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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE UPPER TRIBUNAL, IMMIGRATION AND ASYLUM CHAMBER

CAO

Appellant:

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

Mr Mark Mulholland KC and Mr Erik Peters (instructed by Wilson Nesbitt Solicitors) for the Appellant
Mr Tony McGleenan KC and Mr Philip Henry (instructed by the Crown Solicitor's Office) for the Respondent

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Before: McCloskey LJ, Horner LJ and Fowler J

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McCLOSKEY LJ (*delivering the judgment of the court*)

Anonymity

[1] The appellant and her children have been granted anonymity throughout the entirety of these proceedings and continue to enjoy this protection. Accordingly, there must be no publication of their names or of any information which could reasonably lead to any of them being identified.

Introduction

[2] Section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55" and "the 2009 Act" respectively) is an incontestably important member of a suite of statutory provisions designed to protect one of the most vulnerable cohorts in society, namely children. This appeal, not for the first time, requires the court to examine the duties imposed by section 55, specifically subsection (3), on the Secretary of State for the Home Department (the "Secretary of State") and the two tiers of the Immigration and Asylum Chamber. This, as will become apparent, is a question which has been previously considered by the courts and tribunals of the jurisdictions of Northern Ireland, Scotland and England & Wales. A unanimous approach has not emerged. In particular, the Upper Tribunal has decided recently that there are material differences between this jurisdiction and that of England and Wales and Scotland in the construction and application of section 55. This is a significant development which, in the context of a United Kingdom tribunal (both tiers), gives rise to a divergence between at least two parts of that single unitary state.

Section 55

[3] Section 55 of the *Borders, Citizenship and Immigration Act 2009* (hereinafter "section 55") lies at the heart of these proceedings. Under the rubric of "Duty regarding the welfare of children" it provides as follows:

> "(1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official.

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

(4) The Director of Border Revenue must make arrangements for ensuring that—

(a) the Director's functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements made by the Director in the discharge of such a function are provided having regard to that need.

(5) A person exercising a function of the Director of Border Revenue must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (4).

(6) In this section—

"children" means persons who are under the age of 18;

"customs function", "designated customs official" and

"general customs function" have the meanings given by Part 1.

(7) A reference in an enactment (other than this Act) to the Immigration Acts includes a reference to this section.

(8) Section 21 of the UK Borders Act 2007 (c 30) (children) ceases to have effect.."

The Asylum Application and Decision

[4] An unsuccessful application for asylum has been the genesis for the appeal to this court. The appellant is a citizen of Nigeria and the mother of two children, born to her in that country. On 25 September 2018 she entered the United Kingdom with her children, then aged 12 and 16 years respectively. On 8 November 2018 she applied for asylum and humanitarian protection, invoking also her rights and those of her children protected by Articles 2, 3 and 8 ECHR under section 6 of the Human Rights Act 1998. The essence of the appellant's claim was that she had been subjected to violence by her husband, rendering her a member of a particular social group (namely female victims of domestic violence in Nigeria) and was at risk of further such violence upon return. As regards her daughter, the claim was based on a real risk of being subjected to female genital mutilation directed by her husband. It was claimed that neither the appellant nor her daughter would be able to rely on the Nigerian law enforcement agencies for protection and, further, that internal relocation within Nigeria was not a viable option.

[5] The decision underlying the somewhat protracted legal proceedings which have materialised is that of the Secretary of State for the Home Department (the "*Secretary of State*") dated 10 April 2019, whereby the appellant's application for asylum was refused. The Secretary of State's decision maker examined separately what were assessed as the twin components of the appellant's asylum claim, namely (a) fear of the infliction of violence by her husband and (b) the risk of her husband forcing their daughter to undergo female genital mutilation ("FGM"), in the event of a return to Nigeria. It was concluded that these claims lack plausibility and credibility. The decision maker highlighted *inter alia* the fact of the appellant and her children returning to Nigeria following three previous visits to the United Kingdom, the appellant's delay (some 5 weeks) in claiming asylum following entry to the United Kingdom, her husband's express consent to the children accompanying the appellant on this visit and her husband's willingness to marry the appellant, notwithstanding that she had not undergone FGM.

[6] The decision maker then turned to consider the issue of State Protection in the event of the appellant and her children returning to Nigeria. This gave rise to a further discrete conclusion namely that the appellant had failed to demonstrate that the Nigerian authorities would be unable or unwilling to offer her protection if requested. From this it followed that the appellant did not fall within the compose of the Refugee Convention 1951. In short, a well founded fear of persecution for a Convention reason had not been demonstrated.

