In the Upper Tribunal (Immigration and Asylum Chamber)

R (on the application of B) v Secretary of State for the Home Department (Rule 33A JR amendments and transfers) IJR [2016] UKUT 00182 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Field House
8 March 2016

Before

MR JUSTICE WALKER
Sitting as a Judge of the Upper Tribunal

Between

The QUEEN (on the application of B)

Applicant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Hearing date: 4 June 2015

- - - - - - - -

Mr Declan O'Callaghan, instructed by Duncan Lewis Solicitors, appeared on behalf of the applicant.

Mr Mathew Gullick, instructed by the Government Legal Department, appeared on behalf of the respondent.

- - - - - - - - - - - -

JUDGMENT

- - - - - - - - - - - -

(i) Neither s.18, nor any other provision in the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), nor any provision in the Tribunal Procedure (Upper Tribunal) Rules 2008 gives the Upper Tribunal a discretionary power to transfer to the High Court a case which has been begun in the Upper Tribunal. Where a case has been transferred to the Upper Tribunal, it is only in circumstances bringing the case within rule 33A(3)(b) that a discretionary power to transfer the case back to the High Court will arise.

(ii) Section 18(11) of the 2007 Act contemplates that Tribunal Procedure Rules should provide for the making of amendments to judicial review proceedings in the Upper Tribunal which would have the effect that, once made, the application would be required to be transferred to the High Court. Rule 33A does this by expressly giving the tribunal control over the making of such amendments, and it ensures also that the tribunal controls whether there can be reliance on additional grounds which would have the same effect.

MR JUSTICE WALKER:

[Table of Contents]

A. Introduction

1. The Tribunal Procedure (Upper Tribunal) Rules 2008, as amended ("the Upper Tribunal rules"), made under section 22 and schedule 5 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), govern the practice and procedure to be followed in the Upper Tribunal. On 17 October 2011 a new rule 33A came into force. By rule 33A(1) it applies only to judicial review proceedings arising under the law of England and Wales.

2. Paragraph (2) of rule 33A states that in relation to judicial review proceedings arising under the law of England and Wales:

> (a) the powers of the Upper Tribunal to permit or require amendments under rule 5(3)(c) extend to amendments which would, once in place, give rise to an obligation or power to transfer the proceedings to the High Court in England and Wales under section 18(3) of the 2007 Act or paragraph (3);
>
> (b) except with the permission of the Upper Tribunal, additional grounds may not be advanced, whether by an applicant or otherwise, if they would give rise to an obligation or power to transfer the proceedings to the High Court in England and Wales under section 18(3) of the 2007 Act or paragraph (3).

3. Paragraph (3) of rule 33A provides:

> (3) Where the High Court in England and Wales has transferred judicial review proceedings to the Upper Tribunal under any power or duty and subsequently the proceedings are amended or any party advances additional grounds –
>
> > (a) if the proceedings in their present form could not have been transferred to the Upper Tribunal under the relevant power or duty had they been in that form at the time of the transfer, the Upper Tribunal must transfer the proceedings back to the High Court in England and Wales;
> >
> > (b) subject to sub-paragraph (a), where the proceedings were transferred to the Upper Tribunal under section 31A(3) of the Senior Courts Act 1981 (power to transfer judicial review proceedings to the Upper Tribunal), the Upper Tribunal may transfer

> proceedings back to the High Court in England and Wales if it appears just and convenient to do so.

4. The present case is a claim for judicial review begun in the Upper Tribunal. It concerns the entitlement of the respondent Secretary of State for the Home Department to return the applicant asylum-seeker to Malta under the Dublin III Convention. That convention is now embodied in EU law: see Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), which I shall refer to as "the recast Regulation".

5. In the present case a proposed consent order, signed by the parties on 22 May 2015, was sealed by the Immigration and Asylum Chamber of the Upper Tribunal on 27 May 2015 ("the 27 May consent order"). The 27 May consent order purported to transfer the claim to the High Court. This course was taken because the applicant proposed to ask the High Court for permission to amend to claim a declaration of incompatibility, a remedy which in England and Wales only the High Court has power to grant. The validity of the 27 May consent order, however, was in doubt. A question arose as to whether rule 33A gave the Upper Tribunal power to make the 27 May consent order. At a hearing on 4 June 2015 I ruled that the 27 May consent order was not permitted by rule 33A, and was accordingly a nullity. I now give my considered reasons for that ruling.

6. At the hearing Mr Declan O'Callaghan, instructed by Duncan Lewis Solicitors ("Duncan Lewis"), appeared for the applicant. Mr Mathew Gullick, instructed by the Government Legal Department, appeared for the respondent. I am grateful for the assistance that I have received from the legal teams on both sides.

B. A declaration of interest

7. Prior to the hearing I advised the parties:

> As regards Upper Tribunal Rule 33A, the parties should please note that:
>
> (1) I was the Chairman of the Tribunal Procedure Committee ("TPC") from 2010 to 2012;
>
> (2) the TPC's consultation papers on Fresh Claim Judicial Reviews and on Judicial Review in the Upper

Tribunal, and replies to consultation responses, were published during that period;

(3) the relevant statutory instrument introducing rule 33A was made by the TPC during that period;

(4) I was responsible for much of the drafting of what became rule 33A.

8. I asked the parties whether in these circumstances they had any objection to my dealing with the matter. Both sides stated that they had no objection. In the circumstances I concluded that it would be undesirable to recuse myself of my own motion, as the parties were content for me to deal with the matter, and as it may assist practitioners to highlight certain aspects of the consideration given by the TPC to rule 33A.

C. Background

9. The applicant is a national of Eritrea. He has concerns about what would happen to him if the Maltese authorities were to return him to Eritrea. Without pre-judging those concerns, I have directed that he is not to be identified in any report of these proceedings, and is to be known in these proceedings as "B". Dealings with B concerning his status here have been handled by United Kingdom Visas and Immigration ("UKVI") on behalf of the respondent.

10. B says that he had been living in Libya, and had escaped from detention there, before coming to this country in February 2014. He claimed asylum here. However he accepts that, before coming here, he irregularly crossed the border into Malta on 29 March 2011 by sea, having come from Libya. On 19 March 2014 Malta accepted that it is the member state responsible for B under the recast Regulation.

