Sheku Bayoh Public Inquiry

Supplementary List of Authorities

For Core Participants Smith, Good and Tomlinson

For the Procedural Hearing on 12 and 13 June 2025

1. Errington v Wilson 1995 S.C 550
2. Rex (LA (Albania)) v Upper Tribunal [2024] 1 WLR 1673
3. The Queen on the Application of George Low v Independent Adjudicator [2009] EWHC 2253 (Admin)

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ERRINGTON v WILSON

No 56
16 June 1995

FIRST DIVISION
Lord Weir

HUMPHREY ERRINGTON (t/a H J ERRINGTON & Co), Petitioner (Respondent) — *Jones, QC, Tyre*

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MRS ELIZABETH WILSON AND OTHERS, Respondents (Reclaimers) — *No appearance (First Respondent), Sutherland, QC, Milligan (Second and Third Respondents)*

Administration of justice — Administrative law — Courts of law — Justice of the peace — Hearing before justice of the peace — Natural justice — Duty to allow cross examination — Justice requiring all questions to be put through her — Whether justice erred — Whether breach of natural justice — Food Safety Act 1990 (cap 16), sec 9[1]

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Under sec 9 of the Food Safety Act 1990 an authorised officer of the food authority is empowered to inspect any food intended for human consumption. If it appears to him that any food fails to comply with food safety requirements, he is empowered under sec 9(3) to seize the food and remove it in order to have it dealt with by a justice of the peace. The person in charge of the food is entitled to attend before the justice of the peace and, if he does so, is entitled to be heard and to call witnesses under sec 9(5)(a). The justice of the peace, on the basis of such evidence as he considers appropriate in the circumstances,

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is empowered to make certain orders in respect of the food under sec 9(6).

A sec 9 hearing took place before a justice of the peace in relation to 44 batches of a particular cheese produced by the petitioner, which were allegedly contaminated and unfit for human consumption. In respect of the conduct of proceedings, the justice prohibited cross examination of witnesses and any questions to witnesses were to be put through her. Counsel for the petitioner at the hearing declined to put any questions in that way to the witnesses for

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the food authority. The justice decided that the cheese should be disposed of or destroyed. The petitioner thereafter sought judicial review of that decision. The Lord Ordinary (Weir) reduced the decision and held that the justice had been under a duty to exercise her powers in terms of the Act in accordance with the principles of natural justice, especially as she was obliged by the statute to reach her decision on the basis of evidence. His Lordship held that there had been a denial of natural justice as the petitioners' counsel had been denied the opportunity, by cross examining the other side's witnesses, of

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testing the strength of their evidence. The food authority and their authorised officer reclaimed.

Held (*aff* judgment of Lord Weir) (1) that the principles of natural justice and the duty to act fairly were inseparable, for the principles of natural justice were designed to achieve fairness of procedure so that the concept which

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[1]The Food Safety Act 1990 enacts, *inter alia*, that: '9.—... (5) Where an authorised officer exercises the powers conferred by subsection (3)(b) or (4)(b) above, he shall inform the person in charge of the food of his intention to have it dealt with by a justice of the peace and — (a) any person who under section 7 or 8 above might be liable to a prosecution in respect of the food shall, if he attends before the justice of the peace by whom the food falls to be dealt with, be entitled to be heard and to call witnesses, and (b) that justice of the peace may, but need not, be a member of the court before which any person is charged

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with an offence under that section in relation to that food.

'(6) If it appears to a justice of the peace, on the basis of such evidence as he considers appropriate in the circumstances, that any food falling to be dealt with by him under this section fails to comply with food safety requirements, he shall condemn the food and order — (a) the food to be destroyed or to be so disposed of as to prevent it from being used for human consumption; and (b) any expenses reasonably incurred in connection with the destruction or disposal

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to be defrayed by the owner of the food.'

underlay both expressions of duty was the same; (2) that in view of the nature of the proceedings the justice was under a duty to have regard to the principles of natural justice which, in this case, required her to allow cross examination if the proceedings were to be fair and whether or not to allow such cross examination was not a matter for her discretion; and (4) that, in this case, the matter was not a dispute about an isolated incident affecting one piece of food but related to a whole brand of product which would have direct consequences of the gravest importance for the petitioner, his business and workforce and, as there was a difference of opinion between experts on points crucial to a sound determination of the questions which the justice had to decide and the petitioner had been denied the opportunity to test the strength of the experts against him, the prejudice which resulted from the refusal to allow cross examination was self evident; and reclaiming motion *refused*.

Opinion that averments of prejudice were not necessary to make a relevant case of breach of natural justice.

Cigaro (Glasgow) Ltd v City of Glasgow District Licensing Board 1982 SC 104 *commented upon*.

Opinion (*per* the Lord President (Hope)) that the question whether a justice was acting in a judicial or in an administrative capacity might be important for some purposes but no such distinction required to be drawn in this case.

HUMPHREY ERRINGTON (t/a H J ERRINGTON & Co) applied to the Court of Session for a judicial review of a decision of the justice of the peace, Mrs Elizabeth Wilson, dated 3 March 1995, in which she ordered 44 batches of Lanark Blue Cheese produced by the petitioner to be destroyed or otherwise disposed of as they were unfit for human consumption. The justice of the peace, food authority for the district of Clydesdale and the authorised officer of that authority, were called in the petition as respondents.

The application for judicial review called for a first hearing before the Lord Ordinary (Weir).

At advising, on 28 April 1995, the Lord Ordinary sustained the petitioner's first plea in law and pronounced decree of reduction of the justice of the peace's decision.

The food authority and its authorised officer reclaimed.

Cases referred to:
Barrs v British Wool Marketing Board 1957 SC 72
Breen v Amalgamated Engineering Union [1971] 2 QB 175
Bushell v Secretary of State for the Environment [1981] AC 75
Cigaro (Glasgow) Ltd v City of Glasgow District Licensing Board 1982 SC 104
Cowe v McDougall 1909 SC (J) 1
Furnell v Whangarei High Schools Board [1973] AC 660
McInnes v Onslow-Fane [1978] 1 WLR 1520
R v Birmingham City Justices, ex parte Chris Foreigh Foods (Wholesalers) Ltd [1970] 1 WLR 1428
R v Board of Visitors of Hull Prison, ex parte St Germain (No 2) [1979] 1 WLR 1401
R v Cornwall Quarter Sessions, ex parte Kerley [1956] 1 WLR 906
R v Deputy Industrial Injuries Commissioner, ex parte Moore [1965] 1 QB 456
Ridge v Baldwin [1963] 1 QB 539; [1964] AC 40
Rodenhurst v Chief Constable of Grampian Police 1992 SC 1

Textbooks referred to:
de Smith, *Judicial Review of Administrative Action* (4th edn), p 216
Wade, *Administrative Law* (7th edn), p 511

The reclaiming motion called before the First Division, comprising the Lord President (Hope), Lord Allanbridge and Lord Clyde for a hearing.

At advising, on 16 June 1995 —

A LORD PRESIDENT (Hope).—This is a reclaiming motion by the second and third respondents against an interlocutor which the Lord Ordinary pronounced after the first hearing in a petition for judicial review. The petitioner carries on business near Carnwath under the name H J Errington & Co. His business consists in the manufacture and sale of various products including a blue veined semi-hard cheese known as Lanark Blue. He sought judicial review of a decision by the B first respondent, who is a justice of the peace, that 44 batches of his Lanark Blue cheese were contaminated with listeria monocytogenes, were unfit for human consumption and should be disposed of or destroyed. The second respondents are the food authority for the District of Clydesdale in terms of sec 5 of the Food Safety Act 1990. The third respondent is an authorised officer of the second respondents for the purposes of that Act.

C The decision was issued on 3 March 1995 after a hearing which took place before the justice on 24 February 1995. The petitioner sought its reduction on three grounds. The first was that there had been communings before the hearing between the justice and the solicitor for the second respondents. But nothing was made of this point at the first hearing, as the facts are still in dispute. The second was the refusal by the justice to allow the cross examination of witnesses. The third was that the justice had failed to give reasons for her decision. The D Lord Ordinary held that in refusing senior counsel for the petitioner the opportunity of cross examining the second respondents' witnesses there had been a denial of natural justice. On this ground he sustained the petitioner's first plea in law and pronounced decree of reduction. He was inclined to the view, in regard to the third ground, that the justice should have given proper and adequate reasons for her decision. He also said that it would be highly E desirable, in view of the complex issues involved in this case, that the services of an experienced sheriff should be sought rather than those of a lay person. The second and third respondents have challenged the Lord Ordinary on all these points in this reclaiming motion. But the principal issue is whether the justice was under a duty to allow the petitioner's counsel to cross examine the second respondents' witnesses.

F Among the provisions which the 1990 Act contains in regard to food safety is the power given by sec 9 to an authorised offer of a food authority to inspect any food intended for human consumption. If it appears to him that any food fails to comply with the food safety requirements, he has power under subsec (3) of that section to seize the food and remove it in order to have it dealt with by a justice of the peace. In Scotland the expression 'justice of the peace' includes G a reference to the sheriff and to a magistrate: see sec 9(9)(a). Although these expressions are not further defined in the 1990 Act, it is clear that the references to a justice of the peace and to a magistrate in Scotland are references to a justice of the peace appointed under sec 9 of the District Courts (Scotland) Act 1971 and to a stipendiary magistrate appointed under sec 5 of that Act. The expression 'sheriff' in relation to Scotland includes the sheriff principal: see sec H 5 of and Sched 1 to the Interpretation Act 1978. Thus there is in Scotland a wide choice of persons by whom the matter may be dealt with on the application of the authorised officer.