[7] The decision maker nonetheless then turned to address the issue of internal relocation. The conclusion made was that the appellant had failed to demonstrate that it would be unreasonable to expect her to relocate in Nigeria. The omnibus conclusion was:

> "… there is no reasonable degree of likelihood that you would be persecuted on return to Nigeria."

This was followed by further discrete conclusions that the appellant's removal from the United Kingdom would not violate her rights under Article 2, Article 3 or Article 8 ECHR. Nor could she lay claim to any entitlement to remain in the United Kingdom under the Immigration Rules.

[8] The decision letter did not stop there. Next, under the rubric of "Exceptional Circumstances", it was stated:

> "We have considered whether there are exceptional circumstances in your case which would render refusal a breach of Article 8 [ECHR] because it would result in unjustifiably harsh consequences for you, a relevant child or another family member. **In so doing we have considered the best interests of any relevant child as a primary consideration …**
>
> You have provided no information or evidence to establish that there are any exceptional circumstances in your case."

In the next ensuing passage, the possibility of granting discretionary leave to remain was canvassed and rejected.

[9] The final substantive part of the decision letter is arranged under the title of "Section 55 Consideration." It is in the following terms:

> (1) We have also taken into account the need to safeguard and promote the welfare of children in the United Kingdom in accordance with the Secretary of State's duty under section 55 of the [2009 Act].
>
> (2) The circumstances of your case have been assessed in keeping with relation to [sic] section 55 … This amounts to a consideration of the impact of the decision on the wellbeing (also known as 'best interests') of any children involved and its extent. The following are taken into account:

(i) Whether it is reasonable to expect the child to live in another country.

(ii) What is the level of the child's integration into this country.

(iii) How long has the child been away from the country of the parents.

(iv) Where and with whom the children will live in that country.

(v) What the arrangements for the child will be in that country, and

(vi) What is the strength of the child's relationship with a parent or other family member(s) that would be broken if the child moves away.

(3) Any other factors that you raised have also been taken into account. These have then been included in a final and overall consideration which includes the wider public interest in maintaining an effective system of immigration control.

(4) Your children who are aged 12 and 16 have been in the United Kingdom with you since September 2018, meaning they have been away from Nigeria for six months. As such it is noted that your children can return to Nigeria with you. They all speak English and have been educated in Nigeria albeit this has interrupted [sic] since September 2018.

(5) CPIN (2016 V2 6.22) it is noted that English is also the official language for Nigeria and as such would not be a significant barrier to continuing their schooling in Nigeria. It is not considered that your children have created significant links to life in the UK and that it would therefore not be unduly harsh to return them with you. It is therefore considered that it would be in the best interests of your children to be returned with you to Nigeria as a family unit.

> (6) Having made this consideration our view is that these factors do not alter the decision to remove you to Nigeria."

[10] Summarising, the Secretary of State's refusal of the appellant's asylum and human rights protection claims was based on an assessment of several perceived disparities and other frailties, including in particular the appellant's failure to claim protection during three earlier visits to the United Kingdom. The Secretary of State further considered that in any event there would be sufficient protection provided by the authorities in Nigeria to the appellant and her children and that internal relocation would be available to them.

The History of these Proceedings

[11] The decision letter was followed by several tribunal decisions, which we shall outline infra. Most recently, by its separate decisions dated 25 March 2022 and 29 July 2022, the Upper Tribunal, Immigration and Asylum Chamber (the "*UT*") (a) dismissed the appellant's appeal and (b) subsequently refused her application for leave to appeal to this court. By its order dated 9 October 2022 this court granted leave to appeal.

[12] The central theme of the FtT's dismissal of the ensuing appeal is that the appellant's case was considered to be replete with inconsistencies, relating particularly to the period 2013–2018. The Tribunal further concurred with the Secretary of State's assessments of the availability of adequate protection from the Nigerian authorities and the option of internal relocation within Nigeria. Finally, the FtT dealt with the issues of the children's best interests and Article 8 in the following terms:

> "[Counsel] accepted at the hearing that there are no separate issues arising in relation to the appellant's private and family life which have not been considered in the context of the asylum claim. No submission was made that the appellant meets any of the requirements of the Immigration Rules in relation to her private or family life. The appellant and her family will return to Nigeria together and I find on the evidence before me that it is in the best interests of the children to remain with their mother. On the evidence and submissions before me no separate Article 8 claim arises and I am satisfied that the decision to refuse the appellant's application is proportionate to the respondent's legitimate aim of the maintenance of an effective system of immigration control."

