



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 81

P708/24

OPINION OF LADY HALDANE

in Petition of

ABDUL MUNIM

Petitioner

for

JUDICIAL REVIEW

Petitioner: Party

Respondent: Tariq KC et Smeaton; Office of the Advocate General

25 August 2026

Introduction

[1] The petitioner is Abdul Munim. By this petition, he seeks, primarily, reduction of a decision of the Upper Tribunal (Immigration and Asylum Chamber) (“UT”) dated 22 May 2024, rejecting an application by the petitioner for permission to appeal an earlier decision of the First-tier Tribunal (Immigration and Asylum Chamber) (“FTT”). The petitioner seeks, in addition and in the alternative, other orders which I will discuss in more detail below.

The respondent has entered the process and lodged answers.

[2] This petition has a somewhat complicated procedural history. Initially, an oral hearing was fixed to determine whether permission to proceed should be granted. At that

stage the petitioner was represented by counsel. Permission to proceed was refused by a Lord Ordinary, on the primary basis that the petition was incompetent. In any event even had the petition been competent, she determined that the petition did not meet the requisite threshold for permission to proceed. The petitioner reclaimed (appealed) that decision, as was his right. However, by the time the matter came before the Inner House (appeal court) the petitioner was representing himself and sought to rely upon pleadings and a note of argument that set out a number of arguments not advanced before the Lord Ordinary. On the basis of those re-cast arguments, permission to proceed was granted by the Inner House. The matter therefore came before me for a substantive hearing on the petition, as now adjusted by the petitioner and answers thereto, also as adjusted from the respondent.

[3] The issues for determination have been set out by each side in their respective statements of issues. The parties agree that the overriding issue for determination, if the petition is competent, is whether the UT acted in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice, contrary to section 11A(4)(c)(ii) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").

[4] The petitioner suggests that further issues fall for determination including (i) whether the UT failed lawfully to exercise its jurisdiction in determining the question of permission to appeal without affording the petitioner further time to seek legal assistance as well as his request for an oral hearing; and (ii) a challenge to the approach of the FTT to the petitioner's Article 8 claim. I will analyse the nature and relevance, if any, of these subsidiary issues in due course.

Relevant background

[5] To set the context for these proceedings, it is relevant to mention that this is but one of a number of challenges being mounted by the petitioner emerging from essentially the same set of background circumstances. These include judicial review challenges to sundry decisions of the Home Office, as well as a damages action in the sheriff court. This challenge however is confined to the decision of the UT as described above, although the petitioner contends that in that context his background circumstances, as well as the approach of the FTT in this case, are relevant.

[6] The factual background to this matter may be summarised as follows: On 15 August 2018 the petitioner applied for and was granted a visa to come to the UK to study a 4-year degree course in business management at Glasgow University. The terms of the visa allowed him to remain in the UK until 30 September 2022. He enrolled on the course, having paid the fees required. He also undertook part-time work to enable him to finance his upkeep while in the UK.

[7] On 28 April 2020 while working, he was detained by officials from the Home Office, who were concerned that the petitioner might not have permission to work. He was detained and interviewed in a police station. Two further matters emerged that concerned the officers. Both related to applications for leave to enter the UK that the petitioner had made several years before. One concerned a discrepancy about his date of birth. The other was that in his most recent application for leave to enter he had not disclosed that he had previously overstayed while in the UK several years earlier. After detailed questioning about these matters, the petitioner was released.

[8] On 30 April 2020, the Secretary of State for the Home Department (“SSH”) curtailed the petitioner’s visa granted on 30 August 2018 and revoked his leave to remain. She did so

because she alleged that he had been untruthful in relation to the matters that had been raised at the time of his questioning by Home Office officials and because by working as he had on 28 April 2020, the petitioner had breached the conditions of his visa. The decision stated that if he had reasons to stay in the UK, he required to advise the SSHD by completing a statement of additional grounds in accordance with section 120 of the Nationality Immigration and Asylum Act 2002. The petitioner consulted solicitors. As a result of the SSHD decision, the petitioner was unable to continue with his studies and required to withdraw.

