Neutral Citation Number: [2026] UKUT 136 (AAC)

Appeal No. UA-2024-000862-USTA

RULE 14 ORDER: It is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify RB in these proceedings, including the name of the appellant. *Failure to comply with this order may be contempt of court and could lead to imprisonment, a fine, or other sanction.*

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

RB

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Michelle Brewer

Decided on consideration of the papers

On appeal from:

Tribunal:	First-tier Tribunal (Social Entitlement Chamber)
Judge:	MJ Brassil
Tribunal Case No:	SC319/23/00767
Digital Case No:	1681058243331701
Tribunal Venue:	Nottingham Justice Centre
Decision Date:	24 January 2024

SUMMARY OF DECISION

This appeal concerns the interaction between entitlement to Universal Credit and immigration status following deportation action. The supersession decision fixed 22 May 2020 as the date on which the appellant was treated as a person subject to immigration control under section 115 of the Immigration and Asylum Act 1999.

By section 12(8) of the Social Security Act 1998, the First-tier Tribunal was required to determine only whether the Secretary of State was entitled to reach that conclusion from that date. No earlier immigration history, not having been put in issue and not arising from the evidence, required determination.

The Secretary of State's attempt to rely on new Home Office material before the Upper Tribunal failed. Under *Ladd v Marshall* [1954] 1 WLR 1489, as applied in the social security jurisdiction, that material could and should have been obtained with reasonable diligence; it was incomplete and did not identify the statutory basis of deportation, whether under s.3(5) of the Immigration Act 1971 (conducive deportation) or ss.32–33 of the UK Borders Act 2007 (automatic deportation). It could not establish any clear or uncontentious factual mistake for the purposes of *E v Secretary of State for the Home Department* [2004] QB 1044. It was therefore inadmissible.

In determining whether the appellant retained leave beyond 22 May 2020, the Tribunal applied section 3C of the Immigration Act 1971, which extends leave only while an appeal could be brought or is pending within section 104 of the Nationality, Immigration and Asylum Act 2002. Section 104 provides an exhaustive definition of when an appeal remains pending and is confined to the domestic appellate system. On that basis, the appellant's domestic appeal rights were exhausted on 22 May 2020, and his section 3C leave ended on that date.

The appellant's application to the European Court of Human Rights could not extend or revive leave under section 3C. That is so for three reasons: (1) proceedings before the ECtHR do not form part of the appellate structure established by the 2002 Act; (2) an ECtHR complaint is an international supervisory mechanism, not a continuation of domestic appellate litigation; and (3) section 3C operates only by reference to the domestic appellate routes expressly defined in statute.

The later human-rights submissions made after the expiry of leave were further submissions under paragraph 353 of the Immigration Rules. Such submissions do not engage section 3C and cannot revive leave once it has expired.

Accordingly, the appellant's leave ended on 22 May 2020, and from that date he was a person subject to immigration control without recourse to public funds for the purposes of section 115 of the Immigration and Asylum Act 1999 and the Universal Credit Regulations. The Secretary of State was entitled to supersede the Universal Credit award from that date.

KEYWORD NAME (Keyword Number) 30.1, 34.1,17.1

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION OF THE UPPER TRIBUNAL

The decision of the Upper Tribunal, made under section 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, is that the decision of the First-tier Tribunal dated 24 January 2024 did not involve an error of law. The decision is therefore upheld, and the appellant's appeal is dismissed.

REASONS FOR DECISION

Introduction

1. This appeal is against the decision of the First-tier Tribunal dated 24 January 2024. The Tribunal dismissed the appellant's appeal and upheld the Secretary of State's decision of 9 March 2023.

2. The Secretary of State decided on 9 March 2023 that the appellant was not entitled to Universal Credit from 22 May 2020. This was because, by that date, he was considered a person subject to immigration control with no recourse to public funds under section 115 of the Immigration and Asylum Act 1999 and regulation 4(e) of the Universal Credit Regulations 2013.

