HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 6

on appeal from:[2008]EWCA Civ14

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Z T (Kosovo) (Respondent) *v* Secretary of State for the Home Department (Appellant)

Appellate Committee

Lord Phillips of Worth Matravers
Lord Hope of Craighead
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

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(Instructed by Treasury Solicitors)

Respondent:
Satvinder Juss

(Instructed by Riaz Khan & Co)

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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

1. Section 94 of the Nationality, Immigration and Asylum Act 2002 ('section 94') makes provision for the Secretary of State, on refusing an appeal in an asylum claim or a human rights claim or both, to certify that the claim or claims is or are clearly unfounded. The effect of so certifying is that the claimant is precluded from bringing an appeal to the Asylum and Immigration Tribunal ('the AIT') against the Secretary of State's decision from within the United Kingdom. This appeal raises the following issues of procedure: (1) Where the Secretary of State has so certified, how should she approach the consideration of further submissions made by the claimant from within the jurisdiction? (2) How should the court, in proceedings for judicial review, approach the decision made by the Secretary of State in relation to those further submissions?

The initial claim

2. The respondent, ZT, is a Kosovar Ashkali, which is a sub-group of the Roma. arrived clandestinely in the United Kingdom from Kosovo, which was then part of Serbia, on 14 August 2003. He claimed asylum and protection on Human Rights grounds from being sent back to Kosovo. The grounds of his claim were as follows. The Roma constitute a minority that is widely subjected to persecution in Eastern Europe, including Serbia. Some 17 years earlier ZT had married a lady who was not of his ethnicity. He concealed his ethnicity from her for three years, and from her family until 2002, when they discovered that he was not Albanian, but Ashkali. His wife's brothers then attacked him and beat

him up and took his wife and children away from him. They, however, managed to follow him to England. His fear was that if he returned to Kosovo, his wife's brothers would find him and that this time they would kill him.

3. The decision of the Secretary of State was set out in a lengthy letter dated 2 December 2005 by a member of the Asylum Casework Directorate on behalf of the Secretary of State. Her first conclusion was that the authorities in Kosovo would afford ZT sufficient protection from attack from his wife's family, if he sought that protection. In any event, however, if he was fearful of attack from his wife's family, he and his family could go to live in some other part of Kosovo and could reasonably be expected to do so. There was nothing about ZT's appearance or his speech that would lead anyone, who was not aware of his ethnicity, to suspect that he was other than an Albanian.

4. The letter certified pursuant to section 94 that ZT's claims were clearly unfounded. But for that certification ZT would, pursuant to section 92 of the 2002 Act, have enjoyed a right of appeal to the AIT under section 82 of that Act from within the United Kingdom ('an in country appeal'). The effect of the certification was that ZT could only exercise a right of appeal to the AIT once he had left the jurisdiction ('an out of country appeal'). Under the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230) notice of an in country appeal has to be given within 5 days of receiving notice of the decision to be appealed against if the appellant is detained and within 10 days if he is not (Rule 7(1)). Time for giving an out of country appeal for someone in the position of ZT does not begin to run until he leaves the United Kingdom. Notice of appeal has to be given within 28 days of leaving the United Kingdom (Rule 7(2)).

Further submissions

5. Despite the certification by the Secretary of State, ZT lodged an appeal with the AIT. The AIT struck out that appeal on 9 January 2006. On 20 January 2006 ZT made further submissions to the Secretary of State on asylum and human rights grounds, accompanied by some additional material. On 11 May 2006 an official from the Enforcement & Removals Directorate wrote on behalf of the Secretary of State rejecting the further submissions and stating that the certification of the claims as clearly unfounded was maintained.

6. By this time ZT had lodged an application to seek judicial review – on 5 April 2006. This challenged the Secretary of State's certification of ZT's claims. On 19 June 2006 McCombe J refused permission on the papers. On 23 August 2006 ZT lodged a supplementary bundle in the judicial review proceedings. The Secretary of State gave consideration to these as further representations and, in a letter from the same officer of the Enforcement & Removals Directorate dated 2 November 2006, once again rejected the further representations and maintained the certification.

7. On 7 November 2006 Collins J received oral submissions in support of the application for permission to seek judicial review. The only ground advanced for challenging the Secretary of State's decision was that it was not one that he could properly have reached on the evidence. Collins J. did not accept this and refused the permission sought.

Permission to appeal

8. ZT applied for permission to appeal against the decision of Collins J. On 19 January 2007 Sir Henry Brooke granted permission on the papers. He did so on the ground that a decision of the Court of Appeal delivered after Collins J's decision suggested that the approach that had been adopted by the Secretary of State had been erroneous. That decision was *WM (DRC) v Secretary of State for the Home Department* and *Secretary of State for the Home Department v AR (Afghanistan).* [2006] EWCA Civ 1495; [2007] Imm AR 337. Those appeals had related to refused asylum applications in cases in which the Secretary of State had not issued certificates under section 94 of the 2002 Act. No appeals had been made to the AIT and the time for making such appeals had expired. Further representations with fresh evidence had then been made to the Secretary of State. The Secretary of State had, quite correctly, treated those further representations as being covered by rule 353 of the Immigration Rules (HC 395) ('rule 353').

9. Rule 353 in its present form dates from October 2004. It provides:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim

> is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas.
>
> 353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.
>
> This paragraph does not apply to submissions made overseas."

10. The Secretary of State was concerned at the basis upon which Sir Henry Brooke had granted permission to appeal. This was because she did not consider that rule 353 had had any application in ZT's case. She further considered that it was important that it should be clearly established that this was the position. Accordingly she took the unusual step of applying to set aside the grant of permission to appeal. The Court of Appeal held that it was not an appropriate case to set aside the order of Sir Henry Brooke, although it would be open to the Secretary of State to pursue her challenge to the application of rule 353. The Court of Appeal would itself hear the application for judicial review.

The decision of the Court of Appeal

11. Buxton, Sedley and Pumfrey LJJ heard the appeal. All three agreed that the appeal should be allowed, but tragically, Pumfrey LJ died before judgments had been prepared. Sedley LJ gave the leading judgment. He held, without giving any reasons for so doing, that the procedure laid down by rule 353 should have been applied to the further submissions made by ZT. Had that procedure been applied the Secretary of State might have come to a different decision. Accordingly her

decision fell to be quashed so that she could consider ZT's renewed application according to rule 353. Buxton LJ agreed with this result but, for his part, said that he would assume that the process engaged rule 353.

12. Three issues arise out of the decision of the Court of Appeal: 1) was the court correct to find that the Secretary of State should have approached ZT's further submissions on the basis that rule 353 applied to them? 2) If so, might it have made a difference to the Secretary of State's decision if she had proceeded in accordance with rule 353? 3) Must the case be remitted to the Secretary of State for further consideration?

Did rule 353 apply?

13. Rule 353 applies where a human rights or asylum claim has been refused *and any appeal relating to that claim is no longer pending.* The critical issue relates to the words that I have emphasised. Mr Kovats for the Secretary of State submitted that so long as it remained open to a claimant to bring an appeal it could not be said that an appeal relating to the claim *was no longer pending.* Those words meant 'so long as an appeal is not open to the claimant'. Thus rule 353 had no application if a claimant was pursuing an appeal or it was still open to him to pursue an appeal, whether in country or out of country. Because it was still open to ZT to bring an out of country appeal rule 353 did not apply to him.

14. I have two problems with this interpretation of rule 353. The first is that it is in conflict with the definition of a pending appeal in section 104 of the Act. That section provides:

> "(1) An appeal under section 82(1) is pending during the period—
>
> (a) beginning when it is instituted, and
>
> (b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99.)"