[9] By letter dated 28 July 2020, the solicitors consulted by the petitioner wrote to the SSHD. They submitted a detailed letter explaining the reasons why the petitioner should be allowed to remain in the UK. On 23 June 2021, the SSHD rejected the submissions made on his behalf on 28 July 2020. She adhered to the reasons given in her decision dated 30 April 2020. She submitted that the petitioner did not meet the suitability requirements for being allowed to remain in the UK under the immigration rules. She also considered whether there were any exceptional circumstances outwith the immigration rules which would render refusal a breach of Article 8 ECHR (that is to say a breach of the petitioner's right to respect for his private and/or family life) but concluded that there were none. The petitioner appealed to the FTT.

[10] In accordance with standard procedure in the FTT, the petitioner's solicitors prepared a skeleton argument to support their submissions that the appeal should be granted. This identified five issues:

- "1. Does (sic) the (petitioner) disclose his previous overstay in the UK?
2. Did the (petitioner) deceive the Home Office in relation to his date of birth?
3. Did the (petitioner) work more hours than allowed for by his visa conditions?

4. Has the (petitioner) failed to meet the suitability requirements for leave to remain.....? Did the (petitioner) make false representations for the purposes of obtaining leave to remain in the United Kingdom?
5. Would removal of the (petitioner) to Pakistan breach his Article 8 ECHR rights?"

[11] In response, the SSHD either conceded or did not contest each point other than the final one, in relation to which she adhered to her position that Article 8 ECHR was not engaged either within or outwith the immigration rules. The matter came before the FTT on 12 February 2024. It noted that the SSHD had withdrawn objections to the initial grant of petitioner's visa. Thus, it focussed on the question of whether there were any reasons why the petitioner should be permitted to remain in the UK on the basis of his Article 8 claim. Although noting the position of the SSHD so far as the initial grant of the visa was concerned, it concluded that there were no exceptional circumstances engaging Article 8 and it dismissed the petitioner's appeal. The FTT refused the petitioner's application for permission to appeal that decision to the respondent.

[12] The petitioner then renewed his application for permission to appeal directly to the respondent, as he was entitled to do. It refused his application on 22 May 2024, providing the following reasons for so doing:

- "1. The grounds assert that FTT Judge Prudham, in a decision promulgated on 26 February 2024 refusing his human rights appeal, arguable materially erred in law. That is because he has lost more than £50,000 in tuition fees living expenses and living costs, his health has been adversely impacted, he has been unable to complete his education, the refusal has impacted on his sister and her family, and it would be unduly harsh for him to have to return to Pakistan.
2. The grounds do not disclose an arguable material error of law as the Judge considered all these points and made findings available on the evidence."

In making that decision, the petitioner asserts that UT acted in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice, contrary to section 11A(4)(c)(ii) of the 2007 Act.

The relevant legal framework

[13] The circumstances in which decisions of the FTT and the UT may be reviewed are set out in sections 9 to 11 of the 2007 Act. Section 11A of the 2007 Act was introduced by the Judicial Review and Courts Act 2022, with the policy aim of bringing finality to proceedings within those parts of the Tribunal system covered by the legislation. The rationale for introducing curbs to the otherwise un-curtailed access to the supervisory jurisdiction was, to a great extent, to recognise and reinforce the specialist nature and expertise of the Upper Tribunal in the jurisdiction with which it had been entrusted, as well as to respond to the approaches of the courts north and south of the border as developed in *Eba v Advocate General for Scotland* [2010] CSIH 78, 2011 SC 70, 2010 SLT 1047, later, on appeal [2011] UKSC 29, 2012 SC (UKSC) 1, 2011 SLT 768, and *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, [2011] 3 WLR 107.

[14] So far as is relevant to these proceedings, section 11A is in the following terms:

“11A Finality of decisions by Upper Tribunal about permission to appeal

- (1) Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b).
- (2) The decision is final, and not liable to be questioned or set aside in any other court.
- (3) In particular—
 - (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;
 - (b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.

- (4) Subsections (2) and (3) do not apply so far as the decision involves or gives rise to any question as to whether—
 - (a) the Upper Tribunal has or had a valid application before it under section 11(4)(b),
 - (b) the Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or
 - (c) the Upper Tribunal is acting or has acted—
 - (i) in bad faith, or
 - (ii) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.”