[13] The UT, following the procedural route charted in para [4] above, sensibly conducted a hearing of the "rolled up" species and made the twofold decision that (a)

permission to appeal should be granted on all grounds and (b) the appeal would be dismissed as the decision of the FtT did not involve the making of an error of law. The UT's assessment that the grounds of appeal were arguable was based on the failure of the FtT to address the section 55 issue. The tribunal's reasons for concluding that the section 55 ground of appeal had no merit are expressed at paras [27]–[29]:

> "The appellant was represented by solicitors and counsel who must be taken to have been aware of **JG** yet the issue of section 55 … was not argued in front of the judge. The issue is fact sensitive and not purely an issue of law. It cannot, in such circumstances, be for a judge to go looking for issues which the legally represented appellant did not raise ….
>
> This case can be clearly distinguished on its facts and what was argued from the decision in **JG**. Despite the order from the Northern Ireland Court of Appeal* I have not been provided with the bundle of material provided to the High Court. But in any event, I have not been taken to anything that demonstrates to me that the High Court considered the materiality of any arguable error …
>
> Accordingly, for these reasons, I consider that the decision of the First-tier Tribunal did not involve the making of a material error of law and I uphold it."

[*an error – the order was made by the NI High Court]

[14] As the submissions of Mr McGleenan KC (with Mr Henry of counsel) emphasised, it is necessary to review the history of these proceedings through the lens of whether, and if so how and when, section 55 issues were raised on behalf of the appellant. In brief compass:

(a) The appellant's appeal against the Secretary of State's decision was dismissed by the First-Tier Tribunal (the "*FtT*") by its decision dated 25 February 2020. In the grounds of appeal section 55 does not feature. It is, however, mentioned in counsel's skeleton argument in the context of a submission that it would be in the female child's best interests to remain in the United Kingdom with her mother and brother. There is no mention of section 55(3) or the free-standing duty enshrined therein. In its decision the FtT substantially endorsed the Secretary of State's decision letter and further recorded an acceptance by counsel that "… there are no separate issues arising in relation to the appellant's private and family life which have not been considered in the context of the asylum claim."

(b) Successive applications for leave to appeal to the UT were dismissed by the FtT and the UT. Section 55 did not feature in either of these applications.

(c) The UT refusal decision was challenged by judicial review, giving rise to a consent order quashing the impugned decision of the UT and requiring a fresh decision by a different judge, dated 12 May 2021. The PAP letter contained the following passage:

> "In the first instance the SSHD failed to comply with statutory guidance "Every Child Matters" pursuant to section 55(3) …. [and] … the FtT judge ignored the SSHD's failure …."

There is no further mention of section 55(3). However, in the ensuing pleaded grounds of challenge there are two express references to section 55(3), albeit in the context of a somewhat opaquely formulated ground under the rubric of irrationality.

(d) By its substantive decision and order dated 25 March 2022 the UT granted leave to appeal and dismissed the appeal.

(e) By its subsequent decision dated 29 July 2022 the UT refused to grant leave to appeal to this court.

(f) By its order dated 06 October 2022, following an *inter – partes* hearing this court granted leave to appeal.

[15] The UT, in several passages, refers to section 55 without specificity ie omitting any reference to the pertinent subsection. The reference at para [27] of its decision to *JG* suggests that in this part of its decision it had in mind section 55(3). It concluded that no error of law based on the FtT's failure to consider section 55(3) had been established because this could not be related to any of the grounds of appeal or arguments advanced. Next the judge states:

> "This case can clearly be distinguished on its facts and what was argued, from the decision in **JG**."

There is no accompanying elaboration or reasoning. The same observation applies to the words "the materiality of any arguable error" which follow in the same paragraph.

[16] Summarising there are, therefore, two substantive tribunal decisions underlying his appeal, namely (a) the FtT decision dismissing the appellant's appeal against the impugned decision of the Secretary of State and (b) the UT's decision dismissing the ensuing appeal.

