Neutral Citation Number: [2024] EWCA Civ 1421

Case No: CA-2023-002071

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE UPPER TRIBUNAL (IMMIGRATION & ASYLUM CHAMBER)
Upper Tribunal Judge Perkins
JR-2022-LON-000001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2024

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE DINGEMANS

- -

Between :

The King **On the application of** **Mr Emilio Branco-Bonfim**	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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- -

Ranjiv Khubber (instructed by **Turpin Miller LLP**) for the **Appellant**
Christian J Howells (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 30 October 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 20/11/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Dingemans:

Introduction and issues

1. This appeal and cross appeal raises two issues. The first issue is whether the respondent Secretary of State for the Home Department is entitled to rely, pursuant to paragraph 2 of schedule 2 of the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations), on an earlier certification made pursuant to regulation 33(2) of the EEA Regulations in a letter dated 20 November 2018 to the effect that removal pending the outcome of the appeal would not be unlawful under section 6 of the Human Rights Act 1998, to deny the appellant Mr Branco-Bonfim an in-country appeal after the refusal in a letter dated 14 July 2020 of a later human rights claim.

2. The second issue is whether, if the Secretary of State was not entitled to rely on that earlier certification, relief should nevertheless be refused to Mr Branco-Bonfim pursuant to section 31(2A) of the Senior Courts Act 1981 because "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" and the Secretary of State would have certified Mr Branco-Bonfim's claim pursuant to section 94(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

3. The appeal is against the decision of the Upper Tribunal (Immigration and Asylum Chamber) (Upper Tribunal) dated 5 October 2023. UT Judge Perkins held that the Secretary of State's reliance on paragraph 2 of schedule 2 of the EEA Regulations to prevent Mr Branco-Bonfim from having and pursuing an in-country right of appeal against the refusal of the human rights grounds as set out in the decision letter dated 14 July 2020 was unlawful. However, UT Perkins refused to grant relief, relying on section 31(2A) of the Senior Courts Act. The application for judicial review was therefore refused.

Factual background

4. The appellant, Mr Branco-Bonfim was born in 1995 in Sao Tome and Principe, an African state located off the western coast of Africa. He is a national of Portugal, having lived in Portugal from 1998. His mother and Mr Branco-Bonfim moved from Portugal to the United Kingdom in 2002 when he was aged 6 or 7 years.

5. Mr Branco-Bonfim was convicted of various criminal offences including an offence of violent disorder. He was sentenced to imprisonment. The Secretary of State served a liability to deportation letter to Mr Branco-Bonfim on 4 January 2018. After Mr Branco-Bonfim's further conviction for possessing class A drugs with intent to supply, the Secretary of State sent a letter dated 20 November 2018 deciding to deport Mr Branco-Bonfim pursuant to regulation 27 of the EEA Regulations on the basis that he posed a genuine, present and sufficiently serious threat to the interests of public policy and that he should not be allowed to remain.

6. In paragraphs 19 to 34 of the letter dated 20 November 2018 the Secretary of State addressed the issue of certification under regulation 33 of the EEA Regulations. At paragraph 19 it was recorded that "… the Secretary of State may only give directions for your removal while you could bring an appeal against this deportation decision or where such an appeal has not been finally determined where they have certified that

such removal would not be unlawful under section 6 of the Human Rights Act 1998." The letter then addressed why, in the particular circumstances of that proposed deportation, the removal of Mr Branco-Bonfim would not be unlawful pending determination of any appeal against his deportation.

7. Mr Branco-Bonfim appealed to the First-tier Tribunal (FTT) but withdrew his appeal. Mr Branco-Bonfim was deported to Portugal on 17 September 2019 as part of the "early release/removal scheme".

8. Mr Branco-Bonfim contended that he was unable to integrate in Portugal and he returned to the UK. On 18 December 2019, just over two months after his original deportation, Mr Branco-Bonfim was encountered at Holyhead, detained and taken to prison to complete his sentence. Mr Branco-Bonfim was then held in immigration detention.

9. Human rights representations, contending that Mr Branco-Bonfim should remain with the rest of his family in the UK, were made on his behalf, together with representations that the Secretary of State should revoke the deportation order. The Secretary of State refused to consider the application to revoke the deportation order, in a letter dated 2 June 2020, as it was not made from outside the UK.

