Upper Tribunal
(Immigration and Asylum Chamber)

Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London
on 22 September 2015

Decision promulgated

……

Before

Mr Justice McCloskey, President
Upper Tribunal Judge Lindsley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSEPH HILMAN GREENWOOD

Respondent

Representation

Appellant: Mr T Melvin, Senior Home Office Presenting Officer
Respondent: Mr M S Gill QC, instructed by Hanswoods Solicitors

(i) The exercise of considering whether there are very compelling circumstances over and above those described in paragraphs 399 and 399A of the Immigration Rules must, logically, be preceded by an assessment that the appellant's case does not fall within paragraph 399 or 399A.

(ii) At the stages of both granting permission to appeal and determining appeals, it is essential to expose those cases where, properly analysed, the challenge to the First-tier Tribunal's decision is based on unvarnished irrationality grounds. The elevated threshold for intervention on appeal thereby engaged must be recognised.

(iii) Every application for permission to appeal to the Upper Tribunal should be preceded by a conscientious, considered assessment of the decision of the First-tier Tribunal ("FtT"). Inundation of the Upper Tribunal with permission to appeal applications in every case belonging to a given category is not harmonious with the Parliamentary intention.

(iv) Remittal to the Secretary of State is not one of the disposal powers now available to the FtT, which are threefold: to allow the appeal, to dismiss the appeal or to make a decision the effect whereof is that the Secretary of State either must, or may, make a fresh decision.

(v) The eleventh hour advent of skeleton arguments and Rule 24 Notices is in breach of the Upper Tribunal's procedural rules and is an unacceptable practice.

DECISION AND REASONS

Introduction

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*") dated 27 June 2013, whereby it was determined that the deportation provisions of section 32(5) of the UK Borders Act 2007 (the "*2007 Act*") apply to the Respondent, a national of Jamaica aged 36 years. The impetus for this decision was the conviction of the Respondent in respect of two counts of possession of Class A Controlled Drugs with intent to supply (crack cocaine and heroin), generating a sentence of five years imprisonment, on 23 September 2011.

History

2. The history is somewhat protracted and we summarise it thus:

   (a) In April 2002 the Respondent entered the United Kingdom as a visitor and was subsequently granted leave to remain as a student.

   (b) On 23 January 2004 he was sentenced to 12 months imprisonment having pleaded guilty to possession of heroin with intent to supply and two other drugs possession offences.

   (c) On 30 April 2004 the Secretary of State decided to make a deportation order against the Respondent.

   (d) On 26 July 2006 the Asylum and Immigration Tribunal allowed the Respondent's appeal against this decision.

   (e) There followed the grant of discretionary leave to remain to the Respondent, ultimately expiring on 06 May 2011.

   (f) Between January and September 2011 the Respondent was detained on remand in respect of certain drugs offences.

(g) On 24 June 2011 the Respondent applied for indefinite leave to remain in the United Kingdom based on his marriage to a British citizen on 23 September 2003.

(h) On 23 September 2011 the index convictions were made at Bristol Crown Court.

(i) On 07 October 2011 the Secretary of State refused the Respondent's indefinite leave to remain application.

(j) By a determination promulgated on 09 February 2012 the First-tier Tribunal dismissed the appeal, finding that the Respondent did not satisfy paragraph 287 of the Immigration Rules and, further, that his deportation would not infringe Article 8 ECHR.

(k) On appeal, the Upper Tribunal held that the FtT had erred in law in its dismissal of the appeal under Article 8. By its decision promulgated on 19 December 2012, the Upper Tribunal remade the decision, dismissing the Respondent's appeal.

(l) Meantime, on 15 March 2012, prior to the grant of permission to appeal to the Upper Tribunal (*supra*), the Secretary of State transmitted the customary "minded to deport" letter to the Respondent.

(m) This elicited representations on behalf of the Respondent.

(n) Next, on 27 June 2013, the Secretary of State decided that section 32(5) of the 2007 Act was applicable and, on the same date, a deportation order was made.

