Neutral Citation Number: [2018] EWHC 3546 (Admin) Case Nos: CO/3435/2017
CO/3438/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 19/12/2018

Before :

LADY JUSTICE SHARP
LORD JUSTICE PETER JACKSON
LORD JUSTICE SINGH

- -

Between :

The Queen (on the application of TN (Vietnam))	**Claimants**
and	
The Queen (on the application of US (Pakistan))	
- and -	
First-tier Tribunal (Immigration and Asylum Chamber)	**1st Defendant**
and	
Lord Chancellor	**2nd Defendant**
Secretary of State for the Home Department	
31 Other Appellants	
	Interested Parties

- -
- -

Ms Stephanie Harrison QC and Ms Louise Hooper (instructed by **Duncan Lewis)** for **TN**
(Vietnam)
Ms Nathalie Lieven QC and Ms Charlotte Kilroy (instructed by **Duncan Lewis**) for **US (Pakistan)**
The First-tier Tribunal (Immigration and Asylum Chamber) did not appear and was not represented
Ms Julie Anderson (instructed by **the Government Legal Department**) for the **Lord Chancellor**
Mr Robin Tam QC and Ms Natasha Barnes (instructed by the **Government Legal Department**) for the **Secretary of State for the Home Department**

Hearing dates: 23-25 October 2018

- -

Judgment Approved

Lord Justice Singh:

Introduction

1. These are two claims for judicial review of the decision of the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT") dated 30 May 2017, in which it held that it had no jurisdiction to determine the Claimants' applications to set aside earlier appeal decisions made by it. Permission to bring these claims for judicial review was granted by Supperstone J. Although there are two claims before the Court they both raise the same legal issues, the principal issue being whether the FTT has jurisdiction to consider applications to set aside an earlier appeal decision in cases such as these.

2. On 20 February 2018, after a joint case management hearing, Singh LJ and Supperstone J directed that these claims should be heard by a Divisional Court consisting of the same members of the Court of Appeal who would be hearing the appeals in the related case of *R (TN and US) v Secretary of State for the Home Department* [2018] EWCA Civ 2838. The background is more fully set out in the judgments of the Court of Appeal in that case, which was an appeal from the decision of Ouseley J [2017] EWHC 59 (Admin); [2017] 1 WLR 2595.

3. In his judgment in *TN and US* Ouseley J held that the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 (SI 2005 No. 560) were *ultra vires* (I will refer to these simply as "the 2005 Rules" unless it is necessary to distinguish them from other rules, in which case I will refer to them as "the Fast Track Rules"). He also held that an application would then have to be made to set aside an appeal decision which had previously been made by the FTT under the 2005 Rules.

4. Ouseley J proceeded on the assumption that it would be the FTT which would be the suitable forum in which any applications to set aside earlier appeal decisions could and should be made: see paras. 96-101 of his judgment. However, he added a postscript, at para. 102, to the effect that, although he had assumed that this was accepted by the Secretary of State and the Lord Chancellor, it seemed that that was not necessarily the case. He recorded that, in submissions made on their behalf by counsel before him, the position had been left "open."

5. In due course the Secretary of State made submissions before the FTT that in fact it did *not* have jurisdiction to determine such applications to set aside appeal decisions which had been made under the 2005 Rules. The FTT accepted those submissions in its determination of 30 May 2017 and it is that which has led to the present proceedings for judicial review.

Material legislation

6. The relevant primary legislation is contained in the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").

7. Section 9, so far as material provides:

> "(1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).
>
> (2) The First-tier Tribunal's power under subsection (1) in relation to a decision is exercisable –
>
> (a) of its own initiative, or
>
> (b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision.
>
> (3) Tribunal Procedure Rules may –
>
> (a) provide that the First-tier Tribunal may not under subsection (1) review (whether of its own initiative or on application under subsection (2)(b)) a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules;
>
> (b) provide that the First-tier Tribunal's power under subsection (1) to review a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules is exercisable only of the Tribunal's own initiative;
>
> (c) provide that an application under subsection (2)(b) that is of a description specified for the purposes of this paragraph in Tribunal Procedure Rules may be made only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules;
>
> (d) provide, in relation to a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules, that the First-tier Tribunal's power under subsection (1) to review the decision of its own initiative is exercisable only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules."