[15] The net effect of section 11A is to preclude any form of appeal from, or judicial review of, any decision of the UT refusing permission to appeal save in certain narrow prescribed circumstances. It was a matter of agreement in the circumstances of the present case that the only possible exception was that provided for in section 11A(4)(c)(ii).

[16] A number of authorities offer guidance as to the proper approach to assessing whether that subsection is engaged. Although not binding upon me in a strict sense, they are nevertheless highly persuasive and were, in any event, founded on by one or other or both parties in their respective notes of argument and oral submission.

[17] In *R (LA(Albania) v Upper tribunal (CA)* [2023] EWCA Civ 1337 the Court of Appeal considered the nature and purpose of section 11A, and the circumstances in which one of the section 11A exceptions might properly be engaged. In refusing the application for want of jurisdiction, the court held, *inter alia*, that

“34although the effect of the test as to the scope of judicial review means that some errors of law made by the Upper Tribunal might not be corrected if they do not fall within the exceptions set out in section 11A(4) of the 2007 Act, and the effect of an error of law is to render the decision of the Upper Tribunal a nullity in the *O'Reilly v Mackman* sense, the second appeals test adopted by the Supreme Court in *Cart* expressly contemplated that some errors of law would not be corrected...” (per Dingemans LJ)

[18] Dingemans LJ continued at paragraph 38 by considering the proper test to be applied in determining whether the exceptions in section 11A(4) apply. He concluded:

“37..... a mere assertion that the exception applied was not sufficient to establish the jurisdiction of the court.

38 In my judgment a party needs to show a genuinely disputable question that the exception applies. This is not dissimilar from the approach taken by the Privy Council when considering whether an appellant has an appeal as of right from certain jurisdictions where the appeal concerns an issue of constitutional interpretation. This has been interpreted to mean a genuinely disputable issue of constitutional interpretation, see *Frater v The Queen* (Note) [1981] 1 WLR 1468, 1470 and *Alleyne-Forte v Attorney General of Trinidad and Tobago* [1998] 1 WLR 68, 72. A party cannot bring an appeal as of right by simply asserting that it raises an issue of constitutional interpretation. In the same way a party cannot establish jurisdiction to apply for judicial review of a decision of the Upper Tribunal simply by asserting that the claim falls within the exceptions set out in section 11A(4) of the 2007 Act.”

[19] Underhill LJ, who formed part of the bench in *LA (Albania)*, also heard the appeal in

R (Chowdhury) v Upper Tribunal (Immigration and Asylum Chamber) [2025] EWCA Civ 656

[2025] 1 WLR 5507. There, considering whether the claim in question fell within the exception in section 11A(4)(c)(ii) he made the following observations at paragraph 37:

“.....the exception provided for by the subsection is expressed not as depending on whether any of the specified circumstances applies *in fact* but rather on whether the decision of the UT to refuse PTA ‘involves or gives rise to any question whether [they do so]’. As Dingemans LJ makes clear at paras 37—38 of his judgment in *LA (Albania)* [2024] 1 WLR 1673, the question must be genuinely disputable. To put it another way, subsection (4) applies where there is a realistically arguable case that one of the specified circumstances obtains. That does not of course mean that the court will not have to resolve the relevant subsection (4) question, only that it will not have to do so for the purpose of deciding whether it has jurisdiction. If it decides that it has, it will proceed to consider whether to grant PTAJR.... And if permission is granted the relevant question will have to be decided at the substantive hearing (unless the two stages have been rolled up).”

[20] Thus far, the authorities make clear that there is a gateway test to be applied in any application for judicial review founding upon one of the exceptions in section 11A(4) and that is to determine whether the court has jurisdiction at all to entertain the application.

That involves assessing whether there is, as Dingemans LJ described it, a “genuinely

disputable” question as to whether one of the exceptions applies. Or, to adopt the language of Underhill LJ “subsection (4) applies where there is a realistically arguable case that one of the specified circumstances obtains.”

[21] Assuming the applicant can satisfy the jurisdictional gateway, then, as least so far as the subsection 4(c)(ii) exception is concerned, there are two further aspects to consider, firstly whether the proceedings demonstrate a procedural defect, and secondly whether the alleged defect is such as to amount to a fundamental breach of the principles of natural justice.