10. Further correspondence was sent on behalf of Mr Branco-Bonfim contending that any removal to Portugal would infringe his human rights under article 8 of the European Convention on Human Rights (ECHR), which was given domestic effect by the Human Rights Act 1998. On 1 July 2020 Mr Branco-Bonfim was granted bail from immigration detention. By letter dated 14 July 2020 the Secretary of State made a decision refusing Mr Branco-Bonfim's human rights claim, recording that the public interest in deporting him outweighed his right to private and family life.

11. Under the heading "Bringing an Appeal" the letter said that Mr Branco-Bonfim could appeal by virtue of regulation 32(4) of the EEA Regulations against the decision to remove him. The ground of appeal under regulation 36 would be "that the decision to remove you breaches your rights under the EU Treaties in relation to entry to or residence in the United Kingdom." It was stated that the appeal right was out of country, meaning it was only exercisable from outside the UK.

12. The letter then went on to state: "<u>You may also appeal the decision to refuse your human rights claim under s.82(1) NIAA 2002. As your decision to make a Deportation Order was certified under regulation 33 and your human rights claim arises from the consequences of that deportation decision, in accordance with para 2 of Schedule 2 to the EEA Regulations, your s.82(1)(b) NIAA 2002 appeal right in respect of your human rights decision must be brought from outside the UK</u>" (underlining added). It is this part of the letter which has generated controversy and the first issue on this appeal.

The proceedings and judgment below

13. There was further correspondence between the parties, with Mr Branco-Bonfim's legal representatives contending that Mr Branco-Bonfim could appeal in-country on the human rights grounds. Mr Branco-Bonfim commenced an application for judicial review on 2 September 2020 in the Administrative Court, King's Bench Division of the High Court. The claim was commenced in the High Court and not the Upper Tribunal

because one of the grounds of the claim related to the compatibility of domestic law with EU law. Following the lodging of summary grounds opposing the claim, on 26 May 2021 an order for a rolled up hearing was made. After various procedural steps had been taken there was a hearing before Heather Williams J. On 21 October 2021 Heather Williams J. refused permission to apply in relation to some grounds (including the ground related to EU law), found that the ground relating to the effect of the certification under the EEA Regulations was arguable, and stated that the substantive claim should be transferred to the Upper Tribunal (Immigration and Asylum Chamber).

14. Mr Branco-Bonfim sought permission to appeal Heather Williams J's refusal of permission to apply for judicial review on some of the grounds to the Court of Appeal. Permission to appeal was refused by the Court of Appeal by order dated 27 May 2022. Directions were then given in the UT for the hearing of the claim for judicial review on the ground allowed by Heather Williams J. That hearing took place on 28 November 2022 before UT Judge Perkins. The decision was given on 5 October 2023.

15. On the first issue, UT Judge Perkins recorded that the Secretary of State had not certified the claim under section 94 of the 2002 Act, and had relied on paragraph 2 of schedule 2 of the EEA Regulations. UT Judge Perkins stated that there were two proposed removals, one in 2018 and one in 2020. The judge stated that there was no doubt that Mr Branco-Bonfim was entitled to raise human rights grounds and have them determined before his removal. The judge held that the power to certify under regulation 33 arose when an EEA decision was made, and that the certification related to a particular removal. The subsequent removal was not the subject of the certification. The Secretary of State would need to make a further decision and certify it.

16. On the second issue UT Judge Perkins held that "it is very likely that any new decision on the available evidence will be certified under section 94". It was common ground that this was a reference to section 94(1) of the 2002 Act. The judge noted that Mr Branco-Bonfim's human rights claim was informed by very unhappy experiences in Portugal, but there was no strong family life in the UK like a partner or child. Mr Branco-Bonfim was a healthy adult and a national of a safe and prosperous European county. Evidence of disagreeable experiences was not capable of leading to a different outcome. The judge therefore declined to grant any relief in reliance on section 31(2A) of the Senior Courts Act 1981. This is the ruling which gives rise to the second issue on the appeal.