If there is no appeal pending, the qualification "and any appeal…is no longer pending" has no application. Thus, if the wording of rule 353 is read in conjunction with section 104, as I believe that it should be, the

procedure that it lays down must be applied if a claim has been refused and no appeal has been instituted.

15. My second problem with the Secretary of State's submission is that it does not produce a sensible result. Rule 353 would seem designed to make express provision for the circumstances in which the Secretary of State may be required to consider further submissions. If an appeal is pending within the meaning of section 104 she will be under no obligation to consider further submissions. They can properly be made to the appeal tribunal. Nor in practice will any question arise of the Secretary of State being required to consider further submissions in the very short period (ten days at the most) that will elapse between the delivery of her decision and the institution of, or expiry of the time for bringing, an in country appeal. One of the situations where the Secretary of State will be required to give consideration to further submissions is in a situation such as that with which this appeal is concerned. Where a claimant remains in this country after the refusal of a claim that has been certified under section 94, the obligations of the Refugee Convention and the Human Rights Act leave the Secretary of State no alternative but to consider further submissions. Her response to this point is that she does not need the provisions of rule 353 – she can adopt an appropriate procedure anyway. I do not find this argument persuasive. It seems to me more sensible for rule 353 to apply in this situation just as in the other situations where the Secretary of State is called upon to consider fresh submissions.

16. For these reasons I have reached the conclusion that the Court of Appeal was correct to proceed upon the basis that rule 353 applied to the further submissions that were made by ZT to the Secretary of State.

Might it have made a difference to the Secretary of State's decision if she had proceeded in accordance with rule 353?

17. The approach of the Secretary of State, acting through the decision taker, in a case such as this was explained by her counsel to the Court of Appeal and by Mr Kovats to your Lordships. The effect of that explanation is as follows. The Secretary of State accepts that if fresh submissions are made she has to reconsider her certification that the claim is clearly unfounded. The claim may be founded on one ground, or on more than one. The fresh submissions may be directed to bolstering an existing ground or to advancing a fresh ground. In reconsidering her certification the Secretary of State has regard to the

entirety of the claim. If there is a single ground, the strength of that ground has to be considered in the light of all the relevant evidence. If there is more than one ground, the strength of each has to be evaluated. If the further submissions persuade the Secretary of State that the claim is a good one, she will allow it; if not she will reject it. In the latter case, she considers whether her certificate that the claim is clearly unfounded should be maintained. If all the grounds are clearly unfounded the certificate stands. If any ground is not clearly unfounded the certificate is lifted and the applicant can pursue all the grounds on an in country appeal. I shall describe this procedure as 'the section 94 reconsideration' in order to compare it with the 'rule 353 procedure'.

18. The Secretary of State carried out the section 94 reconsideration in the case of ZT and concluded that his claim remained clearly unfounded. Might she have come to a different result had she applied the 353 procedure? That procedure would first have required her to decide whether she accepted or rejected the further submissions. That is precisely what she will have done under the section 94 reconsideration. Thus the first stage of the 353 procedure would have produced the same result. ZT's further submissions would have been rejected. Having rejected the further submissions the 353 procedure would have required the Secretary of State to determine "whether they amount to a fresh claim". Rule 353 defines the test. The further submissions will amount to a fresh claim if their content "taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection". The 353 procedure would thus have required the Secretary of State to consider ZT's claim as a whole, just as she will have done under the section 94 reconsideration. The section 94 reconsideration led the Secretary of State to conclude that ZT's claim remained 'clearly unfounded'. Might she have concluded that it had 'a realistic prospect of success' had she applied the rule 353 procedure? Only if the test of whether or not a claim has 'a realistic prospect of success' is more generous to the claimant than the test of whether or not a claim is 'clearly unfounded'. Plainly it is not. A claim that is clearly unfounded cannot possibly have a reasonable prospect of success. Arguably a claim that has 'no realistic prospect of success' may not be so hopeless as to be deemed 'clearly unfounded'. If so, in carrying out the section 94 reconsideration the Secretary of State was more generous to ZT than she would have been had she applied the rule 353 procedure. Whichever course was adopted she would have rejected ZT's further submissions and denied him a right of an in country appeal. ZT retains his right of an out of country appeal and will be free to seek to boost the prospects of that appeal by reference to the further submissions. He would have been in precisely the same position had the Secretary of State followed the rule 353 procedure.

19. My conclusions differ from those of Sedley LJ, whose reasoning I did not find persuasive. Buxton LJ thought that adopting a rule 353 approach was unlikely to produce a different result, but that the Secretary of State ought to be required to go through that exercise none the less. I do not agree.

20. It is possible that the Secretary of State does not treat 'no realistic prospect of success' as constituting a test that is quite so extreme as 'clearly unfounded', so that her decision takers are applying a somewhat less generous approach to a claimant when considering further submissions if the claimant has no in country appeal pending because such appeal has been rejected or never pursued than the approach that they apply where the claimant's original claim has been certified under section 94. If so I consider this difference of approach to be unjustified and undesirable. If further submissions advance a sufficiently strong case to justify an in country right of appeal in the one case I cannot see why they should not do so in the other. In short I consider that the Secretary of State should apply the rule 353 procedure in respect of cases that have been certified under section 94 and should, in all cases, treat a claim as having a realistic prospect of success unless it is clearly unfounded.

Must the case be remitted to the Secretary of State for further consideration?

21. Notwithstanding that he might have failed to persuade your Lordships that the Secretary of State had made a material error in procedure, it remained open to Mr Satvinder Juss, who appeared for ZT, to seek to establish that the decision reached by the Secretary of State could not be sustained. In this context there was some debate as to the approach that should be adopted by the court when reviewing the Secretary of State's decision. Must the court substitute its own view of whether the claim is clearly unfounded, or has no realistic prospect of success, for that of the Secretary of State or is the approach the now familiar one of judicial review that involves the anxious scrutiny that is required where human rights are in issue. ZT is seeking judicial review and thus I would accept that, as a matter of principle the latter is the correct approach. I consider, however, that in a case such as this, either approach involves the same mental process.

22. The test of whether a claim is 'clearly unfounded' is a black and white test. The result cannot, for instance, depend upon whether the

burden of proof is on the claimant or the Secretary of State, albeit that section 94 makes express provision in relation to the burden of proof – in *R(L) v Secretary of State for the Home Department* [2003] EWCA Civ 25; [2003] 1 WLR 1230, paragraphs 56 to 59 I put the matter as follows.

> "56 Section 115(1) empowers—but does not require—the Home Secretary to certify any claim 'which is clearly unfounded'. The test is an objective one; it depends not on the Home Secretary's view but upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not.
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> 57 How, if at all, does the test in section 115(6) differ in practice from this? It requires the Home Secretary to certify all claims from the listed states 'unless satisfied that the claim is not clearly unfounded'. It is useful to start with the ordinary process, such as section 115(1) calls for. Here the decision-maker will (i) consider the factual substance and detail of the claim, (ii) consider how it stands with the known background data, (iii) consider whether in the round it is capable of belief, (iv) if not, consider whether some part of it is capable of belief, (v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.
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> 58 Assuming that decision-makers—who are ordinarily at the level of executive officers—are sensible individuals but not trained logicians, there is no intelligible way of applying section 115(6) except by a similar process of inquiry and reasoning to that described above. In order to decide whether they are satisfied that the claim is not clearly unfounded, they will need to consider the same questions. If on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded. If that point is reached, the decision-maker cannot conclude otherwise. He or she will by definition be satisfied that the claim is not clearly unfounded. Miss Carss-Frisk for the Home Secretary has properly accepted that this is the correct approach."

23. Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational.

24. In the present case Mr Juss did not take us to the facts to seek to persuade us that, on the evidence before her, including that adduced under further submissions, the Secretary of State was irrational to conclude that ZT's claim was clearly unfounded. I have, however, considered the evidence before the Secretary of State and the reasoning of the decision letters. The further submissions added nothing of significance to the claim that was originally certified by the Secretary of State. The decision letter of 2 November 2006 referred to a number of decisions that clearly established the reasoning of the AIT in rejecting claims of persons in equivalent positions to that of ZT. My conclusion is that the Secretary of State was right to conclude that ZT's claim was clearly unfounded, for an appeal to the AIT would have no realistic prospect of success.

25. For these reasons I would allow this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

26. I have had the advantage of reading in draft the opinions of all my noble and learned friends. I agree with them that this appeal should be allowed. But I regret that I am unable to agree with the reasons that they give for making this order.

27. In my opinion the procedure that rule 353 of the Immigration Rules sets out does not apply in this case. The relevant rule, if a rule is needed, is rule 353A. At first sight the question whether rule 353 applies may seem rather technical and unimportant. That might have been so if the rule was then left to speak for itself. Unfortunately my noble and learned friends do not leave it there. They seek to construe the words which rule 353 uses in the light of the procedure that section 94 of the Nationality, Immigration and Asylum Act 2002 describes. This creates a very real problem, in two respects. First, a careful examination of rule 353 shows that its purpose is to be found in the middle of the rule, not the beginning. It also shows that these two procedures are entirely separate from each other. Second, the test for certifying under section 94 differs from that for determining whether there is a fresh claim under rule 353. This is not just a difference in wording. The section 94 test is, as a decision of this House explains (see para 39), intended to be more rigorous. A finding that there is no material distinction between them risks causing confusion and disrupting the way they are operated in practice. I believe that it is important for the integrity of the system for which they were designed that these procedures should be kept separate. I hope that I may be forgiven for setting out my reasons at some length. The answer to the problem is really quite simple once the true purpose of rule 353 is understood.

The issues

28. The factual background to the case can be stated shortly. On 2 December 2005 the Secretary of State rejected the respondent's asylum and human rights claims and certified that they were clearly unfounded under section 94(2) of the Nationality, Immigration and Asylum Act 2002. On 13 December 2005 the respondent was served with a decision under section 82(2)(h) to remove him from the United Kingdom as an illegal immigrant. On 20 January 2006 and again on 23 August 2006 he made further submissions in support of his asylum and human rights claims. On 2 November 2006 the Secretary of State maintained her certification of the claims under section 94. It is still open to the respondent to appeal under section 82(1) against the decision to reject his claims. But the effect of the section 94 certificates is that he cannot do this while he remains in the United Kingdom, where he still is. He can only bring an appeal under section 82(1) while he is out of the country: see section 94(9). So he sought to challenge the certificates by bringing them under judicial review. Collins J refused permission at an oral hearing, but Sir Henry Brooke granted permission to appeal.

29. The Court of Appeal held that when she considered the further submissions the Secretary of State had adopted the wrong procedure. Sedley LJ said that she should have considered them under rule 353 and that, if she accepted them, the respondent would then have had an in-country right of appeal against their rejection as fresh claims under that rule: [2008] EWCA Civ 14, para 18. The refusal letter should be quashed so that the renewed application could be considered under that rule. The Secretary of State submits that this is wrong. She maintains that this is a section 94 case, and that it is with reference to the test that that section lays down that the question whether her decision was sound or not should be considered.

30. The parties are agreed that, on these facts, the following issues arise. First, was the Secretary of State right, in the light of those further submissions and all the material that was then before her, to consider under section 94 whether to maintain her certificates that the claims were clearly unfounded? Or was she bound, as the Court of Appeal thought, to consider them under rule 353 of the Immigration Rules? I shall refer to this as the procedure issue. Secondly, what is the standard of scrutiny that the court must adopt in a judicial review of a certificate by the Secretary of State under section 94(2) of the 2002 Act? I shall refer to this as the scrutiny issue.

The procedure issue

31. My noble and learned friends say that the critical issue as to the application of rule 353 relates to the words "and any appeal relating to that claim is no longer pending". Those words are, of course, important. But in my opinion their significance cannot be determined without examining the rest of the rule and the context in which it is designed to operate.

32. The first thing to notice about the rest of rule 353 is that it bears the heading "Fresh Claims", and that it is followed by para 353A which was inserted by HC 82/2007. The whole context in which rule 353, as amended by HC 420/2008, appears is as follows:

> "**Fresh claims**

> 353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> 353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.
>
> This paragraph does not apply to submissions made overseas."

Rule 353A was not referred to by counsel on either side. But it ought not to be overlooked, as it refers to cases which fall outside rule 353: see the words "or otherwise" at the end of the second sentence.

33. The next thing to notice about the rest of rule 353 are the directions that it gives to the decision maker. In my opinion it is the directions in the middle of the rule, not the opening words, that tell one what this rule is all about. The decision maker is asked to do two things. First, he is to consider whether or not to accept the further submissions. Nothing more is said about what he is to do if he decides to accept them, no doubt because this was thought to be unnecessary. If he accepts them he will withdraw the direction for the claimant's removal because he will have concluded that the claim is well founded. It is what he is to do if he rejects them that gives the clue to the purpose of the rule, and to why it was thought to be necessary. The decision maker who rejects has a further task to perform. He is directed to consider whether the further submissions amount to a fresh claim. Why a "fresh" claim? This is the key. Section 77(1) provides that a person may not be removed from or required to leave the United Kingdom while his claim for asylum is still

pending, and section 78 provides that he may not be removed or required to leave while his appeal under section 82(1) is still pending. The words "fresh claim" show that the assumption on which the rule proceeds is that, for whatever reason, the person whose further submissions are being considered no longer has either a live claim or a pending appeal. He needs a *fresh* claim if he is not to be at risk of being removed or required to leave immediately. And a determination that he has a fresh claim will enable him to appeal against the decision which the decision maker has just taken that his claim must be rejected. The purpose of the rule, as this direction and its heading indicate, is to enable the further submissions to be franked as a fresh claim if they merit this treatment. The effect of doing this will be to enable the applicant to exercise his right to not to be removed while his fresh claim is still pending and to enable him to appeal under section 82(1) against the decision maker's decision to reject his claim.

34. Rule 353A, on the other hand, covers cases where further submissions are being considered "otherwise" than under rule 353. Its purpose is to make it clear that an applicant who has submitted further submissions in situations other than those contemplated by rule 353 is not to be removed before the Secretary of State has considered them. A rule to this effect is needed, to show that the protection against removal that section 77(1) provides while a claim for asylum is still pending applies in those cases too although the claim that was originally made has been rejected. As there is nothing in this rule to indicate the contrary, it applies to section 94 cases as well as those that have not been certified as clearly unfounded under that section. Applications in section 94 too are protected by this rule against removal before their further submissions, if any, have been considered by the Secretary of State.