Subsections (5) and (6) of sec 9 of the 1990 Act are in these terms: [His Lordship quoted the same as set out *supra* and continued:]

When the hearing took place on 24 February 1995 the petitioner was I represented by senior counsel. He had with him as his witness Richard North

of Leeds Metropolitan University, a food safety adviser. The second respondents were represented by a solicitor. She had with her as witnesses the third respondent, Dr J McLauchlin of the Central Public Health Laboratory, London, and Dr Ahmed, a consultant in public health medicine with Lanarkshire Health Board.

The precise sequence of events at the hearing is not agreed. There is a dispute in fact between the parties as to when it was that the justice said that there was to be no cross examination of the witnesses. The petitioner avers that she commenced the proceedings by saying that she would not allow cross examination. The second and third respondents aver that she adjourned to consider the parties' submissions on this point and that, having done this, she intimated that cross examination was not appropriate but that she would ensure that everyone would be given an opportunity to speak and to answer questions through her. It is however agreed that the dispute on this point of detail does not matter if, as the petitioner avers, the justice was obliged to allow both parties to cross examine each other's witnesses. Her decision not to allow cross examination had clearly been taken by the time the second respondents' witnesses gave evidence. It is also agreed that the justice said that any questions to witnesses would have to be put through her. The petitioner's senior counsel declined to put any questions in this way to the second respondents' witnesses. The respondents aver that the solicitor for the second respondents put a few questions to the petitioner's witness Mr North through the justice.

After hearing submissions for both parties the justice reserved her decision. On 3 March 1995 she issued her decision, which was in these terms:

'The following decision has been made after the hearing held on Friday 24 February 1995 and on the basis of relevant evidence presented and in the absence of any statutory provision at the present time, regarding contamination of cheese with listeria monocytogenes.

'I am of the opinion that the contaminated batches of Lanark Blue cheese are potentially hazardous to public health and are therefore unfit for human consumption and should be disposed of or destroyed.

'Any reasonable expenses in connection with the destruction or disposal of the cheese to be defrayed by the owner, H J Errington & Co.'

The Lord Ordinary held that the justice was under a duty to exercise her powers under sec 9(6) of the 1990 Act in accordance with the principles of natural justice, especially as she was obliged by the statute to reach her decision in this case on the basis of evidence. As to whether her refusal to allow cross examination was a breach of these requirements, he was not willing to affirm that failure to allow cross examination would necessarily be unfair in all circumstances. In his opinion regard had to be paid to the scheme of the legislation, to the circumstances of each case and to the extent to which prejudice may have resulted when cross examination has been disallowed. Having examined all these factors, he was of the opinion that there was a denial of natural justice in this case because the petitioner's counsel was denied the opportunity, by cross examining the second respondents' witnesses, of testing the strength of their evidence.

The first question which was debated in the reclaiming motion was whether the hearing which the justice held in this case was administrative or was judicial or quasi-judicial in character. Counsel for the second and third respondents submitted that she was acting in an administrative capacity only and that her

A only duty was to act fairly. It was maintained that she was not bound to act in accordance with the principles of natural justice, as she was not being required to decide an issue between the parties. It was pointed out that the petitioner's case was not pled on the basis that the justice had erred in the exercise of a discretion in deciding not to allow cross examination. Rather it was averred that she was 'obliged' by the principles of natural justice to allow both parties B to be heard and to allow both parties to cross examine each other's witnesses. This was said to be a misconception of her duty in this case. As an administrator her duty was simply to act fairly, in the exercise of her discretion under sec 9(6) to decide the matter on the basis of such evidence she considered appropriate in the circumstances. It was not unfair for her in proceedings which were administrative in character to insist that all questions to the witnesses should be C put through her.

The question whether a justice is acting in a judicial or in an administrative capacity may be important for some purposes, as it was, for example, in *Rodenhurst v Chief Constable of Grampian Police*. But I do not think that this distinction requires to be drawn in the present case, as it was accepted by counsel for the second and third respondents that even on their approach the D justice was under a duty to act fairly. It was submitted that the duty to have regard to the principles of natural justice could be distinguished from the duty to act fairly, and that while these duties might overlap to some extent that was not so in the present case. I think however that it is a misconception to regard these two duties as separable. Of the two, the duty to act fairly is more broadly expressed, but as the principles of natural justice are designed to achieve fairness of procedure the concept which underlies both expressions of duty is the same. E In this context the precise category into which the proceedings may be said to fall is not important.

In *Ridge v Baldwin* Lord Reid at [1964] AC, p 72 described the principles of natural justice as the essentials of all proceedings of a judicial character. It was noted in that case that these principles had a limited application to the wider duties imposed on ministers and other organs of government. But it was held F that they applied to a body such as the Watch committee by whom a power of dismissal for misconduct was being exercised. In my opinion this decision shows that, in their wider application, the principles of natural justice may be invoked in all cases where there is an issue to be decided which affects the rights of the person who is entitled to be heard by the decision maker. This seems to me to be just such a case, as the petitioner, who was a person who might be liable to G prosecution, had the right under sec 9(5) to be heard and to call witnesses. That his rights were liable to be affected by the decision of the justice is clear from the provisions of sec 9(6). If it appeared to her that the cheese failed to comply with food safety standards, it was her duty to order it to be destroyed or otherwise disposed of and to order any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the petitioner.

H In view of the nature of these proceedings I consider that the justice was under a duty to have regard to the principles of natural justice, and that in the circumstances of this case this is simply another way of expressing the broad proposition that she was under a duty to act fairly. As Harman LJ said in the Court of Appeal in *Ridge v Baldwin* at [1963] 1 QB, p 578, natural justice is after all only fair play in action. In *Furnell v Whangarei High Schools Board* at p 679G I Lord Morris of Borth-y-Gest, delivering the majority judgment of the board,

said that natural justice is but fairness writ large and juridically. He also noted that the conceptions which are indicated when natural justice is invoked or referred to are not to be confined within hard and fast and rigid rules. These observations were anticipated by Lord President Clyde in *Barrs v British Wool Marketing Board* at pp 82–83 when he said that, where a tribunal had not dealt fairly and equally with the parties, its conduct of the proceedings had been at variance with the principles of natural justice. In *Breen v Amalgamated Engineering Union* at p 190G, Lord Denning MR said that even though the functions of a domestic body are not judicial or quasi-judicial, but only administrative, the body must still act fairly. Edmund Davies LJ at p 195B and Megaw LJ at p 200C treated the expressions 'acting unfairly' and 'acting contrary to natural justice' as interchangeable. In my opinion it is sufficient for the purposes of the present case to say that the duty to act fairly, which the second and third respondents admit, and the duty to act in accordance with the principles of natural justice, which the petitioner avers, are different ways of expressing the same thing. The point which is at issue is whether, in the exercise of this duty, the justice was bound to allow the petitioner's counsel to cross examine the second respondents' witnesses.

The argument for the second and third respondents was that it was a matter for the discretion of the justice whether or not cross examination should be allowed. It was said that, as it was for her to decide in terms of sec 9(6) what evidence was appropriate in the circumstances, it was for her to decide how witnesses were to give their evidence, and that as the petitioner did not attack the exercise by her of a discretion, that was an end of the case. Counsel also submitted that her decision was a sound one because cross examination was peculiar to judicial and certain kinds of quasi-judicial proceedings. He said that it was not a normal incident of administrative proceedings such as those on which she was engaged in this case. Any suggestion that there was a presumption in favour of allowing cross examination would be based neither on reason nor on precedent. This argument was forcefully presented, but in my opinion it overlooks the point that the duty to act fairly may include other duties according to the circumstances. Thus if fairness requires that something be done, not to do that thing will be a breach of duty to act fairly. If it is necessary to permit cross examination in order to perform the duty to act fairly, then there is a duty to permit cross examination. It is not a matter of discretion, as the duty to act fairly does not leave it to the discretion of the decision maker to decide what is and what is not fair. That is a matter to be decided in the light of the circumstances, and any view which the decision maker may take on it is subject to review by the court.

Counsel for the second and third respondents relied as support for their argument on *Bushell v Secretary of State for the Environment*. In that case an inspector was presiding over a public local inquiry into two draft schemes for the construction of motorways. He disallowed an objector's request to cross examine the department's witnesses about traffic needs and the method adopted by the department for projecting traffic growth. It was held that this was a matter of Government policy in the sense that it was a topic unsuitable for investigation by individual inspectors at individual local inquiries, so the inspector's refusal to permit cross examination on this issue was not a breach of the rules of natural justice. Lord Diplock said at p 97E that it must be a matter of circumstances whether fairness required an inspector to permit a person

A who had made a statement on matters of fact or opinion, whether expert or otherwise, to be cross examined by a party to the inquiry who wished to dispute a particular statement. The facts of that case are, of course, distinguishable from those which are before us here. The issue of Government policy in that case was not one for the inspector to determine, whereas in this case the issue as to whether the cheese failed to comply with food safety requirements was one B which the justice required to decide. As for the point that it depends on the circumstances whether fairness required the justice to permit the cross examination of witnesses, I think that Lord Diplock's *dictum* supports the petitioner's argument that the circumstances of this case were such that fairness did require the justice to take this course. On this view it was not a matter for her discretion, as the circumstances required her to allow cross examination if C the proceedings were to be fair.