Section 55 Unpacked

[17] The genesis of section 55 was explained by Lady Hale in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, at para [23]. It is traceable to Article 3(1) of the United Nations Convention on the Rights of the Child ("*UNCRC*"), which provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The first clear expression of this international law obligation in domestic law is found in section 11 of the Children Act 2004 and, in the jurisdiction of Northern Ireland, Article 3 of the Children (NI) Order 1995, which provides that the welfare of the child shall be the court's "paramount consideration" in certain defined circumstances. In a later enactment, the Safeguarding Board Act (NI) 2001 established the Safeguarding Board for Northern Ireland and, per section 2(1), defined the objective of this agency with reference to "… the purposes of safeguarding and promoting the welfare of children." Prior to the advent of section 55 of the 2009 Act there was no statutory provision of this species extending to the immigration authorities in the United Kingdom by virtue of a reservation which the government had entered when acceding to UNCRC. However, in 2008 this reservation was withdrawn, giving birth to section 55 in consequence.

[18] As para [14]ff of *ZH (Tanzania)* make clear, section 55 must be considered in conjunction with Article 8 ECHR, one of the Convention rights protected under the scheme of the Human Rights Act. The interplay between these two provisions has two particular consequences. First, any decision taken without having regard to the need to safeguard and promote the welfare of any affected child will not be in accordance with the law within the compass of Article 8(2) ECHR. Second, under the Article 8 jurisprudence of the ECtHR national authorities are required to apply Article 3(1) of UNCRC thus treating the best interests of any affected child as a "primary consideration": see paras [24]–[25]. Furthermore, as explained in *R(MK) v Secretary of State for the Home Department* [2016] UKUT 231 (IAC) at para [27] especially and as noted in *JG v The Upper Tribunal, Immigration and Asylum Chamber* [2019] NICA 27, at para [36], a breach of the section 55(3) duty may contravene the procedural dimension of Article 8, which is complementary to the substantive rights protected.

"Every Child Matters: Change for Children"

[19] This is the title of the guidance promulgated by the Secretary of State under section 55(3). It was published in November 2009 and has not been superseded or modified subsequently. In all cases to which section 55(2) applies – which include all immigration, asylum, and nationality matters – the duty imposed upon every official

exercising any of the relevant functions is to "have regard to" this guidance. The statutory language is uncompromising: the official "must" do so.

[20] The statutory guidance is subtitled:

> "Statutory Guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children …. issued under section 55 of the Borders, Citizenship and Immigration Act 2009."

The Ministerial Foreword states inter alia:

> "The UK Borders Agency undertakes difficult and sensitive work on behalf of society as a whole. Working with children presents particular challenges. To meet these challenges effectively, the UK Border Agency needs the support of all those with an interest in children."

The opening paragraph of the Introduction is in these terms:

> "Improving the way people and bodies safeguard and promote the welfare of children is crucial to improving outcomes for children."

Continuing, it is highlighted that the arrangements within the guidance include:

> "Service developments that take account of the need to safeguard and promote welfare and is informed, where appropriate, by the views of children and families."

The overview of the content is in these terms:

> "Part 1 describes the general arrangements to safeguard and promote the welfare of children which are likely to be common to all agencies covered by section 11 [Children Act 2004] and, in the case of the UK Border Agency*, by section 55. Part 1 is intended to make clear how the work of the UK Border Agency fits into the wider arrangements, although not all of Part 1 is directly relevant to it."

[*"UKBA"]

This is followed by a passage of some note:

> "This guidance is issued under section 55(3) and 55(5) which requires any person exercising immigration,

> asylum, nationality and customs functions to have regard to the guidance given to them for the purpose by the Secretary of State. **This means they must take this guidance into account and, if they decide to depart from it, have clear reasons for doing so**."
> [Our emphasis.]

[21] Throughout Part 1 there are repeated reminders of the *duty* in play namely the duty on UKBA officials to:

> "… carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children."

Faithful to the statute, the text makes clear that this duty is not to be performed in some unstructured fashion. Rather, it will be performed within the compass of the "arrangements" which the Secretary of State must, by statute, make to this end: see paras 1.4 and 1.3. In paras 1.4 and 1.5 excerpts from the guidance published under section 11 of the 2004 Act and the 2002 multi-agency report "Safeguarding Children" are reproduced:

> "Safeguarding and promoting Safeguarding and promoting the welfare of children is defined in the guidance to section 11 of the 2004 Act (section 28 in Wales) and in Working Together to Safeguard Children as:
>
> - protecting children from maltreatment;
> - preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development');
> - ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and
> - undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully.
>
> The overall framework set out in the 2004 Act is to provide a basis for achieving the vision of safeguarding set out in the report Safeguarding Children ie:

- all agencies working with children, young people and their families take all reasonable measures to ensure that the risks of harm to children's welfare are minimised; and

- where there are concerns about children and young people's welfare, all agencies take all appropriate actions to address those concerns, working to agreed local policies and procedures in partnership with other agencies."