8. Section 22 confers a power on the Tribunal Procedure Committee to make Tribunal Procedure Rules for the FTT and the Upper Tribunal ("UT").

9. Para. 15 of Sch. 5 to the 2007 Act, so far as material provides:

> "(1) Rules may make provision for the correction of accidental errors in a decision or record of a decision.

> (2) Rules may make provision for the setting aside of a decision in proceedings before the First-tier Tribunal or Upper Tribunal –
>
> > (a) where a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party to the proceedings or a party's representative,
> >
> > (b) where a document relating to the proceedings was not sent to the First-tier Tribunal or Upper Tribunal at an appropriate time,
> >
> > (c) where a party to the proceedings, or a party's representative, was not present at a hearing related to the proceedings, or
> >
> > (d) where there has been any other procedural irregularity in the proceedings."

10. The relevant secondary legislation is to be found in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014 No. 2604) ("the 2014 Rules"). The 2014 Rules came into force on 20 October 2014.

11. Rule 4 of the 2014 Rules, which is headed "Case management powers", provides that, subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure: see para. (1). Para. (3) provides that in particular, and without restricting the general powers in paras. (1) and (2), the Tribunal may (a) extend or shorten the time for complying with any rule, practice direction or direction.

12. Rule 32 of the 2014 Rules provides as follows:

> "(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if –
>
> > (a) the Tribunal considers that it is in the interests of justice to do so; and,
> >
> > (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are –
>
> > (a) a document relating to the proceedings was not provided to, or was not received at an appropriate time by, a party or a party's representative;
> >
> > (b) a document relating to the proceedings was not provided to the Tribunal at an appropriate time;

> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings."

13. Rule 33 provides that:

> "(1) A party seeking permission to appeal to the Upper Tribunal must make a written application to the Tribunal for permission to appeal."

14. Rule 34 provides that:

> "(1) On receiving an application for permission to appeal the Tribunal must first consider whether to review the decision in accordance with Rule 35."

15. Rule 35 provides that:

> "(1) The Tribunal may only undertake a review of a decision –
>
> (a) pursuant to Rule 34 (review on an application for permission to appeal); and
>
> (b) if it is satisfied that there was an error of law in the decision."

16. Rule 36 provides that the Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things.

17. Rule 46, which is headed "transitional provisions", provides that:

> "(1) The Tribunal may give any direction to ensure that proceedings are dealt with fairly and, in particular, may –
>
> (a) apply any provision of the Asylum and Immigration Tribunal (Procedure) Rules 2005 or the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 which applied to the

> proceedings immediately before the date these Rules came into force; or
>
> (b) disapply provisions of those Rules (including the fast track rules).
>
> …"

18. At the risk of stating the obvious, it should be noted that the 2005 Rules were not made under the 2007 Act since they pre-dated that Act. Indeed, at that time and until 2010, the present appellate structure, which comprises the FTT and the Upper Tribunal (Immigration and Asylum Chamber), did not exist. At that time the relevant body was the Asylum and Immigration Tribunal ("AIT").

19. In 2010 (under powers conferred by sections 30 and 31 of the 2007 Act) the functions of the AIT were transferred to the FTT: see the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (SI 2010 No. 21) ("the 2010 Order"), Article 2. The 2010 Order came into force on 15 February 2010.

20. The Order also provided, in Article 4, that the Asylum and Immigration Tribunal (Procedure) Rules 2005 and the 2005 Fast Track Rules were to have effect as if they were procedure rules of the FTT.

21. Schedule 4 to the 2010 Order contained transitional and saving provisions. It is unnecessary for present purposes to refer to those provisions in detail.