We were referred to a number of cases to illustrate the circumstances in which cross examination might or might not be appropriate. In *Cowe v McDougall* the pursuer had obtained a decree in the small debt court. It was held that there had been oppression within the meaning of sec 31 of the Small Debt (Scotland) Act 1837 because the sheriff substitute had refused to allow the defender to D cross examine the pursuer or to lead evidence on the question of damages. Lord Low described the procedure in that case as amounting to a refusal to hear parties, and Lord Ardwall said that there had been a departure from the principles of natural justice. I do not think that that case has any direct bearing on the circumstances with which the justice was faced in the present case. But the observations of Lord Low and Lord Ardwall indicate the importance of allowing cross examination in a case where a party has a right to be heard and E where it would be unfair not to permit him to cross examine the other party's witnesses. In *R v Deputy Industrial Injuries Commissioner, ex parte Moore* at p 488A, Diplock LJ said that the rules of natural justice which the deputy commissioner had to observe could be reduced to two, of which the second was that, if a hearing was requested, he must fairly listen to the contentions of all persons who were entitled to be represented at the hearing. At p 490C–F he went on to F say this: 'Where, however, there is a hearing, whether requested or not, the second rule requires the deputy commissioner (a) to consider such "evidence" relevant to the question to be decided as any person entitled to be represented wishes to put before him; (b) to inform every person represented of any "evidence" which the deputy commissioner proposes to take into consideration, whether such "evidence" be proferred by another person represented at the G hearing, or is discovered by the deputy commissioner as a result of his own investigation; (c) to allow each person represented to comment upon any such "evidence" and, where the "evidence" given orally by witnesses, to put questions to those witnesses; and (d) to allow each person represented to address argument to him on the whole of the case. This in the context of the Act and the regulations fulfils the requirement of the second rule of natural justice to listen fairly to all H sides.'

Counsel submitted that the requirement mentioned in head (c) of this passage to allow each person represented 'to put questions to those witnesses' was satisfied in this case, because the justice said that she was willing to allow questions to be put through her to the witnesses. But I understand the requirement which was being described here by Lord Diplock as being to allow I each person to put his own questions to the witnesses, by questioning the

witness himself directly, not putting questions through the deputy commissioner or any other intermediary. In my opinion this passage provides strong support for the view that the justice was obliged in the present case to allow the petitioner's counsel to put questions to the second respondents' witnesses — that is, to cross examine them on their evidence.

In *R v Board of Visitors of Hull Prison, ex parte St Germain (No 2)* it was held that the board of visitors were not bound by the technical rules of evidence, but that the admission by them of hearsay evidence was subject to the overriding obligation to provide the accused with a fair hearing. Geoffrey Lane LJ said at p. 1409F that, depending upon the nature of the evidence and the particular circumstances of the case, the sufficient opportunity to deal with the hearsay evidence might well involve the cross examination of the witness whose evidence was initially before the board in the form of hearsay. I do not see this case or the other cases to which we were referred as indicating that there is a presumption that cross examination should be allowed, as junior counsel for the petitioner suggested. But in my opinion they show that a failure to allow cross examination may amount to a failure to give a fair hearing to a party who wishes to challenge the evidence on which the other party seeks to rely.

Counsel for the second and third respondents also sought to find support for their argument in *R v Cornwall Quarter Sessions, ex parte Kerley*. In that case a justice of the peace condemned a carcase of meat as unfit for human consumption and ordered it to be destroyed under sec 10 of the Food and Drugs Act 1938. It was held that there was no appeal against his decision, as he was not sitting as a court of summary jurisdiction but was acting in an executive capacity. Lord Goddard CJ at p 910 gave various reasons for the view that a justice sitting alone was acting administratively and not as a court. Donovan J at p 911 said that the mere fact that there was a dispute and that witnesses might be called and heard did not show that the proceeding was judicial or that there was a *lis* between the parties. Counsel submitted that there was a close analogy between that case and the present one, because there was no material difference between the provisions of sec 10 of the Food and Drugs Act 1938 and sec 9 of the 1990 Act which applies in this case. No issue was raised there as to whether the justice should have permitted the cross examination of witnesses. The case was cited in order to illustrate the nature of the jurisdiction which the justice in the present case was being called upon to exercise.

The provisions of sec 10(2) of the 1938 Act have been re-enacted in sec 9(5)(a) of the 1990 Act, which also provides that the person in whose possession the food was found is entitled to be heard and to call witnesses. The words 'on the basis of such evidence as he considers appropriate in the circumstances' which appear now in sec 9(6), are not to be found in sec 10(3) of the 1938 Act. I do not think that this is an important difference, because in a case where there is a right to call witnesses it must follow that the justice should have regard to the evidence given by those witnesses. But I agree with the Lord Ordinary that the situation which was described in that case was very different from the situation which arose here. The question whether the cheese in this case failed to comply with food safety requirements was not one which could be decided in a summary manner simply by examining it, as in the case of rotten meat or bad fish. Nor does it seem appropriate, in Scotland at least, to attach the same significance to the fact that the justice was acting alone as Lord Goddard saw in that case when he held that the justice was acting administratively. Section 2(2) of the

A District Courts (Scotland) Act 1975 provides that the jurisdiction and powers of the district court shall be exercisable by one or more justices, so the fact that the justice was acting alone here does not of itself point to the conclusion that she was acting otherwise than in a judicial or quasi-judicial capacity.

In *R v Birmingham City Justices, ex parte Chris Foreign Foods (Wholesalers) Ltd* of the Food and Drugs Act 1955, although acting in an administrative or executive B capacity, was obliged to act fairly and impartially. James J said at p 1434C that the exercise of that duty should be seen to be carried out openly, impartially and with fairness. This echoes Donovan' J's observation in *Kerley* at p 911 that the justice has to bring qualities of impartiality and fairness to bear upon the problem. While these *dicta* are helpful to the petitioner, it seems to me that neither of these cases has a direct bearing on the point which is at issue here. C They do not address the crucial question which is whether the refusal to allow cross examination was a breach of the duty to act fairly.

In the present case the prejudice which resulted from the refusal to allow cross examination is self evident. There was a difference of opinion between experts on points which were crucial to a sound determination of the questions which the justice had to decide. The result of her refusal to allow cross examination was that the evidence of the second respondents' witnesses could D not be challenged in the only manner which was likely to be effective in a case of such difficulty. So I consider that the Lord Ordinary was well founded in his decision that by refusing to allow cross examination in these circumstances the justice disabled herself from reaching a fully informed conclusion upon the evidence. This amounted to a denial of natural justice to the petitioner, as her duty to act fairly in this case required her to permit cross examination of the E second respondents' witnesses.

The answer to that question must in the end depend upon the circumstances. In my opinion it is clear from the facts in this case that the justice could not decide whether the cheese failed to comply with food safety requirements without examining the evidence of the expert witnesses. We were not referred in detail to their evidence, but the documents which were shown to us indicate F that important questions were raised by the petitioner's expert about the reliability of the evidence of the second respondents' witnesses. The nature of these questions was such that they could not be answered without a detailed study and understanding of the witnesses' evidence. Counsel for the second and third respondents submitted that the point which was being made by these witnesses was a simple one. There were no statutory guidelines, but they said G that the matter could be decided by the application of the PHLS Guidelines which did not give rise to any questions of difficulty. But the application of those guidelines to this case was disputed, and the justice could not decide that issue fairly between the parties without examining the detail of their evidence.

In a case of this difficulty there was an obvious risk of unfairness if the second respondents' witnesses were not open to cross examination on the detail of H their evidence. There was a risk that defects in that evidence would lie undetected, and that the justice would not be informed about the issues which she had to decide. It is no answer to this point to say that she put both parties on an equal footing by denying to both of them the opportunity of cross examining each other's witnesses. Nor is it an answer to say that the public have an interest in food safety. The consequences for the petitioner and his I business were likely to be very serious if the case went against him, and he had

a right under the statute to attend and to call witnesses. The issues which the petitioner's representative wished to raise in cross examination were issues on which the petitioner wished to be heard. These were issues which he wished to raise by way of challenge to the evidence of the second respondents' expert witnesses. The unfairness to him lay in the denial to him of the opportunity of opening up these issues by putting questions about them directly to the second respondents' expert witnesses.

Counsel for the second and third respondents also submitted that, in order to plead a successful case on an alleged breach of the rules of natural justice, a petitioner had to aver prejudice and that as there were no averments of prejudice in this case the petitioner's averments were irrelevant. This submission appeared to be based on a statement in the rubric in *Cigaro Ltd v City of Glasgow District Licensng Board* at p 105 that it was observed in that case that 'a breach of the rules of natural justice cannot relevantly be averred in the absence of averments of prejudice'. But it is clear from an examination of the opinion at p 112 that this part of the rubric found in *The Scots Law Times* report of the case at 1983 SLT p 553 is inaccurate. Lord President Emslie's observations were directed to the averments in that case only, which he described as speculative. He did not say that an averment of prejudice was required in all cases where a breach of the rules of natural justice was alleged. In *Barrs v British Wool Marketing Board* at p 82 Lord President Clyde said that the question was whether the tribunal had dealt fairly and equally with the parties before it in arriving at its result. It was sufficient in that case that the conduct of the proceedings was at variance with the principles of natural justice, and there was no discussion as to whether the result of that unfairness had been to create prejudice. In most cases it can be assumed that prejudice will result from a failure in the duty to act fairly.

