Court of Appeal

Regina (Khan) *v* Secretary of State for the Home Department

[2017] EWCA Civ 424

2017 May 16; June 8 Gross, Underhill LJJ

Judicial review — Alternative remedy — Whether judicial review appropriate — Claimant seeking judicial review of Secretary of State's decision to refuse to extend leave to remain — Upper Tribunal declining to determine claim on grounds of alternative remedy of appeal to First-tier Tribunal — Whether exceptional circumstances making judicial review appropriate — Immigration Act 1971 (c 77), s 3C(1)(2) (as substituted by Nationality, Immigration and Asylum Act 2002 (c 41), Pt 6, s 118)

The claimant, a national of Pakistan, had limited leave to remain in the United Kingdom. A few days before the expiry of his leave he applied for an extension of his period of leave. The Secretary of State rejected the application on the ground that it had not been accompanied by the required fee. Since the claimant had no right of appeal against that rejection, he submitted a renewed application accompanied by the required fee. The Secretary of State refused the application on the merits, informing the claimant that he had no right of appeal against her refusal since his renewed application had been made at a time when he had no leave to remain. The claimant sought judicial review in the Upper Tribunal of the applicable decisions. On the claim, an issue arose as to jurisdiction, namely as to what rights the claimant had in such circumstances where, pursuant to section 3C(1)(2) of the Immigration Act 1971[1], where an application to vary leave to remain was made during the currency of existing leave, leave was automatically extended until that application was finally disposed of. The claimant contended that if the Secretary of State had not been entitled to reject the first application, then he still enjoyed leave to remain at the point that he lodged his second application and he was entitled to a right of appeal in that application. The claimant also contended that the appropriate application was by way of judicial review proceedings in the Upper Tribunal, whereas the Secretary of State contended that the appropriate route was via an appeal to the First-tier Tribunal, which would then determine whether it had jurisdiction to entertain the appeal. The Upper Tribunal declined to determine the issue as to jurisdiction and the claim was dismissed on the basis that the claimant had an alternative remedy in the form of an appeal to the First-tier Tribunal.

On the claimant's appeal—

Held, allowing the appeal, that although section 3C(1)(2) of the Immigration Act 1971 provided that, where an application to vary leave to remain was made during the currency of existing leave, leave was automatically extended until that application was finally disposed of, whether there was a right of appeal against the refusal in question by the Secretary of State depended on the validity of the rejection of another application by the claimant; that, in the circumstances, the Upper Tribunal's decision not to determine the jurisdiction issue was wrong notwithstanding the existence of an alternative remedy, and it could and should have done so while maintaining that in general the jurisdiction issue should to be determined in the first instance by the First-tier Tribunal; and that, accordingly, the matter should be remitted to the Upper Tribunal for determination (post, paras 28–29, 31–32, 36, 38).

In re Basnet (Validity of application: Respondent: Nepal) [2012] UKUT 113 (IAC); [2012] Imm AR 673 approved.

Decision of the Upper Tribunal (Immigration and Asylum Chamber) [2015] UKUT 353 (IAC) reversed.

[1] Immigration Act 1971, s 3C: "(1) This section applies if— (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave, (b) the application for variation is made before the leave expires, and (c) the leave expires without the application for variation having been decided. (2) The leave is extended by virtue of this section during any period when— (a) the application for variation is neither decided nor withdrawn ..."

APPEAL from the Upper Tribunal (Immigration and Asylum Chamber)

The claimant, Saqib Zia Khan, was a national of Pakistan who sought an extension to his existing limited leave to remain in the United Kingdom. The law as of 2013 was in issue, since amended. The Secretary of State for the Home Department rejected the application. The rejection was arguably ill-founded. There was no right of appeal. The claimant's leave meanwhile expired, which potentially affected his right of appeal if a further application by him was also rejected. The claimant made such a further application which the Secretary of State rejected, stating that the claimant had no right of appeal because the application was made at a time when his leave had expired.

The claimant issued proceedings for judicial review. The decision challenged was the decision of 24 May 2013, refusing an application made in November 2012, but it was made clear in the grounds that what was in fact challenged was not the refusal on the merits but the denial of a right of appeal, which turned on whether the claimant enjoyed continuing leave pursuant to section 3C of the Immigration Act 1971 while his first application of July 2012 remained arguably undetermined.

The issue accordingly arose as to what rights the claimant had in such circumstances where, when an application to vary leave to remain was made during the currency of existing leave, leave was automatically extended until that application was finally disposed of.

At the hearing in the Upper Tribunal (Immigration and Asylum Chamber) Upper Tribunal Judge O'Connor raised the question whether the Upper Tribunal should decline to entertain an application for judicial review on the basis that there was an alternative remedy, namely by initiating an appeal to the First-tier Tribunal which would then decide the jurisdiction issue for itself as a preliminary to deciding whether it could hear the appeal, where it was well-established that where there was a statutory right of appeal against a decision it was only where "special or exceptional factors" were in play that the court would allow a challenge to that decision to proceed by way of judicial review rather than by the route provided by statute.

