: substantive decision**

Having considered all documents lodged and having heard from Mr D Balroop of Counsel instructed by Duncan Lewis Solicitors on behalf of the Applicant and Mr M Biggs of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on Friday 28 June 2024.

**IT IS ORDERED THAT**:

**The application for judicial review is refused for the reasons set out in my judgment handed down on Friday 26 July 2024**

**COSTS**

**The Applicant is to pay the Respondent's costs of the application summarily assessed in the sum of £6987.90**

Reasons
The Applicant's application for judicial review has failed. Accordingly, he is liable to pay the Respondent's costs of the application. This was conceded by the Applicant. The Respondent has filed a schedule of costs. The Applicant seeks an order that costs should be assessed if not agreed. However, the only submission made about the reasonableness of the costs claimed is by way of an example that the hearing lasted 1.25 hours but 6 hours is claimed. However, that ignores preparation for that hearing which is not separately claimed. I have considered the schedule. The rates and time claimed are reasonable as are Counsel's fees. I consider the costs claimed to be reasonable for a substantive judicial review claim.

**PERMISSION TO APPEAL**

**Permission to appeal is refused.**

Reasons

Although there is no formal application for permission to appeal, the draft order provided by the parties indicates that the Applicant relies in support of an application for permission to appeal on the submissions already made. In any event, I am required by rule 44(4A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to determine the issue of permission to appeal at any hearing where a decision is given which disposes of immigration judicial review proceedings. That applies whether or not any application for permission to appeal is made. I refused permission to appeal as there is no arguable error of law in my decision.

Signed: L K Smith

**Upper Tribunal Judge Smith**

Dated: 26 July 2024

**For completion by the Upper Tribunal Immigration and Asylum Chamber**

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 30/07/2024

Solicitors:
Ref No.
Home Office Ref:

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**Notification of appeal rights**

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2023-LON-002505

**IN THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

Field House,
Breams Buildings
London, EC4A 1WR

**Friday 26 July 2024**

**Before:**

**UPPER TRIBUNAL JUDGE SMITH**

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**Between:**

**THE KING**
**on the application of**
**LLOYD TOMLINSON**

**Applicant**

**- and -**

**ENTRY CLEARANCE OFFICER**

**Respondent**

**- - - - - - - - - - - - - - - - - - - - -**

**MR D BALROOP**
(instructed by Duncan Lewis Solicitors), for the Applicant

**MR M BIGGS**
(instructed by the Government Legal Department) for the Respondent

Hearing date: Friday 28 June 2024

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**J U D G M E N T**

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**Judge Smith:**

## INTRODUCTION

1. This is an application for judicial review challenging the Respondent's decision dated 21 August 2023 ("the Decision"), refusing the Applicant entry clearance as the spouse of a British citizen, [E]. Permission to apply for judicial review was initially refused on the papers on 29 January 2024 by Upper Tribunal Judge Pickup but granted by Upper Tribunal Judge Stephen Smith at an oral hearing on 14 March 2024.

2. The matter therefore comes before me at a substantive hearing. I had before me a composite bundle running to 164 pages (pdf) to which I refer below as [B/xx] and a bundle of authorities to which I was referred only briefly. I also had skeleton arguments from Mr Balroop and Mr Biggs. Having heard oral submissions from them both, I reserved my judgment which I indicated I would deliver in writing as I now turn to do.

## FACTUAL BACKGROUND

3. In order to consider the issues that arise in this case, it is necessary to set the Decision under challenge in context of the Applicant's immigration history.

4. The Applicant is a Jamaican national now aged 42 years. He came to the UK initially aged 18 years. He did not have leave to be here. On 9 November 2011, he was convicted of possessing a prohibited automatic weapon and sentenced to 5 years in prison. It was proposed that he be deported. His appeal against the deportation order was dismissed in October 2014 and he was deported to Jamaica.

5. The Applicant entered into a relationship with [E] and married her on 15 June 2018. They lived together in France until she became ill and returned to the UK for medical treatment in July 2020. The Applicant tried to accompany her but was refused entry on the basis that he did not have entry clearance and had a deportation order against him.

6. The Applicant also has three children in the UK from other relationships, but their position was considered in the deportation appeal and is no longer central to the Applicant's case.

7. On 24 September 2020, the Applicant applied to join [E] in the UK (put neutrally). He did so placing reliance on EU law (the Surrinder Singh principle) and Article 8 ECHR. The Respondent treated the submissions as a request to revoke the deportation order and refused to do so. The Respondent refused the human rights claim which generated a right of appeal. The Respondent disputed that any application had been made under the EU Settlement Scheme

("EUSS") but in any event did not accept that [E] had been exercising Treaty rights before her return to the UK, did not accept that she had acquired permanent residence and continued to rely on the Applicant's conduct as reason to refuse any application. Again, the EUSS application is not relevant to the issues which arise in this application for judicial review, and I need say no more about that.