That is sufficient for the decision in this reclaiming motion. Although the Lord Ordinary went on to examine the question whether the justice was under a duty to give reasons and made observations about the desirability of the issue in this case being considered by a sheriff rather than a justice, I do not find it necessary to express any opinion on these matters in this case.

For these reasons I would refuse this reclaiming motion and adhere to the interlocutor of the Lord Ordinary.

LORD ALLANBRIDGE—I have read the opinion of your Lordship in the chair and, for the reasons stated therein, I agree this reclaiming motion should be refused.

LORD CLYDE—The petitioner seeks judicial review of a decision by a justice of the peace dated 3 March 1995 made under sec 9(6) of the Food Safety Act 1990 to the effect that certain batches of cheese manufactured by the petitioner were unfit for human consumption and should be disposed of or destroyed. The decision was issued following on a hearing attended by representatives of the local food authority and of the petitioner. The principal ground of challenge is set out in art 12 of the petition in these terms: 'The first respondent was obliged to have regard to the principles of natural justice in regulating the procedure to be followed at the hearing. In particular she was obliged to allow both parties to be heard, and, as such, to allow both parties to cross examine witnesses called by the other.'

The Lord Ordinary has held that the refusal to allow cross examination was a denial of natural justice and has reduced the decision. The food authority,

A along with the officer authorised by them who had required the cheese to be dealt with by a justice of the peace under the provisions of sec 9 of the Act, have reclaimed against the Lord Ordinary's interlocutor.

It was argued on behalf of the reclaimers that the petitioner's formulation of his challenge was misconceived because the only duty on the justice was to act fairly and that that duty was in some way different from the duty to observe B the principles of natural justice. But that is a fallacious approach. The observation made by Lord Morris of Borth-y-Gest in the case of *Furnell v Whangarei High Schools Board* at p 679 seems to me entirely applicable to the present case. His Lordship there said: 'Natural justice is but fairness writ large and juridically. It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But ... the requirements of natural C justice must depend on the circumstances of each particular case and the subject matter under consideration.'

As I understand it the term 'natural justice' is used where attention is to be directed to those aspects of fairness which apply to what may be described as the constitutional and procedural aspects of the task of decision making. The term 'fairness' may be particularly appropriate where the issue is further D removed from what may reasonably be called a justiciable question (*McInnes v Onslow-Fane* at p 1530). The cross examination of witnesses is a matter falling within the procedural aspects of the decision making and the petitioner was in my view correct in focusing attention on matters of natural justice and not simply raising the point as one of fairness.

The excerpt from the speech of Lord Morris of Borth-y-Gest which I have just quoted is also relevant to another distinction which the reclaimers sought to E raise and found upon before us, namely a distinction between administrative and judicial or quasi-judicial decisions. The purpose of this argument was to enable the proposition to be advanced that any right to cross examination would belong to judicial or quasi-judicial proceedings and not to administrative proceedings, that the proceedings in question in the present case were administrative in character and accordingly that no right to cross examination F should arise in the present case. The first leg of this argument relates in part to the alleged distinction between fairness and the principles of natural justice, but just as those labels are useful in particular contexts to focus attention on particular areas of inquiry but may not be determinative, so also the categorisation of functions as administrative or judicial or quasi-judicial, while often useful as an element in the decision whether particular acts or omissions G were or were not lawful as falling or not falling within the scope of what in the circumstances was required under the general principle of fairness, nevertheless should not be seen as determinative of that issue. As Sir William Wade expressed it (*Administrative Law* (7th edn), p 511) the 'judicial' fallacy was repudiated in *Ridge v Baldwin*. An approach along the lines of such categorisation was held to be unnecessary by Parker LJ in *R v Birmingham City Justices* at p 1432, and the H duty to act fairly in both administrative and judicial decisions was recognised in *Breen v Amalgamated Engineering Union*.

In arguing that the justice in the present case was acting administratively the reclaimers founded on the case of *R v Cornwall Quarter Sessions, ex parte Kerley*. In the course of his decision in that case Lord Goddard CJ observed (at p 910): 'In my opinion the justice is simply acting administratively and it is quite I impossible to say that he is acting as a court of summary jurisdiction.'

The observation was recognised as *obiter*, but in any event, in my view, even within the limits of use of the label 'administrative' which I have already acknowledged, the case does not materially assist the reclaimers. The case was dealing with procedure under sec 10 of the Food and Drugs Act 1938 which was in different terms than those of the Act of 1990. The 1938 Act applied in England and I am not confident that a useful parallel can be drawn between the work of a justice in England and the work of a justice in Scotland, particularly when, in the application of the 1990 Act to Scotland, the reference to a justice of the peace is to be taken as including reference to a sheriff and to a magistrate. As was pointed out, there are differences in the procedural provisions contained in the 1938 Act as compared with those in sec 9 of the Food and Drugs (Scotland) Act 1956 as well as those in sec 9 of the Act of 1990, but it is not easy to treat these as making the decision in *Kerley* distinguishable. Moreover the problem in *Kerley* was solely whether the decision in question was one made by a court of summary jurisdiction for the purpose of the appeal provisions contained in sec 88 of the Act of 1938 and it was in that context and for that purpose that Lord Goddard made the observation which I have quoted. I also note that the propriety of the classification in *Kerley* is questioned in de Smith's work on *Judicial Review of Administrative Action* (4th edn), p 216, fn 14. It is also to be observed that Donovan J recognised in his judgment in the *Kerley* case that even although the justice was acting in an executive capacity he still had to bring qualities of impartiality and fairness to bear upon the parties. In *R v Birmingham City Justices, ex parte Chris Foreign Foods (Wholesalers) Ltd* at p 1433, Lord Parker CJ preferred that way of referring to the matter.

The reclaimers then came to argue that the matter of a right to cross examine was a matter of discretion for the justice in the exercise of her general duty to act fairly. This was linked in argument to the proposition that she was bound only by principles of fairness and not bound by principles of natural justice. But I have already sought to displace the distinction sought to be made between these concepts. It is certainly correct that the petitioner does not present his case as a challenge to the exercise of a discretion and in the submission made on his behalf in the reclaiming motion there was no attempt to argue that the matter was one of discretion. What the respondent argued was that it was a matter of obligation on the justice in the circumstances of the case.

In my view it is evident from the authorities to which we were referred that the existence of a duty to allow cross examination in the context of a statutory hearing such as in the present instance depends upon the circumstances of the case. If there is no duty to allow it there may be circumstances where it may be allowed as a matter of discretion, and then the exercise of that discretion could be a potential matter for review. But that is not the position in the present case. Here the matter is one of a duty in the circumstances. In *Bushell v Secretary of State for the Environment* at p 97 Lord Diplock stated that a refusal to allow cross examination of a witness who had given evidence at a local inquiry was not unfair *per se*. The circumstances there were those of an inquiry attended by many parties who wished to make representations without incurring the cost of legal representation and without the ability to attend throughout the whole length of the proceedings. Lord Diplock regarded it as unfair to 'over-judicialise' such an inquiry by insisting on the observance of court procedures. He stated (at p 97E): 'Whether fairness requires an inspector to permit a person who has made statements on matters of fact or opinion, whether expert or otherwise, to

A be cross-examined by a party to the enquiry who wishes to dispute a particular statement must depend on all the circumstances'

On the other hand, as was noticed in the case of *R v Board of Visitors of Hull Prison* at p 1409, in some circumstances to deprive a party of the opportunity of cross examination would be to deprive him of a fair hearing.

In the circumstances of this case I consider that it was part of the duty of
B affording a fair hearing to the petitioner that he should have been given a right to cross examine. This was in terms of the Act a hearing before either a justice or a sheriff. The person in charge of the food, who may be liable to prosecution under the Act, is entitled under sec 9(5) to be heard and to call witnesses. The justice or sheriff may be the person who is sitting in the court before whom the alleged offender is charged. The justice or sheriff must
C proceed upon such evidence as he considers appropriate, but these words cannot be construed so as to cut across the duty to act fairly or in accordance with natural justice. I also note, although counsel were not concerned to put much weight on the point, that if an order is made it is to be at least sufficient evidence for the purpose of a criminal prosecution (sec 9(9)). The matter in the present case was not a dispute about an isolated incident affecting one
D piece of food but related to a whole brand of product. It had direct consequences of the gravest importance for the petitioner, his business and his workforce. It involved the possible destruction of his property. Furthermore, despite the attempts of counsel for the reclaimers to suggest that the issue was a simple one, it was to my mind one of considerable technical complexity calling for expert witnesses on both sides in an area where no clear guidance was available. To my mind a fair hearing in these circumstances required the
E giving of a right to cross examine the witnesses led on behalf of the food authority. As in the cases of *R v Deputy Industrial Injuries Commissioner, ex parte Moore* and *Cowe v McDougall*, so also here the duty to listen fairly to the contentions of all parties entitled to be represented at the hearing required the justice to allow the petitioner to put questions to the witnesses who gave oral evidence and in this case at least that involved the right to cross examine. The
F ground on which the justice evidently proceeded in refusing cross examination was that she considered it sufficient that the parties should 'set out their positions'. In so understanding what the purpose of the hearing was she failed to appreciate that fairness required that the respective positions of the parties should be tested by cross examination. In my view she erred in law and her decision was rightly quashed by the Lord Ordinary.