First Decision of the FtT

3. By its decision promulgated on 23 September 2013, the FtT allowed the Respondent's appeal. It did so on the single ground that the deportation order (dated 17 June 2013) preceded the decision to deport (dated 27 June 2013). This decision was based on an analysis of various decisions of the 2007 Act and the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*"). Having made this conclusion, the FtT declined to determine the second ground of appeal, which was based on Article 8 ECHR. It formulated its decision in these terms:

> "*The Respondent's decision to deport Mr Greenwood dated 24 June 2013 is not in accordance with the law. Given the fundamental nature of the Respondent's error, we remit the matter back to the Respondent for the error to be remedied. We, therefore, do not proceed to decide the substance of the Article 8 appeal. We allow the appeal against deportation to the aforementioned extent only.*"

4. We shall comment *infra* on the FtT's election to decide the appeal in part only.

First Appeal to the Upper Tribunal

5. The Secretary of State was granted permission to challenge the aforementioned decision of the FtT by appeal to the Upper Tribunal which, by its determination dated 04 July 2014, set aside the decision of the FtT. It did so on two main grounds. First, it concluded that there is nothing unlawful where a notice that section 32(5) of the 2007 Act applies postdates the associated deportation order. We highlight the following passages:

> "*[29] ….. The making of the deportation order expressly under section 32(5) is a decision that section 32(5) applies to the case. To treat it otherwise would be bizarre ….*
>
> *[33] ….* [It] *is the clearest possible indication that the decision maker has decided that the subsection applies …..*
>
> *[38] The right of appeal is against the decision that section 32(5) applies. Such a decision is not rendered unlawful by bearing a date after that of the deportation order, either on the basis that the combination of dates necessarily indicates a failure of due process or on the basis that it necessarily indicates that the person giving the reasons was unable fairly to consider the case.*"

The Upper Tribunal determined to set aside the decision of the FtT and to order remittal. This was the stimulus for the further, and most recent, decision of the FtT giving rise to the appeal which we must now decide.

6. For completeness, by its order dated 29 April 2015 the Court of Appeal dismissed the Respondent's application for permission to appeal against the last mentioned decision of the Upper Tribunal.

The Most Recent Decision of the FtT

7. The FtT allowed the Respondent's appeal. The basis upon which the judge did so is discernible from the following passages:

> "*[104] …. I find that it would be unduly harsh for the child to remain in the UK without the Appellant ….*
>
> *[107] I come to the conclusion that at this time and on the evidence now before me there are very compelling reasons over and above those in paragraphs 399 and 399A ….*
>
> *[109] In the circumstances of this case, the separation of the Appellant from his children and extended family is in the public interest but the strong (and very weighty) public interest in this case is outweighed by the Appellant's interests and those of the children concerned and his partner ….*

[110] I find that the Appellant meets the requirements of the Immigration Rules namely that there are very compelling reasons over and above the matters listed in paragraph 399 and 399A which outweigh the public interest in this case."

Under the rubric of Article 8 ECHR, the Judge's analysis and conclusions continued, containing the following salient passages:

"[121] …. It is difficult to see that a decision under the Immigration Rules in this case would justify a different conclusion in respect of Article 8 ….

[122] It is my view that the proportionality considerations under the Immigration Rules and outlined above cover all the factors which the Tribunal should consider under Article 8 ….

[124] In all the circumstances of this case, the separation (ie deportation) of the Appellant from the children and his partner is in the public interest but this is outweighed by the Appellant's interests and those of the children (including step children and wider extended family) and his partner …

[126] In all the circumstances and for the reasons already given above I consider that the decision of the Respondent is disproportionate …

[128] Therefore the Appellant meets the exceptions set out in section 33 (UKBA 2007)."

This Appeal

8. The Secretary of State has been granted permission to appeal against this decision. The essence of the grant of permission is contained in the following passage:

"The decision does not show what it is about the circumstances of the Appellant and the children that make it very compelling or unduly harsh. The situation was predictable as were the consequences for the Appellant and his family."

There is little correlation between the grant of permission to appeal (on the one hand) and the dominant argument which was presented to us on behalf of the Secretary of State (on the other). We permitted this argument to unfold *de bene esse*. Its substance is that the FtT erred in law in its consideration of paragraphs 399 and 399A of the Immigration Rules. Paragraph 398 must also be considered. We reproduce here these three provisions:

Paragraph 398

"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

Paragraph 399

"399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported."