3. That decision proceeded on the basis that his leave to remain, previously extended under s 3C of the Immigration Act 1971, had ended on 22 May 2020. This was the date his domestic appeal rights against the Home Office decision of 23 December 2015 were treated as exhausted.

4. The proceedings before the First-tier Tribunal (Social Entitlement Chamber) concerned the interaction between immigration and social security law in the context of deportation action. As the case was presented, the central issue was whether the appellant's s 3C leave continued beyond 22 May 2020, or was revived thereafter, by reason of his application to the European Court of Human Rights (ECtHR) on 18 November 2020 and his subsequent representations to the Home Office.

Issues in this appeal

5. The issues arising in this appeal are:

   (i) the scope of the appeal before the First-tier Tribunal and the questions it was required to resolve;

   (ii) admissibility of the Home Office evidence (*Ladd v Marshall* considered);

   (iii) whether the appellant's application to the European Court of Human Rights (ECtHR) extended his leave under s 3C of the Immigration Act 1971; and

   (iv) whether permission should now be granted on grounds for which the First-tier Tribunal refused leave.

The appellant's immigration and social security history

6. Not all of the history set out below was known to the judge hearing the appeal in the First-tier Tribunal as it only emerged from the respondent's most recent submissions of 30 May 2025.

7. The appellant entered the United Kingdom on 15 March 2002.

8. On 10 October 2013, the Secretary of State for the Home Department granted him discretionary leave to remain under s 3(1) of the Immigration Act 1971, with permission to work and access to public funds, expiring on 10 October 2016.

9. Before 21 October 2015, the appellant committed a criminal offence which brought him within the deportation regime. A deportation order authorises compulsory removal and prevents return unless revoked: Immigration Act 1971, s 5(1)–(2).

10. The respondent's records indicate that a deportation order was signed on 21 October 2015 and served on 23 December 2015. In submissions dated 30 May 2025, the respondent asserted that service occurred on 21 October 2015.

11. The material before this Tribunal is limited, and it is not clear whether the date relied on reflects service of the deportation order or a notice of intention to deport. A notice of intention invites representations. The appellant made such representations on 3 November 2015, amounting to a human rights claim.

12. That claim was refused on 23 December 2015, and the refusal is recorded as served with the deportation notice.

13. The appellant claimed Universal Credit from 20 November 2018. On 3 January 2019, the respondent accepted that he had discretionary leave and was not to be treated as absent from Great Britain while his appeal against refusal of his human rights claim was pending before the First-tier Tribunal (Immigration and Asylum Chamber).

14. His domestic appeal rights arising from the 23 December 2015 decision were treated as exhausted on 22 May 2020.

15. On 18 November 2020, he applied to the ECtHR on Article 8 (Family Life and Private Life) grounds.

16. On 8 March 2021, he made a fresh human rights claim to the Secretary of State for the Home Department based on medical and family circumstances. That claim remained unresolved on 30 October 2023.

17. On 10 November 2022, the ECtHR declared his application inadmissible as manifestly ill-founded.

18. On 9 March 2023, the respondent concluded that the appellant's appeal rights had been exhausted by 22 May 2020. On that basis, she superseded the Universal Credit award from 23 May 2020. The decision was upheld on mandatory reconsideration.

19. The appellant appealed on 9 April 2023, arguing that his s 3C leave continued, or revived, because of his ECtHR application and outstanding application to the Home Office.

20. He claimed asylum in or around November 2023.

21. Before the First-tier Tribunal (SEC), he submitted that his ECtHR application and his fresh human rights claim preserved his s 3C leave until the ECtHR's decision in November 2022.

First-tier Tribunal decision

22. The First-tier Tribunal considered whether the appellant remained entitled to Universal Credit after 22 May 2020, or whether he had become a person subject to immigration control with no recourse to public funds.

23. The Tribunal found that discretionary leave granted until 10 October 2016 had been automatically revoked when a deportation order was made on 21 October 2015. The appellant appealed on 5 January 2016, and the Tribunal accepted that his leave was extended by s 3C while that appeal was pending.