8. The Applicant appealed the Respondent's decision (again put neutrally). The appeal was heard by First-tier Tribunal Judge Karbani on 14 September 2022. She considered the Applicant's case on the basis of the statutory provisions and case-law relating to deportation and concluded that the impact of the Applicant's deportation had unduly harsh consequences for [E]. By a decision dated 16 September 2022 ("the Appeal Decision") ([B/87-102]), Judge Karbani therefore allowed the Applicant's appeal finding that the Respondent's decision was unlawful as contrary to section 6 Human Rights Act 1998 and in breach of his and [E]'s Article 8 ECHR rights.

9. Although the Respondent sought to challenge the Appeal Decision, and was granted permission to appeal to do so, this Tribunal concluded that there was no error of law in the Appeal Decision and therefore upheld it. The Respondent did not appeal further.

10. The Respondent revoked the deportation order on 20 June 2023 on the basis that this was an implementation of the Appeal Decision. The Applicant protested that this was insufficient and that he should also be granted entry clearance, but the Respondent stood her ground in a response dated 29 June 2023. The Applicant made an application for entry clearance on 17 July 2023 which was refused by the Decision.

## THE RESPONDENT'S DECISION

11. The Decision is at [B/83-85]. The Respondent first considered the application for entry clearance under the Immigration Rules ("the Rules"). However, the Respondent rejected the application on the basis that the Applicant could not meet the suitability requirements. That part of the Decision reads as follows:

> "Under paragraph EC-P.1.1.(c), your application falls for refusal on grounds of suitability under Section S-EC of Appendix FM. For the following reasons.
> Records held in the United Kingdom indicate that you have been convicted of a criminal offence on 09/11/2011 and have been sentenced to imprisonment for 5 years. I therefore refuse your application under paragraph EC-P.1.1(c) of Appendix FM of the Immigration Rules, S-EC.1.4.(a)."

12. Having thereafter concluded that the Applicant otherwise met the Rules, the Respondent went on to consider the application outside the Rules (applying GEN.3.1. and GEN.3.2. of Appendix FM to the Rules – "Appendix FM") under the heading "Exceptional Circumstances" as follows:

> "We have considered, under paragraphs GEN.3.1. and GEN.3.2. of Appendix FM as applicable, whether there are exceptional circumstances in your case which could or would render refusal a breach of Article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for you or your family. In so doing we have taken into account, under paragraph GEN.3.3. of Appendix FM, the best interests of any relevant children as a primary consideration.
> We have also considered your application under paragraph GEN.3.2 of Appendix FM. We have concluded that there are no exceptional circumstances in your case which would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for you, your partner, a relevant child or another family member.
> You have told us that your sponsor is suffering from mental health issues, repeated miscarriages, thyroid cancer and from Familial Adenomatous Polyposis. You have stated that your sponsor is receiving treatment for these conditions in the UK and that you wish to be with them in order to be able to support them and in order to care for them.
> Whilst I note that these circumstances are distressing for you and your sponsor, I have considered your rights under Article 8 of ECHR. Article 8 of the ECHR is a qualified right, proportionate with the need to maintain an effective immigration and border control and decisions under the Immigration Rules are deemed to be compliant with human rights legislation. Although you may have a family life with the sponsor, I am satisfied the decision is proportionate under Article 8(2)."

13. The Respondent went on to refuse the application under the "partner route" in Appendix FM. The Decision gave the Applicant a right of appeal. As part of this application for judicial review, therefore, the Respondent argues that the Applicant had and has an alternative remedy which acts as a barrier to the application for judicial review.

## THE APPLICANT'S GROUNDS

14. The Applicant challenges the Decision on two grounds which were somewhat refined at the oral permission stage and can now be summarised as follows:
    - Ground one: Whether the Respondent gave effect or proper effect to the Appeal Decision. Subsumed in this ground is a challenge that the Decision amounted to an abuse of process

as the Applicant's human rights claim had already been determined by the Appeal Decision. In other words, it was not open to the Respondent either to require an application for entry clearance or, having done so, to refuse entry clearance. The abuse of process is said to render the Decision unlawful/irrational.

- Ground two: Allied to this, by the second ground the Applicant says that the Decision is in any event unlawful or irrational for failing to take into account the findings in the Appeal Decision and/or making a decision which was contrary to those findings.

15. As noted above, the judicial review application also raises an issue of alternative remedy as the Applicant was given a right of appeal against the Decision. Indeed, as I come to below, Mr Biggs invited me to dismiss the application on this basis, particularly if I were with him on the first ground.

## THE PERMISSION GRANT

16. Upper Tribunal Judge Pickup refused permission on the papers for the following reasons so far as relevant ([B/67]):

> "..(2) In summary, the grounds argue that the decision to refuse EC is unlawful or irrational.
> (3) The impugned decision was made with a right of appeal, which the grounds accept. It follows that the applicant has an alternative remedy which he chose not to exercise. It is not arguable that judicial review proceedings should take precedence when there is an alternative means of redress. There is no arguable merit in the assertion in the grounds that the applicant's 'wife's circumstances are exceedingly exceptional. Moreover, the right of appeal is not convenient or effective because of the unique facts.' Unarguably, there is nothing truly exceptional on the facts of this case which justify using judicial review rather than statutory appeal.
> (4) In all the circumstances, permission must be refused as the applicant has an effective alternative remedy and these proceedings are an abuse of the discretionary remedy of judicial review."