Background

22. It is common ground that, in the case of appeals heard under the 2014 Rules, following the decision of the Court of Appeal in *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840; [2015] 1 WLR 5341 ("*DA6*") the FTT has exercised jurisdiction to set aside its earlier appeal decisions. A simple procedure for doing so was established by the FTT in the lead case of *Alvi v Secretary of State for the Home Department* (4 August 2015). This was achieved under Rule 32 of the 2014 Rules. As I have mentioned, when the present cases were before Ouseley J, he was of the view that Rule 32 would also be available, and indeed would be the appropriate procedure to use, in cases which had been decided under the 2005 Rules.

23. As I have also mentioned, the 2014 Rules came into force on 20 October 2014. TN's substantive appeal was heard by the FTT on 21 August 2014. US's appeal was heard by the FTT on 23 May 2014. Accordingly they had been determined under the 2005 Rules and not the 2014 Rules.

24. On behalf of US it is pointed out that, even in his case, the application to set aside the appeal decision remains unresolved despite the fact that, as long ago as 20 January 2017, Ouseley J said (at para. 184 of his judgment) that, if it were a matter to be decided on judicial review, he would have quashed the FTT determination on the ground that it was procedurally unfair.

25. On behalf of both Claimants Ms Nathalie Lieven QC submits that there is no distinction in principle between the FTT's power to determine such applications to set aside earlier appeal decisions whether they were heard under the 2014 Rules, which were quashed by the Court of Appeal in *DA6*; or were heard under the 2005 Rules, which were declared to be *ultra vires* by Ouseley J in the judicial review proceedings before him.

26. On behalf of the Secretary of State Mr Robin Tam QC submits that there is a crucial distinction between the two sets of rules. He submits that there was no power to consider an application to set aside an earlier appeal decision before the 2014 Rules came into force; and that relevant provisions in those Rules do not have retrospective effect.

27. On behalf of the Lord Chancellor, Ms Julie Anderson also submits that the FTT was right to hold that it lacked the relevant jurisdiction.

The determination of the FTT

28. The determination of the FTT was given by Mr M. A. Clements, the President of the FTT, and Upper Tribunal Judge Deans. At para. 1 the FTT observed that applications for set aside had been made in 2015 but had been deferred to await the outcome of proceedings brought by the Claimants in the Administrative Court challenging the *vires* of the 2005 Rules. That of course led to the decision of Ouseley J on 20 January 2017.

29. At paras. 5-6 the FTT identified the two issues which it had to decide. The first issue was whether the FTT had jurisdiction to consider the applications to set aside its earlier appeal decisions. The second issue only arose if the FTT did have jurisdiction and concerned what the correct approach should be to an application to set aside.

30. After setting out the relevant legislation, the FTT turned to the issue of jurisdiction at paras. 12-42.

31. I would note in passing that, at paras. 12-15, the FTT addressed a complaint which was made on behalf of the Applicants by Ms Lieven to the effect that the Secretary of State had only raised the issue of jurisdiction late in the day. This is the sort of skirmish on the periphery of litigation which also occurred at the hearing before us and which must be discouraged. I would respectfully endorse what the FTT itself said about this, at para. 15:

> "… The question of whether the issue of jurisdiction might have been raised at an earlier stage has no direct bearing on the

> question we have to decide of whether the Tribunal has the power in law to set aside the decisions in question. … It is not infrequently the position in litigation that an issue that comes to be regarded as crucial is not necessarily identified as such at an earlier stage. Further, it is entirely appropriate that the First-tier Tribunal should itself make a decision at first instance as to its jurisdiction when this is at issue."

32. To that I would add only this: questions of jurisdiction cannot be determined by consent, still less by default. The question whether or not a tribunal has jurisdiction to determine a question is a question of law. The answer to it depends upon the correct interpretation of the legislation creating its jurisdiction and cannot depend on the conduct of one of the parties.