Paragraph 399A

> "*399A. This paragraph applies where paragraph 398(b) or (c) applies if –*
>
> *(a) the person has been lawfully resident in the UK for most of his life; and*
>
> *(b) he is socially and culturally integrated in the UK; and*
>
> (c) *there would be very significant obstacles to his integration into the country to which it is proposed he is deported.*"

9. As the Respondent's personal and family circumstances are rehearsed adequately in the decision of the FtT, they need not be repeated here.

The Deportation of Foreign Criminals

10. In all cases belonging to this sphere, the contest is between the several public interests favouring deportation – deterrence, protecting the public, maintaining firm immigration control and promoting the economic wellbeing of the nation – and the private, personal interests of the offender and, frequently, the members of his family circle. The potency of the public interest in play was emphasised resoundingly by the Court of Appeal in SS (Nigeria) v SSHD [2013] EWCA Civ 550. This theme has continued to chime in further decisions of the Court of Appeal. In LC (China) v SSHD [2014] EWCA Civ 1310, it was stated, at [21]:

> "*The fact that they are British nationals is undoubtedly of importance, since it carries with it the right to live and be brought up here, but in this case the children appear to have formed no particular attachment to this country and are of an age at which they can be expected to integrate into Chinese society with less difficulty than might otherwise have been the case. However, they are not being required to leave the UK, since their mother has indefinite leave to remain and can continue to care for them here, if she so chooses. If the appellant is deported, it will be for him and his partner to decide whether it is in the children's best interests to remain here with her or move to China as part of a united family. In the end, however, this case turned largely on the balance struck between two competing interests: the public interest in the deportation of the appellant and the children's interests in remaining here with both parents.*"

The judgment continues, at [24]:

> "*The starting point for any such assessment is the recognition that the public interest in deporting foreign criminals is so great that only in exceptional circumstances will it be outweighed by other factors, including the effect of deportation on any children. However, in cases where the person to be deported has been sentenced to a term of imprisonment for less than four years and has a genuine and subsisting parental relationship with a child under the age of 18 years who enjoys British nationality and is in the UK, less weight is to be attached to the pubic interest in deportation if it would not be reasonable to expect the child to leave the UK and there is no one else here to look after him. By contrast, however, where the person to be deported has been sentenced to a*

term of four years' imprisonment or more, the provisions of paragraph 399 do not apply and accordingly the weight to be attached to the public interest in deportation remains very great despite the factors to which that paragraph refers. It follows that neither the fact that the appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of a kind which outweigh the public interest in his deportation. The appellant's children will not be forced to leave the UK since, if she chooses to do so, their mother is free to remain with them in this country."

11. Most recently, in PF (Nigeria) v SSHD [2015] EWCA Civ 251, the Court of Appeal, having emphasised the supreme importance of the tribunal identifying exceptional, or compelling, factors sufficient to outweigh the public interest in deportation, stated at [43]:

> "*I fully recognise that if the Judge's factual findings are well founded, they will be a real and damaging impact on his partner and the children; but that is a common consequence of the deportation of a person who has children in this country. Deportation will normally be appropriate in cases such as the present, even though the children will be affected and the interests of the children are a primary consideration.*"

We are also mindful of the statement of the Court of Appeal in SSHD v MA Somalia [2015] EWCA Civ 48, at [17], that –

> "*…. the scales are heavily weighted in favour of deportation and that something very compelling is required to outweigh the public interest in deportation.*"

12. The Secretary of State's argument also invokes the recent decision of the Upper Tribunal in Chege (Section 117D – Article 8 – approach) [2015] UKUT 00165. This decided, *inter alia*, that in applying the new provisions of Part 5A of the 2002 Act, the Tribunal should adopt the following sequence:

    (a) Is the appellant a foreign criminal as defined by section 117D(2)(a), (b) or (c)?

    (b) If "yes", does he fall within paragraph 399 or 399A of the Immigration Rules?

