Michaelmas Term
[2009] UKSC 7
On appeal from: [2009] EWCA Civ 119

JUDGMENT

BA (Nigeria) (FC) (Respondent) *v* Secretary of State for the Home Department (Appellant) and others

PE (Cameroon) (FC) (Respondent) *v* Secretary of State for the Home Department (Appellant)

(Consolidated Appeals)

before

Lord Hope, Deputy President
Lord Scott
Lord Rodger
Lady Hale
Lord Brown

JUDGMENT GIVEN ON

26 November 2009

Heard on 30 July 2009

Appellant
Elisabeth Laing QC
Deok Joo Rhee
(Instructed by Treasury Solicitors)

Respondent (BA)
Raza Husain
Ronan Toal
(Instructed by Turpin and Miller Solicitors)

Respondent (PE)
Raza Husain
Ronan Toal
(Instructed by Wilson and Co.)

LORD HOPE

1. The ability of asylum seekers who make unsuccessful claims to be allowed to remain to discover further reasons why they should not be removed from the country where they seek refuge is an inescapable feature of any system that is put in place to meet a State's obligations under the Geneva Convention on the Status of Refugees and article 3 of the European Convention on Human Rights. The opportunity for further reasons to be put forward is enhanced by the fact that a series of decisions may need to be taken before a person's immigration status is resolved. Various measures have been put in place by the United Kingdom to deal with this phenomenon. Some of these measures are to be found in the Immigration Rules, and on occasion the meaning that is to be given to them is the subject of controversy: see *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6, [2009] 1 WLR 348.

2. In this case however we are concerned with meaning and effect of the statute. The relevant provisions are to be found in Part 5 of the Nationality, Immigration and Asylum Act 2002, which deals with immigration and asylum appeals. The question is whether the expression "an asylum claim, or a human rights claim" in section 92(4)(a) of the 2002 Act includes any second or subsequent claim that the asylum seeker may make, or only a second or subsequent claim which has been accepted as a "fresh claim" by the Secretary of State under rule 353 of the Immigration Rules.

The facts

3. The first respondent BA is a citizen of Nigeria. He is married to a British citizen, by whom he has four children. He entered the United Kingdom in 1988 as a visitor. Initially he was given six months leave to enter. Later he was granted leave to remain as a student until the end of August 1991. He was granted indefinite leave to remain on 25 May 1994 on the basis of his marriage. On 20 May 2005, however, he was served with a decision by the Secretary of State that he was to be deported following his release on licence from a 10 year sentence of imprisonment for conspiracy to import class A drugs. His appeal against this decision to the asylum and immigration tribunal on human rights grounds failed. On 25 May 2007 he was served with a deportation order. On 25 June 2007 and 8 August 2007 further submissions were made on his behalf as to why he should not be deported. The Secretary of State agreed to consider his reasons for seeking revocation of the deportation order, but she declined to revoke it. Directions were then given for him to be removed from this country on 29 December 2007.

4. The respondent PE is a citizen of Cameroon. He entered the United Kingdom clandestinely in August 2004. On 19 May 2005 he applied for asylum. The Secretary of State refused his application on 5 July 2005. On 9 July 2005 it was decided that directions were to be given for his removal to Cameroon. He did not appeal against this decision. Before it was put into effect however he was sentenced to twelve months imprisonment for having a forged passport and using it to obtain work, to which he had pleaded guilty. As a result of this conviction the Secretary of State decided to make a deportation order against him. He appealed against this decision on asylum and human rights grounds, but his appeal was dismissed. The deportation order was signed, and it was served on him on 10 January 2007. On various dates thereafter his representatives made written representations on his behalf for the decision to be reconsidered. They claimed that he had been and would be persecuted in Cameroon on account of his homosexuality. The Secretary of State declined to reconsider her decision, as in her view his further representations did not amount to a fresh claim within the meaning of rule 353 of the Immigration Rules. He appealed to the tribunal against the Secretary of State's refusal to revoke her decision to make the order. The tribunal held that this decision was not an appealable decision.