24. His appeal was dismissed on 22 May 2020, and the Tribunal held that his s 3C leave ended on that date. It recognised that he made applications to the ECtHR and to the Home Office but found that they did not extend or revive s 3C leave.

25. The Tribunal therefore concluded that from 22 May 2020 the appellant was a person subject to immigration control without access to public funds and upheld the Secretary of State's decision.

Permission decision of the First-tier Tribunal

26. On 25 April 2024 (issued 2 May 2024), the First-tier Tribunal granted permission on two grounds:

    (i) whether exhaustion of appeal rights in May 2020 necessarily ended any continuation of s 3C leave, or whether such leave could be revived by an ECtHR application, *Akinola v SSHD* [2021] EWCA Civ 1308 considered; and

    (ii) whether the Tribunal erred in finding that leave did not continue or revive following the ECtHR application.

27. Permission was refused on three further grounds: inadequate reasons, including an explanation of s 3C; a plain clerical slip in recording the appellant's year of arrival; and the argument that the Tribunal should not have decided the appeal while other matters were outstanding before the Home Office.

The appellant's grounds of appeal to the Upper Tribunal

28. In his UT1, the appellant raises two groups of grounds. On the ground for which permission was granted, he argues that his ECtHR application, determined only in November 2022, meant that he still had outstanding appeal rights and retained entitlement to public funds after May 2020.

29. He also renews his argument that s 3C leave continued because of pending applications before the Secretary of State. These renewed grounds require consideration at the permission stage.

Submissions to the Upper Tribunal

30. The Secretary of State supported the grant of permission and initially submitted that the Tribunal had erred in its approach to s 3C. It was argued that s 3C leave might revive from 18 November 2020, the date of the ECtHR application, by analogy with *Akinola*. The respondent asked for the decision to be set aside and remitted and did not request an oral hearing.

31. The appellant filed a Rule 25 response without substantive submissions. He preferred an oral hearing.

32. In directions under rule 15 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I noted that it was unclear how an ECtHR application, external to the domestic appellate system. could fall within s 3C(2)(b)–(c) of the 1971 Act. The parties were invited to address whether such an application could amount to a "pending appeal", the relevance of *Akinola*, and the interaction with s 104 of the 2002 Act, which defines when an appeal is finally determined.

33. Following those directions, the Secretary of State revised her position. Having obtained Home Office information, she submitted that s 3C leave had never been engaged. She argued that the appellant's discretionary leave ended when the deportation order was served, at a time when no application to vary or extend leave was pending. The human rights representations made on 3 November 2015, although constituting a claim, were not a paid application capable of triggering s 3C. On that analysis, no s 3C leave existed to be extended by an appeal.

34. Three issues arise from that revised position:

35. First, the relevance of this new Home Office material to an appeal concerning a supersession decision turning on circumstances as at 22 May 2020.

36. Second, whether evidence arising after the First-tier Tribunal hearing is admissible according to *Ladd v Marshall*; and

37. Third and interrelated whether the Home Office evidence is adequate, given the complexity of the interaction between deportation provisions and s 3C.

38. The Secretary of State also submitted that an ECtHR application cannot fall within s 3C(2)(b)–(c), as it is wholly outside the domestic appellate framework. Reliance was placed on *R (Geddes) v Secretary of State for the Home Department* [2025] EWCA Civ 306, which confirms that only appeals falling within s 104 can constitute pending appeals capable of extending leave pursuant to s 3C of the 1971 Act.

39. The respondent therefore maintained that the appellant had been a person subject to immigration control without recourse to public funds since October 2015.

40. The appellant submitted that his appeal rights were not exhausted when he applied to the ECtHR. He accepted that the ECtHR is not a domestic tribunal but argued that, because the Human Rights Act integrates Convention rights into domestic law, an ECtHR application should be viewed as part of the wider remedial process. He contended that the period before the ECtHR's inadmissibility decision was analogous to *Akinola* and that his leave should be treated as continuing until November 2022.