17. As a matter of fact the order drawn up by the UT, after amendment, provided that "the respondent's reliance on paragraph 2 of schedule 2 of the Immigration (EEA) Regulations 2016 to prevent the applicant from having (and pursuing) an in-country right of appeal against the adverse article 8 decision … was unlawful". The order went on to state that "for the reasons given the Tribunal declines to grant the applicant any relief". As Lewison LJ pointed out during the course of argument on the appeal, the grant of a declaration was all the relief to which Mr Branco-Bonfim would have been entitled, and even a failure to grant Mr Branco-Bonfim any relief on the claim for judicial review did not prevent Mr Branco-Bonfim appealing to the FTT and referring to the decision of the UT to the effect that he had a right of appeal. Both Mr Khubber on behalf of Mr Branco-Bonfim and Mr Howells on behalf of the Secretary of State pointed to the difficulties of going to the FTT in circumstances where the UT had refused to grant relief on the basis that the human rights claim would have been certified. These practical issues illustrate the advantages in cases such as these, where

arguable appeal rights to the FTT are in issue, of bringing the appeal before the FTT for a determination on jurisdiction, rather than pursuing a claim for judicial review. As it was it seems that the issue about whether permission to apply for judicial review should be refused because of the existence of an adequate alternative remedy (namely the right to apply to that the FTT could determine whether there was an in-country right of appeal) was overlooked because of the existence of other grounds of challenge on which the original application for permission to apply for judicial review was made.

Relevant statutory provisions

18. Section 82 of the 2002 Act is headed "Right of appeal to the Tribunal" and provides, so far as is material: "(1) A person ("P") may appeal to the Tribunal where— … (b) the Secretary of State has decided to refuse a human rights claim made by P …". Section 84(2) provides that an appeal under this provision of section 82 must be brought "on the ground that the decision is unlawful under section 6 of the Human Rights Act".

19. Section 92 of the 2002 Act provides for the place from which an appeal may be brought or continued. Section 92(3) provides that: "in the case of an appeal under section 82(1)(b) (human rights claim appeal) … the appeal must be brought from outside the United Kingdom if- (a) the claim to which the appeal relates has been certified under section 94(1) or (7) (claim clearly unfounded or removal to safe third country) or section 94B (certification of human rights claims), otherwise the appeal must be brought within the United Kingdom."

20. As is well known, section 94 of the 2002 Act provides for certification by the Secretary of State of human rights claims. Section 94(1) provides that the "Secretary of State may certify … a human rights claim as clearly unfounded". Section 94(7)(b) provides that the Secretary of State may certify a human rights claim made by a person if "there is no reason to believe that the person's human rights under the Human Rights Convention will be breached in that country". Section 94B is headed "Appeal from within the United Kingdom: certification of human rights" and 94B(2) provides "The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention)."

21. Regulation 2 of the EEA Regulations provides that an EEA decision "means a decision under these Regulations that concerns … (c) a person's removal from the UK".

22. Regulation 23(2) provides that "a person is not entitled to be admitted to the United Kingdom … if that person is subject to a deportation or exclusion order …". Regulation 23(6)(b) provides that an EEA national who has entered the UK might be removed "if the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health".

23. Regulation 32(4) provides for that a "person who enters the United Kingdom in breach of a deportation or exclusion order … is removable as an illegal entrant under Schedule 2 to the 1971 Act and the provisions of that Schedule apply accordingly". Schedule 2 of the 1971 Act is headed "administrative provisions as to control on entry etc" and

provides, among other matters, for removal of persons refused leave to enter and illegal entrants.

24. Regulation 33(1) provides that where the Secretary of State intends to give directions for the removal of a person in circumstances where that person has either not appealed but would be entitled and remains in time to do so from within the UK, or has appealed but the appeal has not been finally determined, then the Secretary of State may only give directions for removal "(2) … if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention)".

25. Regulation 34(2) provides that "a deportation order remains in force – (a) until the order is revoked under this regulation; or (b) for the period specified in the order." Regulations 34(3) to (6) provides for a person who is subject to a deportation order applying to the Secretary of State from outside the UK to revoke the order on the basis of a material change in circumstances, and the Secretary of State revoking the order if the Secretary of State considers that the criteria for making such an order are no longer satisfied.

26. Appeal rights are provided for by regulation 36. Regulation 36(10) provides that "the provisions of, or made under, the 2002 Act referred to in Schedule 2 have effect for the purposes of an appeal under these Regulations to the First-tier Tribunal in accordance with that Schedule."

27. Regulation 37 is headed out of country appeals and provides that "a person may not appeal under regulation 36 whilst in the United Kingdom against an EEA decision … (g) to remove the person from the United Kingdom following entry to the United Kingdom in breach of a deportation or exclusion order …".