5. On 27 December 2007 BA applied for judicial review of the directions for his removal. He contended that he had a further in-country right of appeal. It was no part of his case that his further representations amounted to a fresh claim under rule 353 of the Immigration Rules. PE had already applied for judicial review of the decisions that had been made against him. He claimed that he had a right of appeal against a refusal to revoke the deportation order, that this right was exercisable in-country and that in any event the representations amounted to a fresh claim under rule 353. Permission was given in each case, and the applications were heard together by Blake J: [2008] EWHC 1140 (Admin); [2008] 4 All ER 798. The judge held that what determined whether there was an in-country right of appeal was whether or not the Secretary of State was satisfied under rule 353 there was a fresh claim: para 62. In his opinion neither claimant had an in-country right of appeal simply by virtue of having made a protection claim or having made fresh representations supported by different material: para 74. In PE's case he quashed the decision that his was not a fresh claim and remitted it for redetermination by the Secretary of State. He said that if the Secretary of State were to conclude that the claim is a fresh one but it was still refused, PE would have access to a right of appeal in-country before removal. But if it was not a fresh claim, his right to appeal would have to be exercised from abroad. As Sedley LJ observed in the Court of Appeal, this conclusion raises the same issue as that raised by BA's appeal: [2009] EWCA Civ 119; [2009] 2 WLR 1370, para 4.

6. Rule 353 of the Immigration Rules, on which the Secretary of State relies, is headed "Fresh claims". It provides:

> "353. 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:
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> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

Rule 353A, which needs to be read together with rule 353 to complete the picture, provides:

> "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."

The 2002 Act

7. This Act was passed in the light of strong pressure to streamline appeals against immigration decisions in the light of objections that were taken to the large number of repeat claims. Part 5 of the Act provides a general right of appeal against an immigration decision to an adjudicator: section 82(1). The expression "immigration decision" is defined in section 82(2). It includes, among other things, a decision that a person is to be removed from the United Kingdom who is here unlawfully, a decision to make a deportation order under section 5(1) of the Act and a refusal to revoke a deportation order under section 5(2): sections 82(2)(g), (j) and (k). Having defined this expression, the statute proceeds to lay down an elaborate system for the handling of appeals.

8. Section 84(1) provides that an appeal under section 82(1) against an immigration decision must be brought under one or more of the grounds specified in that subsection. They include the following ground, with a view to ensuring that the United Kingdom complies with its international obligations:

> "(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

This is the ground on which both BA and PE rely.

9. Section 92, as amended, provides:

> "(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.
>
> (2) This section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d),(e), (f) . . . and (j).
>
> (3) This section also applies to an appeal against refusal of leave to enter the United Kingdom if –
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> (a) at the time of the refusal the appellant is in the United Kingdom, and
>
> (b) on his arrival in the United Kingdom the appellant had entry clearance. …
>
> (4) This section also applies to an appeal against an immigration decision if the appellant –
>
> (a) has made an asylum claim, or a human rights claim, while in the United Kingdom, or
>
> (b) is an EEA national or a member of the family of an EEA national and makes a claim to the Secretary of State that the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom."

The respondents' case is that section 92(4)(a) confers a suspensive in-country right of appeal unless the appeal has been certified under either section 94 or section 96 of the 2002 Act. It is suspensive because it suspends the operation of the immigration decision appealed against until the appeal has been disposed of.

10. Section 94 excludes appeals in asylum and human rights cases if the Secretary of State certifies that they are clearly unfounded. The relevant subsections, as amended, provide as follows:

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

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

…

(9) Where a person in relation to whom a certificate is issued under this section subsequently brings an appeal under section 82(1) while outside the United Kingdom, the appeal shall be considered as if he had not been removed from the United Kingdom."

11. Section 96 removes the right of appeal altogether if the Secretary of State or an immigration officer certifies that the person has dealt with, or ought to have dealt with, the issue in an earlier appeal. The relevant subsections of section 96, as amended, are in these terms:

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

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

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

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

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

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

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

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

12. The expressions "asylum claim" and "human rights claim" are each defined in section 113(1). It provides:

"In this Part, unless a contrary intention appears –

"asylum claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or to require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention,

…

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

Section 12 of the Immigration, Asylum and Nationality Act 2006 amends those definitions prospectively by adding in each case a provision that the expression:

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

As Sedley LJ observed in the Court of Appeal, under this amended formula a claim in any case where an earlier challenge to removal has been made and failed will only rank as an asylum claim or a human rights claim if it is a fresh claim under rule 353: [2009] 2 WLR 1370, para 27. The amendment has not yet been brought into force, as the entire system of immigration law is now under review. A Green Paper containing proposals to simplify the law was published in February

2008, and it is expected that a Bill to simplify the law will be published towards the end of this year.