By a decision dated 15 June 2015 [2015] UKUT 353 (IAC) Upper Tribunal Judge O'Connor declined to determine the issue as to jurisdiction which arose and dismissed the claim.

By an appellant's notice dated 13 July 2015 and with the permission of the Court of Appeal the claimant appealed on the grounds, inter alia, that, in the circumstances of the case, the Upper Tribunal judge ought to have determined the jurisdiction issue in the clamant's favour pursuant to section 3C of the Immigration Act 1971 and permitted the case to proceed.

The facts are stated in the judgment of Underhill LJ.

Rowan Pennington-Benton and *Julia Lowis* (instructed by *Farani Javid Taylor*) for the claimant.
Zane Malik (instructed by *Treasury Solicitor*) for the Secretary of State.

The court took time for consideration.

8 June 2017. The following judgments were handed down.

UNDERHILL LJ

The issue and the procedural history

1 The issue on this appeal is comparatively narrow, but it arises out of a particular situation which occurs quite frequently in connection with applications by non-nationals for leave to remain in the UK and which has generated a number of cases in the First-tier and Upper Tribunals. I will set out the essentials of the situation in generic terms—what I will call the paradigm case—before turning to the facts of the instant case. In doing so I will refer to the law as it stood in 2013, which is the relevant date for our purposes; but it should be noted that it has since changed in some important respects.

2 The essential factual elements of the paradigm case are as follows:

(1) C, a non-national with limited leave to remain, applies for an extension of his period of leave. The extension may be on the same basis as the original leave, eg a student wishing to continue their studies, or on a different basis, eg a student who has married a UK national: in either case the legislation describes it as a "variation". He makes the application before the expiry of his current period of leave. I will call this application "A1".

(2) The Secretary of State rejects A1 because of an asserted technical invalidity, eg non-payment of the fee or failure to supply required information or documents.

(3) The rejection is, or is arguably, ill-founded—either because it was on an incorrect factual basis (eg the documents had in fact been supplied) or because it was unlawful for some other reason (eg breach of a flexibility policy or of the common law duty of fairness).

(4) There is no right of appeal, since a rejection of this kind does not constitute an "immigration decision".[1] C could in principle challenge it by way of judicial review; but he takes the more pragmatic course of re-submitting the application and correcting the alleged error. I will call this application "A2".

(5) Because of the interval between the lodging of A1 and the Secretary of State's rejection of it, which will typically be months rather than weeks, C's current leave has (subject to the point considered at para 3 below) expired by the time he lodges A2. This is potentially significant for his right of appeal if A2 is refused: that is because the right of appeal under section 82(2)(d) of the Nationality Immigration and Asylum Act 2002 only applies where the applicant has leave to remain at the time that the application was made: see *SA (Pakistan) v Secretary of State for the Home Department* [2007] UKAIT 83; [2008] Imm AR 124.

(6) The Secretary of State considers A2 and refuses it on the merits.

(7) The Secretary of State is obliged by regulation 5(3) of the Immigration (Notices) Regulations 2003 ("the Notices Regulations"; SI 2003/658) to include in the notice of decision a statement of any right of appeal. The decision notice communicating the refusal of A2 contains a statement that C has no right of appeal because the application was made at a time when he had no leave to remain—see (5) above.

3 The question is what are C's rights in that situation. On the face of it the Secretary of State's statement that he has no right of appeal is correct, for the reason given in the notice. However, in *In re Basnet (Validity of application: Respondent: Nepal)* [2012] UKUT 113 (IAC); [2012] Imm AR 673 the Upper Tribunal (Blake J and Upper Tribunal Judge Macleman) identified an important qualification. Section 3C(1)(2) of the Immigration Act 1971 provides that, where an application to vary leave to remain is made during the currency of existing leave, leave is automatically extended until that application is finally disposed of: I refer to this as "3C leave". Accordingly, *if* the Secretary of State was indeed not entitled to reject A1, C still enjoyed leave to remain at the point that he lodged A2 and is entitled to a right of appeal after all. The result is that whether there is a right of appeal against the refusal of A2 depends on the validity of the rejection of A1. This issue, ie whether C has a statutory right of appeal because he has 3C leave, was referred to before us as "the jurisdiction issue".

4 The primary question raised by this appeal concerns the forum in which the jurisdiction issue should be decided. The claimant's case is that it should, or in any event can, be determined in judicial review proceedings in the Upper Tribunal. The Secretary of State's case is that C must seek to appeal to the First-tier Tribunal, which will then itself determine the issue in order to decide whether it has jurisdiction to entertain the appeal. But before I consider that question I should set out the facts, and the procedural history, of the present case. It will be seen that we are in the same area as the paradigm case, but that there are peculiar features which may affect the legal analysis.

5 As for the facts, they can be sufficiently summarised as follows:

(1) The claimant is a national of Pakistan. He came to this country on a student visa in July 2007. His leave was subsequently extended to 30 July 2012.