G It was suggested that the readiness of the justice in the present case to have questions asked through her was sufficient. Reference here was made to the propriety recognised in the case of *R v Board of Visitors of Hull Prison, ex parte St Germain (No 2)* of requiring questions to be channelled through the chairman where direct questioning could lead to the proceedings becoming out of control. But that situation is far removed from the situation of a cross examination of
H expert witnesses by senior counsel. In the circumstances of this case such channelling was no substitute for cross examination. It was accepted by counsel for the reclaimers that it would give the justice a freedom to decide whether or not any question should be asked and in the circumstances of this case in my view that would amount to denial of a fair hearing. While it was argued that both parties were treated equally in respect that both were denied the right to
I cross examine, the fact was that only the petitioner wished to cross examine.

The deprivation of the right for both parties thus still created an inequality between them.

It was also argued for the reclaimers that the petitioner's case was not relevant in the absence of averments of prejudice to the petitioner. This was sought to be supported by reference to the case of *Cigaro Ltd v City of Glasgow District Licensing Board*. In my view that case is not authority for the proposition that in every case a petitioner seeking judicial review must be able to aver and establish some particular prejudice beyond the fact that the decision of which he complains has been tainted by some breach of the principles of natural justice. The case of *Barrs v British Wool Marketing Board*, which was referred to in the decision in *Cigaro*, is a clear authority to the converse. In my view the decision of the Lord Ordinary was correct on this point and I agree also with his observation that the petitioner was prejudiced by the very fact of being denied the opportunity to test the strength of his opponent's experts.

The Lord Ordinary's decision proceeded solely on the ground of the refusal of cross examination. There was also argument raised before us on the question whether there was any obligation on the justice to give reasons for her decision. I do not find that matter to be a ground for the Lord Ordinary's decision. His remarks under that head only go the length of an inclination towards a view and it is inappropriate to explore that matter further. I would only add that it is not impossible in my view to read the decision letter as containing reasons in that the question before her for decision was whether the food failed to comply with safety requirements. That phrase is defined in sec 8(2) as meaning *inter alia* that it is unfit for human consumption. The justice held that the batches of cheese 'are potentially hazardous to public health and therefore unfit for human consumption'. That view lay behind the decision made under sec 9(6) that the cheese failed to comply with food safety requirements. The question remaining would be whether she was required to go further back in a chain of reasoning.

On the whole matter I agree that the reclaiming motion should be refused.

THE COURT refused the reclaiming motion.

Morton Fraser Milligan, WS — Bonar Mackenzie, WS

A

Court of Appeal

*Rex (LA (Albania)) *v* Upper Tribunal

[2023] EWCA Civ 1337

2023 Oct 16; Nov 16

B

Underhill, Dingemans, Lewis LJJ

Judicial review — Court's jurisdiction — Upper Tribunal — Application for judicial review of Upper Tribunal's refusal to grant permission to appeal against decision of First-tier Tribunal — Whether High Court having jurisdiction to determine such application — Whether statute effective to restrict scope of High Court's supervisory jurisdiction — Tribunals, Courts and Enforcement Act 2007 (c 15), 11A[1] — CPR r 52.8(2)[2]

C

The claimant, an Albanian national, entered the United Kingdom and applied for asylum. The Secretary of State refused her application. The First-tier Tribunal dismissed the claimant's appeal and the Upper Tribunal refused to grant the claimant permission to appeal against the First-tier Tribunal's decision. Since there was no right of appeal from the Upper Tribunal's refusal of permission, the claimant applied for judicial review of the refusal instead. The judge in the High Court refused to grant

D

permission to apply for judicial review on consideration of the papers, concluding that pursuant to section 11A of the Tribunals, Courts and Enforcement Act 2007 there was no jurisdiction to hear the application.

On the claimant's application for permission to appeal against the judge's decision—

Held, dismissing the application for want of jurisdiction, that section 11A of the Tribunals, Courts and Enforcement Act 2007 was effective to restrict the scope of the

E

High Court's supervisory jurisdiction, exercisable by way of judicial review, so that it did not extend to a decision by the Upper Tribunal refusing permission to appeal from a decision of the First-tier Tribunal unless one of the exceptions in section 11A(4) applied; that in order to establish that one of the exceptions in section 11A(4) applied, a party would have to show a genuinely disputable question that the exception applied rather than merely asserting that the exception applied; that, in the present case, there was no disputable question that the Upper Tribunal had acted in such a procedurally

F

defective way as amounted to a fundamental breach of the principles of natural justice, so as to fall within the exception set out in section 11A(4)(c)(ii) relied on by the claimant; and that, accordingly, the High Court had had no jurisdiction to determine the claimant's application for judicial review and the Court of Appeal had no jurisdiction to entertain the claimant's appeal from the High Court's decision (post, paras 31–38, 40–43, 46–47, 48–49, 51).

R (Oceana) v Upper Tribunal [2023] EWHC 791 (Admin) approved.

G

R (Cart) v Upper Tribunal [2012] 1 AC 663, SC(E) considered.

Per Dingemans LJ. Following the introduction of section 11A of the 2007 Act, if permission to proceed with an application for judicial review of a decision of the Upper Tribunal is refused on the papers, the High Court will not have jurisdiction to determine a renewed application for permission at an oral hearing. Rather, the correct procedural route to challenge such a decision is to apply to the Court of Appeal for permission to appeal pursuant to CPR r 52.8(2) (post, paras 28–29).

H

Quaere. Whether the exception in section 11A(4)(c)(ii) of the 2007 Act will apply in circumstances where the decision of the First-tier Tribunal is arguably

[1] Tribunals, Courts and Enforcement Act 2007, s 11A: see post, para 20.

[2] CPR r 52.8(2): see post, para 26.
R 54.7A: see post, para 27.

vitiated by fundamental procedural unfairness but the Upper Tribunal refuses permission to appeal (post, paras 50, 56).

The following cases are referred to in the judgments:

Alleyne-Forte v Attorney General of Trinidad and Tobago [1998] 1 WLR 68, PC
Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 2 WLR 163; [1969] 1 All ER 208, HL(E)
Frater v The Queen (Note) [1981] 1 WLR 1468, PC
O'Reilly v Mackman [1983] 2 AC 237; [1982] 3 WLR 1096; [1982] 3 All ER 1124, HL(E)
R (Cart) v Upper Tribunal [2009] EWHC 3052 (Admin); [2011] QB 120; [2010] 2 WLR 1012; [2010] PTSR 824; [2010] 1 All ER 908, DC; [2010] EWCA Civ 859; [2011] QB 120; [2011] 2 WLR 36; [2011] PTSR 42; [2010] 4 All ER 714, CA; [2011] UKSC 28; [2012] 1 AC 663; [2011] 3 WLR 107; [2011] PTSR 1053; [2011] 4 All ER 127, SC(E)
R (LM (Albania)) v Secretary of State for the Home Department [2022] EWCA Civ 977, CA
R (Oceana) v Upper Tribunal [2023] EWHC 791 (Admin); [2023] ACD 72
R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22; [2020] AC 491; [2019] 2 WLR 1219; [2019] 4 All ER 1, SC(E)

The following additional cases were cited in argument or referred to in the skeleton arguments:

BF (Albania) v The Secretary of State for the Home Department [2019] UKUT 93 (IAC), UT
Karanakaran v Secretary of State for the Home Department [2000] 3 All ER 449, CA
MY (Pakistan) v Secretary of State for the Home Department [2021] EWCA Civ 1615, CA
R (Joint Council for the Welfare of Immigrants) v President of the Upper Tribunal (Immigration and Asylum Chamber) [2020] EWHC 3103 (Admin); [2021] PTSR 800
R (Osborn) v Parole Board [2013] UKSC 61; [2014] AC 1115; [2013] 3 WLR 1020; [2014] 1 All ER 369, SC(E & NI)
R (WL (Congo)) v Secretary of State for the Home Department [2011] UKSC 12; [2012] 1 AC 245; [2011] 2 WLR 671; [2011] 4 All ER 1, SC(E)
TD v Secretary of State for the Home Department [2016] UKUT 92 (IAC), UT

APPLICATION for permission to appeal

On 8 November 2018 the claimant, LA, an Albanian national who had arrived in the United Kingdom the previous day, claimed asylum on the basis that she feared persecution if returned to Albania on account of her being a lesbian Muslim. On 4 March 2020 the Secretary of State refused the claim.

By a notice of appeal dated 28 September 2021 the claimant appealed. By a decision dated 12 October 2022 the First-tier Tribunal (Immigration and Asylum Chamber) ("the FTT") (FTT Judge Athwal) dismissed the appeal.

On 25 October 2022 the claimant applied for permission to appeal. On 20 December 2022 the FTT (FTT Judge Evans) refused the application. By an appellant's notice dated 3 January 2023 the claimant renewed her application for permission to appeal. By a decision dated 22 March 2023 the Upper Tribunal (Upper Tribunal Judge Sheridan) refused the application.

On 11 April 2023 the claimant applied under CPR r 54.7A for judicial review of the decision of the Upper Tribunal. On consideration of the papers, Sir Duncan Ouseley sitting as a judge of the King's Bench Division refused permission to proceed with the claim, concluding that the High

A Court had no jurisdiction to hear the claim, since section 11A of the Tribunals, Courts and Enforcement Act 2007 restricted the scope of judicial review of decisions of the Upper Tribunal in relation to permission to appeal, save in the circumstances provided for in the limited exceptions contained in section 11A(4), none of which applied in the present case.