[22] In the next section of the statutory guidance (paras 1.6–1.7) there is a notable emphasis on the requirement of a structured framework according to which the statutory duty to discharge UKBA functions with regard to the need to safeguard and promote the welfare of children is to be performed. In this context the multiplicity of public authorities subject to the statutory duty owed to children under section 11 of the 2004 Act is highlighted and they are listed. The fact of UKBA interaction with these agencies is specifically noted (at para 1.8). This is followed by a list of the "key features for safeguarding and promoting the welfare of children":

"(a) Senior management commitment to the importance of safeguarding and promoting children's welfare.

(b) A clear statement of the agency's responsibilities towards children is available for all staff.

(c) A clear line of accountability in the organisation for work on safeguarding and promoting the welfare of children.

(d) Service development takes account of the need to safeguard and promote welfare and is informed, where appropriate, by the views of children and families.

(e) Staff training on safeguarding and promoting the welfare of children for all staff working with or, depending on the agencies' primary functions, in contact with children and families.

(f) Safer recruitment.

(g) Effective inter-agency working to safeguard and promote the welfare of children.

(h) Information sharing."

The text rehearses the outworkings of each of these "key features" seriatim.

[23] In the next section of the statutory guidance there is a resume of the "Contact Point" mechanism. This is described as "a key part of the Every Child Matters Programme to improve outcomes for children and will support practitioners, local authorities and other organisations in fulfilling their duties to safeguard and promote the welfare of children."

The text continues:

> "Contact Point will be the quick way to find out who else is working with the same child or young person and allow services to contact one another more efficiently."

When one turns to examine Part 2 of the statutory guidance, the fact of this particular mechanism and its availability to UKBA assume some importance.

[24] The next section of the statutory guidance (para 1.14) lists the "key features of an effective system" for safeguarding and promoting the welfare of individual children:

- Children and young people are listened to and what they have to say is taken seriously and acted on;

- Interventions take place at an early point when difficulties or problems are identified;

- Where possible the wishes and feelings of the particular child are obtained and taken into account when deciding on action to be undertaken in relation to him or her. Communication is according to his or her preferred communication method or language;

- Ethnic identity, language, religion, faith, gender, and disability are taken into account when working with a child and their family;

- Practitioners are clear when and how it is appropriate to make a referral to Local Authority children's services where children may need services to safeguard them or to promote their welfare;

- Where children are being provided with services to respond to their needs and support their welfare (usually by Local Authority children's services),

professionals including the UK Border Agency contribute to subsequent plans, interventions and reviews in accordance with requirements in relevant regulations and guidance;

- Following assessment, relevant services are provided to respond to the assessed needs of children and to support parents or carers in effectively undertaking their parenting roles. Wherever such services are being provided the UK Border Agency will take account of them in planning their future interaction with the family and the children.

[25] This is followed by (in paras 1.15 and 1.16) a detailed list of the "principles [which] underpin work with children and their families to safeguard and promote the welfare of children." The text continues:

> "The UK Borders Agency should seek to reflect them as appropriate."

Followed by (para 1.16):

> "Work with children and families should be:
>
> - child centred;
> - rooted in child development;
> - supporting the achievement of the best possible outcomes for children and improving their wellbeing;
> - holistic in approach;
> - ensuring equality of opportunity;
> - involve children and families, taking their wishes and feelings into account;
> - building on strengths as well as identifying and addressing difficulties;
> - multi and inter-agency in its approach;
> - a continuing process, not an event;
> - designed to identify and provide the services required, and monitor the impact their provision has on a child's developmental progress;
> - informed by evidence."

The themes of information gathering, and properly informed decision making are readily identifiable in this suite of principles. They emerge even more forcefully in what follows in the next paragraph.

[26] The next part of the statutory guidance (1.17) rehearses the following principles: ensuring that every child has the opportunity to achieve their best possible development; listening to and taking account of the child's wishes and feelings; developing a co-operative, constructive working relationship with parents or care givers; identifying the "strengths and difficulties within the child, his or her family and the context in which they are living"; adopting a multi and inter-agency approach; "a continuing process not on event"; the need to reassess service provision; and the necessity of "a rigorous evidence base", drawing on the practitioner's knowledge and experience.