11. In a letter to B dated 26 March 2014 ("the 26 March asylum refusal letter") UKVI recorded this acceptance by Malta. The letter could have been more clearly expressed: there was in one place a reference to "Bulgaria" instead of "Malta", and in another an omission to identify Malta at all. Nevertheless it was tolerably clear from the letter that the respondent had concluded that Malta was a safe third country to which B could be sent, and that accordingly the respondent declined to examine B's asylum application substantively. The letter certified that conditions mentioned in paragraphs 4 and 5 of part 2 of schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 were satisfied. This certification deprived B of an in-country right of appeal against the refusal of asylum.

12. On 10 April 2014 Duncan Lewis wrote to UKVI a letter before action. The letter submitted that certification of B's asylum claim was unlawful. Referring to the recent decision of the Supreme Court in *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, the letter made human rights representations. Those representations asserted that returning B to Malta would breach article 3 and article 5 of the European Convention on Human Rights in that:

> … on his return to Malta he is likely to face poor reception conditions, mandatory detention for a prolonged period of time without access to lawyers or a speedy and effective legal redress mechanism to address to the lawfulness of his detention.

13. The claim form in the present case, seeking permission to apply for judicial review, was issued in the Immigration and Asylum Chamber of the Upper Tribunal on 11 April 2014. It was accompanied by Grounds for seeking Judicial Relief ("B's grounds"). B's grounds noted that a reply was awaited to B's human rights representations.

14. On 8 May 2014 UKVI wrote a letter ("the 8 May human rights rejection letter") to Duncan Lewis. This letter rejected B's human rights claims. It noted that in *EM (Eritrea)* the Supreme Court had recognised that there remained a "significant evidential presumption" that European Member States would comply with their obligations under both European law and the European Convention on Human Rights. Lord Kerr in that case had emphasised that "to rebut the presumption a claimant will have to produce sufficient evidence to show that it would be unsafe for the court to rely on it." In relation to article 3, the letter said that B had not shown that he was at real risk of breach of that article on return to Malta, whether deriving from systemic deficiencies in the asylum procedures and reception conditions in that state, or by way of any other route, including individual risk factors. In relation to article 5 the letter noted that detention would be required to be in strict accordance with Maltese law and to be fully compliant with article 5(1)(f) of the European Convention on Human Rights. In relation to the entirety of B's human rights claim the letter certified that that claim was "clearly unfounded". This certification deprived B of an in-country right of appeal against the rejection of his human rights claim.

15. An acknowledgement of service was lodged by the respondent on 9 May 2015. It was accompanied by summary grounds of defence which relied, among other things, on the 26 March asylum refusal letter and the 8 May human rights rejection letter.

16. The application for permission to apply for judicial review came before His Honour Judge Purle QC, sitting as a judge of the Upper Tribunal,

for consideration on the papers. In a decision dated 21 May 2015 he granted permission, and gave case management and listing directions. In accordance with His Honour Judge Purle's listing directions the application was listed to be heard by a High Court judge on 4 June 2015.

17. On 19 May 2015 Duncan Lewis wrote to the Government Legal Department. Their letter sought consent to proposed amendment of B's grounds, and to transfer of the proceedings to the High Court. The proposed amended grounds included a new head of relief, in the form of a declaration of incompatibility. A document headed "Application to transfer proceedings to the High Court of Justice" was enclosed with the letter. This document explained that the Upper Tribunal did not have jurisdiction to deal with an application for a declaration of incompatibility. It added:

> Consequently, [B] applies for a transfer of his claim to the High Court.

18. The document drew attention to a judicial review claim in the High Court concerning return of another asylum-seeker to Malta under the recast Regulation. It explained that amended grounds in that case also sought a declaration of incompatibility, and it was proposed to link the present case with that case.

19. On 22 May the parties signed an agreed "Form of Consent". This document referred to B as "the Claimant". So far as material, it provided:

> 1. The Substantive Hearing for 4 June 2015 is vacated
>
> 2. The Claimant's claim for Judicial Review be transferred to the Administrative Court
>
> 3. Upon transfer the Claimant have leave to make an application to amend his Judicial Review grounds with notice to the Respondent
>
> ...

20. An important feature of this "Form of Consent" is that what was proposed involved no amendment to the proceedings prior to the proposed transfer. Instead, it envisaged that upon transfer B would have "leave to make an application to amend …".

21. The "Form of Consent" as signed by the parties was lodged with the Upper Tribunal. Once lodged, it was placed before Upper Tribunal Judge Jordan. He approved the "Form of Consent" and signed it on 27

May 2015. On the same day it was sealed by the Immigration and Asylum Chamber of the Upper Tribunal. Thus it was that the 27 May consent order came into being.

22. However, a further order was made by Judge Jordan on 28 May ("the 28 May order"). It was headed:

> Application for the Upper Tribunal to consent to a transfer to the Administrative Court

23. The 28 May order stated that it was made upon reading "the application for judicial review and the proposed consent order". I infer from this that Judge Jordan was unaware that the "Form of Consent" had in fact been sealed the previous day. The 28 May order recorded a decision by Judge Jordan, along with directions, as follows:

> Decision by Upper Tribunal Judge Jordan
>
> I make no order transferring the application
>
> Directions:
>
> 1. The application is to remain listed for substantive hearing on 4 June 2015
>
> 2. The application is to be listed before a High Court Judge.

24. Under the heading, "Reasons", the 28 May order stated:

> 1. The matter has been listed for one-day as the hearing of the substantive application (permission having been granted by Judge Purle QC).
>
> 2. The Upper Tribunal has jurisdiction to hear and determine the issues raised in the grounds of application. No argument has so far addressed the Upper Tribunal's want of jurisdiction.
>
> 3. If the Upper Tribunal lacks jurisdiction, the Judge hearing the appeal is able to sit as a Judge of the Administrative Court.
>
> 4. No application for permission to amend the grounds of application has been made and no draft of the proposed amended grounds has been submitted.
>
> 5. The directions made by Judge Purle QC on 21 May 2014 were explicit and the consequences of a failure to

> comply with those directions may be explored at the hearing.
>
> 6. There is sufficient time to prepare for the hearing on the basis of the material already filed and served.