By an appellant's notice dated 4 August 2023 the claimant applied for permission to appeal to the Court of Appeal on the grounds that Sir Duncan B Ouseley had been wrong as to the effect of section 11A of the 2007 Act and his conclusion that section 11A(4) was not engaged on the facts. The question of permission to appeal was ordered to be considered at an appeal hearing so that the question whether the court had jurisdiction to hear the appeal could be determined.

The facts are stated in the judgment of Dingemans LJ, post, paras 3–10.

C

Benjamin Hawkin (instructed by *TNA Solicitors*) for the claimant.

Jennifer Thelen (instructed by *Treasury Solicitor*) for the Secretary of State.

The Upper Tribunal was not represented.

16 November 2023. The following judgments were handed down.

D

DINGEMANS LJ

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 E 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 Underhill LJ, Vice-President of the Court of F 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 G 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 H 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 (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 para 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 (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 para 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* [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 [2011] QB 120, paras 94–100.

14 In the Court of Appeal in *Cart* [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 paras 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 of Richmond JSC 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] 2 AC 237, 278 although, as Lord Sumption pointed out in his dissenting judgment in *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 ("*Privacy International*") at para 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 JSC in para 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 JSC suggested that the Civil Procedure Rule Committee ("CPRC") might want to consider streamlining 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 r 54.7A was brought into effect. CPR r 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

Review and Courts 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 *Oceana* [2023] EWHC 791 (Admin).

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:

"47. . . . 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)."

"52. . . . 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 r 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* [2012] 1 AC 663, the CPRC had introduced CPR r 54.7A which removed the right to a renewed oral hearing in the High Court in a *Cart* judicial review. CPR r 52.8(1) and (2) gave effect to these provisions in the Court of Appeal. CPR r 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 r 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 r 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 apply for judicial review has been removed from CPR r 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 r 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 r 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 JSC in *Privacy International* [2020] AC 491. In that judgment Lord Carnwath JSC 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 "decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be 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 PSC, Lord Kerr of Tonaghmore and Lord Lloyd-Jones JJSC). The second reason given by Lord Carnwath JSC 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 PSC and Lord Kerr JSC agreed with this reason, but Lord Lloyd-Jones JSC did not express any view on the second reason, and Lord Reed DPSC, Lord Wilson JSC and Lord Sumption did not agree with either of the reasons given by Lord Carnwath JSC 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* [2011] QB 120. Lord Dyson JSC 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* [2023] EWHC 791 (Admin), 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 JSC, at para 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 Review and Courts 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 (Note)* [1981] 1 WLR 1468, 1470 and *Alleyne-Forte v Attorney General of Trinidad and Tobago* [1998] 1 WLR 68, 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 para 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 paras 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 *R (LM (Albania)) v Secretary of State for the Home Department* [2022] EWCA Civ 977 and country information in para 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.

LEWIS LJ

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 Tribunals, Courts and Enforcement Act 2007, 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 paras 40–42 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 paras 43–45 of Dingemans LJ's judgment.

50 As Underhill LJ observes at paras 53–56 of his judgment, the question of whether the exception in section 11A(4)(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(4)(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.

UNDERHILL LJ

51 I agree with Dingemans LJ's reasons for dismissing this application. It is in my view clear that section 11A of the Tribunals, Courts and Enforcement Act 2007 is indeed effective to limit the judicial review jurisdiction of the High Court to questions of the kind specified in subsection (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 v Upper Tribunal* [2023] EWHC 791 (Admin) 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.

Application dismissed for want of jurisdiction.
Permission to appeal refused.

GIOVANNI D'AVOLA, Barrister

CO/8797/2009

Neutral Citation Number: [2009] EWHC 2253 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 20 August 2009

B e f o r e:

JOHN RANDALL QC
(Sitting as a Deputy High Court Judge)

Between:
THE QUEEN ON THE APPLICATION OF GEORGE LOW
Claimant

v

INDEPENDENT ADJUDICATOR
Defendant

THE MINISTRY OF JUSTICE
Interested Party

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(Official Shorthand Writers to the Court)

Mr S Field (instructed by Messrs Parlby Calder, Plymouth) appeared on behalf of the **Claimant**
The Defendant did not appear and was not represented
Miss L Busch (instructed by Treasury Solicitors) appeared on behalf of the **Interested Party**

J U D G M E N T
(As Approved by the Court)

1. THE DEPUTY JUDGE: This is a rolled-up hearing of both permission to apply for judicial review and, if granted, a substantive judicial review pursuant to orders to that effect made by Hickinbottom J on 11th and 13th August 2009. Given the speed at which matters have progressed, which is a necessary speed given the subject matter if the court is to make an order of any practical effect, the matter has come on before me with the paperwork not in a wholly conventional and ideal form. Nevertheless I have before me, in lieu of the conventional form of summary grounds from the claimant, an opinion drafted by counsel on the claimant's behalf (counsel who did not appear in front of me today) which makes it perfectly clear what the grounds relied on are, supplemented by a helpful skeleton argument prepared very recently by Mr Field who has appeared today on behalf of the claimant. On behalf of the Interested Parties, two prison governors, I have their summary grounds with an acknowledgment of service, recently settled by Miss Busch, who does appear on behalf of the those Interested Parties, and they perfectly conveniently double as her skeleton argument.

2. The subject matter of the application is a determination by an independent adjudicator, someone who is in fact himself a District Judge, District Judge Morgan, in relation to a charge brought against Mr Low under the notice of report at page 27 of the claimant's bundle which was that he (in effect) refused a lawful order to provide a specimen of urine required of him under the mandatory drug testing programme.

3. In essence, the points made on the claimant's behalf are twofold. First, that he was subjected to procedural unfairness by the independent adjudicator by reason that the independent adjudicator took it upon himself to speak to two doctors, who were, potentially at least, providing relevant evidence for the hearing, before the hearing started and having done so then passed that fact on together with at least prima facie a conclusion which he had reached -- and I will deal with that in more detail later in my judgment -- to the claimant's then solicitor; and secondly, that the independent adjudicator declined to take into account written evidence submitted on behalf of the claimant and thereby failed to take into account a relevant matter contrary to the Wednesbury principles.

4. The adjudicator in this case has not chosen to put in an acknowledgment of service, nor any evidence, nor to appear in front of me, although from Mr Field's researches conducted very shortly over the luncheon adjournment it appears that in two previous reported cases the adjudicator has been represented before the court. Whilst that is not a matter for criticism or concern in itself, it does have a particular evidential relevance. The solicitor who represented Mr Low at the effective hearing of what I will call the charge, Ms Racheal Congdon, made quite a detailed note (headed "Advocacy Note") of the events of that day, 23rd July, at HM Prison Exeter where the relevant adjudication took place. That is verified by the statement of truth signed by a more senior colleague within her firm which forms part of the claim form. There is nothing to contradict or, as the phrase is sometimes used, "gainsay" that which is in the solicitor's advocacy note, and in those circumstances absent obvious error or particular reason to doubt the content of the note, Mr Field is perfectly entitled to put his submissions to me on the basis that the content of that note represents uncontradicted evidence and I do therefore propose to approach it on that basis.

5. Before I get on to dealing with the main points in the case, let me deal shortly with certain arguments raised by which I have not been particularly impressed. First, Mr Field has sought to persuade me that I should treat the latter part of the last sentence of paragraph 28 of counsel's opinion, which fulfills the role of the claimant's summary grounds in this case, as factual evidence, indeed for the same reasons I have just mentioned in the context of the advocacy note uncontradicted factual evidence, to the effect that one of the things that the adjudicator said to Miss Congdon, having spoken to the doctors in her absence, was that the claimant did not have a defence. I am not prepared to treat it as such. Firstly, counsel's opinion is just such, albeit that it is, by virtue of section 5 of the Claim Form, arguably within the scope of a block verification under the statement of truth in the claim form. Secondly, counsel's opinion specifies in paragraph 3 the material on which he is acting, namely "a detailed attendance note from my instructing solicitors of the hearing before the independent adjudicator together with other documents." There is nothing in the opinion to indicate that he has obtained additional factual instructions by conference, whether in person or over the telephone, and there is no reason to believe that there are documents which would materially assist the claimant which his solicitors have failed to put before me. In those circumstances I construe paragraph 28, and in particular the passage in the last sentence thereof, as simply counsel seeking to summarise the import of material which is contained within those documents, and which in particular includes the word "inaccurate", to which again I shall come later in my judgment.

6. Second, I am not impressed by the submission that the proceedings in front of the adjudicator were flawed in that because the reporting officer was apparently not called to give evidence, and because therefore no formal evidence proving the lawful order was made in the first place, and the claimant entitled to be, as it were, acquitted for want of proof of one of the most basic elements of charge. First, the note made by the Adjudicator, though not easy to decipher in full, does appear to me to indicate (and I am referring here to the first two lines under the date 23rd July 2009) that the "officer's statement not in dispute". It is hard to be entirely confident that the last word in the quotation is indeed "dispute", but I am reinforced in that view by the fact that the proceedings, at which the claimant was legally represented, were thereafter conducted in exactly the manner one would expect if that was the case. The point has not previously been raised - that is no criticism of Mr Field's ingenuity in raising it now - but I do not feel able on this evidence to act on a basis otherwise than that the proceedings went ahead on the basis that the formal evidence of the lawful order was not required because the officer's statement was not in dispute. In my judgment it would be unsafe to do so.