35. The next thing to notice about the rest of rule 353 is that the test which the decision maker is directed to apply in order to determine whether or not the further submissions amount to a fresh claim is whether, taken together with the previously considered material, their content creates "a realistic prospect of success". The words "clearly unfounded" that section 94 uses do not appear here. Given that the effect of a decision that their content amounts to a fresh claim is that there will be a right not to be removed from the United Kingdom while the claim and any appeal is still pending, the application of the "clearly unfounded" test which determines whether he can remain in the United Kingdom for the purposes of an appeal would be inappropriate. Moreover a person who makes further submissions while he is still in this country after his claim has been certified under section 94 still has a

claim that can be taken to appeal, albeit not until he has moved overseas. He has no need for his claim to be certified as a "fresh claim" to enable him to do this, and he is protected against removal while his further submissions are being considered by rule 353A. For these reasons I consider that the test that rule 353 sets out does not require the section 94 question to be determined by the person who is acting as the decision maker under that rule.

36. Then there is the reference in the first sentence of rule 353 to an appeal relating to the claim that "is no longer pending". There is no doubt that the effect of these words is that the rule does not apply where such an appeal *is* pending. The question is what is to be made of the fact that no mention is made of the situation where an appeal is still open but has not yet been brought. I think that this is because there is still an opportunity in that situation for any further submissions to be considered by the Secretary of State as part of a claim that is still pending. Rule 353A addresses this situation, because it ensures that the applicant cannot be removed while this is being done. On the other hand, if the case has reached the stage of an appeal under section 82(1) and the appellant makes a statement under section 120, the adjudicator must consider any matter raised in it which constitutes a ground of appeal of a kind listed in section 84(1), whether or not that statement was made before or after the appeal was commenced: section 85(2) and (3). He may also consider evidence about any matter which is relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision: section 85(4). These provisions provide ample scope for the making of further submissions in the course of an appeal in addition to those that were before the decision taker before the appeal was brought.

37. It seems to be clear therefore that the need for rule 353 arises only where, because, the claim is no longer alive and an appeal is no longer pending, a determination that this is a fresh claim is required for the person to appeal. *MacDonald, Immigration Law and Practice* (7th ed, 2008), para 12.19 explains the origin of rule 353. The general rule is that repeated applications for asylum on the same basis will not generate a fresh right of appeal. But it has been held that an asylum seeker has the right to make a fresh application: *R v Secretary of State for the Home Department, Ex p Onibiyo* [1996] Imm AR 370. He may do so, for example, if he leaves the United Kingdom and then returns to this country and makes a further asylum claim: *MacDonald*, para 12-177(iv). It is this right that has now been reflected and provided for by the rule. Its object is not, as my noble and learned friend Lord Brown of Eaton-under-Heywood says in para 74, to prevent fresh in-country rights of

appeal arising in the case of re-asserted but still hopeless claims. It is to enable fresh claims to be brought, provided they are truly fresh claims because there is a realistic prospect of success if the decision to reject them were to be taken to appeal.

38. The importance of keeping the rule 353 and the section 94 issues separate has been recognised by the UK Border Agency's Asylum Policy Instructions ("APIs"). The APIs are regarded in practice as an invaluable guide to the latest Home Office practice in the interpretation of the Rules: *MacDonald, Immigration Law and Practice*, para 1.37. They are available to the public on the government's website. The most up to date link is: http://ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/. Two of the many Asylum Policy Instructions ("APIs") that have been issued are relevant to this issue. I regret the fact that they were not referred to by counsel for the Secretary of State in the course of his submissions to your Lordships. I believe that they would have helped to explain why he stressed the importance of keeping these procedures separate, and why he said that the Court of Appeal's decision distorted a coherent decision making scheme and was liable to lead to confusion among case workers and applicants. Technically, of course, the APIs are not an aid to the construction of rules 353 and 353A. But it would be wrong for your Lordships to ignore them, as they are both part of the system which the Secretary of State has set up for the handling in practice of claims by decision makers. In my opinion your Lordships should be slow to interfere with that system unless this is plainly necessary, and certainly not without a clear understanding of the context in which rule 353 was designed to operate.

39. I should make it clear that my reason for referring to the APIs is not to use them as an aid to the construction of the language that rule 353 uses, as I am in agreement with all your Lordships as to what is meant by the words "and any appeal relating to that claim is no longer pending." It is to explain the purpose of the rule and the context in which it is designed to operate. This is a practical matter, as to which the APIs can act as a useful guide. They show that your Lordships' ruling that there is no difference between the approaches required by section 94 and rule 353, which ignores rule 353A, is at variance with the way the system is operated in practice. That system recognises the heightened significance of a decision to certify under section 94, as it excludes the possibility of an in-country appeal. In *R (Yogathas) v Secretary of State for the Home* Department [2002] UKHL 36; [2003] 1 AC 920, para 14, Lord Bingham of Cornhill drew attention to the care that must be taken in conducting this exercise: see also my own

observations in paras 32-34. It also recognises that rule 353 is designed only for in-country cases that have reached the stage that it contemplates, not for those that are the subject of a section 94 certificate.

40. The API on further submissions states in its introduction that it provides guidance on applying para 353 of the Immigration Rules and certifying claims under section 96 of the 2002 Act. That section excludes the right of appeal in cases where the issue ought to have been dealt with in an earlier appeal against a previous immigration decision. The API concludes with this instruction about section 94 certification:

> "Section 94 certification should **never** be considered in a case where paragraph 353 applies. This is because all applicants whose applications have been certified under section 94 are unable to exercise their appeal rights until they have left the United Kingdom. This is inconsistent with the requirement that paragraph 353 can only be applied when an applicant is Appeal Rights Exhausted." [emphasis in the original]

The phrase "Appeal Rights Exhausted" is explained in an earlier section of the API under headings "Criteria for applying paragraph 353" and "No Appeal Pending against refusal of previous Asylum/Human Rights Claim", which states:

> "In addition, paragraph 353 can only be applied where there is no appeal pending against the refusal of the earlier claim. If there is an appeal pending, the applicant should, where possible, raise all relevant matters in the context of that appeal. If there is no appeal pending, either because the applicant never brought an appeal or because the appeal has been dismissed, withdrawn, abandoned or has lapsed, the case owner should apply paragraph 353."

Under the heading "New material raised before appeal hearing" it states:

> "Where an applicant raises new material after a decision has been made on his asylum and/or human rights claim but before his appeal is heard, paragraph 353 should not be

> applied. The applicant should raise this material in the context of his appeal. However, if it has not been possible to raise this material during the course of his appeal for any reason, the case owner should consider it after the conclusion of the appeal and apply paragraph 353."

41. The API on certification under section 94 states in its introduction that it is concerned with the application of section 94 by caseworkers. Under the heading "key points" it states:

> "Only caseworkers (including senior caseworkers) who have received the training on non-suspensive appeals certification may take a decision to certify a claim. All decisions to certify a claim under section 94 will be subject to a second pair of eyes."

Under the heading "further submissions in cases where section 94 certificate has been issued" it states:

> "If, as a result of the further submissions, it is appropriate to reverse the refusal, the certificate should be withdrawn and leave granted as appropriate."

The instruction as to what the caseworker is to do if he decides to maintain the certificate concludes with these words:

> "Paragraph 353 of the Immigration Rules, on further representations and fresh claims, should not be applied or referred to."

42. It was submitted for the Secretary of State that the reference to the situation where any appeal is no longer pending encompasses the situation where an appeal is still open but has not yet been brought. I do not think that the wording of the rule has the effect of extending its application to that situation. Section 104(1) of the 2002 Act provides that an appeal under section 82(1) is "pending" during the period beginning when it is instituted and ending when it is finally determined,

withdrawn or abandoned or has lapsed in the circumstances referred to in section 99. The Immigration Rules were made under section 106 of the 2002 Act, so one would expect words used by them to have the same meaning as in the Act itself. An example of the use of the expression "pending" is to be found in section 82(3), which provides:

> "A variation or revocation of the kind referred to in subsection (2)(e) or (f) shall not have effect while an appeal under subsection (1) against that variation or revocation –
>
> (a) could be brought (ignoring any possibility of an appeal out of time with permission), or
>
> (b) is pending."