13. No certificates under either section 94 or section 96 have been issued to the respondent in either case. They maintain that in these circumstances they are entitled to have their appeals heard in-country under section 92(4)(a), and that they cannot be removed from the United Kingdom until their appeals have been dealt with. The Secretary of State's contention is that an appeal against an immigration decision is available only out of country where, as in BA's case, the further representations have not been advanced as a fresh claim or, as in PE's case, have not been accepted as such by the Secretary of State. He maintains that their appeals must now be pursued out of country. If so, there is now no obstacle to the respondents being deported in accordance with the deportation orders that have been served on them.

The competing arguments in more detail

14. For the Secretary of State Miss Laing QC did not dispute that a right of appeal arises under section 82(1) when a decision that is an immigration decision is taken. Nor does she dispute that the Secretary of State's refusal in these cases not to revoke the deportation orders were immigration decisions within the meaning of section 82(2)(k) of the 2002 Act. What was in issue was whether the right of appeal against those decisions was to be exercised from within the United Kingdom. Her submission was that the words "an asylum claim, or a human rights claim" in section 92(4)(a) mean a first asylum or human rights claim or a second or subsequent asylum or human rights claim which has been accepted as a fresh claim under rule 353 of the Immigration Rules.

15. She acknowledged that this was not the literal meaning of this provision, as the definitions of these expressions made no reference to the fact that the claims to which they referred had to be a first or a fresh claim. But she said that they had to be construed in the context of the scheme of the statute as a whole, and that they had to be read in the way she suggested to avoid an absurdity. She submitted that the authorities also showed that they had to be read subject to this qualification. She based this submission on two decisions of the Court of Appeal: *Cakabay v Secretary of State for the Home Department (Nos 2 and 3)* [1999] Imm AR 176 and *R v Secretary of State for the Home Department, ex p Onibiyo* [1996] QB 768. In each of these cases observations were made about the treatment of repeat claims for asylum in the context of the provisions of the Asylum and Immigration Appeals Act 1993.

16. In *Cakabay v Secretary of State for the Home Department (Nos 2 and 3)* [1999] Imm AR 176, 180-181, Schiemann LJ said:

> "The statute makes no express provision as to what is to be done in the case of repeated claims for asylum by the same person. The second claim may be identical to the first ('a repetitious claim') or may be different ('a fresh claim'). It is common ground that a fresh claim attracts all the substantive and procedural consequences of an initial claim whereas a repetitious claim does not.
>
> In the case of a repetitious claim no more is required to be done: the first decision has ensured that the United Kingdom has complied with its obligations under the Convention. Section 6 of the 1993 Act creates no inhibition on the claimant's removal: the Secretary of State has on the occasion of his decision on the first claim decided the repetitious claim. So far as the decision on the claimant's repetitious application for leave to enter is concerned, the claimant will be told that leave has already been refused and that there is no need for any new decision."

17. In *R v Secretary of State for the Home Department, ex p Onibiyo* [1996] QB 768 the court had to consider whether, as a matter of law, a person might make more than one "claim for asylum" within the meaning of section 6 of the 1993 Act during a single uninterrupted stay in the United Kingdom. The Secretary of State argued that, once a person had made a claim for asylum, had had that claim refused and had unsuccessfully exercised his rights of appeal under section 9 of that Act, his legal rights were exhausted. There could be no further claim for asylum unless the claimant left the United Kingdom and returned before making a fresh application. At p 781 Sir Thomas Bingham MR rejected that argument. He said that it would undermine the beneficial object of the Convention if the making of an unsuccessful application for asylum were to be treated as modifying the obligation of the United Kingdom or depriving a person of the right to make a fresh "claim for asylum". He then discussed what constituted a fresh claim. At pp 783-784 he said that the acid test must always be whether, comparing the new claim with that which had been rejected, and excluding material on which the claimant could reasonably be expected to rely in the earlier claim, the new claim was sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim.