17. At oral permission stage, Upper Tribunal Judge Stephen Smith granted permission for the following reasons so far as relevant ([B/64-65]):

> "..(3) The grounds are arguable, although I respectfully consider that they could be more focussed by reference to the statutory jurisdiction of the First-tier Tribunal, as it was constituted to hear the applicant's human rights appeal. I consider the following points to be arguable. As a consequence of the changes to the rights of appeal in immigration cases introduced by the Immigration Act

> 2014, an application to revoke a deportation order is treated as a human rights claim. A refusal to revoke a deportation order amounts to the refusal of a human rights claim. Pursuant to section 113(1) of the Nationality, Immigration and Asylum Act 2002, as amended by the 2014 Act, a 'human rights claim' includes a claim by a person that 'to refuse him entry into the United Kingdom' would be unlawful under section 6 of the Human Rights Act. It follows, therefore, that it is arguable that by her decision allowing the applicant's appeal against the refusal of his earlier human rights claim (made in the form of an application to revoke the deportation order), Judge Karbani expressly addressed the human rights implications of the applicant's continued exclusion from the UK, and found that it would breach the Convention for him not to be admitted (rather than having simply found that the deportation order should be revoked).
> (4) It is therefore arguable that the Entry Clearance Officer has unlawfully failed to give effect to Judge Karbani's decision.
> (5) While the Entry Clearance Officer's decision carries a right of appeal, I am not persuaded that this is a reason not to grant permission. If the Secretary of State was bound to give effect to Judge Karbani's decision, but – as I have found is arguable – has unlawfully failed to do so, it is nothing to the point that the decision refusing to give effect to a statutory appeal decision *itself* gives rise to a further statutory right of appeal. The supervisory jurisdiction of judicial review is appropriate in these circumstances."

## GROUND ONE

18. I begin with an issue which I raised of my own motion at the outset of the hearing, namely that there has been a delay in the challenge brought on ground one. If the issue is as was originally pleaded and alluded to at (4) of Judge Smith's permission grant whether the Respondent has failed properly to give effect to the Appeal Decision, then the Applicant is out of time for bringing that claim unless time is extended. That is because the Respondent made clear in her letter dated 29 June 2023 that, in her view, she had implemented the Appeal Decision by revoking the deportation order. She there insisted that the Applicant had to make a further application for entry clearance which he duly did. However, the issue of implementation of the Appeal Decision crystallised at that point. That is therefore the decision under challenge if the challenge is only unlawful implementation of the Appeal Decision. The application for judicial review was issued on 20 November 2023 and therefore nearly two months beyond the three months long-stop.

19. Mr Biggs did take up the point but very fairly did not press it as he had not raised it previously. Mr Balroop urged me to extend time if I needed to do so but, understandably since I had just raised the point, did not have instructions why a judicial review was not

brought at that time and therefore could not give me a good reason for the delay. He did point out however that whether to extend time also encompassed the need to consider whether there was other reason to extend time. That involves looking at the merits of the challenge.

20. I am persuaded that the delay point is not a complete answer to the first ground. First, it might be said that, had the Applicant sought to challenge the 29 June 2023 decision, that challenge would have been said to have been premature or itself involving the alternative remedy of applying for entry clearance (as the Applicant subsequently did). Second, the first ground goes beyond the challenge to implementation (at least as formulated at oral permission stage) as (3) of Judge Smith's permission grant identifies. The challenge as argued is more properly interpreted as an argument that it was not open to the Respondent to refuse the subsequent entry clearance application having regard to what was determined by the Appeal Decision. I therefore turn to that case.

21. It is common ground that what triggers a right of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") is "where … the Secretary of State has decided" to refuse either a protection or human rights claim. I do not need to look at what is a protection claim. It is common ground that a human rights claim is now defined by section 113 of the 2002 Act as follows:

> "'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 or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998…"

22. As I understood Mr Balroop to accept, before the changes to the appeal system by the Immigration Act 2014 ("the 2014 Act"), the right of appeal would lie against an "immigration decision" which in the case of the Appeal Decision in this case would mean that the decision which triggered the right of appeal would have been a refusal to revoke a deportation order. Mr Balroop submitted however that the changes made by the Immigration Act 2014 were such as to mean that the decision under appeal is only the refusal of (in this case) a human rights claim. In essence, his argument is that, the human rights claim having been refused but successfully appealed, it was not open to the Respondent to refuse the subsequent human rights claim made by the application for entry clearance.

23. Mr Biggs submits that the decision which is under appeal is still the one made by the Respondent namely the refusal to revoke the

deportation order albeit that encompasses and is treated as a refusal of a human rights claim which is what triggers the right of appeal. Mr Biggs relies on section 84(2) of the 2002 Act which provides that "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". He says that "the decision" there is the decision to refuse to revoke the deportation order and not the decision refusing the human rights claim.