Discussion

The scope of the appeal before the First-tier Tribunal

41. The Secretary of State's power to supersede the decision of 3 January 2019 arose under s 10(1)(a) of the Social Security Act 1998. That power was exercised on the basis that, from 22 May 2020, a relevant change of circumstances had occurred for the purposes of regulations 6(1) and 6(2)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. The Secretary of State concluded from that date, the appellant was no longer entitled to Universal Credit. Unless revised, superseded, or appealed, that decision was final: s 17 of the 1998 Act.

42. In *Wood v Secretary of State for Work and Pensions* [2003] EWCA Civ 53, Arden LJ endorsed the Tribunal of Social Security Commissioners' decision in *R(DLA) 6/02*: a supersession decision simply replaces an earlier decision in accordance with the statutory mechanism; it is not dependent on the earlier decision being flawed.

43. Under regulation 28 of the 1999 Regulations, the appellant was notified of the decision, the reasons for it, and his right of appeal. The reasons explained that he was treated as a person subject to immigration control from 22 May 2020, excluded from entitlement under s 115 of the Immigration and Asylum Act 1999 because his domestic appeal rights were said to have been exhausted.

44. Judge Brassil summarised the Secretary of State's case at paragraph 8 of his decision:

> *"Whilst the in-country appeal was being determined by the Immigration and Asylum Chamber (IAC), the Department considered that the appellant's discretionary leave to remain was extended under section 3C of the Immigration Act 1971. His immigration status and associated entitlements were preserved pending the IAC's determination of that appeal."*

45. The appellant exercised his right of appeal under s 12(1)(a) of the 1998 Act. The sole question before the First-tier Tribunal was whether the Secretary of State was entitled to conclude that the appellant ceased to be entitled to Universal Credit from 22 May 2020. A supersession decision must identify the date of the asserted change of circumstances. Here, that date was fixed as 22 May 2020. No supersession decision asserted that any change occurred prior to 22 May 2020, including on 21 October 2015.

46. Section 12(8) of the 1998 Act confines the matters the Tribunal may consider. Section 12(8)(a) provides that the First-tier Tribunal "*need not consider any issue that is not raised by the appeal."* Judge Brassil was therefore entitled to proceed on the basis that the supersession decision defined the issues and the relevant date of the change of circumstances.

47. Within that framework, the respondent's case before the First-tier Tribunal was clear. The Secretary of State maintained that the appellant only became a person subject to the exclusion in s 115 of the 1999 Act on 22 May 2020. She argued that the appellant

had leave extended under s 3C until that date and that the exhaustion of his domestic appeal rights on 22 May 2020 brought that leave to an end.

48. The respondent now advances a different position. She submits that Home Office clarification indicates that the appellant's discretionary leave was cancelled on service of a deportation order on 21 October 2015, at a time when no variation application was pending, so s 3C could not operate. Alternatively, she argues that the human rights representations resisting deportation could not amount to a variation application for s 3C purposes and were determined while leave still subsisted bringing him outside of s 3C.

49. This was not the basis of the supersession decision. Nor was it evidence before the First-tier Tribunal. The respondent has not applied under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to challenge Judge Brassil's decision based on legal error, either by misdirection on s 3C or by mistake of fact. In reply to my rule 15 direction, the respondent has not explained why the new Home Office material should be admitted or how it satisfies the principles governing late evidence, including *Ladd v Marshall*. In the absence of such explanation, the respondent has not justified reliance on material falling outside the issues she identified for consideration before the First-tier Tribunal.

Ladd v Marshall **principles**

50. Whether the Home Office material can be admitted turns on the three-limb test in *Ladd v Marshall* [1954] 1 WLR 1489. The principles apply, with adaptation, in the social security jurisdiction.

51. Under that test, the party relying on new evidence must show that:

    (i) it could not with reasonable diligence have been obtained for the original hearing;

    (ii) it would probably have had an important influence on the result; and

    (iii) it is apparently credible.