7. I turn to the first of the two central points in the case. I will quote directly from Miss Congdon's uncontradicted note of events on 23rd July:

> "Prior to entering the hearing and on my initial attendance at the prison, te [IA] called me into the hearing room to provide me with some information.
>
> The [IA] stated that on his arrival at the prison, on 23.07.09, he had spoken to the Prison Doctor, Dr Duncalf and Dr Turner, who had

provided information to him about Mr Low's medication.

> Judge Morgan informed me that the letter that had been provided by the Healthcare Department was inaccurate and that the Locum Doctor should not have provided this information. I stated that I would require the Doctor's attendance - either Dr Duncalf or Dr Turner to provide these details within the hearing and explain why this inaccurate information was provided."

8. Miss Busch, who appeared today on behalf of the Interested Parties, in carefully judged and attractively presented submissions, readily accepted that such a meeting between the independent adjudicator and persons who were at least potentially witnesses for the hearing before him should not have taken place. Faced with that difficulty her submission is that nevertheless the problem was rectified. She puts that on two bases. First, that the adjudicator told the claimant's solicitor that he had done this; and secondly, that the hearing did proceed with what the claimant's solicitor then expressed herself as wanting to happen, namely that one of the doctors would give evidence and be cross-examined -- in the event that was Dr Duncalf.

9. In my judgment those actions, though they may somewhat have alleviated the seriousness of what had happened, did not and could not rectify the position. The dangers which flow from any form of judicial officer, including an independent adjudicator working in the Prison Service, albeit with his in a sense "acquisitorial" role, speaking to witnesses in advance of the hearing is obvious. It raises at least the risk that the adjudicator's mind will be affected on a relevant issue by what has happened before the hearing has started, and equally the risk that something he says to the prospective witness may influence the witness in his or her view of the matter. Secondly, and very importantly, it deprives the claimant of the opportunity for him or his representative to take part in the process of testing the evidence. That is indeed what happened here, because the passage from the note I have already quoted twice uses the word "inaccurate" to describe the short form of letter provided by Dr Turner. Faced with this difficulty Miss Busch is driven to submit that I should be cautious before treating the note made by Ms Congdon, and verified by a senior colleague, as accurate in the sense that a complete contemporaneous transcript is accurate. But there is nothing in the passage I have read which is remotely in the nature of an obvious error. The word "inaccurate" appears twice, three lines apart, and, as I have already indicated, this is uncontradicted by evidence from the adjudicator who one might have thought, given the seriousness of the grounds of complaint raised in support of this application, would have been very anxious to correct any misrepresentation of what he did or said in these unfortunate circumstances. So, not only does one have here the obvious risks and the appearance that the procedure has not been properly followed and, as the phrase goes, justice has not been seen to be done, but there is real evidential material indicating that that risk did at least in part come to pass.

10. In those circumstances, it was in my judgment impossible for Ms Congdon to cause the matter to be put right by taking the point at that stage, in any sense other than either causing the independent adjudicator of his own volition to cancel the hearing and arrange for it to take place in front of someone else or possibly, as was canvassed in

argument before me, offering to recuse himself leaving the claimant with his representative's advice, with a choice in the matter. But nothing short of that would in my judgment have rectified the position here. With the wisdom of hindsight and the opportunity for cool reflection afforded by reading these papers in advance and sitting here with the benefit of counsel's carefully formulated submissions, one could say that it was possibly unwise on Ms Congdon's part to make the suggestion that the calling of one of the doctors would have sufficed. But, as I have said in argument, it is not like the position, for example, where a judge concludes his summing-up omitting something that clearly needs to be dealt with, where a timely reminder from the legal representatives present could enable him or her to put matters right. The damage was done and very wisely Miss Busch did not put her submissions on the basis that the fact that the legal representative carried on was of itself decisive; rather she said that it was part of the overall picture of what then happened which rectified the difficulty.

11. In circumstances such as this, where the short note provided by Dr Turner was clearly going to be a very important part of the prisoner's defence to the charge, this procedural irregularity was a serious one. It amounted to a procedural unfairness. It was not one capable of being rectified in the manner Miss Busch submitted, and is not one which has been effectively waived by the claimant's conduct or the conduct of the claimant's lawyer such that the point is not now available to him. I will come back in a few minutes' time to whether or not the court could proceed on the basis that none of this can possibly have made any difference to the outcome.

12. By way of postscript to this part of the judgment, I should note for completeness that Dr Turner in fact provided a note in slightly different terms on two separate occasions. On at least the second of the two the uncontradicted evidence is that he was aware that it was going to be produced at an adjudication hearing. Quite why the independent adjudicator referred to it as "inaccurate" in his first conversation with Ms Congdon on 23rd July is far from clear. Miss Busch did her best to assist me in this regard, whilst constrained (as we all were) by the absence of evidence. I note the curiosity that on the one hand it would appear that Dr Duncalf and/or the adjudicator formed the view that Dr Turner should never have provided such a document for the prisoner (a view which I find hard to understand), and that there is the evidence of the use of word "inaccurate" which I have already mentioned, but on the other hand it is quite clear from Dr Duncalf's evidence, which clearly impressed and was accepted by the independent adjudicator, that on Dr Duncalf's understanding of the word "difficulty" in the context of it being "difficult ... to pass urine", either as one document said "difficult to pass urine on occasions" or, as the other said, "difficult to pass urine easily", in fact Dr Turner's view could reasonably be argued to be entirely consistent with Dr Duncalf's. The point cannot be taken any further on the evidence that is available to the court.

13. I turn to the second main point in the case. The claimant sought to rely on evidence in written form from his then current cell mate, Mr Gamble, which we have at page 44 of the claimant's bundle. It describes in, it might be said relatively robust terms, the manner in which the claimant, with whom he had shared a cell for a month when he wrote on 16th July, passed urine. It is clear from this letter that this must have been a matter of no little embarrassment to the claimant, as his cell mate himself describes the manner in which he had urinated as having to sit on the toilet "as a female would do,

since this is the only way I believe he can pass urine". He goes on to describe the long periods of time in which he (the author) had to wait whilst his cell mate was occupying the seat of the toilet waiting himself to pass urine. This was either the most elaborate piece of long-term play acting on the part of Mr Low or it was evidence plainly capable of being relevant to the question which the independent adjudicator had to address -- and I will come back to that in a few moments. The claimant's uncontradicted evidence is that the adjudicator indicated that he "did not wish to consider" that evidence - see page 38 of the claimant's bundle.

14. Miss Busch acknowledges that that appears to be a somewhat remarkable thing for the adjudicator to have said, but she then seeks to turn adversity into advantage by relying on its very improbability and submitting that it is so unlikely that the independent adjudicator said such a thing that it is most unlikely to be right. She seeks in her forensic extremity to rely on a passage in the adjudicator's handwritten note of the evidence of Mr Low as indicating to the contrary. The relevant passage reads, as best I can tell from the manuscript, as follows, and as is common ground is, at least in general, the independent adjudicator's manuscript note of the evidence as he heard it. So this is in a sense the claimant talking:

> "I went to him [ie Dr Turner] on 20/7 as I lost letter. He gave me second letter. Still have problem (cell mate confirms his statement). On 20/7 no examination just wrote letter."

First, the question arises as to whether the words in parentheses are, as it were, a note by the adjudicator to himself as to the state of the evidence interposed within the evidence of Mr Low, or whether it is a note of an observation in the nature of an aside made by Mr Low during his evidence. For what it is worth the latter strikes me as by far the greater probability. However, Miss Busch puts her submission on this basis: whichever it is, I can on the basis of this note reject the suggestion from the solicitor's advocacy note that the adjudicator said that he did not wish to consider this letter. I am quite unable to accept that. If the position is that the claimant's evidence seriously mis-stated what the adjudicator in fact said at the hearing, he has had the opportunity to refute it and has not chosen to do so. I do not find the contents of the note which I have just quoted anything like sufficient to enable me to reject the otherwise uncontradicted evidence of the claimant's solicitor. Miss Busch wisely, in my judgment, retracted her initial submission that Mr Gamble's written evidence could not have made any difference, and confined herself to the submission that I should on the evidence conclude that the adjudicator did take it into account and did give some weight to it. For the reasons I have just given I am unable to accept that submission.

15. There then is to be noted what the question which the adjudicator should have focused on in fact was. There having been no dispute as to whether a lawful order was given, the question was whether the claimant "refused" that order. It is of course common ground between the parties that a prisoner can refuse a lawful order without ever uttering the word "refused" or another word to that effect. As a lawyer might put it, one can have a constructive refusal through conduct. The question can be reduced to a simple statement, as Miss Busch put it: the question is whether he could not or whether he would not produce the required minimum volume of urine on one expurgation,

which we see from the relevant rules meant a minimum of 35 millilitres. Whilst the medical evidence was clearly capable of being relevant to that issue, the question for the independent adjudicator was not directly whether or not the prisoner was incapacitated from producing the requisite amount of urine by virtue of the drug which all agree he was taking at the time. From the notes there are at least grounds for concern as to whether the adjudicator was correctly focusing on the issue of refusal as opposed to whether or not the non-production by the prisoner Mr Low was explicable on medical grounds, which is not quite the same question.