[22] What these conditions amount to has also been the subject of judicial consideration. In *Chowdhury*, at paragraph 57 Underhill LJ described the question of procedural defect thus: “The focus of section 11A(4)(c)(ii) is on procedural fairness, and I do not think it can be read as involving an assessment of the substantive merits of the decision.” Or, as it was explained earlier in *LA (Albania)* by Lewis LJ at paragraph 49:

“In the present case, the relevant provision is section 11A(4)(c)(ii). The focus of that subsection is upon the process by which the Upper Tribunal considered an application for permission to appeal. The issue in this case, therefore, is whether the Upper Tribunal acted in such a procedurally defective way in considering Ms LAs application for permission to appeal as amounted to a fundamental breach of the principles of natural justice. For the reasons given by Dingemans LJ at paras 40-42 of his judgment, the High Court was correct to conclude there was no question of the Upper Tribunal having acted in such a way in this case. Strictly, this court is not required to consider for itself the substantive reasoning of the First-tier Tribunal in order to decide if it, arguably, made any error of law. That is the exercise that the Upper Tribunal performs. I do not, therefore, consider that it is necessary to review the reasoning of the First-tier Tribunal.”

[23] As to what fairness, or natural justice might mean in this context, Saini J analysed this matter as follows in *R (Oceana) v Upper Tribunal (Immigration and Asylum Chamber)* [2023] EWHC 791 (Admin) at paragraph 32:

“Subject to the need to be flexible and to avoid hard and fast rules, a high-level summary of what fairness in process generally requires would include the following

guarantees: the right to be heard by an unbiased tribunal; the right to have notice of the case to be met or proved; and the right to be heard on those matters. However, several cases of high authority underline that the principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision. An essential feature of the context is the statute which gives the relevant public body the power to make decisions, as regards both its language and the shape of the legal and administrative system within which the decision is taken. The requirements of fairness must be interpreted in a manner which does not frustrate the intention of Parliament.”

Saini J continued:

“33. Crucially, in the present context, Parliament has taken care to require a ‘fundamental breach’ of natural justice before the exception comes into play. That is an important qualification and needs to be given some meaning. Without seeking to be prescriptive, in my judgment that requires a claimant to identify a failure in process which is so grave as to rob the process of any legitimacy. That is a substantial hurdle. When considering whether this hurdle has been surmounted, a court will need to consider the entire process, as opposed to focussing on the discrete aspect which is the subject of the claim. The fairness of a process has to be assessed holistically.

34. Given some of the arguments made by the Claimant, I also need to underline that complaints about the result and the merits of the decision cannot be the subject of the exception. The exception is concerned with failures of process and not with disappointing outcomes. Parliament has decided that an outcome may in fact be shown to be wrong but has determined that this is not a basis for allowing a judicial review challenge to be made.”

The petitioner’s submissions

[24] The petitioner opened his submissions by explaining that his argument was a simple one, that did not involve any complexity. In short, the UT in refusing his application for permission to appeal stated that the FTT had considered all the points. In so doing, the UT had attributed to the FTT a decision that it did not in fact make - that is to say that it could be demonstrated that the FTT did not consider all the facts, and this could be seen from the face of the documentation available. By way of example, the petitioner submitted that there had been no engagement with his request for further time within which to obtain legal assistance. Nor, it was submitted, was there any engagement with a request for an oral

hearing, or the concession made by the SSHD in relation to the curtailment of the petitioner's visa.

[25] The petitioner continued the same theme by contending that there had been no engagement with the "putting things right" principle, or the evidence submitted about the petitioner's elderly parents residing in Pakistan. These, the petitioner submitted were "facts" which the UT said the FTT had considered when in fact it had not. The silence on these matters permitted the inference that the decision itself was procedurally defective - put another way, there was a process which should have been followed, that is to say an acknowledgment and weighing of these various factors, which had not been followed, giving rise to a procedural defect.