52. Judge Markus KC affirmed this position in *DP v SSWP (ESA)* [2019] UKUT 258 (AAC): the principles remain applicable save where the narrow *E v SSHD* exception applies.

53. The exception in *E v SSHD* is limited. It applies where the tribunal has acted on a mistake about an established, uncontentious fact, not attributable to a party, and the mistake materially contributed to the outcome. It does not encompass incomplete, disputed, or evaluative material.

54. In *PR v SSWP (PIP)* [2021] UKUT 35 (AAC), Church UTJ held that reasonable diligence is context-sensitive; strict application of the first limb may be inappropriate for an unrepresented claimant, although that leniency does not extend to professional litigants. He emphasised that the inquisitorial nature of the jurisdiction and its focus on correct

entitlement inform the exercise of discretion, without displacing the *Ladd v Marshall* framework.

55. Read together, *DP* and *PR* reaffirm that *Ladd v Marshall* is the default test; that flexibility may be applied where appropriate; and that the *E v SSHD* exception is narrow.

56. Here, the respondent does not meet the first requirement. As *DP* confirms, the diligence requirement applies fully to the Secretary of State. The Home Office material could have been sought when the Universal Credit award was made on 3 January 2019, when the Department were informed about pending immigration appeal proceedings, during the supersession review when it was asserted that appeal rights were exhausted. No explanation has been offered for the failure to do so.

57. The second and third criteria, material influence and apparent credibility, are also not met. Although a degree of flexibility is appropriate in the social entitlement context, where the aim is to reach the correct entitlement outcome, that flexibility does not displace the *Ladd v Marshall* framework. The Home Office material cannot satisfy those criteria. To explain why, it is necessary to consider the statutory deportation provisions against which that material must be assessed.

The statutory provisions for deportation

58. At the time deportation action commenced in 2015, the appellant held discretionary leave granted under s 3(1) of the Immigration Act 1971. The respondent now contends that this leave was curtailed under s 5(1) of the 1971 Act as part of the deportation process. The statutory framework therefore requires careful consideration.

59. Under s 5(1)–(2) of the 1971 Act, a deportation order authorises compulsory removal and prohibits return unless revoked. It cancels any existing leave and continues in force until revocation. Deportation must be distinguished from other removal powers, which may terminate lawful presence but do not impose an enduring bar on return.

60. Two statutory regimes exist. In conducive deportation under the 1971 Act, the Secretary of State retains discretion. Under the

61. automatic deportation regime in the UK Borders Act 2007, a deportation order must be made where the statutory criteria are met. The regime engaged determines whether, and when, leave can be curtailed.

62. In both regimes, the Secretary of State follows a two-stage process. First, the individual is given an opportunity to make representations on the proposed deportation. After considering those representations, the Secretary of State decides whether deportation should proceed.

63. In conducive deportation, that decision turns on whether deportation remains justified. In automatic deportation, it depends on whether an exception under s 33 of the UK Borders Act 2007 applies.

64. If deportation is to go ahead, the Secretary of State then determines any protection or human rights claim. A refusal of such a claim ordinarily gives rise to a right of appeal under s 82 of the Nationality, Immigration and Asylum Act 2002, unless the claim is certified under s 94B.

65. In conducive deportation, s 79(1) of the 2002 Act prohibits the making of a deportation order under s 3(5) of the 1971 Act while an appeal could be brought or is pending against a related decision, such as the refusal of a human rights claim.

66. As confirmed in *R (Cyrus) v Secretary of State for the Home Department* [2016] EWHC 918 (Admin), the effect of s 79(1) is that a deportation order cannot be made in a conducive deportation case while a human rights appeal is pending, unless the claim has been certified under s 94B.

67. There is no suggestion that certification was applied in the appellant's case because he exercised a suspensive right of appeal under s 82 of the 2002 Act.