25. B's skeleton argument dated 3 June 2015 explained that the parties had proceeded on the basis that it was for the High Court to consider B's application to amend because only the High Court, not the Upper Tribunal, possesses jurisdiction to consider a declaration of incompatibility. While noting that rule 33A "can appropriately be read as requiring a grant of permission to the amendment of a claim form/ amendment of grounds before consideration can be given to the transfer of proceedings," the skeleton argument added at paragraphs 11 and 12:

> 11. As this matter raises what appears to be a novel point, and one of some importance, consideration has been given as to whether a wider power can be identified within the provision, permitting a situation whereby the Upper Tribunal can exercise its powers to transfer without previously having granted permission that additional grounds be advanced.
>
> 12. The heart of the consideration is where the power to transfer bites: is there a requirement that permission be granted to amend grounds giving rise to the obligation to transfer proceedings before such power to transfer as exists under section 33A is established? Or can the Upper Tribunal act upon notification of intention, exercise its power to transfer and give directions as to the filing of amended grounds with the High Court? Though the former may be preferred in many situations, the latter may be satisfactory where the parties are in agreement that a transfer is appropriate and such a step prevents unnecessary use of public funds.

26. The questions posed in paragraph 12 require consideration not merely of powers to transfer but also of duties to transfer. For this purpose I examine in turn the legislative history prior to the introduction of rule 33A, the consideration of that rule by the TPC, and the subsequent legislative history: see sections D, E and F below. My analysis is then set out in section G below.

27. It is important to stress that in this judgment I am concerned only with the position in England and Wales. I add that both the 27 May consent

order and the 28 May order referred to transfer "to the Administrative Court". This was no doubt because the Administrative Court is the part of the High Court which deals with claims for judicial review. In the remainder of this judgment I shall generally follow the statutory wording and refer to the "High Court".

D. Legislative history prior to May 2011

D1. Judicial review jurisdiction: the 2007 Act as enacted

D1.1 The 2007 Act as enacted: general

28. The 2007 Act created both the Upper Tribunal and the First-tier Tribunal ("FTT"). Appeals lie from the FTT to the Upper Tribunal, which also has a number of additional roles. Importantly, in cases arising under the law of England and Wales, the Upper Tribunal's additional roles include the exercise of power under section 15 of the 2007 Act to grant certain relief which has the same effect as relief granted by the High Court on an application for judicial review. Under section 15(1) the relief that may be granted comprises a mandatory order, a prohibiting order, a quashing order, a declaration or an injunction. In circumstances described in section 16(6) the Upper Tribunal may award to an applicant damages, restitution or the recovery of a sum due. Certain supplementary powers are set out in section 17.

29. Detailed provision is made in section 15 (3), (4) and (5), and in section 16, to equate the Upper Tribunal's role in judicial review claims to that of the High Court, among other things by making it necessary for an applicant to seek permission to make the application. By section 15(3) relief granted under section 15 has the same effect, and is enforceable, as if it were granted by the High Court on an application for judicial review. By section 15(4) and (5) the Upper Tribunal, in deciding whether to grant relief, must apply the principles that would be applied by the High Court on an application for judicial review. The availability and effect of relief under section 15 will thus in all material respects be the same as that granted by the High Court on judicial review. It follows that, as regards mandatory, prohibiting or quashing orders under section 15, applicable principles concerning prerogative relief will be no less relevant in the Upper Tribunal than they would be in the High Court. No doubt for this reason cases seeking relief under section 15 are listed using the same terminology as in High Court applications for prerogative orders - the case being brought in the name of the Crown on the application of the party seeking relief.

30. It is convenient to refer to the powers arising under sections 15 to 17 as "the Upper Tribunal's judicial review powers". Significantly, however,

the powers listed in those sections do not include the power to grant a declaration of incompatibility under the Human Rights Act 1998.

31. The Upper Tribunal rules in their original form were made by the TPC on 9 October 2008 (SI 2008 No. 2698). They came into force on 3 November 2008, the date on which relevant parts of the 2007 Act came into force. Part 4 concerned particular aspects of judicial review claims:

    (1) Rule 27 made specific provision for judicial review proceedings transferred to the Upper Tribunal.

    (2) Rules 28 to 30 made provision for applications for permission to apply for judicial review, for acknowledgements of service with accompanying grounds of opposition, and for permission to be decided on the papers.

    (3) In cases where permission was wholly or partly refused, or made subject to conditions, rule 30 enabled the applicant to seek reconsideration at a hearing.

    (4) Rule 31 entitled any person who had been notified by the Upper Tribunal of a grant of permission, and who wished to contest or support the claim, to provide detailed grounds for that purpose.

    (5) Rule 32, by contrast, prevented an applicant, without the consent of the Upper Tribunal, from relying on any grounds other than those on which the grant of permission had been obtained.

    (6) Rule 33 set out certain entitlements to submit evidence, to make representations at a hearing, and to make written representations.

32. When can the Upper Tribunal's judicial review powers be exercised? Section 15(2) identifies two categories. The first arises when conditions in section 18 (dealing with applications made to the Upper Tribunal) are met. The second arises where there has been a transfer from the High Court to the Upper Tribunal: in that event section 19(3) and (4) may authorise the Upper Tribunal to proceed even though not all of those conditions are met. The requirements in this second category differ according to whether the application is of a kind which the High Court is required to transfer to the Upper Tribunal, or whether it is of a kind in relation to which the High Court may exercise a discretionary power of transfer to the Upper Tribunal. In each of these types of case the conditions which must be met are discussed below.

D1.2 As enacted: claims that may be made to the Upper Tribunal

33. Section 18 of the 2007 Act concerns judicial review claims made to the Upper Tribunal. In this section I describe it as enacted. It lists four conditions. It is convenient to refer to each of the conditions listed in section 18 as a "Section 18 Condition." Only if all four Section 18 Conditions are met will the Upper Tribunal have the function of deciding the application. If the Upper Tribunal does not have the function of deciding the application (i.e. if any of the Section 18 Conditions was not met) then the Upper Tribunal must transfer the application to the High Court: see section 18(3).