18. Miss Laing said that the same approach should be taken to the words used in section 92(4)(a) of the 2002 Act. She submitted that the intention of Parliament

when enacting this provision had to be derived from the context, the legislative history and the requirements of the international instruments. The essential features of the 2002 Act remained the same as those in the 1993 Act. It was to be assumed that where the same words were used they were intended to have the same meaning. It was implicit in the approach that was taken in *Ex p Onibiyo* that the Convention did not require protection against removal if all that the further representations were doing was to repeat an earlier claim which had been considered and rejected on appeal. What the international instruments required was compliance, not redundancy. It was only a fresh claim that would be an obstacle to the claimant's removal, by converting what would otherwise be an out of country appeal into an appeal that must be dealt with in-country.

19. As for the prospective amendment of section 113, she said that it did two things. It removed the requirement that a claim be made "at a place designated by the Secretary of State". And it clarified what section 113 should be taken to have meant on enactment. In the words of the Explanatory Notes, its purpose is to "clarify that further submissions which follow the refusal of an asylum or human rights claim but which do not amount to a fresh claim will not carry a further right of appeal." But it was of no assistance in resolving the argument either way as to the meaning of the definitions in their current form. Lloyd LJ was right when he said in the Court of Appeal that the amendment should be ignored: [2009] 2 WLR 1370, para 35.

20. Mr Husain too submitted that the meaning of the words used in section 94(2)(a) must be understood from their context. But he said that the context was markedly different from that in the 1993 Act. There was now a series of statutory provisions against abuse which were not to be found in the earlier legislation. It was those provisions, and not those instituted under the Immigration Rules by the executive, that should be used if it was thought that the appeals should not be dealt with in-country. The Secretary of State's approach rendered the new provisions otiose and unworkable in the case of second claims.

21. For example, Parliament had provided by section 84(1)(g) that an appeal against an immigration decision might be taken on the ground that the person's removal from the United Kingdom would breach the State's obligations under the Refugee Convention. Section 84(1)(c) dealt with the situation where it was contended that the decision was unlawful under section 6 of the Human Rights Act 1998. But the rights conferred by the European Convention on Human Rights were, in various respects, not the same: *JM v Secretary of State for the Home Department* [2006] EWCA Civ 1402; [2007] Imm AR 293, para 27, per Laws LJ. If the Secretary of State was right that the appeal could only be taken in-country if it was certified under rule 353, the person would be forced to take his appeal out of country even although it was on grounds referred to in section 84(1)(g), which

could be different from those advanced at an earlier stage under section 84(1)(c). As he would be without a certificate under section 94, he would be deprived of the benefit of section 94(9).

22. As for what was said in *R v Secretary of State for the Home Department, ex p Onibiyo*, Mr Husain said that it was not the only relevant authority. Prior to the enactment of the 2002 Act there were two other important decisions to which reference should be made. In *R (Kariharan) v Secretary of State for the Home Department* [2002] EWCA Civ 1102, [2003] QB 933, reference was made to the one-stop procedure that was introduced by sections 74-77 of the Immigration and Asylum Act 1999 and to section 73 of that Act, which enabled the Secretary of State to certify that a claim that a decision of a decision-maker was in breach of the appellant's human rights could reasonably have been made earlier, the effect of which was that the appeal was to be treated as finally determined: see Auld LJ, para 30. In para 36 Sedley LJ said that those provisions gave ample powers to the Secretary of State to dispose summarily of repetitive and abusive appeals. In *R v Secretary of State for the Home Department, ex p Saleem* [2001] 1 WLR 443, 449, Roche LJ accepted that the right of appeal to an independent appellate body was a fundamental or basic right akin to the right of unimpeded access to a court, an infringement of which must be either expressly authorised by or arise by necessary implication from an Act of Parliament.

23. Furthermore the approach that was taken in *R v Secretary of State for the Home Department, ex p Onibiyo* to the problem of repeat claims was imprecise and had been rendered unnecessary by the current legislation. In that case, as Sir Thomas Bingham MR recorded at p 783, counsel for the applicant, Mr Blake QC, as he then was, had conceded that that a fresh "claim for asylum" could not be made by advancing, even with some elaboration or addition, a claim already made or by relying on evidence available to the applicant but not advanced at the time of an earlier claim. A similar concession was made in *Manvinder Singh v Secretary of State for the Home Department* [1995] EWCA Civ 53, where Stuart-Smith LJ noted that in his skeleton argument Mr Blake QC had accepted that Parliament could not have intended removal to be indefinitely deferred pending successive identical appeals. The observations in *Ex p Onibiyo* had been inspired by the possibility of abuse. The contours of the legislation had now changed. The opportunity to resolve the issue by bringing the amendment of the definitions in section 113 into force had not been taken. It was difficult to understand why, if its purpose was simply to clarify, it had not been brought into force. As it was, the legislation had to be taken as it stood without regard to what may have been contemplated by the amendment.