28. Paragraph 2 of schedule 2 of the EEA Regulations provides:

> "(1) Section 92(3) of the 2002 Act has effect as though an additional basis upon which an appeal under section 82(l)(b) of that Act (human rights claim appeal) must be brought from outside the United Kingdom were that—
>
> (a) the claim to which that appeal relates arises from an EEA decision or the consequences of an EEA decision; and
>
> (b) the removal of that person from the United Kingdom has been certified under regulation 33 (human rights considerations and interim orders to suspend removal)."

29. Section 31(2A) of the Senior Court Act provides that:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and

> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest."

Not entitled to rely on the earlier certification under paragraph 2 of schedule 2 of the EEA Regulations – issue one

30. Mr Howells, on behalf of the Secretary of State, relied on the scheme of the EEA Regulations, referring in particular to regulations 2, 32, 33, 34, 36 and 37. He submitted that when Mr Branco-Bonfim returned to the UK after the making of the deportation order and his removal, he was subject to administrative removal pursuant to regulation 32(4) of the EEA Regulations. Regulation 36 provided for appeal rights, and regulation 36(10) expressly referred to schedule 2 of the EEA Regulations. Regulation 37 had the effect that Mr Branco-Bonfim could not appeal the EEA decision to remove him to another country.

31. Mr Howells submitted that both conditions set out in paragraph 2 of schedule 2 to the EEA Regulations were met. First, the Appellant's future removal from the UK will be a direct consequence of the extant deportation order. Secondly, his deportation from the UK was certified pursuant to regulations 33(2) and 33(3). Therefore, the Respondent was entitled to rely on paragraph 2 of schedule 2. Mr Howells submitted that if "removal" meant "removal closest in time", paragraph 2 of Schedule 2 could never apply to people who illegally re-enter the UK. To allow a deported person to re-enter the UK in breach of the deportation order and make a human rights claim which attracts an in-country right of appeal would be to drive a coach and horses through the tightly drawn provisions.

32. Mr Khubber, on behalf of Mr Branco-Bonfim, recorded that the Secretary of State was seeking to block an in-country right of appeal by relying on a certification of a previous claim relying on article 8 of the ECHR, which was not the purpose of paragraph 2 of Schedule 2 to the 2016 Regulations. The correct legal source for blocking such an in-country appeal would be certification under section 94(1) or 94B of the 2002 Act. The Secretary of State could not satisfy either of the two conditions for paragraph 2 of schedule 2 of the EEA Regulations to operate.

33. Mr Khubber submitted that the contention that the appellant's case on the first issue drove "a coach and horses through the tightly drawn provisions" was a bad point, because the analysis on behalf of Mr Branco-Bonfim respected those provisions. The true error was that the Secretary of State failed to use section 94 or 94B of the 2002 Act to certify the human rights claim made by Mr Branco-Bonfim in 2020.

34. In my judgment it is apparent that the scheme of certification under regulation 33 is directed to the removal of a person who is still in time for appealing, or who has appealed but whose appeal has not yet been determined. That is apparent from the

wording of regulation 33(1) of the EEA Regulations itself which is dependent on the Secretary of State intending to give directions for removal but the applicant under 33(1)(a) who has not appealed against the EEA decision but would be entitled and "remains within time to do so", or under 33(1)(b) has appealed but the "appeal has not been finally determined". Where certification has occurred, a possible in time or existing appeal against the Secretary of State's refusal of the human rights claim does not prevent removal of the appellant, so that the appellant may pursue that appeal out of country.

35. In my judgment this scheme of certification in regulation 33 means that "the removal" specified in paragraph 2(1)(b) of schedule 2, relates to the removal in respect of which the Secretary of State is intending to give directions, but which removal has not yet happened. This enables the Secretary of State to direct a removal notwithstanding the fact that a late human rights claim was made by the applicant and rejected and an appeal had not yet been brought or determined. This means that a second and subsequent removal, taking place after the removal which was intended by the Secretary of State when certification under regulation 33 took place, is not covered by the certification under regulation 33 and therefore paragraph 2 of schedule 2.