(2) On 4 April 2012 he applied for leave to remain as a Tier 1 (Post Study Work) Migrant: I call this "the April application". At that stage he was awaiting a decision about his degree, and in the covering letter he asked for that decision to be deferred until he could receive the degree certificate.[2] The application required payment of a fee, and for that purpose he supplied his credit card details.

(3) UKBA did not on receipt of the application promptly apply for the card payment. On 2 May 2012 the claimant's solicitors, Farani Taylor, now Farani Javid Taylor, ("FT") wrote to point out that the card of which he had supplied details had expired at the end of April: they asked UKBA to contact them as soon as possible "in order to allow us to provide you with new card details in a secure manner".

(4) In the event there were difficulties about the completion of the claimant's degree. On 27 July 2012, ie a few days before his current leave was due to expire, he applied for 60 days' leave on an exceptional basis: I call this "the July application". It appears from FT's covering letter that he was intending to apply to take a different course but that for that purpose he needed to be able to show the college that he had current leave to remain.

(5) The July application itself required to be accompanied by a fee. However, payment was not included with it, nor were credit card details provided on the form. It seems that UKBA attempted nevertheless to obtain payment, using the credit card details supplied in the April application, but the attempt was unsuccessful because, as it had been warned was the case, the

card had expired. On 24 September UKBA wrote to FT rejecting the application on the basis that it had not been accompanied by payment of the fee.

(6) On 20 November 2012 FT wrote to UKBA pointing out that the problem of non-payment could have been avoided if it had asked for fresh credit card details as previously offered. However, they submitted a further copy of the July application with the credit card details completed: I call this "the November application".

(7) The November application was refused on the merits by a decision letter dated 24 May 2013. The decision notice informed the claimant that he had no right of appeal.

6 It will be seen that those facts conform to the paradigm in as much as the July application was made during the currency of the claimant's original (extended) leave, so that if the Secretary of State's rejection of that application was unlawful he still enjoyed "3C leave" at the time that he made the November application. The July application corresponds to "A1" and the November application to "A2". Mr Rowan Pennington-Benton, who appears for the claimant with Ms Julia (as he did in the Upper Tribunal), is constrained to acknowledge that the July application was defective because it did not include any credit card details, but he would if necessary submit that it was nevertheless unfair of UKBA to reject it on that basis when they could and should have applied for up-to-date details as invited by FT (see para 5(5) above). However, there is in this case the additional feature of the April application, which has no equivalent in the paradigm case. That application had never been determined, nor was there any challenge to its validity; and accordingly, Mr Pennington-Benton would argue, he can rely on it as generating 3C leave and thus has no need to rely on arguments about the lawfulness of the rejection of the July application (which, though he made no concessions, I think he recognised would face real difficulties). To that extent this case differs from the decision in *Basnet*.

7 On 22 August 2013 the claimant issued judicial review proceedings. The decision challenged was the decision of 24 May 2013, ie the refusal of the November application, but it was made clear in the grounds that what was in fact challenged was not the refusal on the merits but the denial of a right of appeal, which turned, for the reasons explained above, on whether he enjoyed 3C leave as at the date of the application—in other words, it raised the jurisdiction issue.

8 After an initial refusal on the papers, permission was granted by Upper Tribunal Judge Freeman at an oral hearing, at which the Secretary of State was represented by counsel, on 8 August 2014.

9 The substantive application came on for hearing before Upper Tribunal Judge O'Connor on 9 February 2015. At that hearing, the judge raised the question whether the Upper Tribunal should decline to entertain an application for judicial review on the basis that there was an alternative remedy, namely by initiating an appeal to the First-tier Tribunal which would then decide the jurisdiction issue for itself as a preliminary to deciding whether it could hear the appeal. It is of course well-established that where there is a statutory right of appeal against a decision it is only where "special or exceptional factors" are in play that the court will allow a challenge to that decision to proceed by way of judicial review rather than by the route provided by statute: see, most recently, *R (Mehmood)) v Secretary of State for the Home Department* [2015] EWCA Civ 744; [2016] 1 WLR 461, per Beatson LJ at para 49 (p 475G). I will refer to this for convenience as "the alternative remedy rule", though the existence of a discretion to depart from it in exceptional cases means that it is not a rule in the absolute sense. That point had not been raised by the Secretary of State, at the permission stage or subsequently, and the parties were not in a position to deal with it. The hearing was accordingly adjourned.

10 On 15 June 2015 [2015] UKUT 353 (IAC), following the resumed hearing, Judge O'Connor dismissed the application for judicial review on the basis that there was indeed an alternative remedy by way of appeal to the First-tier Tribunal. His reasoning is clear and thorough, but since I shall have to go over much of the same ground myself it is sufficient to summarise it by saying that he held: (a) that the First-tier Tribunal would have power to decide the jurisdiction issue (that was not in fact in dispute—see *Virk v Secretary of State for the Home Department* [2013] EWCA Civ 652; [2014] Imm AR 95); (b) that the claimant ought not therefore proceed by way of judicial review in the absence of some special reason; and (c) that none of the various reasons advanced on his behalf justified his being allowed to do so. He pointed out that the *Basnet* decision itself had not been decided in judicial review proceedings: the applicant had proceeded by way of appeal to the First-tier Tribunal, notwithstanding the Secretary of State's statement that no appeal lay, and when the First-tier Tribunal decided the jurisdiction issue against him he had appealed to the Upper Tribunal against that decision. He said that that was the route that should have been followed in this case.