33. On the main issue before it, whether it had jurisdiction, the FTT's reasoning was as follows.

34. Section 9(1) of the 2007 Act sets out the free-standing power of the FTT to review a decision, permitting it to "review a decision made by it". This power of review can lead to a power to set aside by operation of section 9(4), since para. (c) allows the FTT to
"set the decision aside": para. 26 of the judgment. But section 9(3) allows the section 9(1) power to be restricted by rules by virtue of, in particular, paras. (c) and (d).

35. The FTT said that such rules have been promulgated in the form of Rules 34 and 35 of the 2014 Rules. In particular, Rule 35 states that the FTT may only undertake the review of a decision where there has been *an application for permission to appeal* and where it is satisfied there has been an error of law in that decision. These conditions of jurisdiction under section 9 could not be satisfied by TN and US in this case, since there was no pending application for permission to appeal: para. 27 of the judgment.

36. The FTT rejected Ms Lieven's argument that the question of the nature of the application (e.g. permission to appeal) was not determinative because, by virtue of section 9(2)(a), the FTT had the power of its own initiative to review a decision under 9(1). At para. 29 of its judgment, the FTT disagreed, stating that section 9(3)(c) and (d) specifically permit restrictions to be made to the FTT's power to review of its own initiative, and this had been achieved through Rules 34 and 35.

37. The FTT also rejected Ms Lieven's argument based on Rule 36. Rule 36 states that the Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things. The FTT said that this Rule might have given TN and US a route to suggesting that their claim could be treated as an application for permission to appeal within the meaning of Rule 35. But the FTT interpreted this as stating that applications for decisions to be corrected, set aside or reviewed might be treated as applications for any one of those things, but *excluded* an application for a decision to be set aside or reviewed being treated as an application for permission to appeal. The FTT said that this was the "apparent meaning and purpose of the provision".

38. TN and US also did not succeed on the basis of Rule 32. Rule 32(1) states that the FTT can set aside an earlier decision if (a) it considers that it is in the interests of justice to do so, and that (b) one of the conditions in para. (2) (which include, at sub-para. (d), the existence of a "procedural irregularity in the proceedings") is satisfied. At para. 33 of its judgment, the FTT held that Rule 32 is only relevant to appeals which were still pending when the 2014 Procedure Rules came into effect, not appeals (such as the ones

in the present cases) which had already been disposed of. Nor was the term "procedural irregularity" sufficiently broad to encompass the error of law that had arisen from the Procedure Rules being *ultra vires*: para. 38 of the judgment.

39. At para. 40 of its judgment the FTT noted that in *Alvi* it had heard applications to set aside appeal decisions made under the 2014 Fast Track Rules, but did not consider this to be problematic since in *Alvi* the FTT did not have the benefit of the Secretary of State's submissions as to jurisdiction (it now did through submissions made by Mr Tam), nor to Ouseley J's judgment, which made clear that the decisions were not themselves nullities just because the rules under which they were made were *ultra vires*.

40. At paras. 43-49 the FTT turned to the second issue before it in case it was wrong about the issue of jurisdiction. It considered that it would have "no hesitation in following the approach set out by Ouseley J in his judgment in *TN and US*": see para. 48.

41. In its conclusion, at para. 51, the FTT said that it had no jurisdiction to consider setting aside the earlier decisions made on appeals in these two cases and therefore it had no power to take any further action in respect of the applications to set those decisions aside.

The Claimants' grounds of challenge

42. Under Ground 1 in this claim for judicial review, Ms Lieven submits that, on their proper construction, the relevant Rules and the 2007 Act do not have the effect contended for by the Secretary of State and held by the FTT in its determination. She relies on either or both of Rule 32 of the 2014 Rules and Rule 36/section 9 of the 2007 Act in support of her submission that the FTT does have jurisdiction to set aside an earlier appeal decision made under the 2005 Rules.

43. Ms Lieven acknowledges that Rule 35 of the 2014 Rules provides that the FTT may only undertake a section 9 review of a decision pursuant to Rule 34, in other words on receipt of an application for permission to appeal. However, she submits that:

(1) the flexibility given to the FTT in Rule 36 allows it to treat applications for reviews or set aside as applications for permission to appeal and so to apply Rule 34;

(2) the flexibility given to the FTT in Rule 4 means that it retains a power to extend time in respect of any Rule, including in respect of the power to set aside in Rule 32, where the interests of justice require this;

(3) in any event, Rule 32 gives the FTT a separate power to set aside decisions of its own initiative and on application on specified grounds.