24. The Respondent's position is reinforced by section 82 of the 2002 Act itself. That does not refer to an appeal being against the refusal of a human rights claim but where the Respondent has decided to refuse a human rights claim. That is consistent with the immigration status decision encompassing the refusal of a human rights claim. It is still the case that the refusal of the human rights claim is what triggers the right of appeal. However, that issue and the ground of appeal has to be considered in the context of the immigration status decision which is being made.

25. It seems to me that the conflict between the parties as to what decision is under appeal can also be determined by considering how an appeal is generated and decided.

26. The Applicant relies largely on the wording of what is a human rights claim and that the Applicant has sought and been refused entry by the decision which led to the Appeal Decision. However, that misunderstands that the claim itself is not self-standing; it is part of an application.

27. Take the more straightforward example of an in-country applicant who applies for leave to remain as, say, a spouse. That application will be refused by a decision which refuses leave to remain but would be treated as encompassing a human rights claim that to remove the applicant would breach his human rights. The decision therefore would be one refusing leave to remain as a spouse but would incorporate a refusal of a human rights claim giving rise to the right of appeal. If the application were one which did not involve a human rights claim, say as a student, again the decision taken would be one refusing leave to remain but, since there was no human rights claim, no right of appeal would be triggered. However, if the individual raised human rights as part of the application and that claim were refused, the decision would remain one refusing leave to remain as a student but considering and, in this example, refusing the human rights claim thereby giving rise to a right of appeal (unless the claim were certified in which case there would again be no right of appeal).

28. However, in the above examples, the human rights claim under the definition in section 113 of the 2002 Act remains that removal would breach the Human Rights Act 1998. In deciding the appeal, the only ground of appeal can be that "the decision" breaches the Human Rights Act 1998. However, the decision made is one to refuse leave to remain. The consequence of that decision if the appeal is dismissed may well be that removal will follow. However, the decision which is said to breach the appellant's human rights remains one refusing leave to remain. It is in that context that the appeal must be determined, not least because a First-tier Tribunal Judge considering the human rights ground must first determine whether the particular Rules which may apply are met.

29. That leads me to what was determined by the Appeal Decision in this case. As Mr Biggs pointed out, the revocation of a deportation order and a decision whether to grant entry clearance are distinct. The former maintains an individual's exclusion from the UK. The latter permits an individual to enter the UK, in this case on a route to settlement.

30. The submissions made by the Applicant which led to the Appeal Decision are at [B/151-159]. I accept that these are made in the context of an application for entry as a partner (albeit the form if one was completed is not in the bundle). Unfortunately, I do not have in the bundle the decision which followed those submissions – the decision at [B/160] is the one pre-dating the submissions and refusing to allow the Applicant to accompany [E] into the UK.

31. It is however clear from the Appeal Decision what was the decision under appeal. Although the submissions are, as I have noted, for entry into the UK, Judge Karbani took those to be an application to revoke the deportation order ([2] of the Appeal Decision). That is an indication that this is how they were treated. At [5] of the Appeal Decision, Judge Karbani refers to the Respondent's position as being "that the continuation of the deportation order is in the public interest". Following reference to an application to enter on EU law grounds which is not at issue in this judicial review, Judge Karbani went on to consider the Rules. As she said at [24] of the Appeal Decision, the Applicant's case had first to be considered under the Rules. She cited the relevant rules as being those concerned with revocation of deportation orders and the relevant part of section 117 of the 2002 Act as being Section 117C.

32. At [31] of the Appeal Decision, Judge Karbani said this:

> "The appellant's right of appeal initially arose from his application to revoke his deportation order received on 24 September 2020. The decision considered his human rights grounds and attracted an out of country right of appeal."

At [33] of the Appeal Decision, she noted the parties' agreement that paragraphs 390 and 391 of the Rules applied. It is self-evident from the reasoning which follows that the Judge was considering the human rights claim through the lens of the deportation provisions which at that stage applied. She concluded at [55] of the Appeal Decision that the factors relied upon by the Appellant amounted to "very compelling circumstances which outweigh the public interest in maintaining the appellant's deportation" (my emphasis). She expressly concluded at [56] of the Appeal Decision that she was "satisfied that the refusal to revoke the appellant's deportation order amounts to a breach of Mrs Tomlinson's Article 8 right to family life" (my emphasis).

33. The Appeal Decision could not be any clearer. The Judge treated "the decision" as being the refusal to revoke the deportation order consistently with Mr Biggs' analysis which I accept as correct. The decision incorporated a decision to refuse a human rights claim which triggered the right of appeal on the ground that the decision to refuse to revoke the deportation order breached the human rights of the Applicant and in particular his wife.

34. In those circumstances both as a matter of law and fact, what was determined by the Judge in the Appeal Decision was only that the continuation of the deportation order would breach the Applicant's human rights. There is not nor could there be any consideration of the entry clearance requirements which would apply to an application for entry clearance as a partner because that was not the application which was considered and refused by the decision under appeal.