The rule makes no reference to the situation where an appeal could still be brought but is not yet pending within the meaning of that expression as defined by section 104. I would hold therefore that it does not apply to that situation at all. The reason is that, as an appeal in which consideration to be given to new points is still open, there is no need for a rule that enables consideration to be given to the question whether the further submissions amount to a fresh claim. What is needed is protection against removal while the further submissions are being considered. This is provided by rule 353A.

43. It seems to me that the guiding principle as to the application of a rule of this kind is to determine the purpose which it was intended to serve. It is clear from its opening words, and from what follows, that rule 353 was intended to deal with the situation where an appeal could no longer be brought or, having been brought, was no longer pending. In that situation it was necessary to provide a means for determining whether, if the Secretary of State was not persuaded to alter the decision that had already been taken, the further submissions amounted to a fresh claim. If they did not, there would be no reason for re-opening the matter. But if they did amount to a fresh claim, they would have to be dealt with as such and the right of appeal under Part 5 of the 2002 Act would then have to have been made available. Rule 353 provides a means of achieving this by franking the further material as requiring a fresh determination in accordance with the procedures that the statutes lay down. It was clearly necessary for provision to be made as to how cases where an appeal had been heard and disposed of should be dealt with. The same consideration applies to cases where an appeal is no longer open because the time for bringing it has expired. The rule does

not mention that situation expressly, but it must be taken to be covered by the reference to the situation where any appeal is no longer pending. It is the absence of any opportunity for the issues to be considered as part of a claim that is still pending or of an appeal that gives rise to the need for the rule.

44. I do not think however that the rule has any purpose to serve in a case where an appeal is still open but is not yet pending. Where an in-country appeal is available the time limits are short: 5 days after he is served with the notice where the claimant is in detention under the Immigration Acts, 10 days in any other case. It is not unusual for further submissions to be made within a very short time after the immigration decision is made. It would be quite unnecessary in that situation for the decision maker to be required to go through the procedure set out in rule 353 before it is known whether or not there will be an appeal. If there is an appeal the submissions can be considered by the adjudicator: see para 36. The need for the procedure that the rule describes will arise however if and when the time limit is allowed to expire. Protection against removal in the meantime is afforded by rule 353A.

45. In out-of-country appeals, where the Secretary of State has certified that the claim is clearly unfounded, the time limit is 28 days but it does not begin to run until the claimant has left the United Kingdom. But there is no need for a procedure of the kind that rule 353 describes to deal with that situation. While the claimant remains in this country any further submissions he makes will be directed to the question whether or not his claim is clearly unfounded. As this issue is still in the hands of the Secretary of State it can be dealt with under section 94, and protection against removal will be afforded by rule 353A. When he leaves this country the issue will no longer be in the hands of the in-country decision maker: see the last sentence of rule 353A. He will however have the opportunity to raise the further submissions as part of his out-of-country appeal.

46. As for the question whether there is any material distinction between a claim which is not held to have "a realistic prospect of success" and one which is "clearly unfounded", I think that the answer to it is that it is a question of degree. If, as I approach a traffic light controlled road junction in my motor car, the lights turn to amber when I am just a few yards short of it, I will keep going because there is "a reasonable prospect" that I will be through the junction well before the lights turn to red. The further back I am from it, the more likely it is that

I will stop because I have not got beyond the point where I can assume that I will get through the lights in time. Up to that point such an assumption will "clearly [be] unfounded". Of course the greater includes the less. One cannot say that a claim which is clearly unfounded will have a reasonable prospect of success. But the reverse is not so. The whole point of the test that section 94 lays down is that, for the reasons that were referred to in *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920, it sets a more demanding test for the issuing of certificates whose effect is to deprive claimants of the opportunity of an in-country appeal. The distinction is between claims which are manifestly (or "clearly") unfounded and those which merit full consideration by taking their rejection to appeal in this country.

47. For these reasons I would answer the first of the three questions that Lord Phillips refers to in para 12 of his opinion in the negative. If that answer is given to it, the second and third questions will be superseded.

48. The answer that your Lordships propose to give to the first question will, I fear, cause significant problems in practice for the Home Office. I cannot subscribe to the view that this is a non-issue. The APIs show that this is not so. In my opinion they cannot survive your Lordships' decision in their present form. Either they will have to be re-drafted to give effect to it, or rule 353 will have to be amended to make it clear (i) that it does not apply where an appeal has not yet been brought and (ii) that the test for certification under section 94 is not relevant to a decision as to whether there is a realistic prospect of success for its purposes. A moratorium on the handing of these cases may have to be resorted to until this is done. An alternative course, however, would be just to leave things as they are. I believe that, for the reasons that I have sought to explain, further submissions in section 94 cases fall outside the scope of rule 353. The protection that is needed in their case is provided by rule 353A. It has not been suggested that there is anything wrong with the way the system works in practice. I regret that I have not been able to persuade your Lordships to join with me in subjecting it to detailed scrutiny. But the fact that you have not done so may offer some comfort to those who would prefer that it should not be disturbed.

The scrutiny issue

49. This issue is not mentioned by Lord Phillips in para 12, but your Lordships have been asked to deal with it in view of the doubts raised by Sir Henry Brooke's decision to grant permission to appeal to the Court of Appeal in the light of the decision in *R (WM (DRC)) v Secretary of State for the Home Department* [2006] EWCA Civ 1495; [2007] Imm AR 337. He did so as he considered it arguable that Collins J, when he refused permission for judicial review of the Secretary of State's decision, had not applied the right test. That however was a case where the Secretary of State's consideration whether new material produced by failed asylum applicants constituted a fresh claim was under rule 353: see para 1.

50. In para 11 of his judgment in *WM* Buxton LJ said that the question for the Secretary of State, when considering whether or not a fresh claim had been made, was not whether he himself thinks that the new claim is a good one but whether there was a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant would be exposed to a real risk of persecution on return. If the court could not be satisfied that the Secretary of State had addressed herself to that question it would have to grant an application for review of that decision. He declined to apply the approach that Lord Bingham of Cornhill in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368, para 17, said was appropriate to the question whether a claim was manifestly unfounded in section 94 cases, namely that the reviewing court must ask itself essentially the questions that would have to be answered by an adjudicator. In *R (L) v Secretary of State for the Home Department* [2003] EWCA Civ 25; [2003] 1 WLR 1230, para 56 Lord Phillips of Worth Matravers MR said that the question whether a claim was clearly unfounded was a question which admitted of only one answer: see also *Tozlukaya v Secretary of State for the Home Department* [2006] EWCA Civ 379, [2006] Imm AR 417, para 44. But Buxton LJ said that this was not necessarily so when the review was informed, as it would need to be in rule 353 cases, by the need for anxious scrutiny. In his view, in borderline cases, there could be more than one answer: para 18.

51. I do not think that it is necessary to consider whether Buxton LJ's observations were sound or not in this case, although as at present advised I see no reason to disagree with them as a guide to the approach that should be taken in rule 353 cases. This case, however, is a section 94 case. Nothing that he said was intended to apply to cases of this kind. Indeed the whole purpose of his remarks was to distinguish the situation that applies under section 94 from that which applies where a decision under rule 353 is in issue.