    (c) If "no", are there very compelling circumstances over and above those falling within paragraphs 399 and 399A?

13. It is common case that the Respondent is a "*foreign criminal*" within the meaning of section 117D(2). Furthermore, paragraph 398 of the Rules applies to this case because the Respondent was sentenced to imprisonment for a period exceeding four years. As a result the Respondent, on appeal to the FtT, could not succeed simply by satisfying paragraph 399 or 399A of the Rules. By paragraph 398 the Secretary of State, in the first place and the Judge, on appeal, were both obliged to do two things: first, to consider whether paragraph 399 or 399A applies and, if yielding a negative answer, then to consider whether the public interest in deportation was outweighed by other

factors. This entailed the application of the following test: are there very compelling circumstances over and above those described in paragraphs 399 and 399A?

The Immigration Rules Issue

14. The gravamen of the argument on behalf of the Secretary of State is that the Judge erred in law by considering paragraphs 399 and 399A *en route* to his conclusions. We consider this argument to be fundamentally flawed. Logic, reason and common sense dictate that paragraphs 399 and 339A must be considered in the application of the "*over and above*" test enshrined in paragraph 398. Indeed a failure to do so, if material, would itself be an error of law. In cases where, as here, the "*over and above*" test is engaged, paragraphs 399 and 399A provide the bridge, or link, between the application of the test and the resulting outcome. Giving effect to the ordinary and natural meaning of the three provisions of the Rules under scrutiny, we consider that:

    (a) The first question is whether, having regard to the findings and evaluative assessments made, the Secretary of State (in the first place) and the FtT (on appeal) considers that either paragraph 399 or 399A of the Rules applies.

    (b) If the above exercise yields the assessment that neither of the said paragraphs applies, it is then necessary to decide whether there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

15. It requires no manipulation or distortion of the text of the FtT's decision to conclude that the Judge, in deciding the appeal, gave effect to the approach which we have espoused above and to that contained in Chege. Mr Melvyn, on behalf of the Secretary of State, was driven to accept that the Judge's decision is replete with correct self-directions in law. We remind ourselves of the scope for intervention of an appellate tribunal in cases of this kind. This, it may be observed, is sometimes overlooked. In particular, in practice, it is not addressed in the Secretary of State's grounds of appeal. Nor is it routinely addressed in grants of permission to appeal to this Tribunal. Indeed one may also observe, with deference, that in a number of recent decisions of the Court of Appeal the governing principles do not feature.

16. These principles are based in authority of unmistakable pedigree and binding force. They are contained in Edwards v Bairstow [1956] AC 14. While their Lordships were not uniform in their formulation of the governing principle, it suffices to recall what Lord Radcliffe stated (at page 9):

> "*I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test.*"

The test for unreasonableness, which later became known as perversity, or irrationality, is whether the decision under appeal is one which no person acting judicially and properly instructed on the relevant law could reasonably have made.

The restraint which an appellate court must exercise, having regard to these principles, features in the decision of the House of Lords in Moyna v Secretary of State for Work and Pensions [2003] UKHL 44. In R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport [1993] 1 WLR 23, Lord Mustill offered the following pithy summary (at 32 – 33):

> "*In such a case the Court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational.*"

Decisions which fall "*within the permissible field of judgment*" do not satisfy this elevated hurdle.

17. The second question which arises is whether the Judge committed any error of law in his application of the correct legal test. We find no such error. In the context of the present appeal there is no suggestion that the Judge left out of account any material evidence. Nor can it be suggested that the Judge allowed anything extraneous to enter the equation. The touchstone for intervention is irrationality. This Tribunal can find an error of law in the context of this appeal only if the outcome of the application of the correct legal test is vitiated by irrationality. This is a self-evidently elevated threshold, one which is rarely satisfied in practice and which, interestingly, does not feature expressly in many of the recent Court of Appeal decisions belonging to this sphere. The test for irrationality has been formulated in a variety of tried and trusted ways. Was it reasonably open to the Judge taking into account all material factors and disregarding everything extraneous to reach the conclusion under challenge? Another formulation is: did his conclusion fall within the band, or range, of conclusions reasonably open and available to him? There is also the repeated admonition to appellate courts and tribunals that what they might have done as a first instance court or tribunal is not in point. Thus while it may be that not every first instance immigration judge would have reached the conclusion under challenge in this appeal this does not vitiate in law the decision.