68. Automatic deportation operates differently. Liability arises by operation of law once the criteria in s 32 of the UK Borders Act 2007 are met. As explained in *Molnar and Vargova v Secretary of State for the Home Department* [2026] EWCA Civ 31, the stage 1 notice simply informs the individual that they are automatically liable to deportation and that the Secretary of State intends to make a deportation order unless an exception under s 33 is established.

69. Under s 79(3) of the 2002 Act, a deportation order may be made in an automatic deportation case while an appeal is pending. However, as Irwin J observed in *Cyrus*, s 79(4) prevents such an order from cancelling existing leave pursuant to s 5(1) of the 1971 Act. The effect is that, although a deportation order may be made earlier, leave is preserved and removal is prevented while the appeal remains pending.

70. Against that background, the respondent's submissions do not disclose which regime applied. That is a critical omission.

71. The respondent's records show that the appellant made a human rights claim on 3 November 2015, and the most recent submissions which confirm that this was made in response to a notice of intention to make a deportation order. The refusal of that claim on 23 December 2015 generated a right of appeal.

72. Yet the submissions also state, inconsistently, that a deportation order was served either before the appellant made those representations, or on the very day they were said to have been made and refused. These accounts cannot be reconciled with each other or with the statutory scheme.

73. Under neither the conducive nor the automatic deportation regime does a deportation order precede the notice of intention to make one, the consideration of representations, or the refusal of a human rights claim.

74. The Home Office material, as summarised by the respondent, is incomplete, inconsistent, and legally confused. It does not identify the statutory basis on which deportation proceeded.

75. It does not explain how s 5(1) of the 1971 Act could have applied alongside s 79 of the 2002 Act. Nor does it address the relationship between any deportation order, the appellant's human rights claim in November 2015, or the subsequent appeal under s 82.

76. In that state, the evidence could not realistically be said to have *probably had a material influence on the outcome* before the Upper Tribunal.

77. These matters are not established or uncontentious facts. They involve disputed issues arising from a complex statutory framework. As *SM v SSWP (IIDB)* makes clear, the *E v SSHD* exception is confined to genuinely uncontentious matters, typically technical or scientific facts. It has no application where the material is itself contradictory or where the legal consequences are contested.

78. Taking the threads together, s 12(8)(a) of the Social Security Act 1998 did not require the First-tier Tribunal to consider issues that were not raised by the appeal before it. The supersession decision identified 22 May 2020 as the date of the relevant change of circumstances, and the Secretary of State maintained that position throughout the proceedings.

79. The Tribunal was not required to revisit the correctness of the original award of 3 January 2019; *Wood* confirms that a supersession does not depend on any error in the earlier decision.

80. Whether the appellant in fact retained s 3C leave before 22 May 2020 was not an issue that emerged from the evidence before the Tribunal. The new material now relied upon could not have supported a proper factual inquiry.

81. As already explained, the assertions in that material are inconsistent, incomplete, and do not accurately reflect the statutory provisions governing deportation or the operation of s 5(1) of the 1971 Act. The appellant had no opportunity to address these new matters in the First-tier Tribunal.

82. In these circumstances, I am satisfied that the First-tier Tribunal did not err in law in proceeding on the basis that the appellant's appeal rights were exhausted on 22 May 2020, and, for reasons provided below, that from that date he became a person subject to immigration control for the purposes of s 115 of the Immigration and Asylum Act 1999.

The Strasbourg Application and 3C of the Immigration Act 1971

83. The First-tier Tribunal granted permission on the question whether an application to the European Court of Human Rights could continue or revive leave extended under s 3C of the Immigration Act 1971. That issue requires consideration of the domestic appellate structure, the operation of s 3C leave, and the nature of proceedings before the ECtHR.

The Statutory Appellate Structure under Section 104 of the Nationality, Immigration and Asylum Act 2002

84. The respondent's case before the First-tier Tribunal was that the appellant's leave came to an end when his appeal was finally determined and his appeal rights were exhausted on 22 May 2020. Section 3C of the Immigration Act 1971 extends existing leave only in the circumstances it specifies. It applies where a person with limited leave makes an in-time application to vary that leave and the leave expires before the application is decided. Section 3C(2) then identifies the only periods during which leave continues.