35. I turn then to the other arguments relied upon by the Applicant.

36. The Applicant says that the Decision is unlawful and irrational in consequence of the Respondent's abuse of process. He relies on the case of Secretary of State for the Home Department v TB (Jamaica) [2008] EWCA Civ 977 ("TB (Jamaica)").

37. TB (Jamaica) was concerned with a refusal of an asylum claim. The Secretary of State had refused that claim. TB's appeal was successful. However, TB was a foreign criminal. The Secretary of State had not sought to exclude TB from the Refugee Convention under section 72 of the 2002 Act ("Section 72") in the first decision however sought to do so following the allowed appeal. Bean J held at first instance that this was an abuse of process and unlawful. The Secretary of State's appeal was dismissed.

38. The Applicant relies on the following passage from TB (Jamaica) (to which I have added paragraph [30]):

> "27. In his admirably clear ex tempore judgment, Bean J held that the decision of the Secretary of State was an abuse of the process. The principles requiring finality in litigation, and that a party should not be vexed twice, exemplified by *Henderson v Henderson* (1843) 3 Hare 100 and *Johnson v Gore Wood* [2002] 2 AC 1, are applicable in public law as in private law. Just as applicants in asylum and immigration cases are required to put forward all the matters on which they rely by the 'one-stop' warning which they are given, so must the Secretary of State bring forward his entire case when an applicant appeals to the AIT. Otherwise, the applicant is relegated to seeking judicial review of the Secretary of State's decision to invoke Article 33.2 and section 72, which, as Mr Jay (who appeared before the Judge as he appeared before this Court) realistically accepted was a less advantageous remedy which would make it more difficult for him to succeed. Accordingly, the Judge held that the Secretary of State's decision had been unlawful.
> Discussion
> ...
> 30. This demonstrates that it was open to the Secretary of State to seek to establish that Article 33.2 applied to TB on the hearing of his appeal; and it was open to the Secretary of State to seek to appeal the determination of the Immigration Judge on the ground that in failing to apply the statutory presumption she erred in law. She did not do so, and it is not easy to see why, if she is bound by the Immigration Judge's decision, she should be able to take the same point subsequently. I asked Mr Jay why, if she can take the Article 33.2 point after an adverse determination by an Immigration Judge, she could not take any other point under the Refugee Convention after an adverse determination, and I do not think he was able to provide a satisfactory answer. I see no basis on which it could be said that section 72 confers on Article 33.2 any special status that enables that provision to be relied upon when others cannot.
> 31. Moreover, the Immigration Judge considered, as she had to, whether TB's criminal conviction justified interfering with his Article 8 rights. She held that it did not. Her findings, set out in paragraphs 101 to 104 of her determination, are inconsistent with his constituting a danger to the community. It is evident, therefore, that if section 72 and Article 3.2 had been raised before her, she would have held that the statutory presumption of dangerousness had been rebutted.
> 32. As a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by administrative decision. If she could do so, the statutory appeal system would be undermined; indeed, in a case such as the present, the decision of the Immigration Judge on the application of the Refugee Convention would be made irrelevant. That would be inconsistent with the statutory scheme.
> 33.The principle that the decision of the Tribunal is binding on the parties, and in particular on the Home Secretary, has been

> consistently upheld by the Courts. In *R (Mersin) v Home Secretary* [2000] EWHC Admin 348, Elias J said:
>
> > In my opinion there is a clear duty on the Secretary of State to give effect to the Special Adjudicator's decision. Even if he can refuse to do so in the event of changed circumstances or because there is another country to which the applicant can be sent, there is still a duty unless and until that situation arises. It would wholly undermine the rule of law if he could simply ignore the ruling of the Special Adjudicator without appealing it, and indeed Mr. Catchpole [counsel for the Home Secretary] does not suggest that he can. Nor in my opinion could he deliberately delay giving effect to the ruling in the hope that something might turn up to justify not implementing it. In my judgment, once the adjudicator had determined the application in the applicant's favour, the applicant had a right to be granted refugee status, at least unless and until there was a change in the position.
>
> 34. In *R (Boafo) v Home Secretary* [2002] EWCA Civ, [2002] 1 WLR 44, Auld LJ said at [26] in a judgment with which the other members of the Court of Appeal agreed, "... an unappealed decision of an adjudicator is binding on the parties." In *R (Saribal) v Home Secretary* [2002] EWHC 1542 (Admin), [2002] INLR 596, Moses J said:
>
> > 17. The decision in *ex parte Boafo* demonstrates an important principle at the heart of these proceedings. The Secretary of State is not entitled to disregard the determination of the IAT and refuse a claimant's right to indefinite leave to remain as a refugee unless he can set aside that determination by appropriate procedure founded on appropriate evidence."