Discussion

24. I have set out the competing arguments at some length, partly out of respect for the excellent submissions that were advanced by counsel on either side in the Chamber of the House of Lords on the occasion of the last sitting of the House in its judicial capacity, and partly because they demonstrate very clearly the essence of the issue that we must decide. Miss Laing invites us to follow Sir Thomas Bingham MR's analysis of the problem in *R v Secretary of State for the Home Department, ex p Onibiyo*, to hold that the words "an asylum claim, or a human rights claim" in section 92(4)(a) of the 2002 Act mean a first asylum or human rights claim or a second or subsequent claim which has been accepted by the Secretary of State as a "fresh claim", and that the procedure for determining whether or not a second or subsequent claim is a fresh claim is to be found in rule 353 of the Immigration Rules. Mr Husain on the other hand invites us to examine those words in the context of the current legislation read as a whole, taking full account of the progress of thinking since *Ex p Onibiyo* as to how the problem of repeat claims should be addressed. He submits that there is no justification, in the light of the provisions for dealing with repeat claims that the 2002 Act contains, for enlarging upon the plain words of the statute.

25. The strength of Miss Laing's argument lies in the fact that the definition of the phrase "claim for asylum" has remained, in substance, the same since its first appearance in section 1 of the 1993 Act where it was said to mean –

> "a claim made by a person (whether before or after the coming into force of this section) that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom".

The Convention there referred to was, of course, the Refugee Convention. The definition in section 167 of the 1999 Act was in substantially the same terms. Section 113 of the 2002 Act varies the language a little bit, because it calls this kind of claim "an asylum claim", introduces a requirement for it to be made at a place designated by the Secretary of State (no such place has been designated) and adds a definition in almost identical terms of "a human rights claim". The relevant phrase throughout is "a claim".

26. In *R v Secretary of State for the Home Department, ex p Onibiyo* the Secretary of State's argument that once there had been a claim for asylum and one appeal there could be no further "claim for asylum" unless the claimant had left the United Kingdom and returned before making the fresh application was rejected. It was held that there could be a fresh "claim for asylum" with the same consequences as to the right of appeal as follow on the refusal of an initial claim, provided that the Secretary of State recognised the fresh claim as a "claim for

asylum". If one looks no further and applies what *Bennion on Statutory Interpretation* (5th ed, 2008), section 201 and Part XIV described as "the informed interpretation rule", there is plainly much to be said for the view that the definitions that are set out in section 113 of the 2002 Act should be read in the same way. The procedure for determining whether a repeat claim is or is not a "fresh claim" is set out in rule 353 of the Immigration Rules, the effect of which I attempted to explain in *Z T (Kosovo) v Secretary of State for the Home Department* [2009] 1 WLR 348, para 33. It is a short step to conclude that a repeat claim which is not held under rule 353 to be a fresh claim falls to be disregarded as "an asylum claim, or a human rights claim" for the purposes of section 92(4)(a). Like Lloyd LJ, I would not draw an inference either way from the amendment of section 113 by section 12 of the 2006 Act as it is not yet in force.

27. It is an elementary principle, however, that the words of a statute should be construed in the context of the scheme of the statute as a whole. And it is plain that the scheme of the 2002 Act is not the same as that of the 1993 Act to which Sir Thomas Bingham MR addressed himself in *Ex p Onibiyo*. The problem to which he addressed himself was created by the absence of any provision in the statute to prevent abuse. The question was how that gap might best be filled, having regard to the fact that the blunt solution that was proposed by the Secretary of State would, as the Master of the Rolls pointed out at p 781, undermine the beneficial object of the Convention and the measures giving effect to it in this country.