85. Under s 3C(2)(b), leave continues while an appeal under s 82(1) of the Nationality, Immigration and Asylum Act 2002 *could be brought* against the refusal of the variation application.

86. Under s 3C(2)(c), leave continues while such an appeal *is pending*. Section 3C adopts the statutory meaning of "pending" in s 104 of the 2002 Act. That definition is precise: an appeal is pending only from the point it is instituted until it is finally determined, withdrawn, abandoned, or it lapses. It remains pending only in the circumstances set out in s 104(2). If none of those circumstances applies, the appeal is finally determined.

Section 104 and the meaning of 'finally determined' appeal

87. In *R (Geddes) v Secretary of State for the Home Department* [2025] EWCA Civ 306, the Court of Appeal confirmed that s 104 now provides a *complete* list of the situations in which an appeal is not yet finally determined. Parliament has chosen to link the continuation of an appeal only to the appellate routes created by ss 11 and 13 of the Tribunals, Courts and Enforcement Act 2007.

88. Those routes allow a case to move from the First-tier Tribunal to the Upper Tribunal, and then, if permission is granted, to the Court of Appeal (or the Court of Session in Scotland). As Bean LJ explained, because Parliament has identified only these routes, other forms of challenge, such as an application to the Supreme Court, do not keep an appeal alive.

89. The Court of Appeal approved the earlier decision in *Niaz (NIAA 2002 s 104: pending appeal)* [2019] UKUT 399 (IAC), where Lane J held that s 104(2) is an exhaustive code. If none of the situations listed in that subsection applies, and the appeal has not lapsed, been withdrawn or abandoned, it must be treated as finally determined.

90. Taken together, these cases make the position plain: for the purposes of s 104, the only "appropriate appellate courts" are the Upper Tribunal and the Court of Appeal. In such circumstances, 3C leave is only extended to those appellate routes identified in s 104.

91. In that context, the appellant's submission that his application to the ECtHR should be treated as part of the domestic appellate process, and as analogous to *Akinola*, is misconceived.

92. First, *Akinola* concerned only the operation of s 3C within the United Kingdom's domestic appellate structure. It addressed whether s 3C leave could revive where an out-of-time domestic appeal was later permitted, and how s 3C interacts with the statutory scheme in s 104. It did not consider, still less extend, s 3C to any process outside that domestic hierarchy.

93. Second, the appellant's submission reflects a misunderstanding of s 3C itself. Section 3C is a strict statutory mechanism that extends existing leave only in the circumstances set out in s 3C(2), all of which turn on the domestic appellate process defined in s 104. It does not confer a broad discretion to continue leave.

94. The Secretary of State's general discretion to grant leave arises, not under s 3C, but under s 3(1) of the 1971 Act. Section 3C operates only where an in-time application has been made and where a domestic appeal could be brought or is pending within the meaning of s 104. Nothing in s 3C permits its extension by reference to proceedings in an international court.

95. Third, the European Court of Human Rights has made clear that it is not an appellate court for Member States. Its role is supervisory. It asks whether the State has complied with the Convention; it does not examine whether a domestic court was right or wrong on the facts or on national law. Errors of domestic law matter only if they demonstrate a breach of the Convention.

96. Article 35(1) reinforces the point: a person may apply to Strasbourg only after all effective domestic remedies have been exhausted.

97. This reflects the structure of the Human Rights Act 1998. Section 2 requires domestic courts to take Strasbourg jurisprudence into account, but it does not bind them as a higher domestic appellate court would.

98. In *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, the Supreme Court explained that Convention rights have the same content in domestic law as they do internationally, but they are enforced in a different constitutional setting: by domestic courts, against public authorities, rather than by an international tribunal against the State.

99. Domestic courts must therefore apply Convention rights consistently with Strasbourg in substance, but they remain responsible for their application within the United Kingdom's legal order.