[26] The petitioner amplified his argument to contend that the decision of the FTT was relevant in the assessment of whether a breach of section 11A(4)(c)(ii) had been demonstrated. In the first place the refusal of the UT to grant permission to appeal was a failure, having regard to its status as a supervisory court with the objective of reviewing the decisions of the FTT. Thus, the denial of the opportunity to review the decision on the FTT was a breach of natural justice. In the second place the decision of the FTT was relevant since it had failed properly to follow process when considering the petitioner's family life argument in the context of the SSHD having made the concessions that it did. In short, the procedure was wrong because it ignored a material fact, namely the concession that had been made. The FTT had not explained how the concession was or was not relevant to its consideration or how the concession was weighed in the balance with other considerations. This, the petitioner contended was not simply a disagreement with the outcome, rather that by missing or omitting an important step in the process, the FTT had itself been responsible for a procedural failure. Thus, the UT decision when taken together with the decision before

it from the FTT was cumulatively procedurally defective. It followed that if that threshold of procedural defect was met, then there would have been a breach of natural justice.

[27] The petitioner then turned to the question of remedy. He accepted that the primary remedy he sought was reduction of the decision of the UT. However, the petitioner described the case as involving circumstances that were unusual, urgent and concerning. Because of that, it would be appropriate, he submitted for the court to go further than reduction and, in effect, adopt such procedure as it saw fit to remedy the defective procedure and ensure natural justice. Due to the frailty of his parents' position in Pakistan, the matter was of undoubted urgency. In any event having regard to the view expressed by the Inner House when granting permission that the petitioner's application had reasonable prospects of success, it followed that this court should take such steps as were required to bring about a remedy that recognised the urgency of the process. Therefore, the petitioner contended that the court could and should consider whether a reference to the *Nobile Officium* was required to bring about a result that was commensurate with natural justice.

The respondents' submissions

[28] Mr Tariq adopted his note of argument and invited me to refuse the petition as incompetent, on the basis that the court had no jurisdiction to entertain the application by virtue of section 11A of the 2007 Act. He amplified that submission to submit that there was no genuinely disputable question that the section 11A exception founded upon applied in this case. *Esto* the court did have jurisdiction then in any event the court had to proceed to the next step and consider whether the exception in fact applied in this case. That question too should be answered in the negative, contended Mr Tariq.

[29] He then examined the procedural history of the case, accepting that once the petitioner's visa had been curtailed, that was a final decision, notwithstanding the later concession by the SSHD withdrawing her objections to the grant of the visa in the first place. However, the net effect was that the only avenue for the petitioner to seek to remain in the UK was to make a human rights claim based on family life established in this country. Thus, when the matter ultimately came before the FTT for consideration, it did so as an appeal against a decision dismissing his claim based on having a private life in the UK, not as an appeal in relation to the grant or curtailment of his student visa. That was the context in which the UT had come to consider the application for permission to appeal now the subject of challenge.

[30] It was also important, submitted the respondent, to have regard to the narrow scope of the exceptions set out in section 11A. These narrow jurisdictional parameters had been deliberately drawn following the decisions in *Eba* and *Cart*, and the effect of the recasting of the jurisdictional provisions was to create two separate questions that required to be addressed: firstly, the jurisdictional gateway, and secondly, if jurisdiction is established, the substantive question arising from the exceptions in section 11A(4). It was important to note that the terms of section 11A(3) made it clear that errors of fact and law do not engage the supervisory jurisdiction of this court. Thus, the effect of the statutory test was that there may be some errors of law made by the UT that are left uncorrected, as has been recognised in the authorities, such as *LA (Albania)*.

[31] Consideration of the authorities also supported the contention that the exception was engaged only where there were genuinely disputable questions as to its applicability. It was not enough simply to assert that the exception applied. It was worthy of note, submitted Mr Tariq, that the sorts of issues that were advanced as falling within the terms of the

exception in *LA* at paragraph 41 were not dissimilar to those advanced in the present case but were, in each case, quintessential errors of law and not procedural defects. Complaints of failure to take certain things into account, or improper weight given to a particular factor in a balancing exercise were not, properly understood, procedural defects. This process was not concerned with the merits of the decision in question nor the processes of the FTT.

Mr Tariq properly recognised that the question of whether a procedural effect in the FTT that was not corrected by the UT fell within the section 11A exception was considered in *LA*, although the court ultimately elected not to express a concluded view one way or the other. For his part however, Mr Tariq submitted that such an error on the part of the FTT would not fall within the exception having regard to the plain language of section 11A, and that section 11A, properly understood, as directed to matters arising in the UT only.