36. In my judgment this conclusion accords with the purpose of certification. Paragraph 2 of schedule 2 creates an additional basis under section 92(3) of the 2002 Act upon which an appeal must be brought outside the UK, as if it had been certified. The Secretary of State would not be able to certify a removal to a country as not being unlawful under section 6 of the Human Rights Act 1998 in circumstances where the Secretary of State could have no idea of the future circumstances in which that later removal was taking place.

37. Further, although I accept that in paragraph 2(1)(a) the phrases "arises from an EEA decision" or "the consequences of an EEA decision" can as a matter of "but for" causation be related back to the decision to deport Mr Branco-Bonfim in 2018 (because without that decision he would not have gone to Portugal, found it difficult to integrate, then returned to the UK illegally and made a human rights claim) and so it can be said as a matter of language that the human rights claim "to which that appeal relates" is Mr Branco-Bonfim's appeal from the refusal of his human rights claim in 2020, in my judgment this is not the proper construction of those phrases. This is because, if such a construction was right, paragraph 2(1)(a) would relate to an EEA decision which had nothing to do with the actual circumstances then existing. This part appears from considering the hypothetical situation where Mr Branco-Bonfim had been deported, had been in Portugal for a year, and had then returned to the UK because he was threatened by criminals in Portugal and made a human rights claim. Any appeal from the rejected human rights claim could not reasonably be described as a claim which "arises from an EEA decision" meaning in this case the original decision to deport in 2018 or be described as "the consequences of an EEA decision" (again meaning the original decision to deport in 2018) because the human rights claim arises because of what happened in Portugal long after that EEA decision in 2018. In such a case the EEA decision to which the references in paragraph 2(1)(a) are made would have to be a later EEA decision.

38. I therefore agree with UT Judge Perkins that the Secretary of State was not entitled to rely on the earlier certification in 2018 under regulation 33 to prevent Mr Branco-Bonfim from appealing in country his human rights claim which was rejected in 2020.

This did not leave the Secretary of State without remedies, because the Secretary of State could use powers under section 94 and 94B of the 2002 Act to certify the new human rights claim. This then raises the second issue.

Wrong to refuse relief under section 31(2A) of the Senior Courts Act in this case – issue two

39. Mr Khubber submitted that the Secretary of State could only certify a human rights claim under section 94(1) of the 2002 Act if the claim was "clearly unfounded", which was a very high bar. The UT had failed to apply anxious scrutiny, and failed to appreciate that Mr Branco-Bonfim was relying on a comparative assessment of his substantial "private life" as established in the UK as compared to in Portugal, and that had not been evaluated and addressed. The UT noted that the Appellant has spent most of his life in the UK, but failed to note the importance of that for the purposes of considering whether his article 8 claim would be hopeless if pursued on appeal. Mr Khubber submitted that the Upper Tribunal impermissibly adopted the role of the decision-maker when making any such decision, and failed to have proper regard to the legal context of section 94 of the 2002 Act.

40. Mr Howells submitted that the judge was right for the reasons that he gave. He had a statutory obligation, which could not be shirked, to consider whether it was highly likely that the outcome for Mr Branco-Bonfim would not have been substantially different. Mr Howells referred to the decisions in *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860; [2018] 1 WLR 5161 (*Goring-on-Thames Parish Council), R (Public and Commercial Services Union and others) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin); [2018] ICR 269 (*R(PCSU)*) and *R (Plan B Earth) v The Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446 (*Plan B Earth*).

41. In my judgment the following propositions relevant to this appeal appear from section 31(2A) of the Senior Courts Act and authorities. First there is a statutory obligation on the Courts, pursuant to section 31(2A) of the Senior Courts Act to refuse to grant relief on an application for judicial review "if it appears highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" unless the court considers, pursuant to section 31(2B) those requirements, might be disregarded for "reasons of exceptional public interest". Secondly this statutory test replaces the previous discretion of the court hearing a claim for judicial review to refuse to grant relief in a claim for judicial review where the decision maker would "necessarily" have made the same decision, as considered in *Simplex GE (Holdings) and another v Secretary of State for the Environment* (1989) 57 P&CR 306 at 327 and 329. This means that a narrow construction of "conduct" is not appropriate, see *Goring-on-Thames Parish Council* at paragraph 47. Thirdly the threshold remains a high one see *R(PCSU)* at paragraph 89 and courts still have to be cautious about straying into the forbidden territory of assessing the merits of a public law decision challenged in judicial review proceedings, see *Plan B Earth* at paragraph 273.