16. That leaves me then, as I mentioned a few minutes ago, with the question of whether or not the difficulties with the decision of the adjudicator, which I have mentioned, can be said not to have made any real difference in any event. Miss Busch carefully took me through a significant part of the adjudicator's notes of the evidence of Dr Duncalf by which the adjudicator was clearly impressed.

17. The evidence of Dr Duncalf was in the nature of his expert opinion, not informed by any form of examination of the claimant, as to what the likely extent of urinary side effects of Fluoxetine were and were not. In essence his view was that a prisoner using Fluoxetine (or perhaps he would say a patient using Fluoxetine) might find it more difficult to pass urine, in other words this male patient would have to strain to pass urine more than normal, but would not be such that a prisoner or patient would be unable, with or without straining, to pass urine at all.

18. There is unchallenged evidence that Mr Low drank all the water that he was asked or required to drink during the four hours during which he says he attempted to provide this specimen. He did provide a specimen of urine on at least one occasion but it was not of the necessary minimum quantity, and in accordance with the Prison Standing Orders topping up to the minimum quantity by two or more expurgations was not acceptable so the specimen that he provided had to be rejected on that ground.

19. It seems from the notes of evidence that he was told that it was not possible for him to sit down to provide his specimen. Miss Busch says that may be a reflection of the fact that the room in which the Prison Service at Exeter preferred to obtain its specimens is equipped with something in the nature of a urinal but is not equipped with a conventional water closet on which one can sit down. Be that as it may, that cannot be held against the prisoner for the purpose of it being inferred that the prisoner is wilfully not providing the requisite specimen, as opposed to trying but not succeeding. Reference to the evidence not only of the prisoner himself but also, again, of his then current cell mate indicates that it was, over a period of at least a month, his normal practice to have to sit down, and to have to sit down for a long time, in order to be able to pass urine.

20. In that combination of circumstances, I cannot begin to say that it is clear that the result of this particular adjudication would have been the same even if the serious procedural impropriety at the outset had not occurred and even if the written evidence of Mr Gamble had been taken into account. In those circumstances, permission will be granted and this decision will be quashed.

21. I will now hear from counsel further -- I have already warned them that this situation could arise -- as to what further relief is appropriate, given that but for the extra days given upon the adjudication which is the subject of these proceedings, my understanding is that Mr Low would by now have passed his release date and even with the extra days that release is not far away in any event. Shall I hear from Miss Busch first?

22. MISS BUSCH: My Lord, I did take instructions on that point yesterday and my instructions were that we would not want or request it to be sent back for reconsideration, rather he should simply be released from prison. So it should be fairly straightforward.

23. THE DEPUTY JUDGE: Turning that into a form of order, if the order records the decision to quash, and if it then recites you telling me on behalf of the Interested Parties that the Interested Parties did not wish to seek a re-hearing, and then I make no further order? I am just trying to tie it up in whatever way is clear on the face of the document and does not misrepresent anybody's position.

24. MISS BUSCH: May I take instructions?

25. THE DEPUTY JUDGE: Please do.

26. MISS BUSCH: That causes us no difficulty. I would suggest the decision perhaps should record the fact that we will not be seeking a re-hearing and Mr Low will be free to go.

27. THE DEPUTY JUDGE: Yes. I do not think technically it is for me to release him, is it? The order will record your appearance. I think the order should specifically record the non-appearance and absence of any acknowledgment of service from the defendant in the initial recitals, then it will record obviously that I have heard from you and received the documents that have been lodged with the court, it will then record that having heard you I grant permission and order that the decision of the adjudicator be quashed, and then upon counsel for the Independent Parties informing the court -- and you can agree the wording between yourselves, but effectively they do not wish to proceed with any re-hearing of the complaint/notice -- what is the term they use? Report. On report is what they call it. Does not wish to proceed any further with the report.

28. MISS BUSCH: Yes. I have to say it certainly occurs to me that it is not really a matter for us. It is, I imagine, a matter for the defendant.

29. THE DEPUTY JUDGE: I do not think that is right. The report is from the prison officer, is it not? The adjudicator determines it, so if you do not ask him to come back there is nothing for him to determine. So not wishing to proceed further with the report, subject to these proceedings, or some phrase like that, no further order, save -- now are there any matters --

30. MR FIELD: Could I invite my Lord, if we are to draft it I would ask that my Lord approves this. That where it says the decision be quashed, that that be more specific. It

is the finding of guilt and the imposition of additional days be quashed. That will effectively be faxed back to the prison and then, subject to anything else--

31. THE DEPUTY JUDGE: The determination.

32. MR FIELD: The finding of guilt is quashed and the sentence is quashed. What the claimant would not like to see is an ambiguous fax -- not ambiguous in this room but construed as ambiguous by the receiving prison.

33. THE DEPUTY JUDGE: On the face of it the determination of -- let me just look at the claim form. Box 3.

34. MR FIELD: There is no draft order attached. Quashing the finding of guilt and Mr Low's immediate release.

35. THE DEPUTY JUDGE: I am not going to order his immediate release unless you persuade me that there is some particular ground for me to do it, because that depends on me knowing what else has been going on and all the rest of it. But I understand that that is the very probable effect of this. As a matter of caution, Miss Busch, the suggestion is that rather than using one composite term such as the determination of the adjudicator on 23rd July, which is what I had in mind, for the avoidance of doubt we specify both the finding of guilt and the -- is the word sentence appropriate?

36. MR FIELD: It is used but the imposition of additional days be quashed.

37. MISS BUSCH: My Lord, this is completely unnecessary.

38. THE DEPUTY JUDGE: The determination of the independent adjudicator dated 23rd July must surely --

39. MR FIELD: Providing he is released.

40. THE DEPUTY JUDGE: I think the word "determination" is going to cover both aspects of it and it becomes bulky otherwise. So I would say the determination of the independent adjudicator -- it can be his determination of the report made on 23rd July. His decision was given the same day, that is clear from the papers, that will sufficiently record that fact, that will be quashed and the determination having been quashed then the order can be completed in the manner I indicate, subject to the question of costs. First, you need a public funding certificate.

41. MR FIELD: One may not have been lodged. In any event--

42. THE DEPUTY JUDGE: I am certainly aware of it because I know the date because Hickinbottom J was slightly surprised how long it took.

43. MR FIELD: Yes.

44. THE DEPUTY JUDGE: So we know there is one in existence. So you want a detailed assessment of your costs under that certificate in any event, do you not?

45. MR FIELD: I am not sure I need it. If my Lord gives the claimant an order for costs, I believe to some extent that supercedes a public funding certificate.

46. THE DEPUTY JUDGE: You mean an adversarial order against the Interested Parties?

47. MR FIELD: Yes. Well, against the defendant.

48. THE DEPUTY JUDGE: Against the absent defendant?

49. MR FIELD: That is the usual order.

50. THE DEPUTY JUDGE: I am not familiar with what the "usual order" is. It is not particularly usual for the defendant not to be here, not to put in an acknowledgment of service, etcetera, etcetera.

51. MR FIELD: The defendant could argue why should he have to pay costs because he did not even oppose it and the only reason I was here for so long today was because my learned friend turned up.

52. THE DEPUTY JUDGE: I was wondering about that. You could say that the defendant could, as it were, have publicly fallen on his sword, put in an acknowledgment of service, said "terribly sorry this application is unopposed" and then it could have been one of my two pronouncements tomorrow morning. So the defendant's total silence could still be said to have made this hearing necessary.

53. MR FIELD: Yes, then the defendant might argue that it was the Interested Parties' intervention that led to however much cost were incurred today by having to argue.

54. THE DEPUTY JUDGE: But you do not want only your costs of this hearing, you want the costs of preparing your documents and that would have happened anyway before the defendant decided whether to oppose it or not.

55. MR FIELD: It is a matter of indifference to the claimant in the sense that one public purse--

56. THE DEPUTY JUDGE: Unhappily, as so often occurs in this court, that is in fact the position. So you have done the right thing by the Community Legal Service by asking for an adversarial order. I am thinking about the defendant's position. Miss Busch, what do you want to say about that?

57. MISS BUSCH: My Lord, I am told normally we would just carry the brunt of it, as it were, on the basis that we--

58. THE DEPUTY JUDGE: In effect you have done that which can be done for the defendant to be -- so you would not object to a "usual" adversarial order being directly visited on you to cut the complexities out of it. Is that what you are saying? Or are you saying you just want to be left alone?

59. MISS BUSCH: My Lord, in an ideal world we would prefer not to have to pay costs, but if anyone is--

60. THE DEPUTY JUDGE: If anyone is going to be ordered to pay the costs it might as well be you because probably the adjudicator is entitled to an indemnity from you anyway, I imagine.

61. MISS BUSCH: It is all public money.

62. THE DEPUTY JUDGE: I know. Mr Field, you are content, because there is some attraction in saving public money this way, you are content, are you, if I simply order the costs of this application to be paid to the claimant by the Interested Parties to be subject to detailed assessment if not agreed? You will not then ask for a public funding assessment, so only one exercise will be done?

63. MR FIELD: My Lord, yes.

64. THE DEPUTY JUDGE: I suppose looking at the matter in the round the public purse cannot be saved any more money than doing it that way. Thank you both for your realistic approach to this. As to costs I will simply order that the costs of and occasioned by this application be paid by the Interested Parties to the claimant, to be the subject of a detailed assessment if not agreed.