11 There are five grounds of appeal, which I take in turn.

Ground 1

12 Under this head the claimant contends that the *Basnet* case [2012] Imm AR 673 was wrongly decided. When I considered the application for permission to appeal on the papers I refused permission on this ground because I did not see how, even if that contention were correct, it could affect the outcome in this case. However, the claim renewed the application orally, and it was deferred to the hearing of the other grounds (on which I had given permission) on a rolled-up basis; and we heard argument on it de bene esse.

13 Mr Pennington-Benton's argument is that the Upper Tribunal in the *Basnet* case overlooked the effect of subsections (4) and (5) of section 3C. These read:

> "(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
>
> "(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a)."

The effect of those provisions was authoritatively elucidated by this court in *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78; [2009] Imm AR 499 (see paras 30–46 of the judgment of Richards LJ). It is sufficient to say that, although the effect of subsection (4) is that a person who has made an application for an extension of his leave (ie A1) is prohibited from making a further application while that application is pending, by subsection (5) that prohibition does not prevent him "varying" A1. Mr Pennington-Benton relied on those provisions in this way. He pointed out that in the *Basnet* case A1 had been rejected because the applicant was (wrongly) said to have provided inaccurate credit card details, and that A2 had simply consisted of him re-submitting the same document. He submitted that that could not constitute a "variation" of A1 so as to attract the protection of subsection (5). It followed that Mr Basnet had no right to make A2, that the Secretary of State ought to have made no decision on it, and that for that reason no appeal lay against her decision, irrespective of whether A1 was valid.

14 Even if that argument were right, it is hard to see how it would affect the present case. I agree that it might do so if the claimant's case depended on the July application, since in that regard it is very close to the facts of the *Basnet* case: the only difference is that the November application was not quite identical to the July application, because it contained the missing credit-card details, and it might therefore be arguable that it "varied" it, so as to attract the protection of subsection (5). But, as pointed out at para 6 above, the claimant's case does not stand or fall on the July application, his main point being that he enjoyed 3C leave by virtue of the April application: in that context the argument about whether A2 "varied" A1 would not arise because the November application was unquestionably on a different basis from the April application. Mr Pennington-Benton says that that may be so but that he cannot at this stage count on the argument based on the April application succeeding, so that his alternative based on the July application remains in play. However, even if that is sufficient as far as it goes, it does not answer the more basic point that any questions about the effect of the *Basnet* decision can be determined by the First-tier Tribunal as part of deciding for itself whether it has jurisdiction. As to that, Mr Pennington-Benton says that the issues that would arise if he were right about the *Basnet* case would not all be of a character that the First-tier Tribunal could properly determine: I do not accept that submission, for reasons which appear at para 20 below.

15 In the end, however, I think the more straightforward course is not to refuse permission on the basis that the issue about the correctness of the *Basnet* case does not arise, but to grant it and decide the point. In my view Mr Pennington-Benton's challenge to the *Basnet* case is ill-founded. Mr Zane Malik, for the Secretary of State, submitted that subsections (4) and (5) of section 3C were not engaged in the *Basnet* case because A2 was not a distinct application at all, so as to fall within the terms of subsection (4): it was simply a re-submission of the original application and did not for that reason even potentially fall foul of subsection (4). He pointed out that in *R (Iqbal) v Secretary of State for the Home Department* [2016] UKSC 63; [2017] 1 WLR 85, the Supreme Court seems to have proceeded on the basis of this analysis—see para 10 of the judgment of Lord Carnwath (at p 91). I am not sure the *Iqbal* case helps much, because the point was not there in issue; but in my view Mr Malik's analysis represents a common sense approach in any event and I would accept it. That is so even though it appears to have been the case in the *Basnet* case (as indeed one would expect) that the decision letter was framed by the Secretary of State as a response to A2 rather than A1: what matters is that for the purpose of section 3C the two applications did not fall to be treated as distinct.

Ground 2

16 The essence of this ground, as developed in Mr Pennington-Benton's oral submissions, is that the present case is fundamentally different from the ordinary case caught by the alternative remedy rule because the existence of the alternative remedy is in dispute: the Secretary of State in this case is arguing that the claimant had no statutory right of appeal. All that he was submitting that the Upper Tribunal should do was to decide the jurisdiction issue: if it held in the claimant's favour he would of course thereupon pursue an appeal and the substantive issues would be decided by the First-tier Tribunal in the ordinary way. A fundamental aspect of the alternative remedy rule was that Parliament, or the relevant rule-maker, had designated the tribunal in question—here the First-tier Tribunal—as the forum for determination of a particular kind of issue; but that argument had no, or in any event less, weight where the only issue which it was said should be determined by a different tribunal was one which went to jurisdiction.