34. Section 18 Condition 1 is found in section 18(4). It is concerned to limit applications in the Upper Tribunal for judicial review, or for permission to apply for judicial review, to those seeking the types of relief identified in sections 15 and 16, along with interest and costs.

35. Section 18 Condition 2 is found in section 18(5). It requires that the application must not call into question anything done by the Crown Court.

36. Section 18 Condition 3 is found in section 18(6). Subsection (6) is concerned to limit the classes of case which may be begun in the Upper Tribunal. It limits them to those within a class specified for the purposes of the subsection. The specification must be set out in a direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005. For cases arising under the law of England and Wales, this will be a direction by the Lord Chief Justice made with the consent of the Lord Chancellor. In this regard:

    (1) Two classes of case were specified under section 18(6) in a direction given by the Lord Chief Justice on 29 October 2008 (see *Practice Direction (Upper Tribunal: Judicial review jurisdiction)* [2008] WLR (D) 336).

    (2) The first of the two classes, at paragraph (a) of the direction, comprised "any decision of the [FTT] on an appeal made in the exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1) of the Criminal Injuries Compensation Act 1995 (appeals against decisions on review)."

    (3) What paragraph (a) does is to focus on judicial review claims seeking to challenge the main type of decisions dealt with in the Criminal Injuries Compensation jurisdiction of the Social Entitlement Chamber of the FTT. They are excluded decisions under section 11(5)(a) of the 2007 Act, so they cannot be

appealed from the FTT to the Upper Tribunal – hence the route of judicial review as the means of challenge.

(4) The second of the two classes specified in 2008 is at paragraph (b) of the direction. It comprises "any decision of the [FTT] made under the Tribunal Procedure Rules or section 9 of [the 2007 Act] where there is no right of appeal to the Upper Tribunal and that decision is not an excluded decision within paragraph (b), (c), or (f) of section 11(5) of [the 2007 Act]."

(5) What led to the specification at paragraph (b) of the direction was that under social security legislation prior to the 2007 Act it had been held that interlocutory and certain other ancillary decisions at the equivalent of first-tier level could only be challenged by judicial review, and not by appeal. The Upper Tribunal subsequently held that under the 2007 Act a right of appeal arises from all decisions of the FTT other than those specifically defined as "excluded decisions": see *LS v London Borough of Lambeth (HB)* [2010] UKUT 461 (AAC), [2011] AACR 27 at paras 79 to 97. Prior to the decision in *LS* there had been about a dozen judicial review claims falling within paragraph (b) of the direction. The effect of the *LS* decision is that this class is confined to judicial review claims seeking to challenge excluded decisions within paragraph (a), paragraph (d), or paragraph (e) of section 11(5) of the 2007 Act. In broad terms, the excluded decisions set out in section 11(5)(a) are criminal injuries compensation decisions; those set out in section 11(5)(d) are decisions about setting aside, or review, of an earlier decision of the FTT or about referring a matter to the Upper Tribunal; and those set out in section 11(5)(e) are decisions that have been set aside.

37. Section 18 Condition 4 is found in section 18(8). It applies at the hearing of the application, and requires that the presiding judge must be either (a) a judge of the High Court or the Court of Appeal in England and Wales or Northern Ireland, or a judge of the Court of Session, or (b) a person who has been agreed from time to time between the Lord Chief Justice, the Lord President, or the Lord Chief Justice of Northern Ireland, as the case may be, and the Senior President of Tribunals. From November 2008 onwards individual Upper Tribunal judges have been "ticketed" so as to have authority to preside under this provision.

38. Subsection (11) of section 18 is a rule-making power. It states that Tribunal Procedure Rules may make provision about amendments that would cause the application to become transferable under subsection

(3) – see section D1.1 above. The original Upper Tribunal rules, however, did not make use of the power under section 18(11).

D1.3 As enacted: claims which must or may be transferred by the High Court

39. The 2007 Act amended what is now the Senior Courts Act 1981 (formerly the Supreme Court Act 1981) by introducing a new section 31A. Under section 31A(2) of the Senior Courts Act 1981 the High Court is required to transfer an application if specified conditions are met. It is convenient to call each such condition a "Transfer Condition." In this section I describe the position on coming into force of the new section 31A. Four such conditions must be met in order for there to be a requirement to transfer. The criteria identified in Transfer Condition 1 in section 31A(4), Transfer Condition 2 in section 31A(5), and Transfer Condition 3 in section 31A(6) reflect corresponding provisions found in Section 18 Conditions 1, 2 and 3. They thus have the effect that in cases where all three of these conditions are met, subject to satisfaction of Transfer Condition 4 in section 31A(7) (which broadly excludes immigration, nationality, and citizenship claims from transfer), the Upper Tribunal has an exclusive judicial review jurisdiction in England and Wales.

40. In addition to compulsory transfer under section 31A(2), a discretionary power of transfer is conferred by section 31A(3). Provided that Transfer Conditions 1, 2 and 4 are met, the High Court may transfer an application even if it does not fall within a specified class. This power has been exercised on a substantial number of occasions over the period since November 2008, particularly in age assessment cases: see the decision of the Court of Appeal in *R (FZ) v Croydon LBC* [2011] EWCA Civ 59.

41. As regards transferred judicial review claims in England and Wales, the 2007 Act makes additional provision in section 19 (3), (4) and (5). By section 19(3) there is a seamless transition of a transferred application for judicial review. The application is treated for all purposes as if it had been made to the Upper Tribunal. Things done by the High Court prior to transfer are to be treated as if they were done by the Upper Tribunal. It is made clear that it does not matter whether the application falls within a class specified under section 18(6). Similarly by section 19(4) there is a seamless transition of a transferred application for permission to apply for judicial review.

42. Subsection (5) of section 19 is a rule-making power. It provides that tribunal procedure rules may supplement subsections (3) and (4). Here, too, the original Upper Tribunal rules did not make use of this power.

D2. Judicial review jurisdiction: new "Fresh Claim" powers

43. The Borders, Citizenship and Immigration Act 2009 ("the BCI Act") made changes to the conditions under s 31A of the Senior Courts Act 1981. In particular, section 53 of the BCI Act modified the impact of Transfer Condition 4 in section 31A(7). As noted above, Transfer Condition 4 broadly excluded immigration, nationality, and citizenship claims from transfer.