[32] Even if jurisdiction was established, Mr Tariq submitted, under reference to Underhill LJ at paragraph 36 in *Chowdhary*, that it was important to understand that even if the procedural defect gateway is engaged, it does not open up the whole of the decision to review, rather the supervisory jurisdiction was engaged only in relation to those grounds said to amount to procedural defects. In summary, Mr Tariq invited the court to conclude that the proper approach was as set out in *Chowdhary* and could be tested by asking two questions, firstly, does the court have jurisdiction because of a genuinely disputable question as to the applicability of the exception? If the answer to that question was no, then the matter went no further, and the petition would fall to be dismissed. The second question arose if the jurisdictional threshold was achieved, but, if having moved on to consider whether the exception did in fact apply and the court reached the conclusion that it did not then equally the petition would fall to be refused as incompetent in terms of section 11A(2).

[33] In summary, on this aspect of matters, Mr Tariq submitted that by introducing significant restrictions on the availability of judicial review in challenging the decisions of the UT on permission to appeal the UK Parliament had explicitly chosen in section 11A to strike the balance differently from where it had lain following *Eba*. The petitioner sought, in effect to subvert that balance by seeking to re-frame alleged errors of law as purported procedural defects, which was impermissible. In short, the court had no jurisdiction, and the petition should be dismissed.

[34] Turning finally to the question of remedy Mr Tariq submitted that the only competent remedy sought by the petitioner was reduction of the decision complained of. The petition sought in addition interdict of the respondent from taking steps to remove the petitioner but not only had the petitioner not moved for interdict, it was in any event unnecessary as the respondent had no intention of removing the petitioner and had taken no steps towards removing him. So far as the suggestion of an application to the *Nobile Officium* was concerned, this was incompetent. Resort to the *Nobile Officium* only arose as an avenue of last resort, where no other remedies were available to the petitioner, which was not the case here (*SU v McGinley* 2022 SC 218, at paragraph 24). Remit to the FTT, as was also suggested by the petitioner was similarly incompetent as the primary remedy sought was reduction of a decision of the UT.

[35] So far as the petitioner's overarching invitation to this court to "put things right" was concerned, which was in effect a submission in support of restorative justice, this was based on the case of *Ahsan v Secretary of State for the Home Department* [2017] EWCA 2009. The invitation was misconceived in substance and insofar as based on *Ahsan*. That case was decided on a very different factual set of circumstances from the present, it being argued in that case that no adequate alternative remedy was available to the appellant unlike the

present case where an effective statutory appeal mechanism existed which had been exercised by the petitioner.

[36] Thus, the respondent's position was that the petition was bound to fail. Primarily that was through want of jurisdiction, but even were the court satisfied it had jurisdiction to consider whether the exception in section 11A(4)C(ii) applied, the challenge failed as it relied on a series of complaints that were, properly understood, alleged errors of law rather than being properly characterised as procedural defects. None of the arguments advance by the petitioner supported in any event the conclusion that a breach of natural justice had occurred. For all those reasons, the petition should be dismissed.

Analysis and decision

[37] The will of Parliament in introducing section 11A into the 2007 Act could scarcely have been clearer. The question of the susceptibility to judicial review of decisions of the UT on applications to it for permission to appeal had been analysed both north and south of the border with broadly similar outcomes, albeit in England certain restrictions had been proposed by way of the "second appeals" test espoused in *R (Cart)*. Parliament determined to put the matter beyond peradventure by legislating, in terms, that:

- "(2) The decision is final, and not liable to be questioned or set aside in any other court.
- (3) In particular—
 - (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;
 - (b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision."

This, as Lord Sandison observed in *Elkabany v Advocate General for Scotland* 2025 SLT 871, could scarcely be viewed as a liberalising measure, creating, as it did, effective immunity from judicial review of the relevant decision apart from where the narrow statutory exceptions could be shown to arise.

[38] I therefore accept the submission for the respondent that the language of section 11A created a jurisdictional gateway which must be passed before the exceptions set out in section 11A(4) can be considered. I accept and respectfully adopt the manner in which that question has been considered in the authorities to which I was referred. In particular, that the threshold question is whether the petitioner can show “a genuinely disputable question that the exception applied rather than merely asserting that the exception applied” (*LA (Albania)* per Dingemans LJ). The explicit language of section 11A(3)(a) makes it clear that a genuinely disputable question cannot be evidenced by allegations that are, properly understood, errors of law.