44. Under Ground 2, Ms Lieven submits that, if the FTT's interpretation of the Scheme is correct, then Rules 32, 35 and/or 46 are *ultra vires* both section 9 and para. 15 of Sch. 5 to the 2007 Act, and section 22 of the 2007 Act. She submits that nothing in section 9(3) permits procedure rules to be made which prohibit the FTT from exercising its power of review unless an application for permission to appeal is made.

45. Ms Lieven accepts that section 9(3) of the 2007 Act confers power to make procedural rules which may narrow the review power to certain grounds, certain decisions, or provide that it can only be exercised on the FTT's own initiative. However, Ms Lieven submits that what it does not permit is the making of procedural rules which remove altogether the FTT's right under section 9(2) to review its determinations of its own initiative.

46. There is also a Ground 3 in the present claim for judicial review. This arises from the fact that the FTT said, in its determination of 30 May 2017, that, if it had had jurisdiction to set aside the earlier appeal decisions, it would have had no hesitation in following the approach set out by Ouseley J in his judgment. However, it is common ground between the parties that this issue is also raised in the appeal in the cases of TN and US. That has been dealt with by the Court of Appeal in the judgments delivered in that appeal. It is unnecessary to say anything more about it in the present claim for judicial review.

The submissions on behalf of the Lord Chancellor and the Secretary of State

47. The written submissions in response to the Claimants' grounds were set out on behalf of the Lord Chancellor by Ms Anderson. They were adopted on behalf of the Secretary of State by Mr Tam, who was the principal advocate at the hearing before us in response to the Claimants' arguments.

48. In summary, it is submitted that neither of the two routes upon which Ms Lieven relies (Rule 32 or Rule 36, reflecting section 9 of the 2007 Act) on its correct construction provides a route through which determinations made under the 2005 Rules can now be set aside. It is submitted that there were no equivalent provisions in the 2005 Rules. In the absence of express provision, the 2014 Rules should not be held to have retrospective effect. This would be contrary to the principle of legal certainty.

49. Furthermore it is submitted that normally, once a tribunal has decided a case, that is final. The principle of finality in litigation is important.

50. Finally, it is pointed out, as is common ground before us, that the determination of this issue of construction will have potentially wide-ranging consequences for all first instance tribunals, not only in the immigration and asylum context.

The first issue: jurisdiction

51. Ground 1 raises an issue of statutory construction as to the FTT's jurisdiction. On behalf of the Claimants Ms Lieven acknowledges that there was no equivalent to Rule 32 of the 2014 Rules in the 2005 Rules. However, she submits that the transitional provisions of Rule 46 of the 2014 Rules make it clear that the Tribunal may give any direction to ensure that proceedings are dealt with fairly and go on to make specific provision relating to the continuing effect of the 2005 Rules. In my view, that last point takes the argument nowhere, since there was no relevant provision in the 2005 Rules which can be carried forward. Accordingly, if reliance is properly to be placed on Rule 46 it can only be because of the provision that proceedings are to be dealt with fairly.

52. In my judgement, the fundamental difficulty with Ms Lieven's reliance on Rule 46 is that, at the relevant time, there are no extant "proceedings" before the FTT. The earlier appeal decision by the FTT has been finally disposed of. The time limit for appealing has long since expired. Indeed, as Ms Lieven acknowledged, there may well have been an appeal to the Upper Tribunal which itself has been finally disposed of.

53. Ms Lieven submits that the relevant "proceedings" consist of an application to have an earlier appeal decision set aside but, in my view, that simply begs the question. Further and in any event, she rightly accepts that Rule 32 does not require there to be any application and that the FTT could act of its own initiative. Indeed at the hearing before us she advanced the submission that in certain situations it could be very important as a matter of principle that the FTT should be able to act of its own initiative. This might be, for example, where there was actual bias on the part of the FTT judge who sat in the original appeal but this was not discovered for many years later and was not known to the original appellant but had become known to the President of the FTT.