42. There are no considerations of exceptional public interest under section 31(2B) of the Senior Courts Act which were suggested by the parties which would justify a court disregarding the requirements of section 31(2A) on this appeal.

43. I accept that, although the reasons given by UT Judge Perkins for refusing relief under section 31(2A) of the Senior Courts Act were very summary, they did show the weakness of the human rights claim made by Mr Branco-Bonfim. UT Judge Perkins identified that although Mr Branco-Bonfim said he had found it difficult to integrate in Portugal, and had had very unhappy experiences in Portugal and wished to return to his family in the UK, he was a healthy adult and a national of a safe and prosperous modern European country.

44. I also accept that the definition of "conduct complained of" in section 31(2A) of the Senior Courts Act is wide enough to cover the Secretary of State wrongly relying on the first certification under regulation 33 in 2018 to purport to deny Mr Branco-Bonfim an in-country right of appeal against the rejection of his human rights claim in 2020 and not relying on a further certification. This is because section 31(2A) was the statutory successor to the *Simplex* discretion that the Administrative Court had to refuse relief, and a broad approach to the words "conduct complained of" is justified, see *Goring-on-Thames* at paragraph 47. The exercise of the *Simplex* discretion was broad enough to cover situations where the reality was that the effect of lawful decision making would have led to the same result.

45. There are, however, two difficulties, with the use of section 31(2A) of the Senior Courts Act in this specific case. First it is not apparent that refusing to grant any relief to Mr Branco-Bonfim on the basis that the Secretary of State was highly likely to have certified the claim under section 94(1) of the 2002 Act would have any practical effect. This is because Mr Branco-Bonfim would, absent certification by the Secretary of State, have the right to appeal the refusal of the human rights claim to the FTT and this court does not have the power of certification, which is for the Secretary of State. It may be that the answer to this point is that suggested by Mr Khubber and Mr Howells, to whom I am very grateful for their submissions and assistance, is that the FTT would be unlikely to ignore a decision by either the UT or the Court of Appeal to the effect that the appeal should have been certified, and that the FTT might have refused to accept the appeal, for example by refusing an extension of time for appealing even though the delay would have been otherwise explicable and an extension might have been granted. It is not necessary to decide this point because the second difficulty, in my judgment, prevents the court using section 31(2A) of the Senior Courts Act in this case.

46. The second difficulty is that when asked why the UT had referred to section 94(1) of the 2002 Act Mr Howells stated that his instructions were that if the Secretary of State was not entitled to rely on the 2018 certification under regulation 33 in respect of the 2020 human rights claim, then the Secretary of State's guidance suggested that the power which would have been used to certify would be section 94(1) of the 2002 Act. This was so even though the use of that section involved a different and higher test, namely certifying that the human rights claim was "clearly unfounded" rather than the test of removal pending the outcome of the appeal not being unlawful under section 6 of the Human Rights Act 1998, which is the test under section 94B of the 2002 Act, and regulation 33 of the EEA Regulations. That would have been the position even if, apparently, the Secretary of State had appreciated that she could not rely on the earlier certification under regulation 33 of the EEA Regulations.

47. It is in these particular circumstances that I am unable to say that "it is highly likely" that the Secretary of State would have used a different statutory provision, namely section 94(1) of the 2002 Act, to certify the human rights claim refused in 2020 because

the use of that statutory provision is not what might reasonably be expected as a substitute for certification for regulation under regulation 33. Perhaps the Secretary of State's position on this, which is not the position which might have been expected (namely to use the equivalent power in a different Act to certify), illustrates some of the reasons that courts should be cautious about straying into forbidden territory when exercising the power set out in section 31(2A) of the Senior Courts Act.

Conclusion

48. For the detailed reasons set out above: (1) the Secretary of State was not entitled to rely on the earlier certification in 2018 under regulation 33 to prevent Mr Branco-Bonfim from appealing in country his human rights claim which was rejected in 2020; (2) I am unable to say that "it is highly likely" that the Secretary of State would have used a different statutory provision, namely section 94(1) of the 2002 Act, to certify the human rights claim refused in 2020. These conclusions do not prevent the Secretary of State, if so advised, exercising powers to certify the human rights claim which was refused. I would therefore allow the appeal and dismiss the cross-appeal.

Lord Justice Arnold:

49. I agree.

Lord Justice Lewison:

50. I also agree.