17 Mr Pennington-Benton relied on a number of other features (to some extent reflecting that basic point) which he said made the First-tier Tribunal less appropriate as a forum for determining the jurisdiction issue. I can summarise those as follows:

(1) He submitted that the determination of the jurisdiction issue would or might require decisions of a public law character which were not within the normal remit of the First-tier Tribunal. To take the paradigm case that I have set out above, it is true that sometimes the question whether A1 had been lawfully rejected would depend on a question of fact (eg had the applicant in fact paid the fee?), but it might in other cases depend on an assessment of the fairness of the rejection or its conformity with published policy, which were classic judicial review questions; in this case, the claimant's alternative case based on the July application was of the latter kind. In either case what the applicant was in substance requiring was a declaration of the lawfulness of the rejection, which was relief that the First-tier Tribunal could not give.

(2) Under the rules the First-tier Tribunal would not be obliged to hold a hearing to determine the jurisdiction issue. If it took the view that the decision of 24 May 2013 was not appealable the correct procedural course would be for it not to "accept" the appeal—see rule 22(1)(a) of the Tribunal Procedure (First-tier Tribunal (Immigration and Asylum Chamber)) Rules 2014 ("the Rules"; SI 2014/2604)—and an applicant has no right to a hearing in such a case. If there was indeed no hearing, there would be no right of appeal to the Upper Tribunal because such a decision would not be appealable under the statutory scheme—see *In re Ved (Appealable Decisions: Permission Applications: Basnet)* [2014] UKUT 150 (IAC); [2014] Imm AR 868; and any challenge would have to be by way of judicial review. Mr Pennington-Benton accepted, I think, that if nevertheless there was a hearing at which the issue was formally determined, an appeal would lie to the Upper Tribunal: see *In re Abiyat (Rights of Appeal: Iran)* [2011] UKUT 314 (IAC); [2011] Imm AR 822, to which we were referred by Mr Malik. But his point was that there would often be no such hearing, in which case any challenge to the rejection of the appeal by the First-tier Tribunal would have to come back in the end to the Upper Tribunal for judicial review by a more circuitous route, which was wasteful of time and resources.

(3) He submitted that it was highly unattractive that an applicant who had been told in terms by the Secretary of State, who he could reasonably regard as the voice of authority, that there was no right of appeal, and who accordingly applied for judicial review, should be rebuffed on the basis that he should have ignored what he was told and appealed nevertheless.

(4) He raised a particular point by reference to the decision in this court in *R(E(Russia)) v Secretary of State for the Home Department* [2012] EWCA Civ 357; [2012] 1 WLR 3198[3] ("the *OS(Russia)* case"): the point is quite technical, and it is more convenient if I explain it below—see para 22. He identified several cases in which a jurisdiction issue of this kind had been determined by the Upper Tribunal on a jurisdiction application. He observed that, in consequence of the "tribunalisation" of judicial review in the immigration field, the result would not be that the relevant issues were decided by a non-expert tribunal: the Upper Tribunal had the same expertise as the First-tier Tribunal.

18 Mr Pennington-Benton developed those arguments intelligently and engagingly, but I am not persuaded that they should lead to a departure from the alternative remedy rule in cases of this kind. In my view the normal position should be that the question whether a statutory appeal lies should be determined in the first instance by the First-tier Tribunal itself. My reasons are as follows.

19 My starting-point is that it is both natural and more convenient that where an issue arises as to the jurisdiction of a statutory tribunal that issue should be determined in the first instance by the tribunal itself, which can then proceed to consider the substantive issues if it decides that it has jurisdiction. It is inherently more wasteful for proceedings to have to be brought

in different courts or tribunals. I do not see the force of Mr Pennington-Benton's suggested distinction between cases where jurisdiction is in issue and other "alternative remedy" cases. Once it is accepted, as he does accept, that the tribunal is in principle entitled to determine whether it has jurisdiction, I see no reason, in this context, for treating that question differently from any other question which it is empowered to decide. I accept that if one or other party is dissatisfied with the First-tier Tribunal's decision on jurisdiction it may then have to be decided by the Upper Tribunal, whether on appeal (where there was a hearing in the First-tier Tribunal) or by way of judicial review (where there was not), in which case the parties will have been put to the additional time and trouble of arguing the case twice rather than once. But that is not peculiar to cases of the present kind. It is an inevitable consequence of the application of the alternative remedy principle in the tribunal field and has not been treated in other cases as a sufficient reason for allowing the statutory jurisdiction to be undermined.

20 That would be so whatever the nature of the questions which would have to be investigated in order to determine jurisdiction. But it is an important further advantage that if, as will often be the case, the determination of the jurisdiction issue involves resolving disputed questions of primary fact—such as whether a payment was made or whether particular documents were supplied with the application—a tribunal whose procedures are set up for fact-finding will be better placed to make the necessary findings than a court or tribunal proceeding by way of judicial review. I accept that, as Mr Pennington-Benton says, the jurisdiction issue may sometimes involve questions of a character which are typically encountered in judicial review challenges. But it has been recognised since *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, that such questions may come up outside the context of judicial review proceedings, and require resolution as part of the process leading to the determination of the issues which that court or tribunal has to decide. The kinds of public law questions to which Mr Pennington-Benton referred do not seem to me in the least inappropriate for resolution by the First-tier Tribunal. I would add, though this point was not developed before us, that pursuing the jurisdiction issue in the Upper Tribunal involves claimants in costs risks which are not present in the First-tier Tribunal.