Deportation appeals generally

18. The Upper Tribunal has the impression that the Secretary of State, as a matter of routine, applies for permission to appeal in every deportation appeal in which the appellant succeeds before the FtT. Furthermore, the grounds of appeal are frequently formulated in bland and formulaic terms. Thirdly, the grounds of appeal rarely, if ever, engage with the governing principles which we have rehearsed above. We would suggest that these observations be carefully considered by those who compile applications for permission to appeal and the Judges who decide them.

19. If there is indeed a practice of this kind it must be disapproved. To slavishly apply for permission to appeal to the Upper Tribunal in every deportation appeal resolved in favour of the appellant, if this be the practice, is not a proper or legitimate invocation of this Tribunal's jurisdiction. Decisions on whether to apply for permission to appeal should be the product of conscientious and considered

evaluation of the first instance judicial decision in every case. This, we consider, is what was contemplated by the legislature in making provision for this mechanism. Inundation of the Upper Tribunal with permission to appeal applications in every case belonging to a given category cannot be considered harmonious with the Parliamentary intention. Moreover, it is unfair to other tribunal users and undermines the important values of legal certainty and finality, which are two of the cornerstones of our legal system.

Remittal by the FtT to the Secretary of State

20. We have highlighted in [3] above the first of the two orders of the FtT, namely "remittal" to the Secretary of State. Fundamentally, wherein reposes the power to remit? The operative statutory provision in this context is section 86 of the 2002 Act, as amended by the Asylum and Immigration (Treatment of Claimants) Act 2004, per paragraph 18 of Schedule 2, effective from 04 April 2005, and the Immigration, Asylum and Nationality Act 2006, per paragraph 4 of Schedule 1, effective from 31 August 2006. Its predecessors were paragraph 21 of Schedule 4 to the Immigration and Asylum Act 1999 and section 19 of the Immigration Act 1971. Prior to its most recent amendment, section 86 provided:

> "*(1) This section applies on an appeal under section 82(1), 83 or 83A.*
>
> *(2) The Tribunal must determine –*
>
> > *(a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and*
> >
> > *(b) any matter which section 85 requires it to consider.*
>
> *(3) The Tribunal must allow the appeal in so far as it thinks that –*
>
> > *(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or*
> >
> > *(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.*
>
> *(4) For the purposes of subsection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision.*
>
> *(5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal.*
>
> *(6) Refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes of subsection (3)(b).*

In its amended form, section 86 now provides:

> "*(1) This section applies on an appeal under section 82(1).*

(2) The Tribunal must determine –

(a) any matter raised as a ground of appeal, and

(b) any matter which section 85 requires it to consider"

Section 85, under the rubric "*Matters to be considered*", provides:

"*(1) An appeal under section 82(1) against a decision shall be treated by [the Tribunal] as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).*

(2) If an appellant under section 82(1) makes a statement under section 120, [the Tribunal] shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under section 82(1) [83(2) or 83A(2)] against a decision [the Tribunal] may consider evidence about any matter which [it] thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

(5) But in relation to an appeal under section 82(1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10 –

(a) subsection (4) shall not apply, and

(b) [the Tribunal] may consider only the circumstances appertaining at the time of the decision to refuse."

21. We consider it clear that prior to the most recent amendment of section 86, the FtT, in determining statutory appeals, had two main choices viz to allow or dismiss the appeal. A third and fourth option were also available. The third option was to allow an appeal and, simultaneously, to make directions in order to give effect to its decision, per section 87 of the 2002 Act as amended. However, this has been repealed by paragraph 37 of Schedule 9 to the Immigration Act 2014, effective from 20 October 2014. Thus [17] of Greenwood (Automatic Deportation: Order of Events) [2014] UKUT 00342 (IAC), which predated this statutory development, must be read with this adjustment. The fourth possible outcome of an appeal to the FtT, as Greenwood noted, was the following. If the effect of the Tribunal's decision was to conclude that the decision of the Secretary of State under appeal was unlawful and the Tribunal did not substitute another decision:

(a) if the decision of the Secretary of State involved a determination of an application made by the litigant, a lawful decision remains to be made by the Secretary of State – and it is preferable that the FtT say so clearly;
(b) alternatively, if the challenge in the appeal was to an "own motion" decision of the Secretary of State, it would be a matter for the Secretary of State to decide whether a further decision should be made in the wake of the FtT's decision.