52. The starting point for an examination of the question whether or not a claim is "clearly unfounded" in terms of section 94 is to be found in *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920, where it was stressed that the level of scrutiny that was required of the Secretary of State by this phrase sets a high threshold: see paras 14 and 34. The test that was under consideration in that case was whether under section 72(2)(a) of the Immigration and Asylum Act 1999 the claim was "manifestly unfounded", but that is in effect the same test as that which section 94 of the 2002 Act lays down. As Lord Hodge observed in *FNG, Petitioner* [2008] CSOH 22, para 10, the focus of the test in section 94 is primarily on the quality of the claim rather than the prospects of success on an appeal. The prospects of success on an appeal, not the quality of the claim, is the test that rule 353 uses to determine whether there is a fresh claim. Lord Hutton in *Yogathas* para 74 drew attention to the standard of scrutiny that the court in its turn must apply when it is reviewing the Secretary of State's section 94 certificate.

53. For the Secretary of State Mr Kovats submitted that the court should ask itself whether a reasonable Secretary of State could be satisfied that the claim was clearly unfounded, ie was bound to fail on appeal. He suggested that the observation in *R (L) v Secretary of State for the Home Department* [2003] EWCA Civ 25; [2003] 1 WLR 1230, para 56, that the test was an objective one, as a claim was either clearly unfounded or it was not, might require reconsideration in an appropriate case. The process was essentially one of review, and there might be cases where the issue was not so clear cut. Mr Juss for the respondent submitted that what he described as a bland *Wednesbury* approach was inappropriate in this context. The proper approach was to subject the decision whether the claim was clearly unfounded to anxious scrutiny. He invited your Lordships to endorse Lord Hodge's opinion in *FNG, Petitioner* [2008] CSOH 22, para 14, where he said that a court, in deciding whether the Secretary of State was entitled to be satisfied that a claim was clearly unfounded:

> "must (i) ask the questions which an immigration judge would ask about the claim and (ii) ask itself whether on any legitimate view of the law and the facts any of those questions might be answered in the claimant's favour."

54. In my opinion courts should continue to follow the guidance that the House gave in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 as to how section 94 cases should be dealt

with. Although the claim in that case was certified under section 72 of the 1999 Act and was on human rights grounds only, the guidance that it provides is just as relevant to cases certified under sections 94(2) and (3) of the 2002 Act and to asylum claims too. The approach that Lord Hodge described in *FNG, Petitioner*, para 14, is attractive because it encapsulates in a simple formula what Lord Bingham said in *Razgar*. The key points in Lord Bingham's opinion in that case are to be found in para 17 where he said that a reviewing court must consider how an appeal would be likely to fare before an adjudicator as the body responsible for deciding any appeal, and in para 20 where he said that a reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. The questions that a reviewing court must ask itself, which Lord Bingham described in para 17, must be subjected to anxious scrutiny. It may become clear that the quality of the claim is such that the facts of the case admit of only one answer. But the process, as these observations serve to emphasise, is essentially one of review.

55. I would be uneasy about substituting for the guidance that Lord Bingham gave in *Razgar* the observations of the Court of Appeal in *R (L) v Secretary of State for the Home Department* [2003] 1 WLR 1230, para 56. That case was among those that were cited in argument in *Razgar*, but it was not referred to by any of their Lordships. They do not sit easily with Lord Bingham's analysis in para 18 of the answers that the reviewing court might give to questions that would have to be answered by an adjudicator. It would be better to follow Lord Bingham's careful guidance, which allows for the fact that there may perhaps be cases, albeit rarely, where the reviewing court recognises there may be more than one answer. It must be stressed that the court is not an appellate court. Its function throughout is that of review. Its jurisdiction to deal with the case, outside the decision-making scheme laid down by the statute, rests entirely on that principle.

Conclusion

56. This, as it happens, is a case where the facts permit only one answer. They were summarised by Collins J in his judgment, which Sedley LJ quoted in para 4 of his judgment. I think that it is clear that an adjudicator, exercising his judgment on those facts, would be unable to decide an appeal against the Secretary of State's decision in the respondent's favour. In my opinion Collins J was right to refuse permission for judicial review in this case. I would allow the appeal and affirm the order that he made.

LORD CARSWELL

My Lords,

57. I have had the advantage of reading in draft the opinions prepared by your Lordships, and I agree with the conclusion reached by each of you, that the appeal should be allowed. My reasons are not, however, identical with those expressed in varying terms by your Lordships and accordingly I shall set out the course of my own reasoning, as it affects the way in which I think that cases of the present nature should be handled by the Home Office.

58. A formidable power has been conferred upon the Secretary of State by section 94 of the Nationality, Immigration and Asylum Act 2002. If she certifies that a claim is clearly unfounded, the person claiming asylum can be removed at an early date and is not entitled to remain in the United Kingdom to pursue an appeal against the decision to refuse asylum, which has to be brought from outside the United Kingdom. The object is to minimise the possibility that claimants with a groundless application can prolong their stay in the United Kingdom for a substantial period while they traverse the appellate process. Because of the draconian nature of this power, the House expressed the opinion in *R (Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36, [2003] 1 AC 920, in considering the predecessor provision, that in order to justify its exercise the claim must be so clearly lacking in substance that it is bound to fail (para 34, per Lord Hope of Craighead, and cf para 14, per Lord Bingham of Cornhill). It is necessary accordingly that the matter must receive most anxious scrutiny before a certificate is issued, in order to give full weight to the obligations of the United Kingdom under the European Convention on Human Rights (*ibid*, paras 9, 34).

59. A claimant may seek to adduce further material in support of his claims, which may or may not constitute significant a addition to those which he had earlier submitted without success. To meet this situation rule 353 was made (for the text of rules 353 and 353A see the opinion of my noble and learned friend Lord Phillips of Worth Matravers at para 9). This is relatively straightforward to operate where the Secretary of

State has not given a certificate under section 94, its object being to obviate the necessity for her to reconsider every further submission as a fresh claim attracting the full panoply of the appeal process. If she has given a section 94 certificate, but there is an appeal against her refusal of asylum pending – which has had to be brought from outside the United Kingdom -- the further submissions will fall to be considered as part of the material before the appellate tribunal and rule 353 will not come into play. The problem which arises in the present case is how the matter should be dealt with if a section 94 certificate was given but the claimant has not instituted an appeal, though it would be still open to him to do so from outside the United Kingdom. My noble and learned friend Lord Hope of Craighead considers that in such a case rule 353 does not apply and the Secretary of State has merely to consider whether the section 94 decision should still be maintained. The rest of your Lordships take the view, however, that rule 353 does apply in such a case and that the Court of Appeal were right in holding that the Secretary of State had gone down the wrong pathway in reverting to considering it in terms of the continued application of section 94.

60. In my opinion there are indications in the text of rule 353 that it is intended to apply to the present case. In the first place, the word "pending" ought to bear its ordinary meaning, that an appeal has been instituted but has not yet been disposed of. This accords with the definition in section 104 of the 2002 Act, as to which see para 14 of Lord Phillips' opinion. Secondly, I see some significance in the use of the word "any". It carries the implication that an appeal has come into existence at some time. The whole phrase "and any appeal is no longer pending" should therefore be read in parenthesis, referring to a situation where an appeal has been brought and disposed of.