21 That addresses Mr Pennington-Benton's points summarised at paras 16 and 17(1)–(2) above. As for the point summarised at para 17(3), I have great sympathy for applicants trying to find their way through the maze of immigration and asylum procedure (quite apart from the shameful complexities of the substantive law), which is all the more difficult if they are unrepresented;[4] and I accordingly see the force of the point that an applicant ought not to be blamed for taking at face value the Secretary of State's statement that he has no right of appeal. But in fact that is not the present case. The claimant was not misled by what UKBA said in the decision notice. On the contrary, he asserts that it is wrong. The issue before us is simply whether that challenge should be decided in the First-tier Tribunal itself or by judicial review proceedings in the Upper Tribunal. It is, I accept, unfortunate if there has been uncertainty about that point, as the fact that other *Basnet*-type cases have passed without challenge down the Upper Tribunal route may suggest. But that uncertainty will, I hope, be resolved by our decision in this case and it is not in itself a reason for endorsing the course which the claimant or his advisers chose to take if we believe it to be wrong. As Judge O'Connor pointed out, the correct route was taken in the *Basnet* case.

22 The "*OS (Russia)* point" [2012] 1 WLR 3198 (see para 17(4) above) is a little less straightforward. It was common ground before us that if the claimant is right in his basic case that he enjoyed a statutory right of appeal the decision notice was invalid because it said that he had no such right: that is what (so far as relevant) the *OS (Russia)* case decides. It was also common ground that it was open to him to waive that invalidity, since the relevant requirements were entirely for his benefit, and to appeal nevertheless. In this regard Mr Malik referred us to the decision of the Upper Tribunal in *In re Kishver (Limited Leave: Meaning: Pakistan)* [2011] UKUT 410 (IAC); [2012] Imm AR 128; (see para 9); and Judge O'Connor also referred in his judgment to *OI v Entry Clearance Officer (Lagos)* [2006] UKAIT 42, which made a similar point in the context of notice of time limits (see para 15). However Mr Pennington-Benton submitted to the UT that it was not right to deny him a decision by way of judicial review on the basis that he enjoyed an alternative remedy which he could only invoke by waiving his rights. Judge O'Connor's answer to that submission was that the claimant was not being compelled to waive his right to a valid notice of decision but that he had a choice whether to do so and the availability of that choice was relevant to the decision whether to allow him to claim by way of judicial review.

23 Before us Mr Pennington-Benton repeated the submission that denying him access to the judicial review route forced the claimant to waive his right to a valid decision notice, which is an

important right. I do not agree. If he proceeds with an appeal to the First-tier Tribunal he loses nothing of value. All that he will be waiving is the right to object to the jurisdiction of the First-tier Tribunal on the basis that the absence of a notice rendered the decision appealed against a nullity. If he succeeds in showing that he had a right of appeal, the First-tier Tribunal will enjoy its full powers under section 84 of the Nationality, Immigration and Asylum Act 2002 (as it then stood). That would include the power, as Mr Malik expressly conceded, to allow the appeal on the basis that the decision was not "in accordance with the law", within the meaning of section 84(1)(e), because the notice was invalid. The claim might, however, as Mr Malik pointed out, seek a decision on any substantive grounds also, in order (if he were successful) to preclude the possibility of the Secretary of State simply making the same decision again and accompanying it with a valid notice.

24 I should record that it was common ground before us that if the claimant had now to pursue an appeal to the First-tier Tribunal there would be no distinct point about such an appeal being out of time. That is because, if he is right, he has never received a valid decision notice (see para 22 above) and accordingly time has never started to run against him.

Ground 3

25 Ground 3 is, in effect, that the fact the alternative remedy objection was not raised at the permission stage constitutes an exceptional circumstance which makes it just to depart from the normal rule. Mr Pennington-Benton submitted that, even if it would have been right to refuse permission on the jurisdiction issue, once it was before the Upper Tribunal at a full hearing it was wrong not to decide it. The parties had been led by the grant of permission to expect that it would be decided, and were ready to argue it. Disappointing that expectation would mean (and in the event did mean) not only wasted costs but also wasted time: if permission had been refused on this basis the claimant could have initiated his appeal to the First-tier Tribunal months before. Mr Pennington-Benton made again in this context his point that in other cases of this type the Upper Tribunal had decided the jurisdiction issue without demur.

26 That submission was made to Judge O'Connor. At para 52 of his judgment [2015] UKUT 353 (IAC) he accepted that the late stage at which the issue had arisen was a relevant consideration in the exercise of his discretion whether to allow the claim to proceed notwithstanding the existence of an alternative remedy, but he said that it was not determinative. At para 53 he said simply: "Having considered all of the circumstances of this case in the round I am satisfied that there is an effective alternative remedy available to the applicant such that, as an exercise of discretion, this application should be refused."