39. The reference to Article 8 ECHR at [31] of the judgment has no relevance to this case. The only point there being made is that if the Tribunal had considered the Section 72 issue, it would have rejected the Secretary of State's case based on the other findings which were made. So far as concerns the present case, [30] of the judgment is central to the point which the Applicant seeks to make. In TB's case, the decision under appeal was the making of a deportation order which also rejected TB's asylum and human rights claims (see [16] of the judgment). As the Court of Appeal pointed out, in refusing the asylum claim, the Secretary of State could have but did not certify under Section 72. Having not done so, and the Tribunal having not dealt with the issue of its own motion, the Secretary of State could have appealed the Tribunal's decision for failure to deal with that issue but did not do so. The Secretary of State was therefore bound by the Tribunal's decision that the Appellant's deportation would breach the Refugee Convention.

40. In this case, the Respondent had refused to revoke a deportation order; she had not refused entry clearance. The Judge dealt with the appeal on the basis that it was argued that the maintaining of

the deportation order would breach Article 8 ECHR. That was the issue which was determined. The Judge did not determine that a refusal of entry clearance would breach Article 8 ECHR. The position would of course have been otherwise if the Respondent had refused entry clearance and that had been the decision considered by the Appeal Decision but it was not. The Respondent was not therefore bound by the Appeal Decision to grant entry clearance. The Decision is therefore not an abuse of process.

41. The Applicant also says that it was not open to the Respondent in the Decision to rely on the suitability clause in Appendix FM for much the same reason. The relevant section of Appendix FM reads as follows:

> **"Exceptional circumstances**
> **…**
> GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.
> (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.
> (3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2. or D-LTRPT.1.2.
> **…**
> **Family life with a partner**
> **Section EC-P: Entry clearance as a partner**
> EC-P.1.1. The requirements to be met for entry clearance as a partner are that-
> (a) the applicant must be outside the UK;
> (b) the applicant must have made a valid application for entry clearance as a partner;
> (c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability–entry clearance; and
> (d) the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner.
> **Section S-EC: Suitability-entry clearance**

> S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.9. apply.
> …
> S-EC.1.3. The applicant is currently the subject of a deportation order.
> S-EC.1.4. The exclusion of the applicant from the UK is conducive to the public good because they have:
> (a) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; or
> …
> Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors."

42. I have underlined part of the section relied on above because, although those words appear in the extract from the Rules in the bundle of authorities, they do not appear in the current version of Appendix FM as updated on 6 June 2024 and it is not clear to me when those changes were made. I assume that the version in the bundle of authorities is that which was current at the date of the Decision. However, whatever the position, the overall operation of the Rules may be unaffected as GEN.3.2(2) still requires the decision-maker to consider whether there are exceptional circumstances which would lead to unjustifiably harsh consequences were entry to be refused. It appears from the Decision that this is in fact the way in which the Rules operated at that time.

43. Quite obviously, the Respondent could not have relied on S-EC.1.3 of Appendix FM as the deportation order had by the time of the Decision been revoked. However, the Respondent continued to rely on S-EC.l.4. Mr Balroop submitted that the Respondent was not entitled to rely on this. His submission overlaps largely with his argument relating to TB (Jamaica) and for the same reasons I reject it. As Mr Biggs pointed out, the refusal under S-EC.1.4 is mandatory. The fact that the deportation order has been revoked does not mean that the Applicant's conviction has been overturned. It still exists.

44. Insofar as Mr Balroop submitted that it was not open to the Respondent to refuse on the basis of S-EC.1.4. because of the unjustifiably harsh consequences of a refusal of entry, I agree with Mr Biggs that they are two separate matters (as now appears to have been made clearer by amendment to Appendix FM). The mandatory ground of refusal continues to apply. The Applicant fails on suitability grounds. He cannot therefore meet all the requirements of Appendix FM and will therefore fail on the five-

year route. However, if there are exceptional circumstances, he can still succeed on a ten-year route.

45. For those reasons, it was not unlawful for the Respondent to rely on S-EC.1.4 of Appendix FM.

46. I should also deal with a separate submission made by Mr Balroop arising from the Respondent's "Revocation of Deportation Order Guidance" dated 4 July 2023 ("the Guidance"). The section on which the Applicant relies is headed "Allowed appeals". The relevant part reads as follows:

> "This section tells you about revoking a deportation order following an allowed appeal.
> Information on appeals can be found in the Rights of appeal guidance.
> If an appeal against the refusal of a human rights or protection claim or against a decision to make a deportation order under the Immigration (Citizens' Rights
> Appeals) (EU Exit) Regulations 2020 is allowed and the Home Office does not intend to challenge that decision, any deportation order made must be revoked before leave is granted.
> The decision to revoke a deportation order must only be made once you are satisfied that the case will not be appealed or is appeal rights exhausted (ARE).
> Where an appeal against a deportation order made in accordance with the 2007 Act has been remitted by the Courts for reconsideration there is no requirement to revoke the deportation order pending the final outcome of the appeal.
> In the case of a deportation order obtained under the 2007 Act, the order will not invalidate leave to enter or remain until the person's in country appeal rights are exhausted (see s79 Immigration and Asylum Act 2002). Therefore, the deportation order will not have taken effect and there is no need to revoke it.
> Revocation of a deportation order does not entitle a person to re-enter the UK or to a grant of leave, however if an application is made that results in revocation of a deportation order and the person is in the UK, the decision maker should consider whether a grant of leave is also required.
> Where a deportation order is revoked because the Secretary of State decides that deportation would breach ECHR Article 8, <u>entry clearance or permission to stay must be granted for a period of up to 30 months, subject to such conditions as the Secretary of State considers appropriate</u>.
> <u>Where a deportation order is revoked following an allowed non-suspensive appeal (an appeal that is allowed while the FNO is not in the UK), UKVI will issue a visa to facilitate the FNO's return to the UK that is valid for one month</u>…."
> [Underlining is Applicant's emphasis]