54. However, it seems to me that those kinds of extreme situations can be dealt with, if they arise, by way of judicial review. It is common ground in the present case that there will always be a judicial forum in which a procedural injustice (if that is what has occurred) can be corrected. This is because there will always be available the possibility of an application for judicial review in the High Court. The sole question with which the present case is concerned is whether, as a matter of statutory construction, the FTT has jurisdiction to determine such cases, whether made by way of application or of its own initiative.

55. In my judgement, the answer to that question of statutory construction is that the FTT does not have that jurisdiction. This is essentially for the two reasons which were advanced before us by Mr Tam, supported by Ms Anderson.

56. First, the relevant provisions of the 2014 Rules, in particular Rule 32, simply did not apply at the relevant time. Rule 32 was made under para. 15(2) of Sch. 5 to the 2007 Act. It mirrors the language of that provision. I agree with Mr Tam and Ms Anderson that the insuperable difficulty faced by the Claimants is that, at the time when their appeals were decided, there was no equivalent to the rule in the 2005 Rules then in force. Final determinations were made on their appeals by the FTT before such a rule ever existed.

57. As I have mentioned, the transitional provisions of Rule 46 do not assist to create the bridge which would be necessary between the two sets of Rules. This is because there were no longer any extant proceedings before the FTT. Indeed I would note that some cases (as Ms Lieven acknowledged) will have been the subject of a further appeal to the Upper Tribunal. It would be very curious indeed if the FTT could of its own initiative set aside earlier decisions even though an appeal to the Upper Tribunal had been dismissed and the proceedings had otherwise been finally disposed of. This can be illustrated by the facts of the case of US: it should be noted that he did seek to appeal

    against the FTT decision. On 12 June 2014 his application for permission to appeal to the Upper Tribunal was refused.

58. Secondly, despite the attractive way in which Ms Lieven advanced her submissions, section 9 of the 2007 Act does not assist either. This is because the scope of the power of the FTT to act of its own initiative under section 9(2)(a) has, in my judgement, been successfully reduced by rules which have been properly made pursuant to the power conferred by section 9(3)(d) and, in so far as necessary, by section 9(3)(a) of the 2007 Act.

59. I have already mentioned that, in the case of US, he did seek to appeal against the FTT decision. On 12 June 2014 his application for permission to appeal to the Upper Tribunal was refused. This point also has relevance to the argument under section 9 of the 2007 Act and Rule 36 of the 2014 Rules. It further illustrates, as both Mr Tam and Ms Anderson submit, that section 9 was not intended to deal with cases such as the present. It would be highly unsatisfactory if its availability were to depend on apparently arbitrary factors such as whether an individual had sought at the time to appeal from the FTT to the Upper Tribunal or on whether the appeal had been determined before 2010 by the former AIT rather than the FTT.

60. Furthermore, as they both submit, the consequence would be extraordinary. It would have the effect that section 9 of the 2007 Act could be used to set aside determinations made before the 2007 Act was enacted and before the AIT was replaced by the FTT.

61. Mr Tam and Ms Anderson also draw attention to the following history of the legislation, which is important.

62. As I have said, the original 2005 Rules were not made under the 2007 Act for the obvious reason that they pre-dated that Act. The procedure set out in them referred to what was then a single-tier structure in the AIT. It referred to a possible "reconsideration" provided within that structure by the then section 103A of the Nationality, Immigration and Asylum Act 2002. That provision was repealed when the AIT's appeal jurisdiction was transferred to the FTT on 15 February 2010.

63. The 2005 Rules were then amended by the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 to take account of the new appellate structure. Rules 25 and 26 of the amended 2005 Rules provided that, on receiving an application for permission to appeal to the UT, the FTT had first to consider whether to review a decision "in accordance with Rule 26". Rule 26 specified that the FTT could only review a decision if it was satisfied that there was a substantive error of law in the decision. This constituted a limit on the ambit of the section 9 power, as permitted by section 9(3).