[27] Part 2 of the statutory guidance is specific to UKBA. At the outset it lists UKBA's "main contributions to safeguarding and promoting the welfare of children" in these inclusive terms:

> "Ensuring good treatment and good interactions with children throughout the immigration … process.
>
> - Applying laws and policies that prevent the exploitation of children throughout and following facilitated illegal entry and trafficking.
>
> - Detecting at the border any material linked to child exploitation through pornography.
>
> - Exercising vigilance when dealing with children with whom staff come into contact and identifying children who may be at risk of harm.
>
> - Making timely and appropriate referrals to agencies that provide ongoing care and support to children."

This is followed by references to a range of international treaties, including UNCRC.

[28] In the next ensuing section (para 2.7) it is stated that UKBA "must" act according to the following principles:

> - Every child matters even if they are someone subject to immigration control
>
> - In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children.

- Ethnic identity, language, religion, faith, gender, and disability are taken into account when working with a child and their family.

- Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree. In instances where parents and carers are present they will have primary responsibility for the children's concerns.

- Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience.

The next passage in the statutory guidance (para 2.8) re-enforces the recurrent theme of direct communication between UKBA staff and affected children:

> "When speaking to a child or dealing with a case involving their welfare, staff must be sensitive to each child's needs. Staff must respond to them in a way that communicates respect, taking into account their needs, and their responsibilities to safeguard and promote their welfare."

[29] The statutory guidance then addresses the topics of senior management commitment and accountability; clear statements of responsibility; a clear line of accountability; the development of UKBA policies; training of staff; and safer recruitment, vetting and complaints procedures. This is followed by a section entitled "Work With Individual Children." The passages which follow describe a series of typical concrete situations in which UKBA staff will interact directly with children. There is also explicit recognition (in para 2.21) of the need for UKBA interaction with other agencies – Local Authority Children's Services, schools, and health agencies – where appropriate. The responsibility of UKBA to make a referral to a statutory agency is highlighted in this context (para 2.22).

[30] The by now familiar themes of inter-agency working, information sharing and evidence based decision making resurface at paras 2.29–2.33. Finally, the importance of the section 55 duties is reflected in passages dealing with (a) children and UKBA staff overseas and (b) contractors. As regards (a) while section 55, by its terms, does not apply to children outside the United Kingdom overseas UKBA staff must nonetheless "… adhere to the spirit of the duty" and make certain enquiries where appropriate. Furthermore, they must receive the requisite training. As regards (b), appropriate "operational instructions" are required and there will be mandatory monitoring to ensure that contractors "… have regard to the duty and the guidance."

The Section 55 Jurisprudence

[31] Section 55 has been considered at several judicial tiers in the United Kingdom. The jurisprudence begins with the decision of the Supreme Court *in ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. In that case it was contended that the decision to remove the appellant from the United Kingdom consequential upon the rejection of her asylum claim failed to give sufficient weight to the welfare of her two Tanzanian national children, aged 12 and 9 years respectively, in contravention of Article 8 ECHR and section 55. One of the notable features of the main judgment, given by Lady Hale, is the nexus identified between section 55 and Article 3(1) UNCRC (on the one hand) and Article 8 ECHR (on the other). Another theme emerging clearly in the judgements of Lady Hale and Lord Hope is that of avoiding the attribution of blame to blameless children for the conduct of a parent or parents: in the ZH case, this consisted of the mother's appalling immigration history and the precariousness of her situation when the children were conceived and born: see paras [33] and [44].

[32] At paras [34]–[37] [2011] UKSC 4 Lady Hale considered the issue of "Consulting the Children":

> "[34] Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child's own views. Article 12 of UNCRC provides: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."
>
> 35. There are circumstances in which separate representation of a child in legal proceedings about her future is essential: in this country, this is so when a child is to be permanently removed from her family in her own best interests. There are other circumstances in which it may be desirable, as in some disputes between parents about a child's residence or contact. In most cases, however, it will be possible to obtain the necessary information about the child's welfare and views in other ways. As I said in *EM (Lebanon) v Secretary of State for the*

Home Department [2008] UKHL 64, [2009] 1 AC 1198, at para 49:

> 'Separate consideration and separate representation are, however, two different things. Questions may have to be asked about the situation of other family members, especially children, and about their views. It cannot be assumed that the interests of all the family members are identical. In particular, a child is not to be held responsible for the moral failures of either of his parents. Sometimes, further information may be required. If the Child and Family Court Advisory and Support Service or, more probably, the local children's services authority can be persuaded to help in difficult cases, then so much the better. But in most immigration situations, unlike many ordinary abduction cases, the interests of different family members are unlikely to be in conflict with one another. Separate legal (or other) representation will rarely be called for.'