47. The interaction of the last three paragraphs which were the focus of the Applicant's submissions is I confess not clear. However, it seems to me that the general proposition with which that section starts is that revocation of a deportation order does not entitle an individual to re-entry or a grant of leave to remain. The second paragraph appears to apply only where the individual subject to the deportation order is in the UK, and where the Secretary of State when considering whether to grant leave in accordance with the previous paragraph accepts that it should be granted because deportation would breach Article 8 ECHR. I accept Mr Biggs' submission that the third paragraph of that section of the Guidance applies only to non-suspensive appeals that is to say when there has been a certification of the human rights claim and the appeal proceeds from outside the UK. That is, as Mr Biggs pointed out, consistent albeit in a different context with what the Respondent accepted should apply in other non-suspensive appeals (see by way of example Court of Appeal's judgment in Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009).

48. For those reasons, the Guidance does not avail the Applicant in this case. In any event, this returns to the point I made at the outset that if the Applicant wished to challenge the Respondent's failure to grant entry clearance when implementing the Appeal Decision, the time to do so ran from when the Respondent made clear that a grant of entry clearance would not follow. The Applicant was therefore out of time for challenging that decision.

49. That brings me back under the first ground to where I started. If the Applicant is challenging the failure properly to implement the Appeal Decision, then he is out of time for so doing. No good reason is offered for the delay and there is no other reason to extend time. In relation to the wider challenge that it was not open to the Respondent to refuse entry clearance in light of the findings in the Appeal Decision and an abuse of process and therefore unlawful/irrational to do so, for the reasons given, I do not accept the Applicant's arguments. The decision which led to the Appeal Decision was one refusing to revoke the deportation order. It was not a decision refusing entry clearance. There is no abuse of process. The Respondent was bound to consider the application for entry clearance when made based on that application. The Decision is therefore not unlawful/irrational based on the arguments made in the Applicant's first ground.

## GROUND TWO

50. That then brings me on to the second ground challenging the substance of the Decision. Mr Biggs invited me at this stage to reconsider the issue of adequate alternative remedy. He

submitted that it was clear that Judge Stephen Smith had been persuaded not to refuse permission on the basis of alternative remedy based on the first ground. So much is clear from (5) of the Decision. Having determined that against the Applicant, he said that I should reconsider whether to refuse the substantive application for judicial review on the basis that the Applicant has an adequate alternative remedy namely his right of appeal. I therefore deal with that issue first.

**Alternative Remedy**

51. The Applicant relies on the case of R (oao B) v London Borough of Redbridge [2019] EWHC 250(Admin) as follows:

> "25. Further, the question of whether the Claimant has an alternative remedy is primarily a matter for consideration when determining whether to grant permission to claim judicial review. Since judicial review is a remedy of last resort, permission to claim judicial review may be refused where a Claimant has available to her a suitable alternative remedy. Here, permission has been granted. The matter has been fully argued on a substantive hearing. The question of whether to grant relief is discretionary. It may, in some cases, be open to a Court to refuse relief at a substantive hearing on the basis that there is an alternative remedy available to the Claimant. It would not, however, be appropriate to take that course here. If the claim were otherwise well-founded it would effectively be committing the parties and the Courts to yet further rounds of litigation when the matter (so far as relevant to the judicial review proceedings) has already been argued. That would be inconsistent with the overriding objective."

52. I do not read this as laying down any general proposition beyond that judicial review is a discretionary remedy and consideration of the adequacy of an alternative remedy whether at permission or substantive stage is therefore part of the exercise of a judge's discretion.

53. The Respondent for her part relies on R (oao Watch Tower Bible & Tract Society of Britain) v Charity Commission [2016] EWCA Civ 154 as follows:

> "19. .. If other means of redress are 'conveniently and effectively' available to a party, they ought ordinarily to be used before resort to judicial review: per Lord Bingham in *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465 at para 30. It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. This principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and actions taken to refer the matter to a specialist tribunal....To allow a claim for judicial review

> to proceed in circumstances where there is a statutory procedure for contesting the decision risks undermining the will of Parliament…"

54. Again, I do not find this case of any real assistance as the appeal to the Court of Appeal was against the refusal of permission based on the availability of an alternative remedy. The only part which is of relevance here is the point made regarding the availability of an alternative scheme put in place by an Act of Parliament and that to allow judicial review to proceed in those circumstances may amount to the undermining of the will of Parliament. However, that is there under consideration in the permission context.