64. It is important to bear in mind that that was the version of the 2005 Rules which was in force at the time of the appeal decisions in the two cases of TN and US.

65. When the 2014 Rules were introduced in October 2014, the old Rules 25 and 26 were replaced by what are now Rules 34 and 35 in the 2014 Rules. However, as is common ground, Rule 34 requires there to be an application for permission to appeal before the

FTT can consider whether to review a decision in accordance with Rule 35.

Furthermore, Rule 35(b) requires that the FTT "is satisfied that there was an error of law in the decision". Neither of those criteria was satisfied in the present cases.

66. The applications which TN and US made were not applications for permission to appeal. The Rules at that time contained no equivalent to the current Rule 36 of the 2014 Rules. The applicable rules at that time contained no provision (like Rule 36) allowing the FTT to treat the applications as if they were applications for permission to appeal.

67. Accordingly, I would reject the Claimants' Ground 1, that the FTT had jurisdiction as a matter of statutory construction.

The second issue: are the relevant Rules *ultra vires*?

68. I also do not accept the Claimants' Ground 2 (that the relevant Rules are *ultra vires*), since, in my judgement, the Rules as framed have been properly made under section 9 of the 2007 Act.

69. As I have already said in addressing Ground 1, the scope of the power of the FTT to act of its own initiative under section 9(2)(a) has, in my judgement, been successfully reduced by rules which have been properly made pursuant to the power conferred by section 9(3)(d) and, in so far as necessary, by section 9(3)(a) of the 2007 Act. The language of those provisions is both apt and broad enough to encompass the

restrictions which have been placed on the ability of the FTT to review an earlier appeal decision of its own initiative.

70. I have referred already to the terms of section 9 of the 2007 Act. Subsection (3) expressly confers power to make Tribunal Procedure Rules which (a) "provide that the First-Tier Tribunal may not under subsection (1) review (whether of its own initiative or on application under subsection (2)(b)) a decision of a description specified for the purposes of this paragraph in those rules." In my judgement, the 2014 Rules fall within that description.

71. Further, subsection (3)(d) confers power to make Tribunal Procedure Rules which provide, in relation to a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules, that the FTT's power under subsection (1) to review the decision of its own initiative is exercisable only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules. Again it seems to me that the 2014 Rules fall within that description.

72. Furthermore, as I have already said, I find nothing inherently objectionable about that outcome. In extreme cases, such as the example of actual bias which Ms Lieven suggested could arise, there will be available the opportunity to bring a claim for judicial review in the High Court.

73. I also regard the construction of the enabling legislation to which I have come as being consistent with the fundamental importance of finality in litigation. While that principle is important generally, it is particularly important in the present context, which concerns earlier appeal decisions that were not even made under the 2014 Rules but were made

under earlier Rules, at a time when the 2014 Rules (provisions of which Ms Lieven now contends are *ultra vires*) were not even in force.

Conclusion

74. For the reasons I have set out above I would reject this claim for judicial review.

75. The net result of this judgment and what the Court of Appeal has today held in the related case of *R (TN and US) v Secretary of State for the Home Department* will be that (1) the claim for judicial review of the FTT is dismissed; (2) the appeal against the decision of Ouseley J is dismissed save that the earlier appeal decision by the FTT in the case of US will be quashed. That follows from the conclusion reached by Ouseley J that he would have quashed that decision if the FTT had not been the appropriate forum to consider applications to set aside earlier appeal decisions. Since this Court has now held that the FTT does not have the relevant jurisdiction the earlier appeal decision in the case of US can only be quashed by the High Court and that is what I would now order.

Costs

76. I would deal with the issue of costs in the manner set out in my judgment in the related case before the Court of Appeal: [2018] EWCA Civ 2838, at paras. 152-158.

Peter Jackson LJ:

77. I agree.

Sharp LJ:

78. I also agree.