36. The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. We have been told about a pilot scheme in the Midlands known as the Early Legal Advice Project (ELAP). This is designed to improve the quality of the initial decision, because the legal representative can assist the "caseowner" in establishing all the facts of the claim before a decision is made. Thus, cases including those involving children will be offered an appointment with a legal representative, who has had time to collect evidence before the interview. The Secretary of State tells us that the pilot is limited to asylum claims and does not apply to pure article 8 claims. However, the two will often go hand in hand. The point, however, is that it is one way of enabling the right questions to be asked and answered at the right time.

37. In this case, the mother's representatives did obtain a letter from the children's school and a report from a youth worker in the Refugee and Migrant Forum of East London (Ramfel), which runs a Children's Participation Forum and other activities in which the children had taken part. But the immigration authorities must be prepared at

> least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents' this should not be taken for granted in every case. As the Committee on the Rights of the Child said, in General Comment No 12 (2009) on the Right of the Child to be Heard, at para 36: "in many cases … there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative Children can sometimes surprise one."

The main principle emerging from these passages is that of the need for decision makers to be fully informed about everything bearing on a child's best interests in order to properly assess what those interests are. In this way best quality decision making will be promoted. Pausing, the nexus with the section 55(3) guidance is unmistakable.

[33] Next, in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 one discrete facet of the appellant's case entailed the contention that the Secretary of State, in rejecting his claims for asylum and humanitarian protection and determining that his further representations did not constitute a fresh human rights claim had erred by failing to have regard to the interests of his children as a primary consideration in the proportionality assessment under Article 8 ECHR. This, it was submitted, was in breach of the Secretary of State's duty under section 55(1) of the 2009 Act. One further aspect of the appellant's case was that the Secretary of State had failed to carry out a careful examination of the children's best interests. The Supreme Court dismissed the appeal. Its unanimous decision is recorded in the judgment of Lord Hodge who, at [2013] UKSC 74 para [10], formulated the following code consisting of seven principles:

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
>
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

[34] At para [21] Lord Hodge added:

> "What is important …. is that the interests of the children must be at the forefront of the decision maker's mind."

Notably, he linked this directly to the 4th, 5th and 6th of the principles. Each of these, in one way or another, is concerned with the need for properly informed decision making where a child's best interests are in play. Finally, it is worth nothing the factual footnote that in the letter of decision the Secretary of State's official drew attention to the failure to provide "any information which pertains specifically to the best interests of your three children": see the excerpt at para [17].

[35] At this juncture it is appropriate to consider certain decisions of the English Court of Appeal. In the first, *AJ (India) v Secretary of State for the Home Department* [2011] EWCA Civ 1191, there were three conjoined appeals. In the appeal of *SP* it was argued that in dismissing the appellant's application for leave to remain on human right's grounds and making directions for his removal the Secretary of State, in breach of section 55(1), had failed to treat the best interests of the child concerned as a primary consideration. The decision maker made no mention of section 55 and, indeed, was unaware that there was a child: see para [18]. The Court of Appeal rejected the argument that in these circumstances the tribunal had erred in law by failing to allow the appeal and remit the case to the Secretary of State for fresh decision making. The court drew on the decisions of the Supreme Court in *R (Razgar) v SSHD* [2004] UKHL 27 and *Huang v SSHD* [2007] UKHL 11 that in asylum and immigration appeals the tribunal's function is that of decision maker (in addition to that of judicially

independent adjudicator) to be contrasted with, for example, the supervisory function of the High Court in judicial review. Thus, the tribunal is not limited to considering the material available to the Secretary of State at the initial decision-making stage.

[36] Given the contours of the present appeal, one particular feature of the decision in *AJ (India)* and others is that the statutory guidance made under section 55(3) was raised: see paras [16] and [25]. It was specifically argued that the tribunal had been required to take the statutory guidance into account and should have at least attempted to consult the children concerned. In the remainder of his judgment Pill LJ addressed mainly issues other than those raised in these specific arguments. His only engagement with them is found at para [44], in the statement "D's age was such that there could be no consultation with him, as required in the guidance with older children …" The child was aged 1½ years when the Secretary of State's decision was made and two years when the ensuing appeal was decided by the FtT.