100. The correct approach to Strasbourg authority is that stated in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323: domestic courts should follow any clear and consistent line of Strasbourg jurisprudence, no more, but no less.

101. Section 2 of the Human Rights Act 1998 does not require automatic adherence. As *Manchester City Council v Pinnock* [2010] UKSC 45 confirms, domestic courts may

depart where there is a sound reason to do so, including where a chamber judgment appears to misunderstand domestic law or where a principled dialogue is warranted.

102. These features show why the Strasbourg Court is not part of the United Kingdom's appellate hierarchy. It does not review domestic findings of fact or correct domestic law. Its function is to ensure Convention compliance, nothing more.

103. The structural asymmetry reinforces this: an individual may bring a claim to Strasbourg, but the State cannot. If a domestic court adopts an interpretation Strasbourg would not share, there is no route by which the State can "appeal" that conclusion internationally. That asymmetry is inconsistent with treating Strasbourg as part of a continuing domestic appellate process.

104. Seen in this light, a complaint to the ECtHR is not a step in the domestic appellate sequence. It is not an appeal to an "appropriate appellate court" under ss 11 and 13 of the Tribunals, Courts and Enforcement Act 2007, and therefore cannot fall within s 104. It does not keep a domestic appeal "pending," and it cannot extend or revive leave under s 3C of the Immigration Act 1971.

Decision on Permission of the renewed Grounds of Appeal

105. I would adopt, without hesitation, the Tribunal's conclusion that the date of the appellant's arrival in the United Kingdom is immaterial. It has no bearing on any issue that properly arises in this appeal.

106. The further submission that the Tribunal ought not to have proceeded because a human-rights application remained outstanding before the Home Office, and that this could somehow revive leave under section 3C of the Immigration Act 1971 is also misconceived. Nothing in section 3C permits expired leave to be restored by the making of such an application, and its existence could not affect the Tribunal's duty to determine the appeal before it.

107. That submission rests on a misconception about the nature of the application he made. He had already pursued, and lost, an appeal against the refusal of his human-rights claim.

108. The representations the appellant submitted to the Home Office on 8 March 2021 are properly understood as further submissions intended to amount to a *fresh human-rights claim* under paragraph 353 of the Immigration Rules.

109. As explained by the Upper Tribunal in *R (Akber) v SSHD* [2021] UKUT 260 (IAC), paragraph 353 performs a gatekeeping function: it determines whether further submissions should be treated as a new human-rights claim generating an appeal right, or whether they should be rejected as not significantly different from what has already been considered.

110. A fresh claim arises only where the new material is *significantly different* from the previous material and, taken together, creates a realistic prospect of success before the Tribunal**.**

111. If the Secretary of State accepts that the submissions amount to a fresh claim, she makes a new refusal decision under s 82 of the 2002 Act, which carries a suspensive right of appeal under s 82 of the 2002 Act**.** If she decides that they do *not* amount to a fresh claim, there is no right of appeal, and the only remedy is judicial review, as the Upper Tribunal described in *Akber*.

112. A key point is that fresh claim submissions do not extend immigration leave**.** When he made this application, he did so at a time when he held no extant leave. Section 3C is a tightly drawn statutory scheme, and leave is extended only where a person already has lawful leave at the time they make an in-time application to vary it, or where a domestic appeal is pending within the meaning of s 104 of the 2002 Act.

113. Further submissions made after leave has expired, even if later accepted as a fresh claim do not fall within any limb of s 3C. As *Akber* confirms, paragraph 353 concerns appeal rights**,** not the continuation of leave. The application therefore does not revive or create leave for those who have none.

114. Accordingly, the appellant's March 2021 representations, submitted at a time when he had no extant leave, could not revive s 3C leave.

115. This ground of appeal did not disclose an arguable error of law and therefore permission on the renewed grounds of appeal is refused.

116. For those reasons I dismiss the appellant's appeal.

Michelle Brewer
Judge of the Upper Tribunal
Approved for issue on 25 March 2026