44. Section 53 of the BCI Act was designed to have the following effect. From the time that it was brought into force, if Transfer Conditions 1, 2 and 3 were met, then transfer would continue to be mandatory if Transfer Condition 4 were met (section 31A(2) and (7): no nationality, immigration or asylum question arises). However also from that time section 31A(2A) and (8) would make transfer mandatory if Transfer Conditions 1, 2, 3 and a new Transfer Condition 5 were met. Transfer Condition 5 was that:

> … the application calls into question a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered (whether or not it calls into question any other decision).

45. Decisions of the kind described in Transfer Condition 5 arose in certain types of case where, in broad terms, an individual's earlier asylum or human rights claim had been refused or withdrawn. In these types of case the individual would only exceptionally have a right of appeal against refusal of a later application. Relevant rights of appeal under part 5 of the Nationality, Immigration and Asylum Act 2002 would, however, be conferred if the Secretary of State concluded that there was a "fresh" claim, in the sense of a claim significantly different from material that had previously been considered. In order to secure relevant appeal rights, a decision that the claim was not "fresh" would often be the subject of an application for judicial review. These "fresh claim" judicial reviews came to be known as "FCJRs".

46. The effect of the BCI Act was thus that the statutory bar on transfer of immigration, nationality and citizenship cases would not apply where an application included a challenge to a "fresh claim" decision. However the statutory amendment in the BCI Act did not remove the need for Transfer Condition 3 to be satisfied. It would be a matter for the Lord Chief Justice, with the concurrence of the Lord Chancellor, to decide whether a new direction should be given, if so whether if it

should be confined to "pure" FCJRs (i.e. those in which no other decision was called into question), and if not confined to "pure" FCJRs then what factors would determine whether a FCJR fell within the scope of the new direction.

47. Where a proposed FCJR fell within the scope of the new direction, and other Section 18 Conditions were satisfied, the Upper Tribunal would have jurisdiction to deal with the claim. Moreover, if a proposed FCJR within the scope of the direction were brought in the High Court, then (provided that Transfer Conditions 1 and 2 were satisfied) the High Court would be required to transfer the claim to the Upper Tribunal.

48. In March 2011 the TPC issued a consultation paper ("the FCJR consultation paper") on changes to the Upper Tribunal rules to accommodate FCJRs. The bulk of the FCJR consultation paper set out detailed proposals in that regard. The paper noted in paragraph 45, however, that the TPC was also considering possible general changes to Part 4 of the Upper Tribunal Rules, which concerned judicial review claims in the Upper Tribunal. These possible changes would be the subject of a separate consultation.

E. The May 2011 TPC consultation

E1. The May 2011 TPC consultation: general

49. This separate consultation, as foreshadowed in paragraph 45 of the FCJR consultation paper, was the subject of a TPC consultation paper issued in May 2011 ("the May 2011 TPC consultation paper"). It was entitled "Judicial Review in the Upper Tribunal". Despite the breadth of that title, however, the introduction to the paper made it clear that it did not seek to review the rules for judicial review generally. Rather, it arose "because developments in England and Wales may make it desirable for rules to be made in that jurisdiction to cater for amended or additional grounds of challenge". The developments referred to were the new arrangements for FCJRs, which would greatly increase the volume of judicial review work in the Upper Tribunal.

50. The May 2011 TPC consultation paper identified two areas where rule changes might be appropriate. The first concerned provision about amendments or additional grounds that would cause a judicial review claim to become transferable to the High Court. The second concerned amendments or additional grounds in cases which had been transferred to the Upper Tribunal by the High Court. I deal with them in sections E2 and E3 below.

51. In this judgment I have included citations from the May 2011 TPC consultation paper. When doing so I have, for ease of reference,

adopted the short forms used in the present judgment rather than those which were used in the May 2011 TPC consultation paper when it was originally published.

E2. May 2011: amendments requiring transfer

52. The May 2011 consultation paper stated at paragraphs 27 to 32:

> 27. Section 18(11) of the 2007 Act provides that the "provision that may be made by Tribunal Procedure Rules about amendment of an application for relief under section 15(1) includes, in particular, provision about amendments that would cause the application to become transferable under subsection (3)". The implication appears to be that amendments may be made to judicial review proceedings in the Upper Tribunal even though the effect is that they must then be transferred to the High Court. There is a good reason why this should be so. It would be open to the Upper Tribunal to refuse to allow such an amendment on the ground that it would be preferable for the applicant to bring separate proceedings in the High Court, leaving the existing proceedings in the Upper Tribunal. But there will be cases where it would be more appropriate for the existing proceedings to be amended and transferred to the High Court, rather than for separate proceedings to be commenced, e.g. where an arguable claim for a declaration of incompatibility is added.
>
> 28. No rules under section 18(11) have thus far been made. There is reason to think, however, that such rules should be made so as to cater for developments in judicial review cases in the Upper Tribunal. This is because parties may wish to amend proceedings, or rely on additional grounds, in a way which would bring section 18(3) into play because an amendment or additional ground would mean that the Upper Tribunal did not have the function of deciding the application. In FCJRs there are often occasions when, e.g. because a fresh decision is taken, it is appropriate to add or substitute a challenge which no longer involves a "fresh claim" dispute. Similarly an age assessment judicial review may have been transferred by the High Court to the Upper Tribunal at a time when no immigration, nationality or citizenship issue arose, but subsequent developments may give rise to such an issue.

29. The Committee invites comment on proposed new rules which would provide -

> "33A. Rules 33B and 33C apply only to judicial review claims arising under the law of England and Wales.
>
> 33B. In relation to an application for judicial review or for permission to apply for judicial review the Upper Tribunal may permit or require amendments under rule 5(3)(c), or permit the applicant or another party to rely on additional grounds of challenge, which will result in transfer of the application to the High Court under section 18(3) of the 2007 Act or under rule 33C."