28. Parliament might, of course, have stood still and left the matter to be dealt with under the Immigration Rules. But it has not stood still. The experience of the intervening years has been taken into account. First, there were the provisions against abuse in sections 73 to 77 of the 1999 Act. Now there is a set of entirely new provisions in the 2002 Act. As Lord Hoffmann said in *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844, para 15, while there is a good deal of authority for having regard in the construction of a statute to the way a word or phrase has been construed by the court in earlier statutes, the value of such previous interpretation as a guide to construction will vary with the circumstances. In this case the phrase in question has remained, in essence, unchanged. But the system in which it must be made to work is very different. This is a factor to which full weight must be given.

29. The new system contains a range of powers that enable the Secretary of State or, as the case may be, an immigration officer to deal with the problem of repeat claims. The Secretary of State's power in section 94(2) of the 2002 Act to certify that a claim is clearly unfounded, if exercised, has the effect that the person may not bring his appeal in-country in reliance on section 92(4). The power in section 96 enables the Secretary of State or an immigration officer to certify that a person who is subject to a new immigration decision has raised an issue which has

been dealt with, or ought to have been dealt with, in an earlier appeal against a previous immigration decision, which has the effect that the person will have no right of appeal against the new decision. It is common ground that the present cases are not certifiable under either of these two sections. Why then should they be subjected to a further requirement which is not mentioned anywhere in the 2002 Act? It can only be read into the Act by, as Sedley LJ in the Court of Appeal put it, glossing the meaning of the words "a…claim" so as to exclude a further claim which has not been held under rule 353 to be a fresh claim: [2009] 2 WLR 1370, paras 20, 30. The court had to do this in *Ex p Onibiyo*. But there is no need to do this now.

30. It is not just that there is no need now to read those words into the statute. As Mr Husain pointed out, the two systems for excluding repeat claims are not compatible. Take the system that section 94 lays down for dealing with claims that the Secretary of State considers to be clearly unfounded. If he issues a certificate to that effect, the appeal must be pursued out of country. But the claimant will have the benefit of section 94(9), which provides that where a person in relation to whom a certificate under that section subsequently brings an appeal under section 82(1) while outside the United Kingdom the appeal will be considered as if he had not been removed from the United Kingdom. He will have the benefit too of the passage in parenthesis in section 95, which provides:

> "A person who is outside the United Kingdom may not appeal under section 82(1) on the ground specified in section 84(1)(g) (except in a case to which section 94(9) applies)."

31. If Miss Laing is right, the effect of a decision by the Secretary of State that the representations that a person makes against an immigration decision of the kind mentioned in section 82(1)(k) – a refusal to revoke a deportation order – is not a fresh claim will be that an appeal against that decision must be brought out of country. But the interpretative route by which she reaches that position does not save that person from the exclusionary rule in section 95, unless – which has not been done in these cases – the claims are also certified under section 94(2) as clearly unfounded. The ground of appeal referred to in section 84(1)(g) has been designed to honour the international obligations of the United Kingdom. To exclude claims which the Secretary of State considers not to be fresh claims from this ground of appeal, when claims which he certifies as clearly unfounded are given the benefit of it, can serve no good purpose. On the contrary, it risks undermining the beneficial objects of the Refugee Convention which the court in *Onibiyo*, under a legislative system which had no equivalent to section 95, was careful to avoid.

32. In my opinion Lloyd LJ in the Court of Appeal was right to attach importance to this point: [2009] 2 WLR 1370, paras 39-40. As he said, the development of the legislative provisions and the powers given to the Secretary of State to limit the scope for in country appeals deprive Miss Laing's submissions of the foundation which they need. There is obviously a balance to be struck. The immigration appeals system must not be burdened with worthless repeat claims. On the other hand, procedures that are put in place to address this problem must respect the United Kingdom's international obligations. That is what the legislative scheme does, when section 95 is read together with section 94(9). It preserves the right to maintain in an out of country appeal that the decision in question has breached international obligations. I would hold that claims which are not certified under section 94 or excluded under section 96, if rejected, should be allowed to proceed to appeal in-country under sections 82 and 92, whether or not they are accepted by the Secretary of State as fresh claims.

33. There is no doubt, as I indicated in *Z T (Kosovo) v Secretary of State for the Home Department* [2009] 1 WLR 348, para 33, that rule 353 was drafted on the assumption that a claimant who made further submissions would be at risk of being removed or required to leave immediately if he does not have a "fresh claim". That was indeed the case when this rule was originally drafted, as there was no equivalent of section 92(4) of the 2002 Act. But Mr Husain's analysis has persuaded me that the legislative scheme that Parliament has now put in place does not have that effect. Its carefully interlocking provisions, when read as a whole, set out the complete code for dealing with repeat claims. Rule 353, as presently drafted, has no part to play in the legislative scheme. As an expression of the will of Parliament, it must take priority over the rules formulated by the executive. Rule 353A on the other hand remains in place as necessary protection against premature removal until the further submissions have been considered by the Secretary of State.