27 Mr Malik submitted that the judge's self-direction was unimpeachable and that the decision which he reached in the exercise of his discretion was one which was open to him. He drew our attention to a number of cases where a judicial review claim had been dismissed on the basis of the alternative remedy rule even at the substantive hearing: see *R (Miah) v Secretary of State for the Home Department* [2016] UKUT 23 (IAC), *R (Islam) v Secretary of State for the Home Department* [2016] EWHC 2491(Admin); [2017] Imm AR 565, and—in this court—*Oyekan v Secretary of State for the Home Department* [2016] EWCA Civ 1352, per Cranston J at paras 33–34.

28 If I had been in the judge's position I would have found that in the special circumstances of this case it was right to go on to determine the jurisdiction issue, notwithstanding the existence of an alternative remedy. The relevant circumstances are not only that permission had been granted and the disappointed expectation and wasted time and costs which are the inevitable consequence if the parties are then required to pursue a different route. I agree that those are not determinative, although they carry considerable weight. But there are the additional features: (a) that permission was granted at an oral hearing, at which the Secretary of State was represented and took no point on alternative remedy; (b) that the Secretary of State did not herself take the point at any subsequent stage, it being raised by the tribunal for the first time at what was expected to be the substantive hearing; (c) that the judicial review route followed by the claimant was one which had been followed without demur in several other cases; (d) that it was, to put it no higher, uncomfortable to decide the claim on the basis that the claim should have appealed to the First-tier Tribunal in circumstances where her own decision letter asserted that no such appeal lay;[5] (e) that the proceedings had already been going on for almost two years without a decision even as to the correct route of challenge (a delay exacerbated by the adjournment in order to allow the alternative remedy point to be explored); and (f) that it appeared that the jurisdiction issue in this case might throw up issues about the reasoning in the *Basnet* case which might be of wider application and which it would therefore be useful to have determined at Upper Tribunal level. Our attention was not drawn to any factual issue of a kind which was inappropriate for resolution in judicial review proceedings.

29 All that, however, does not necessarily get the claimant home. It is axiomatic that the fact that one judge would have exercised a discretion in a particular way does not mean that another judge was wrong to have exercised it differently, and there is obvious force in Mr Malik's submission that the course taken by Upper Tribunal Judge O'Connor was one which was open to him. In the end, however, and not without hesitation, I have come to the conclusion that the judge's conclusion was indeed wrong. Cumulatively, the circumstances that I have identified above mean that he not only could but should have gone on to determine the jurisdiction issue himself. He could have done so while still maintaining that in general the jurisdiction issue should be determined in the first instance by the First-tier Tribunal. It is not uncommon for appellate tribunals, particularly in the case of procedural uncertainties, to say something to the effect of "you get away with it this time, but now that the position has been clarified other litigants cannot expect the same indulgence".

30 It might be thought to follow that since I think that the Upper Tribunal should have decided the jurisdiction issue we should go on to do so ourselves. But Mr Pennington-Benton made it clear that he did not wish us to take that course. He submitted that there were aspects of the jurisdiction issue which, as a result of the Upper Tribunal's failure to decide it, we were not in a position ourselves to resolve. Mr Malik did not advance any contrary submission, and I think we must accept that.

31 The straightforward view is that it follows that we should remit the case to the Upper Tribunal in order to determine the issue which it should have resolved first time round. But in the draft of this judgment circulated to counsel we acknowledged that there might be arguments to the contrary, and we invited written submissions. Mr Malik filed submissions contending that the right course, in the situation that we are now in, is for the jurisdiction issue to be decided by the First-tier Tribunal, which would mean that the decision of the Upper Tribunal should stand. His points were well-made but on balance I think remittal is the better course. I would hope that the case could be heard in the Upper Tribunal fairly soon, but on any view it would be likely to be heard sooner than the same point in an appeal to the First-tier Tribunal that would have to be started from scratch. A decision by the Upper Tribunal is likely to be final (that is, as regards the jurisdiction issue); but even if it were to be appealable the appeal ladder is one rung shorter than if the decision were made by the First-tier Tribunal. Mr Malik makes the fair point that if the claimant succeeds on the jurisdiction point in the Upper Tribunal he will then have to bring his appeal in the First-tier Tribnual to have the substantive issue determined, and he submits that that will mean that the process is likely to be slower, not faster. But I do not think that that is self-evident: although it would be a matter for the case-management decision of the tribunal, it would be very common in such a case to have a preliminary hearing on the jurisdiction issue and to defer consideration of the substantive issue to a subsequent hearing if necessary, in which case there would still be a two-stage process, albeit that both stages occurred in the same tribunal. I proceed, as I must, without taking any view about who is right on the jurisdiction issue; but in my view the possibility of obtaining a speedy and hopefully authoritative determination of that issue weighs strongly in favour of remittal to the Upper Tribunal, whichever way the decision goes. Mr Malik makes some other points in favour of his preferred course, but I hope he will forgive me if I describe them as makeweights: none of them seems to me sufficiently cogent to outweigh the advantages which I have identified above. An additional advantage is that it will enable the Upper Tribunal to deal with the issue of the costs of the judicial review proceedings as a whole in the light of its decision on the substantive issue: as to this, see para 35 below.