30. This would not merely make clear what is implicit in section 18(11). It refers also to "additional grounds" and to transfer under the proposed new rule 33C (see below) and therefore makes clear what otherwise might be in doubt. Reliance upon additional grounds does not necessarily imply an amendment. The current Rules use the term "additional grounds" where a party other than the applicant wishes to support an application on grounds additional to those on which the applicant relies (rule 31(2)) or where an applicant seeks to rely on grounds in a substantive application which were not grounds upon which permission was granted (rule 32).

31. The proposed new rules would apply to judicial review claims that were originally begun in the Upper Tribunal. They would, pursuant to section 19(3) of the 2007 Act, also apply to applications for judicial review transferred from the High Court to the Upper Tribunal. Moreover they would apply in cases where an application for permission made to the High Court is transferred to the Upper Tribunal, and the Upper Tribunal grants permission – for in that event the permitted application for judicial review is made to the Upper Tribunal and for that reason falls within section 18(1) of the 2007 Act.

32.The proposed new rules would confirm as regards section 18(11) (and establish as regards "additional grounds") the availability to the Upper Tribunal of a flexible means of determining whether new issues should become part of the application in the light of the statutory

consequences which would follow. Comments on this and alternative or additional proposals are invited. Alternative provision that could be made would, for instance, include a rule that would prohibit an amendment that required section 18(3) to be acted upon, thus requiring an applicant to make a separate application to the High Court. Additional provision might take the form of a rule that would require the parties to state whether they would like the case transferred back to the Upper Tribunal, and why, so that that information may be passed to the High Court when the case is transferred.

E3. May 2011: amendments after transfer

53. The May 2011 consultation paper stated at paragraphs 33 to 39:

> 33. Section 19(5) of the 2007 Act permits the making of rules to supplement section 19(3) and (4), dealing with the consequences of a case being transferred to the Upper Tribunal from the High Court. No such rules have hitherto been made.
>
> 34. The relationship between section 19(3) and (4) and section 18 needs consideration. Section 18(3), read with section 18(2), requires a case to be transferred to the High Court if the four conditions in that section are not all satisfied. Section 19(3) and (4) ensure that an application for judicial review that is transferred to the Upper Tribunal, and an application for judicial review made in the Upper Tribunal following transfer of an application for permission, are subject to the requirements in section 18. When doing so, however, those subsections identify one exception: the Upper Tribunal has the function of deciding the case notwithstanding that Condition 3 in section 18 (that the case falls within the scope of a direction made by the Lord Chief Justice) is not met. The exception ensures that discretionary transfers are not stifled once the transfer is made, for they will have been transferred expressly on the basis that Condition 3 is not met (see section 31A(3) of the Senior Courts Act), and without the exception would have to be transferred back as soon as they reached the Upper Tribunal. However, it appears to the Committee that there are potential

difficulties where an application is amended, or additional grounds are relied on, after transfer.

35. First, where there has been a mandatory transfer, without the High Court having considered the merits of transfer, it would arguably be contrary to principle for the application to continue in the Upper Tribunal without the High Court so ordering if an amendment or additional ground has the effect that Condition 3 ceases to be satisfied. On the other hand, allowing such an amendment or additional ground would be sensible if good case management required it to be decided together with existing issues. This may well happen in FCJRs. The Committee therefore proposes that Rule 33C(a) should require such a case to be transferred back to the High Court. One factor in this regard is that to treat mandatorily transferred cases more advantageously than cases that have been properly commenced in the Upper Tribunal might act as an encouragement to applicants to start proceedings in the High Court, causing an unnecessary waste of resources in transferring them.

36. Proposed rule 33C(a) would also extend to a case that had been transferred on a discretionary basis under section 31A(3) of the Senior Courts Act if a subsequent amendment or additional ground has the effect that Condition 4 of section 31A would no longer be met. There is no equivalent to Condition 4 of section 31A in section 18 and so such a case would not fall to be transferred to the High Court under section 18(3). Again, it seems to the Committee that it would be contrary to principle for the case to remain in the Upper Tribunal when it could neither have been started in the Upper Tribunal nor transferred to it if the amendment or additional ground had been relied on at the time of transfer.

37. Secondly, where a case has been transferred on a discretionary basis, the Committee considers that the Upper Tribunal should have the power to transfer the case back to the High Court if an amendment or additional ground would be of such significance that the Upper Tribunal considered that the High Court would not have transferred it if the amendment or additional ground had been relied on at the time of transfer, even though section 31A(3) would have permitted transfer. Proposed rule 33C(b) would provide such a power. The

criterion for transfer back would be in identical terms to section 31A(3) of the Senior Courts Act – "if it appears to be just and convenient to do so".

38. The proposed rule is –

> "33C. Where the High Court has transferred judicial review proceedings to the Upper Tribunal under any power or duty and subsequently the proceedings are amended or any party relies on additional grounds of challenge –
>
> (a) if the proceedings could not have been transferred to the Upper Tribunal by the High Court had they been so amended or with such additional grounds relied on at the time of transfer, the Upper Tribunal must transfer the proceedings back to the High Court;
>
> (b) subject to subparagraph (a), where the proceedings were transferred to the Upper Tribunal under section 31A(3) of the Senior Courts Act 1981 (power to transfer judicial review proceedings to the Upper Tribunal), the Upper Tribunal may transfer the case back to the High Court if it appears to be just and convenient to do so."

39. The Committee invites comment on this proposal, or any alternative or additional proposals.

E4. Responses, TPC reply, and the new rule 33A

54. In November 2011 the TPC published a single document giving a summary of responses on the FCJR consultation and the May 2011 consultation, and its reply to those responses. As regards the May 2011 consultation, the document first set out Question 1 from the May 2011 TPC consultation paper, concerning provision about amendments or additional grounds that would cause a judicial review claim to become transferable to the High Court:

> Question 1
>
> As regards amendments which would bring section 18(3) of the 2007 Act into play, or would give rise to an

obligation to transfer the application to the High Court under the proposed new rule 33C:

(a) is it appropriate that the Upper Tribunal's general powers to permit or require amendments under rule 5(3)(c), or to permit the applicant or another party to rely upon additional grounds of challenge, should extend to amendments and additional grounds which would, once made or relied upon, require the application to be transferred to the High Court?

(b) if so, is the proposed new rule 33B a satisfactory way of ensuring that this will be the case?