55. Although neither party referred to other cases, the bundle of authorities does contain further case-law on the principles to be applied. The first case is R (oao Chaudhry) v Secretary of State for the Home Department and First-tier Tribunal [2018] EWHC 3887 (Admin) ("Chaudhry"). The second is R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners [2017] EWCA Civ 1716 ("Glencore")

56. Chaudhry was a case where the applicant had available to him a right of appeal from inside the UK but which he had in fact exercised only once he had left the UK. The First-tier Tribunal concluded that it had no jurisdiction to deal with the appeal. Although that was accepted by the Judge, he concluded that the fact that an alternative remedy may no longer be available did not mean that it was not an adequate alternative remedy relevant to the exercise of discretion. The Judge therefore declined to grant judicial review. Of relevance to this case is what is said at [13] of the judgment as follows:

> "I therefore decline to exercise my discretion to grant judicial review of the First Defendant's decision of 11th August 2016. Judicial review is a remedy of last resort. In this case the Claimant had an alternative remedy which he chose not to pursue. I find no exceptional or special circumstances. Whilst conscious that this was not an argument which found favour with Mr Brennan QC who granted permission, the fact that permission has been granted in the face of a contention in the Summary Grounds of Defence that there is an alternative remedy available to judicial review should not be in itself, or together with any other factor, either a bar to raising that issue at the substantive hearing, see the comments of Silber J in *(R (Islam) v Secretary of State for the Home Department* [2016] EWHC 2491 at 26."

The Judge did however go on to address the merits of the challenge to the Respondent's decision which had generated the right of appeal.

57. Glencore is also a judgment of the Court of Appeal. However, although it was an appeal against a refusal of permission to apply for judicial review, the Court of Appeal itself granted permission to proceed and heard the claim itself ([7] of the judgment). The Court of Appeal makes plain at [54] of the judgment that the availability of an alternative remedy remains a consideration at the substantive stage of a judicial review and goes on to make the following observations relevant to the exercise of the Court or Tribunal's discretion:

> "55 In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of
> procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.
> 56 Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required."

58. I have carefully considered whether I should exercise discretion in this case to refuse the application for judicial review on ground two on the basis that there is an adequate alternative remedy. In so

doing, I take into account that the Applicant's solicitors do not appear to have exercised any protective right of appeal within time and that the Applicant will have to apply to extend time if he is to appeal the Decision. However, as is said in Chaudhry, that is largely irrelevant if as a matter of choice a litigant decides not to exercise the alternative remedy which is readily available to him. I would hope in any event that were the First-tier Tribunal to be asked to exercise its discretion to extend time, it would take into account the fact that the Applicant has sought to challenge the Decision by alternative means presumably on the advice of his solicitors and that permission to apply for judicial review was granted notwithstanding the availability of the right of appeal.

59. Judge Stephen Smith when granting permission notwithstanding the availability of a right of appeal did so on the basis of the first ground. I have determined that against the Applicant. The Applicant's remedy in relation to that ground is therefore complete. Whether or not I would have reached the same view as did Judge Stephen Smith regarding the alternative remedy on that ground is nothing to the point. Where we are now is that I have refused the application on that ground leaving only the issue of the substance of the Decision.

60. In an application for judicial review, the Tribunal can only consider whether the Decision is unlawful or irrational. Mr Balroop submitted that the Decision was either unlawful for failing to apply the findings made in the Appeal Decision (or even take them into account) or irrational on the basis that no decision-maker properly directed could reach that decision. I was initially attracted to the first of those submissions but I am persuaded by Mr Biggs largely for the reasons set out under the first ground that there was no requirement for the Respondent to take into account those findings because they relate to different Rules. The Respondent was considering the application for entry clearance based on the Rules which apply to such applications. As set out when dealing with the first ground, that is a very different decision than whether to revoke a deportation order because the consequence of entry clearance is, in this case, that the Applicant will be permitted to enter on a route to settlement notwithstanding that he cannot meet a mandatory requirement of the Rules. Irrationality is a high threshold.

61. As I pointed out to Mr Balroop, unlike the jurisdiction of this Tribunal in a judicial review, the First-tier Tribunal will be able to determine for itself the merits of the Applicant's case (and the rights of [E]). A second Judge will also be bound by the guidance in Devaseelan to take as a starting point the findings made in the Appeal Decision so far as those affect the issues under

consideration in that appeal. As the Respondent also points out, the effect of allowing a judicial review of the Decision would lead only to the quashing of the Decision and a requirement for reconsideration whereas if the Applicant were to succeed in his appeal, the Respondent would be bound to grant entry clearance (unless there were any change of circumstances after the appeal was allowed).

62. In all the circumstances, not only do I consider that the Applicant has an adequate alternative remedy to challenge the Decision namely his right of appeal (albeit out of time) but I conclude that it is in fact a preferable remedy from the Applicant's perspective.

63. For those reasons in the exercise of my discretion, I refuse the application for permission on the second ground on the basis that there is available to the Applicant an adequate alternative remedy.

## CONCLUSION

64. For the foregoing reasons, I dismiss the application for judicial review

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