Conclusion

34. I would dismiss these appeals and affirm the orders made by the Court of Appeal.

LORD SCOTT

35. I have had the advantage of reading in draft the judgment of Lord Hope and am persuaded that for the reasons he has given these appeals should be dismissed. I am in full agreement also with the comments made by Lord Brown whose judgment I have also had the advantage of reading in draft.

LORD RODGER

36. I agree with the judgment of Lord Hope and with the additional observations of Lord Brown.

37. The submission for the Home Secretary that the expression "an asylum claim" in section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 should be given the same meaning as Sir Thomas Bingham gave to the expression "a claim for asylum" in section 6 of the Asylum and Immigration Appeals Act 1993 is at first sight compelling. Certainly, the change in the form of the expression is irrelevant. The contexts within which the two expressions have to be interpreted are, however, relevant. And, as Lord Hope explains, they are significantly different, since the 2002 Act contains a new scheme for dealing with abusive claims. Given that new scheme, there is no longer the same need to adopt the former interpretation and, indeed, the one now adopted fits the new context better.

LADY HALE

38. I am afraid that I have reached a different conclusion from the other members of the Court. There is no need to explain my views in detail as it will make no difference to the result.

39. We are concerned with the meaning of the word "claim" in section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002. When that Act was passed, it had been understood since 1996 that in this context the word "claim" referred to a first claim, or to a second or subsequent claim which was different from any earlier claim, but not to a second or subsequent claim which was merely repetitious of an earlier claim. This eminently sensible conclusion had been reached by a Court of Appeal led by Sir Thomas Bingham MR in *R v Secretary of State for the*

Home Department, ex parte Onibiyo [1996] QB 768. It is a well-known principle of statutory interpretation that when Parliament re-enacts words which have already been the subject of judicial interpretation it intends them to have the same meaning. There was no need, therefore, for Parliament to spell out what it meant by a "claim" in section 92(4)(a). It was already well-known.

40. In *Onibiyo* the Court also considered whether the decision that a "claim" was a "claim" was a question of precedent fact for the court to decide or a question for the Secretary of State to decide subject to challenge on the usual judicial review grounds. It was not necessary to decide this question in that case, but the Master of the Rolls "inclined" to the latter view. This was adopted by the Court of Appeal in later cases: see eg *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, [2007] Imm A R 337; *R (AK) (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 447. Rule 353 of the Immigration Rules sets out the test which the Secretary of State applies in making his decision. It should not be thought, however, that Miss Laing's argument depends upon the existence and wording of rule 353. That merely provides for how the Secretary of State reaches his decision as to whether or not a claim is a "claim". It is not the end of the matter. The Secretary of State's test might come under attack for not reflecting the "acid test" laid down by the Master of the Rolls in *Onibiyo*. His conclusion reached in an individual case might come under attack on *Wednesbury* or other conventional grounds. The conclusion of the Court of Appeal, that this is not a question of precedent fact, to be determined by the appellate authorities and ultimately by the courts, might be challenged in the Supreme Court. Miss Laing's argument is simply that when Parliament enacted section 92(4)(a) of the 2002 Act it thought that the meaning of "an asylum claim, or a human rights claim," was already well established and did not include a claim which was merely repetitious of an earlier one. She is not relying on rule 353 to construe the 2002 Act.

41. I am not persuaded by Mr Husain's argument, attractively though it was put, that the new powers under sections 94 and 96 to restrict or deny appeals put such an entirely new complexion on matters that Parliament is to be taken to have abandoned the old meaning of "claim" without saying so. This would be astonishing given that it is apparently common ground that neither of these claims would have been certifiable under either section. Section 94 removes the right of in-country (but not out-country) appeal if an asylum or human rights claim is "clearly unfounded". Yet apparently it is not suggested that the fact that a claim has been made previously and rejected necessarily means that it is "clearly unfounded". Section 96 removes the right of appeal altogether if a claim or application raises matters which could have been raised on an appeal against an earlier decision. This does not deal with a claim which raises exactly the same matters as were rejected on an earlier occasion. So it is common ground that these new powers are not apt to cater for repetitious claims. If so, I cannot understand

how Parliament, by introducing them, can be taken to have departed from an established interpretation which was designed to deal with a different problem.