(c) if not, ought there to be a rule that would prohibit the Upper Tribunal from permitting or requiring an amendment, or permitting reliance upon an additional ground, which would, once made or relied upon, give rise to an obligation to transfer the application to the High Court?

(d) when the Upper Tribunal is under an obligation to order transfer to the High Court, would it be appropriate for a rule to require the parties to state whether they wish the High Court to transfer the application back to the Upper Tribunal, and why, if the High Court's discretionary powers under section 31A(3) of the Senior Courts Act 1981 permitted it to do so?

55. As to question 1, the TPC summarised the responses:

All respondents agreed that the proposal at (a) was appropriate, that the proposal at (b) was satisfactory (although some drafting observations were made), and that the alternative at (c) was unsatisfactory.

One respondent stressed the importance of speedy resolution of FCJRs. Another commented specifically that it is in the interests of justice for amendments to be permitted to be made to the existing claim rather than requiring an applicant to issue a new claim in the Administrative Court, with the attendant costs implications, even where that would result in the claim being transferred back to the Administrative Court. It was said that the issues will often be closely connected and it would be a waste of court time, costs and risk injustice if the claims have to be considered separately by the Administrative Court and the Upper Tribunal.

> Respondents were divided as to the merits of the suggestion at (d).

56. The TPC's reply to the responses on question 1 stated:

> The TPC concluded that it should proceed as proposed at (a) and (b), which accorded with the views of all respondents. On the question of delay the TPC considered that the tribunal would have well in mind the need to avoid delay, especially in the light of the overriding objective set out in the rules. As to the suggestion at (d), the TPC considered that the appropriate course was to leave it to the parties to make representations if they wished.

57. The document next set out Question 2 from the May 2011 TPC consultation paper, concerning amendments or additional grounds in cases which had been transferred to the Upper Tribunal by the High Court:

> Question 2
>
> As regards an application for judicial review or an application for permission to apply for judicial review, which the High Court has transferred as a matter of discretion, or as regards an application for judicial review following grant of permission by the Upper Tribunal in a case where the application for permission was transferred by the High Court as a matter of discretion:
>
> (a) is it appropriate that the Upper Tribunal should have a power to transfer the application to the High Court where the significance of an amendment, or additional ground of challenge, makes it just and convenient that the High Court rather than the Upper Tribunal should deal with the proceedings?
>
> (b) if so, is the proposed new rule 33C a satisfactory way of ensuring that this will be the case?
>
> (c) ought the Upper Tribunal to be required to transfer the application to the High Court where an amendment, or additional ground of challenge, is such that if the amendment or additional ground had been relied on at the time of transfer the conditions which must be met for discretionary transfer would not have been satisfied?

(d) if so, is the proposed new rule 33C a satisfactory way of ensuring that this will be the case?

58. As to question 2, the TPC summarised the responses:

> All respondents agreed with what was proposed at each of (a), (b), (c) and (d), with one adding a proviso about the importance of avoiding delay. Others raised a major point: there was a concern that merely raising an additional ground falling within the proposed rule should not of itself lead to transfer: this should only occur if the tribunal permitted the additional ground to be raised. Otherwise, rule 33C would be engaged simply by a party raising a proposed additional ground, rather than where it would actually fall to be determined in the case. In addition one respondent noted that the parties should be afforded the opportunity to make representations as to whether it is just and convenient that the High Court rather than the Upper Tribunal deal with the proceedings.

59. The TPC's reply to the responses on question 2 stated:

> Dealing with the last point first, the TPC concluded that the tribunal could be relied upon to ensure that representations could be made at an appropriate stage. There was no need to make a change to the rules. On the major point raised, the TPC agreed that it was appropriate to make express provision to avoid the danger that merely advancing an additional ground might lead to unnecessary transfer. It has modified the proposed rule changes to that end.

60. The document then set out Question 3 from the May 2011 TPC consultation paper, also concerning amendments or additional grounds in cases which had been transferred to the Upper Tribunal by the High Court:

> Question 3
>
> As regards an application for judicial review or an application for permission to apply for judicial review, which the High Court has transferred because it was required to do so, or as regards an application for judicial review following grant of permission by the Upper Tribunal in a case where the application for permission was transferred by the High Court because it was required to do so:

> (a) ought the Upper Tribunal to be required to transfer the application to the High Court where an amendment, or additional ground of challenge, is such that if the amendment or additional ground had been relied on at the time of transfer the conditions which must be met for compulsory transfer would not have been satisfied?
>
> (b) if so, is the proposed new rule 33C a satisfactory way of ensuring that this will be the case?

61. As to question 3, the TPC summarised the responses:

> All respondents agreed with the proposals at (a) and (b). The only qualifications concerned the major point identified above in relation to Question 2.

62. The TPC's reply to the responses on question 3 stated:

> The TPC concluded that it should proceed with these proposals, on the footing that the major point would be dealt with as indicated above.

63. In the late summer and autumn of 2011 a statutory instrument was prepared by the TPC giving effect to the conclusions described above. The opportunity was taken to simplify the drafting so that it took the form of a single rule 33A as set out in section A above. A major point noted in the consultation responses and reply was the need to affirm the tribunal's ability to control "additional grounds" in the same way that it can control amendments. This was dealt with by the introduction of paragraph (2)(b) in that rule: see section A above. Relevant changes under the statutory instrument, including the introduction of new rule 33A, came into force on 17 October 2011.

64. A direction by the Lord Chief Justice made on 9 September 2011 also came into force on 17 October 2011. The class which it specified under section 18(6) of the 2007 Act included not only "pure" FCJRs, but also those where certain additional matters were called into question. Expressly excluded from the class, however, were cases in which an applicant sought a declaration of incompatibility or sought to challenge detention.

65. Thus it was that new Upper Tribunal rule 33A took effect on 17 October 2011. It made specific provision enabling the Upper Tribunal to grant permission for amendments or additional grounds which would, once in place, require transfer of the claim to the High Court. In relation to cases transferred from the High Court, it also made specific provision imposing in certain circumstances a duty, and in certain other circumstances a power, to transfer the case back to the High

Court. At the same time, important alterations in the definition of cases falling within the Upper Tribunal's judicial review jurisdiction took effect. Those alterations significantly increased the likelihood that amendments would be needed to cater for changing circumstances in judicial review cases before the Upper Tribunal.