[39] Therefore, the primary question is whether the petitioner has set out averments supporting the conclusion that a genuinely disputable question arises as to whether the decision of the UT demonstrates a procedural defect which gives rise to a fundamental breach of natural justice. The petitioner invites the conclusion that the failure of the FTT, compounded by the UT, lies in failing properly to weigh in the balance the import of the concessions made by the SSHD. Added to that is the failure properly to weigh in the balance the petitioner’s application for further time within which to seek legal advice, the failure to afford him an oral hearing and the broader failure to take into account or give proper consideration to the circumstances of the petitioner’s parents. These are, it is argued, individually and cumulatively, procedural failures rather than a dispute on the merits.

[40] As the authorities make clear, it is the decision-making process that is the narrow carve out to the section 11A prohibition, not the outcome. Taking each of the points made by the petitioner, both in his written and oral submissions, at their highest, none can fairly or objectively be categorised as a complaint about process. They are, individually and cumulatively, quintessential allegations of errors of law - failure to take matters into account, failure to give proper weight to certain factors, and so on. That conclusion permits of only one result, which is that the petitioner has failed to establish that this court has *prima facie* jurisdiction to consider the matter. To conclude otherwise would fail to pay proper respect to the will of Parliament in enacting section 11A, nor, more prosaically, would an alternative conclusion reflect the plain language of the legislation. It is well understood that the words of a statute must, as a generality, be given their ordinary meaning (*Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153, paragraph 14, per Lord Hope).

[41] In the face of a lack of jurisdiction, there is, strictly speaking, no requirement to go further. However, had the question of jurisdiction been established, I would in any event have concluded that the petitioner had failed to establish that the decision of the UT demonstrated a procedural defect, for essentially the same reasons set out in paragraphs 37 and 38 above, that is to say that the complaints made by the petitioner go to the merits, or the outcome, rather than the procedure adopted by the UT. Even if one were to take the view that the criticisms of the reasoning of the FTT were relevant in that consideration, and in common with Lewis LJ I remain to be persuaded that any alleged failures on the part of the FTT do have relevance given the clear and unambiguous language of section 11A(3) in particular, they would suffer from the same difficulty, namely that they are directed towards error of law, rather than process. Even assuming, for the sake of argument, that these not insignificant hurdles could be overcome, there is a final aspect of the exception

in section 11A(4)(c)(ii) to be addressed, which is that the UT must have acted in such a procedurally defective way “as amounts to a fundamental breach of the principles of natural justice.”

[42] I respectfully adopt the explanation of what fairness demands in that context as offered by Saini J in *R (Oceana)*. Whilst well understood concepts of fairness such as a fair hearing before an unbiased tribunal are clearly relevant, as has been observed, what fairness demands will inevitably be case and context specific. As importantly however, the will of Parliament in enacting section 11A must also be respected, thus necessitating that the breach be a fundamental one, properly understood as the sort of breach that emerges from a “failure in process which is so grave as to rob the process of any legitimacy” (per Saini J, *R (Oceana)* paragraph 33). By that yardstick and once again taking the factors relied upon by the petitioner at their highest, I would not have considered that a fundamental breach of natural justice of that sort had been demonstrated.

[43] Finally, on the question of remedy, on the hypothesis that the petitioner had established that he was entitled to a remedy by operation of the supervisory jurisdiction of the court, the only relevant remedy would have been reduction of the decision in question. Questions of restorative justice would not have been relevant or appropriate in this tightly drawn statutory context and nor would any question of an application to the *Nobile Officium* have arisen. There is no lacuna in procedure or remedy that requires to be addressed and none, in truth, identified by the petitioner other than a desire, entirely understandable from his perspective, to achieve the outcome he desires.

Disposal

[44] Standing my primary conclusion that this petition fails for want of jurisdiction, the primary disposal is to refuse it as incompetent because of the provisions of section 11A of the 2007 Act. Had any alternative hypothesis required to be considered, the petition would in any event fall to be dismissed for all of the reasons set out above.