42. Nor am I persuaded by the argument that, if an asylum or human rights claim is certified under section 94, the claimant can still raise his asylum or human rights arguments in an out-of-country appeal, but that otherwise section 95 prevents a person from raising asylum or human rights grounds from outside the country. A person whose claim is certified under section 94 is denied any right of appeal in this country, but may appeal from outside. It is only right in those circumstances that he should be able to appeal on the same grounds that he could have raised in this country. A person whose claim is not a claim at all, because essentially the same claim has already been determined, has already enjoyed rights of appeal on asylum or human rights grounds in this country. There is no reason to give him a second bite at the cherry whether here or abroad.

43. This country is bound not to expel people in breach of their human rights or when they have a well-founded fear of persecution in their home country. We must of course have a fair system for deciding whether expulsion will be in breach of those obligations. An initial decision followed by an appeal system in this country is sufficient to do this. This country is not bound to allow people to make essentially the same claim time and time again as a way of staving off their departure. The interpretation put forward by Miss Laing accords with our international obligations, as well as with principle and practicality. I would have allowed this appeal.

LORD BROWN

44. I have had the advantage of reading in draft the judgment of Lord Hope and am in full agreement with him that these appeals should be dismissed. I would make it clear, however, that this is not a conclusion at which I readily arrived and I reached it only on the basis that, as Mr Husain in his enticing submissions readily accepted, the statutory solution to the problem of abuse created by the making of repeat asylum claims lies not in construing "an asylum claim" in section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 as the Court of Appeal in *R v Secretary of State for the Home Department ex parte Onibiyo* [1996] QB 768 construed "a claim for asylum" in section 6 of the Asylum and Immigration Appeals Act 1993 but rather in the Secretary of State issuing certificates where appropriate under sections 94 or 96 of the 2002 Act (no equivalent provisions having been available under the 1993 Act).

45. True it is, as observed by Lord Hope in paragraph 29 of his judgment (and noted also at paragraph 13 of Sedley LJ's judgment in the Court of Appeal [2009] 2 WLR 1370), that it is common ground between the parties that the present cases are not certifiable under either of these sections. That, however, as I understand it, is solely because, so far as section 94 is concerned, it applies only "where the appellant has made an asylum claim or a human rights claim (or both)" (subsection 1). By the same token that, on the Secretary of State's argument, a repeat claim does not fall within those words in section 92 (4)(a), so he contends that it does not do so for section 94 purposes. Given, however, as Mr Husain submits and I would accept, that a repeat claim *does* involve making a claim for the purposes of section 92(4)(a), so too it enables the Secretary of State to certify it as "clearly unfounded" if he so regards it under section 94. Moreover, consistently with what the House said in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] 1 WLR 348 (Lord Neuberger's views expressed at paragraphs 80-81 of his opinion being determinative on this point), there will be precious few cases in which that test differs from the rule 353 test as to whether a claim has "a realistic prospect of success".

46. The major reason why finally I am persuaded that the respondent's approach is the correct one is that, so far from leaving the critical words "an asylum claim" in section 92(4)(a) to be construed as the Court of Appeal in *Onibiyo* construed "a claim for asylum" in the 1993 Act, Parliament in the 2002 Act not only made express provisions to deal with abusive claims but split up different aspects of the possible abuse between sections 94 and 96. Sir Thomas Bingham MR in *Onibiyo* had said (at pp783-784):

> "The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

"[Ex]cluding material on which the claimant could reasonably have been expected to rely in the earlier claim" is now expressly dealt with by section 96. As already explained, ordinary repeat claims fall to be excluded under section 94.

47. As Lord Hope points out, moreover, there is one very clear advantage in providing for any abuse by making repeat claims to be dealt with by section 94 rather than rule 353: by virtue of sections 94(9), 95 and 84(1)(g) it allows an out of

country appeal to be brought on human rights grounds when otherwise that would not be possible.

48. For these reasons, therefore, which in large part echo those given in Lord Hope's altogether fuller judgment, I too would dismiss these appeals.