61. If a claimant seeks to adduce further material, the Secretary of State should commence by considering whether the claim has been refused or withdrawn or is treated as having been withdrawn. If so, she then asks if an appeal has been brought and, if so, whether it is still pending or has been disposed of. If it is still pending, rule 353 does not apply, and the further material is dealt with as part of the appeal. If it has been brought but is no longer pending, then rule 353 applies and the Secretary of State applies the criteria which it lays down. If no appeal has been brought, the phrase in parenthesis does not enter into consideration and rule 353 applies.

62. Some of your Lordships take the view that the test of "clearly unfounded" in section 94 and a "realistic prospect of success" under rule

353 amount to the same thing, so that it is immaterial which provision is applied. I am not convinced that this is correct. One can envisage situations - though they may be rare - in which the tests would not produce the same result and Lord Hope has illustrated the lack of congruity between the tests in para 46 of his opinion. The possible difference is not, however, a matter of great consequence. The *Yogathas* decision underlines the importance of preserving the strictness of the clearly unfounded test. Whatever the difference may be, it follows from the strictness of that test that a claimant to whom it is applied could not satisfy the "realistic prospect of success" test.

63. It may be helpful to set out the sequence of consideration which the Secretary of State should follow in a case such as the present, where a section 94 certificate has been given, which requires the claimant to leave the United Kingdom and to bring any appeal from outside the country, but while still in the United Kingdom he has submitted further material

(i) if she accepts that the further material now gives the claimant a valid claim to asylum, she should reverse the previous refusal, with the consequence that the claimant can remain in the United Kingdom;
(ii) if she considers that the further material still does not give the claimant a valid claim to asylum, but satisfies the criteria for a fresh claim, she should refuse the claim, whereupon the claimant can pursue an appeal from within the United Kingdom against the refusal;
(iii) if she does not accept that the further material satisfies the criteria for a fresh claim, she should reject the submissions as further representations, leaving the section 94 certificate still standing.

64. I agree with your Lordships, however, that in the present case if the Secretary of State had followed the correct procedure of considering the further material under rule 353, she would have reached just the same conclusion. As I have stated, if the claim continued to satisfy the stringent test of being clearly unfounded, it must follow that it could not be said that it had a realistic prospect of success. For that reason I would allow the appeal.

65. I agree with Lord Hope's conclusion on what he has termed the scrutiny issue. The issue is similar to that posed in *R v Pendleton* [2001]

UKHL 66, [2002] 1 WLR 72 concerning the way in which the Court of Appeal should review the safety of a criminal conviction. The matter is, as Lord Hope says, essentially one of review and I agree that the concise summary of the process produced by Lord Hodge in *FNG, Petitioner* [2008] CSOH 22, para 14, encapsulating the observations of Lord Bingham of Cornhill in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, 389, para 17, forms a useful guide to the reviewing court.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

66. The real issues raised by this appeal are, to my mind, these: (1) Is there any material distinction between a human rights or asylum claim which has "[no] realistic prospect of success" and one which is "clearly unfounded"?; (2) When determining a judicial review challenge to the Secretary of State's characterisation of such a claim as one having no realistic prospect of success or, as the case may be, as being clearly unfounded, is there any material distinction between on the one hand the Court adopting a conventional *Wednesbury* approach (albeit, in this fundamental rights context, subject to "anxious scrutiny"), and on the other hand the Court deciding for itself whether the claim should properly have been so characterised—it being common ground between the parties that the correct touchstone for deciding whether a claim is properly to be so characterised is whether it would be bound to fail on appeal to the AIT.

67. If, as I believe, the answer to both those questions is a clear "no", ie there is no material distinction in either case, the issues ostensibly raised for your Lordships' determination on this appeal lose all significance. It matters not whether, in a case where the Secretary of State has already certified the claim under section 94 of the Nationality, Immigration and Asylum Act 2002 as "clearly unfounded", she should be considering further submissions under that provision (so as to decide whether or not to maintain certification), or under rule 353 of the Immigration rules (HC395) so as to decide whether, overall, the claim now has "a realistic prospect of success" (so as to amount to a fresh claim). Similarly it matters not whether the Court is overtly adopting a conventional judicial review approach to a challenge or rather an approach appropriate to an appellate tribunal.

68. Before turning to what I have called the real issues, I shall nevertheless touch briefly on the two issues as they were presented to us.

Q1. Was the Secretary of State right to have reconsidered this case under section 94 or should she have done so under rule 353?

69. These provisions are to be found in other of your Lordships' opinions but it is perhaps convenient to set out their core wording again here:

> Section 94(2): "A person may not bring an appeal [against a refused human rights or asylum claim] in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims . . . is or are clearly unfounded."

Section 92 (4)(a) would otherwise have permitted the appellant to appeal against the refusal of his or her human rights or asylum claim "while in the United Kingdom". Section 94 (9): expressly provides for an appeal against a certificated claim from "outside the United Kingdom". In short, the effect of certification is to prevent an appeal save from abroad. Rule 353 provides:

> "When a human rights or asylum claim has been refused . . . and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

70. As will be seen, rule 353 applies only when "any appeal relating to [the refused] claim is no longer pending". Section 104 (1) of the 2002 Act provides that "an appeal . . . is pending during the period (a) beginning when it is instituted, and (b) ending when it is finally

determined, withdrawn or abandoned . . . ". An appeal against a claim which has been both refused and certified under section 94 cannot be pending whilst the claimant remains in the UK since by definition it cannot by then have been instituted. Rule 353 accordingly applies to any "further submissions" advanced in respect of such a claim.

71. In short, on this issue (or non-issue as I would prefer to regard it) I agree with all that is said by my noble and learned friend Lord Phillips of Worth Matravers at paragraphs 13-16 of his opinion.

Q2. On a judicial review of the section 94 certification or of a refusal to accept that further submissions amount to a fresh claim, what should be the Court's approach?

72. I entertain no doubt that the correct approach is that conventionally adopted on a judicial review challenge: *Wednesbury* (with, in the present context, anxious scrutiny). It by no means follows, however, that there is any material difference between this approach and that of an appellate court when, as here, the issue ultimately before the court is: could the AIT on appeal possibly have allowed the claim? To that I shall return. So much for this second non-issue.

Q3. Is the test as to whether a claim is "clearly unfounded" any different from— as opposed to the mirror image of— the test as to whether it has "a realistic prospect of success"?

73. For the life of me I cannot see any logical distinction between the two. It seems to me plain that if one properly says of a case that it is clearly unfounded, one is saying no more and no less than that it has no realistic prospect of success; and vice versa. To try to find room between these two tests is in my opinion to dance on the head of a pin: they are the opposite sides of the same coin.

74. And why, indeed, should they not be the same test? The object of certification under section 94 is to shut out in-country appeals in the case of hopeless claims. The object of rule 353, at the same time as enabling truly fresh claims to be brought and (if rejected) nevertheless to proceed to appeal, is to prevent fresh in-country rights of appeal arising in the case of re-asserted but still hopeless claims. In both cases (i.e. consideration under both section 94 and rule 353) it would be

appropriate, even though ex-hypothesi the claims are being rejected by the Secretary of State, to allow them to proceed to an in-country appeal to the AIT if there is any reasonable chance of an appeal being successful, but otherwise not.

Q4. In this particular context is there any material difference between a supervisory and an appellate jurisdiction?

75. As I have said, the critical question for the Court's determination in these cases is: could the AIT possibly allow an appeal against the rejection of the claim or would it be bound to dismiss it (again, the opposite sides of the same coin)? Could the Court ever reach the position of saying: we ourselves do not think that an appeal to the AIT in this case would have been bound to fail but we think that it was reasonable for the Secretary of State to decide that it would? In my opinion it could not. If the Court concludes that an appeal to the AIT might succeed, it must uphold the challenge and allow such an in-country appeal to be brought.