This is, in effect, a declaratory decision.

22. As noted above, in the seemingly interminable merry-go-round of legislative activity, section 86 has undergone a significant recent amendment. This is linked to the wholesale reduction in statutory rights of appeal effected by the amendments introduced by the Immigration Act 2014, operative from 20 October 2014. In this context, the exercise of juxtaposing the new section 82 with its predecessor is enlightening. This reduction in appealable decisions is accompanied by a significant pruning of the permitted grounds of appeal, which are enshrined in section 84. By section 85, the FtT is obliged to consider certain matters. By this route one arrives at section 86, which bears the cross heading "Determination of Appeal".

23. In notable contrast with its predecessor, the new section 86 does not reproduce the two basic options of allowing or dismissing the appeal. In this respect, the drafting is both surprising and infelicitous. However, applying elementary dogma, it is the function of every appellate tribunal and court to resolve appeals, normally by allowing or dismissing them, unless directed otherwise by statute. I consider that any reconfiguration of this basic model would, given the legislative history, require clear and elaborative new provisions. There are none. The new statutory language is "*determine*". I conclude that this encompasses the two basic options of either allowing or dismissing an appeal. The third option – noted in [21] above – of allowing an appeal with directions has clearly been extinguished by the repeal of section 87 of the 2002 Act. I consider, however, that the fourth option noted above, with its two dimensions, continues to apply. This has been a feature of UTIAC jurisprudence for some years and, in the new legislation, Parliament has not taken the opportunity to interfere.

24. The effect of this analysis is that the answer to the question posed in [20] above is uncompromising: the FtT has no power to remit a case to the Secretary of State for any purpose. The principle which underpins this conclusion is that the FtT is a creature of statute and its powers are exclusively statutory in consequence. Any course which the statute does not, expressly or by implication, permit is forbidden. In this respect, the FtT is to be contrasted with the High Court which, by tradition of some longevity, is acknowledged to possess an inherent jurisdiction. The FtT cannot lay claim to possession of comparable powers.

25. This analysis is consistent with the limited jurisprudence bearing on this subject. In Haddad [2000] INLR 117, the IAT decided that the adjudicator had no power to remit to the Secretary of State an unconsidered and undetermined claim but should, rather, determine such claim as primary decision maker. The Court of Appeal espoused the same approach in R (Zaier) v Secretary of State for the Home Department [2003]

EWCA Civ 937. The FtT is also constituted primary decision maker in cases where new claims are raised by the appellant in response to a so-called "one stop" notice in accordance with sections 85(2) and 120 of the 2002 Act: see AS (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1076. Similarly, in circumstances where the Secretary of State has not made a decision on whether the appellant has a Community law right to remain in the United Kingdom or in respect of the best interests of an affected child, the FtT must make the primary decision: see VM (Zambia) v Secretary of State for the Home Department [2009] EWCA Civ 521 and DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305.

Practice

26. Finally, we have drawn attention, in [8] above, to the disconnect between the grant of permission to appeal and the case presented on behalf of the Secretary of State at the hearing. We also received the customary 11th hour skeleton argument on behalf of the Secretary of State. The timing of its advent compares with that which occurs in relation to Rule 24 Notices in a disturbingly high percentage of cases. We take this opportunity to emphasise, not for the first time, the impropriety of each of these practices and the breach of the Tribunal's procedural rules which they entail.

Disposal

27. We are satisfied that applying the correct legal criteria and principles this decision withstands scrutiny. Accordingly we dismiss the appeal of the Secretary of State and affirm the decision of the FtT.

Signed: Edward McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 22 October 2015