F. Legislative history: November 2011 onwards

66. A further major change took effect on 1 November 2013. On that date amendments under section 22 of the Crime and Courts Act 2013 modified section 31A of the Senior Courts Act 1981. The amendments removed Transfer Conditions 4 and 5 entirely, and altered section 31A(2) so that the requirement to transfer an application from the High Court to the Upper Tribunal would arise when Transfer Conditions 1, 2 and 3 were met. There was thus no longer a statutory limitation on the ability of the Upper Tribunal to deal with immigration judicial review claims.

67. At the same time directions of the Lord Chief Justice, Lord Judge, dated 21 August 2013, and of the Lord Chief Justice, Lord Thomas of Cwmgiedd, dated 24 October 2013, also came into force. Those directions, made under section 18(6) of the 2007 Act, specified a class which encompassed cases calling into question a decision under the Immigration Acts (as defined in Schedule 1 to the Interpretation Act 1978), or any instrument having effect under those Acts, or otherwise relating to leave to enter or remain in the United Kingdom outside the immigration rules. Expressly excluded from the class, however, are certain categories of cases, among them cases in which there is an application for a declaration of incompatibility.

68. The effect of these directions was to add the vast majority of immigration judicial review claims to the classes of case that under section 18 of the 2007 Act can, and under section 31A of the Senior Courts Act 1981 must, be dealt with in the Upper Tribunal. Consequential changes to the Upper Tribunal rules were the subject of a TPC consultation and were brought into force on 1 November 2013.

G. Validity of the 27 May consent order

69. In the circumstances described in section F above, the present claim for judicial review was properly brought in the Upper Tribunal. It satisfied each of Section 18 Conditions 1, 2 and 3 and, so long as the presiding judge held the appropriate standing, it would meet Section 18 Condition 4.

70. The present claim, however, could not have been brought in the Upper Tribunal if it had included an application for a declaration of

incompatibility. If it had done so it would not have fallen within any class specified in a direction under section 18(6) and would thus have failed to meet Section 18 Condition 3.

71. It seems from the explanation in B's skeleton argument (see section C above) that these considerations led the parties to assume that it would be for the High Court to decide whether B should be permitted to add a claim for a declaration of incompatibility. The assumption is understandable, but consideration of the structure of relevant parts of the 2007 Act, and section 18 of that Act in particular, shows it to be mistaken. There are three principal features which must be borne in mind:

(1) Section 18 ensures respect for the limits on the Upper Tribunal's judicial review jurisdiction by imposing a mandatory duty to transfer: section 18(3) is a bright line rule under which the Upper Tribunal can only exercise its judicial review power if it continues to have "the function of deciding the application". This means that:

(a) unless the application was the subject of a transfer from the High Court, and thus benefited from section 19(3)(b), each of section 18 Conditions 1 to 4 must continue to be satisfied – and if they are not all satisfied then the case must be transferred to the High Court; and

(b) in a case transferred from the High Court, section 19(3)(b) removes the need for compliance with section 18 Condition 3, thereby enabling the Upper Tribunal to continue to deal with a case which does not fall within a specified class. In all cases transferred from the High Court, however, consideration will need to be given to rule 33A(3) if after transfer the proceedings are amended or any party relies on additional grounds. In that event:

(i) under rule 33A(3) a mandatory duty to transfer back arises if the proceedings in their present form could not have been transferred to the Upper Tribunal under the relevant power or duty had they been in that form at the time of transfer; and

(ii) subject to that mandatory duty, a discretionary power is given to transfer proceedings back to the High Court where it appears just and convenient to do so.

(2) Neither section 18, nor any other provision in the 2007 Act, nor any provision in the Upper Tribunal rules in their current form, gives the Upper Tribunal a discretionary power to transfer to the High Court a case which has been begun in the Upper Tribunal. Where a case has been transferred to the Upper Tribunal, it is only in circumstances bringing the case within rule 33A(3)(b) that a discretionary power to transfer the case back to the High Court will arise.

(3) As noted by the TPC (see section E2 above) section 18(11) of the 2007 Act contemplates that Tribunal Procedure Rules should provide for the making of amendments to judicial review proceedings in the Upper Tribunal which would have the effect that, once made, the application would be required to be transferred to the High Court. Rule 33A does this by expressly giving the tribunal control over the making of such amendments, and it ensures also that the tribunal controls whether there can be reliance on additional grounds which would have the same effect.

72. It necessarily follows from this analysis that the "wider power" contemplated in paragraphs 11 and 12 of B's skeleton argument would not be consistent with the 2007 Act structure, and does not exist. The mere fact that the parties may both agree that a judicial review claim begun in the Upper Tribunal should be transferred to the High Court will not of itself confer the necessary jurisdiction. The parties may, of course, propose a consent order permitting amendments, or reliance on additional grounds, of a kind which would give rise to an obligation to transfer once the amendment or additional grounds had been permitted: under rule 33A(2)(b) it will be within the sole discretion of the tribunal whether to give permission for such amendments or additional grounds.

73. By the time of the hearing on 4 June, it had become apparent that the proposal which had led to the "Form of Consent" was premature. Neither side suggested that it was appropriate at that stage for the claim to be amended so as to include a declaration of incompatibility. The reason was that additional material had been submitted to the respondent on B's behalf, and both parties considered that the preferable course was for the proceedings to be stayed while the respondent considered that material. In these circumstances it was accepted on B's behalf at the hearing that the 27 May consent order was a nullity, and there was no submission on behalf of the respondent to the contrary.

H. Conclusion

74. The statutory provisions governing the Upper Tribunal's judicial review functions are less complex than they once were. It remains the case, however, that they are not straightforward. Moreover, the directions specifying classes of case are now significantly more complex than previously.

75. Consideration of the statutory provisions, and of Upper Tribunal rule 33A, in the present case has ensured that an over-hasty agreed proposal for transfer to the High Court has not taken effect. Practitioners must in future give careful consideration to those provisions and to relevant rules so as to ensure that they are deployed in furtherance of the legislative objectives and in a manner consistent with the overriding objective found in Upper Tribunal rule 2.