76. It follows that on this issue also I agree with what Lord Phillips says at para 23 of his opinion.

77. On the facts of the present case I think that the Court of Appeal erred in upholding the respondent's challenge. In common with all your Lordships I would accordingly allow the Secretary of State's appeal and substitute for the Court of Appeal's order an order dismissing the judicial review application with costs.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

78. The facts and statutory provisions giving rise to this appeal have been set out by my noble and learned friends, Lord Phillips of Worth Matravers, Lord Hope of Craighead, Lord Carswell, and Lord Brown of Eaton-under-Heywood in their respective opinions which I have had the benefit of reading in draft. As there is a difference of view on some of

the points which have been raised, I propose to explain, albeit briefly, why I agree that this appeal must be allowed.

79. I propose to consider the issues in the following order:

(a) Is there any difference of approach required by section 94(2) of the 2002 Act and rule 353 of the Immigration Rules?
(b) What is the proper approach for the court to adopt to a refusal under either provision?
(c) Which of the two provisions applied here?
(d) How should this appeal be disposed of?

80. The first point it is convenient to consider is whether there is any difference in the requirement of rule 353, under which the Secretary of State must be satisfied that a claim has "a realistic prospect of success", and section 94(2), under which she must be satisfied that a claim is not "clearly unfounded). My initial opinion was that there was no difference between the effects of the two expressions, and that they were in practice mirror images of each other. In other words, it seemed to me that, as a matter of ordinary language, if a claim is clearly unfounded then it has no realistic prospect of success (and *vice versa*), and if it has a realistic prospect of success then it is not clearly unfounded (and *vice versa*). This opinion also seemed to me to be supported by the purpose of the two provisions in which the expressions were found. In each case, it is to shut out hopeless applications, but not those which have some potential merit. Whoever is right on the question of which provision applied here, it might appear to be illogical if different standards were applied under the two provisions, given that they are both ultimately concerned with very similar types of situation, types of claim, and types of rights, as Lord Brown says.

81. However, having considered what Lord Hope and Lord Carswell say on this point, I can see how there might conceivably be circumstances in which a person entrusted with a decision could conclude that a case, which had no realistic prospect of success, might nonetheless not be clearly unfounded. I must admit to finding it very hard to conceive of such a case in practice. In the end, however, each set of facts must be considered by reference to the provision which applies to them. Accordingly, I am persuaded that it would be wrong to lay down as a general proposition that, if a particular set of facts would have no realistic prospect of success under rule 353, then that set of facts

must, as a matter of law, be clearly unfounded under section 94. As Lord Hope points out, different expressions have been used by the drafters, and the two provisions are intended to apply in different types of circumstances.

82. The second question concerns the proper approach to be adopted by the court to a challenge to a certification that a claim is clearly unfounded or that it has no realistic prospect of success. I can see no basis for a different approach being adopted by the court under the two provisions. As we are in Convention territory, it appears clear that the correct test is, as Lord Brown says, the normal judicial review test, with the addition of anxious scrutiny. That is consistent with the guidance given by Lord Bingham of Cornhill at in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, para 17, as pointed out by Lord Hope, with whose remarks on this issue I also agree

83. However, for the reasons given by Lord Phillips, it seems to me that, where there are no issues of primary fact, application of this test will, at least normally, admit of only one answer, and a challenge to the Secretary of State's decision will normally stand or fall on establishing irrationality. Accordingly, I agree that, if, in a case where the primary facts are not in dispute, the court concludes that a claim is not "clearly unfounded" or (which is, of course, the same thing) that a claim has some "realistic prospect of success", it is hard to think of any circumstances where it would not quash the Secretary of State's decision to the contrary. However, I would again be reluctant to suggest that there is a hard and fast rule to that effect.

84. The third issue is whether Secretary of State, having certified his original claim as clearly unfounded under section 94, should have considered ZT's further submissions of 20 January 2006 under rule 353 or section 94. In my view, in agreement with Lord Phillips, Lord Carswell, and Lord Brown, and with the Court of Appeal, rule 353 was the relevant provision. Crucially for present purposes, rule 353 is expressed to apply where "any appeal relating to that claim is no longer pending" (which I shall call "the expression"). Particularly bearing in mind the simplicity of the expression and the unimportance of the issue, I have found it disproportionately hard to resolve the question whether the expression applies to a case where no appeal has been brought, and a case where there is temporary bar on bringing an appeal.

85. At any rate at first sight, the words “no longer” suggest that an appeal must have been brought before the expression applies. You cannot say you are “no longer” in your seventies when you are 68; you cannot say you are “no longer” married, if you have never wed. So, on the face of it, one cannot say that an appeal is “no longer pending”, if it has never been brought. This point of view seems to get some support from section 104(1), which makes it clear that an appeal only starts to be “pending” when it is instituted. If this is right, then an appeal has to have been brought (and to have been concluded) before rule 353 can apply. Further support may said to be found for this conclusion by contrasting the words in rule 353 with the provisions of section 82(3) of the 2002 Act.

86. Having been initially attracted to that argument, I have come to the conclusion that it is wrong. It seems to me that the argument gives insufficient weight to two points which can be made about the expression in its context in rule 353. First the expression follows on from words which indicate that rule 353 is primarily concerned with cases where an asylum claim “has been refused”; secondly, the expression refers to “any appeal” being “no longer pending”. In my view, these two factors make it much easier to read the expression “any appeal … is no longer pending” as meaning “if there is an appeal, it is no longer pending”. Such a reading is also supported by practical sense: it would seem silly if rule 353 only applied after an appeal had been brought and concluded, but did not apply before an appeal was brought and could never apply in a case where no appeal had been brought. On the other hand, as Lord Phillips says, it is perfectly logical that application of the rule should be disapplied during, and only during, the currency of any appeal.

87. Once one decides that the expression refers to an appeal, only if and while it is instituted, it seems to me to dispose of the contention that the expression disapplies rule 353 during the period when an appeal can be mounted, or when an appeal is temporarily precluded (as is said by the Secretary of State in this case), at least unless it leads to silly results. I do not see any such problems if rule 353 applies in cases such as the present. Indeed, once one accepts that the rule is only disapplied during a period when an appellate court is seised of the matter, it does not appear to me to be inappropriate that it should apply at a time when an appeal is temporarily barred (or when it is permitted but no appeal has yet been brought).

88. It was only after reaching this conclusion that I had the benefit of reading in full the arguments which persuade Lord Hope that rule 353

does not apply in a case such as the present. I see very considerable force in his lucid reasoning, which digs rather deeper than any argument advanced before your Lordships. In particular, the points he makes about the wording of rule 353A and the need for "coherent decision making" strike me as telling. I am also concerned about the possible practical consequences of our decision, which he mentions. In the end, however, I adhere to the view which I originally formed on this issue. For the reasons given by Lord Phillips and Lord Carswell, the wording of rule 353 is, in my opinion, too clear to permit the cogent arguments canvassed by Lord Hope to prevail.

89. Finally, what is the correct way of disposing of this appeal? In common with all your Lordships, I am of the view that the Court of Appeal was wrong in thinking that ZT had any substantive ground for complaining of the Secretary of State's decision disposing of his further submission of 20 January 2007. While I agree with the Court of Appeal that the Secretary of State proceeded under the wrong provision, I have no doubt that this was not one of those very rare cases (which may exist) where the application of the two tests could yield different results Accordingly, I, too, would allow the Secretary of State's appeal, and would dismiss with costs ZT's application for judicial review.