32 I should emphasise that I only favour taking this course because of the very particular history of the present case. It does not in any way undermine my conclusion that ordinarily the jurisdiction issue should be determined by the First-tier Tribunal.

Ground 4

33 This ground focuses on a passage at para 30 of Judge O'Connor's judgment. In the previous paragraph he had said that the various points raised by Mr Pennington-Benton about whether the April and July applications remained extant could all be dealt with by the First-tier Tribunal as part of its consideration of the jurisdiction issue in relation to the decision of 24 May 2013. He then, in the passage which is challenged, went on to observe that if that were wrong the claimant's case would have to be by way of challenge to the decision of 24 September 2012 but that any such challenge would be out of time.

34 Mr Pennington-Benton has various criticisms of that passage, but I do not propose to address them because, whether they are right or wrong, they would not impugn the basis on which Judge O'Connor decided the only point which is in issue before us. That issue is whether the jurisdiction issue should have been decided by the Upper Tribunal or the First-tier Tribunal,

and it would be the same whether the decision generating the claimed right of appeal was the September 2012 decision or the May 2013 decision. But in any event Mr Pennington-Benton has always made it clear that the claimant's challenge is to the decision of 24 May 2013 and the judge's views on the viability of a challenge, which was not being made, to the September 2012 decision are immaterial. To be fair to the judge, he understood that too: the passage being complained of was a marginal aside, just in case he had misunderstood the position.

Ground 5

35 This ground goes to the Upper Tribunal's decision to award the Secretary of State her costs. It is rendered redundant by our decision in the claimant's favour on ground 3, which means that the question of costs in the Upper Tribunal needs to be revisited. We have had written submissions on the question of costs generally following the circulation of the judgment in draft. In my view a fair decision on the issue of costs in the Upper Tribunal can only be made following the determination of the jurisdiction issue. If the claimant succeeds there will no doubt be an argument about how to reflect (a) the fact that he has succeeded on the substantive claim, but (b) that it was brought in the wrong forum, but (c) that there was a common practice of doing so to which the Secretary of State had not objected. That is not a balance that we should strike in advance, though it follows from my reasoning on ground 3 that point (c) goes a considerable way to reduce the weight that might otherwise be attached to point (b). It follows that in my view we should quash the Upper Tribunal's decision on costs and remit that issue also to it for determination.

Conclusion

36 I would accordingly allow the appeal on the basis of ground 3, which involves allowing it also on ground 5, but not on the other grounds. I would remit the case to the Upper Tribunal's to decide the jurisdiction issue and the costs of the judicial review proceedings. I would very much hope, in view of the history of this matter, that the Upper Tribunal will be able to expedite the hearing so far as the state of its lists allows.

37 As regards the costs of this appeal, the claimant has obtained the essential outcome which he sought, namely that the jurisdiction issue should be determined in the Upper Tribunal. But he has lost on most of the grounds on which he relied, which are also the most substantial grounds in terms of the time and space devoted to them in the written and oral submissions. In all the circumstances I think the fair order is that there be no order as to costs.

Notes

1. This was common ground before us. We were referred to paras 31–33 of the judgment of Elias LJ in *R (Iqbal) v Secretary of State for the Home Department* [2015] EWCA Civ 838; [2016] 1 WLR 582; [2016] 2 All ER 469. The issue in that case was not in fact quite the same, but I accept that the reasoning is analogous.

2. At that time it was thought that such an application was valid as long as the missing documents had been supplied by the time of decision. This court subsequently held otherwise: see *Raju v Secretary of State for the Home Department* [2013] EWCA Civ 754; [2014] 1 WLR 1768.

3. For some reason the title of this case in the law reports, given here, differs from that in the version handed down and on BAILII, which refers to it as "*E1/(OS Russia)*"; counsel referred to it as "*OS (Russia)*" and I will do the same.

4. As to this, Mr Pennington-Benton referred us to the observations of both this court and the Supreme Court in the *Iqbal* case —see para 49 of the judgment of Elias LJ [2016] 1 WLR 582 and para 30 of the judgment of Lord Carnwath [2017] 1 WLR 85.

5. This last point is not inconsistent with what I say at para 21 above. It is one thing to say, when considering what the correct procedure should be, that the fact that the Secretary of State has asserted that no appeal lies is not a reason why an applicant should not appeal nevertheless. It is another to say, once the issue has in a particular case arrived (irregularly) before the Upper Tribunal, that that assertion should be ignored in the exercise of the discretion whether to allow the claim to proceed.

GROSS LJ

38 I agree.

Appeal allowed.
Case remitted to Upper Tribunal.

MATTHEW BROTHERTON, Barrister