[37] His Lordship did not suggest that there would, or could, not be cases in which the appellate tribunal may be obliged to take the step of consulting with children or, perhaps, making arrangements to ensure that this be undertaken. By extension it is implicit in *AJ India* that the appellate tribunal may find itself having to undertake, or orchestrate, some of the other steps specified in the statutory guidance such as engaging with other agencies or ensuring that the "Contact Point" mechanism is utilised.

[38] In the second of the English Court of Appeal decisions, *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550, the appellant's two successive appeals against the Secretary of State's decision to deport him from the United Kingdom were dismissed. The appellant was the father of a British citizen son aged 5 years, born to a British citizen. His case was that the impugned decision infringed rights under Article 8 ECHR. Laws LJ, delivering the main judgment of the court, noted that his case involved "much reliance" on section 55: see para [12]. Having recorded that the appellant's argument invoked, inter alia, both section 55(1) and the statutory guidance, Laws LJ formulated the appellant's submission thus, at [34]:

> "…. In determining an Article 8 claim where a child's rights are affected, the child's best interests must be properly gone into: that is to say they must be treated as a primary consideration and the court or tribunal must be armed – if necessary, by its own initiative – with the facts required for a careful examination of those interests and where in truth they lie."

The court did not dissent from this proposition, as the next ensuing passage indicates, at [35]:

> "While in very general terms I would not quarrel with this proposition (though I consider that the circumstances in

> which the Tribunal should exercise an inquisitorial function on its own initiative will be extremely rare), its practical bite must plainly depend on the nature of the case in hand. It is necessary to consider the deportation of foreign criminals as a particular class of case; and, of course, the circumstances of this case itself."

Neither section 55 nor the statutory guidance features in the remainder of the judgment. The third member of the Court, Mann J, added, at [62]:

> "I agree with Laws LJ that the circumstances in which the Tribunal will require further enquiries to be made, or evidence to be obtained, are likely to be extremely rare. In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision maker by the individual concerned. The decision maker would then make such additional enquiries as might appear to him or her to be appropriate. The scope for the Tribunal to require, much less indulge in, further enquiries of its own seems to me to be extremely limited, almost to the extent that I find it hard to imagine when, or how, it could do so."

We observe that the decision in *SS* was in alignment with an earlier (then very recent) decision of the same court, namely *DS (Afghanistan) v SSHD* [2011] EWCA Civ 305.

[39] There are two further English Court of Appeal decisions belonging to this discrete cohort. In each of these, as in *SS (Nigeria),* para [55], the appellate court was at pains to curb the breadth of the approach espoused in the first instance decision of *R (Tinizaray) v Secretary of State for the Home Department* [2011] EWHC 1850. The theme common to each of these decisions is that the information gathering principle formulated in *Tinizaray* at para [24] was couched in excessively wide terms. Notably in *AM (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1189, Phil LJ, giving the decision of the court, did not question the High Court's assessment in *Tinizaray* that "… very full information … [further] detailed information" was necessary in order to adequately assess the best interests of the child concerned: see para [23](2).

[40] This was followed by *AA (Iran) v Upper Tribunal (Immigration and Asylum Chamber)* [2013] EWCA Civ 1523,m where a different constitution of the Court of Appeal endorsed one specific aspect of the *AM (Afghanistan)* disagreement with the formulation of principle in *Tinizaray*, namely that via the conduit of the statutory guidance there was a requirement that in asylum and immigration cases the Secretary of State's officials should observe section 1 of the Children Act. In a sentence, through this series of appellate court decisions *Tinizaray* was considered to have ventured too far and was confined accordingly.

[41] It is appropriate to interpose the observation at this stage that in those cases which were the subject of particularly detailed analysis by the Upper Tribunal in its recent decision in *Arturas v Secretary of State for the Home Department* [2021] UKUT 00237 (IAC) neither the tribunal nor the court concerned drew on *Tinizaray* in support of its analysis and conclusions. This applies particularly, though inexhaustively, to *JO (Nigeria)*, *MK (Sierra Leone)*, and *JG*.

[42] It is convenient at this juncture to set out the observations of the Upper Tribunal in respect of *SS*, in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 00223 (IAC) at paras [30]–[32]:

> "[30] We consider that from the perspective of section 55 of the 2009 Act, the main principle to be distilled from SS (Nigeria) is that in cases where the Tribunal is assessing the best interests of an affected child it should normally do so on the basis of the available evidence without more. The decision strongly discourages the Tribunal from conducting an inquisitorial exercise. But Laws LJ stated that the Tribunal must be "armed … with the facts required for a careful examination" of the affected child's best interests. This invites the following question: in cases where the Tribunal does not consider itself sufficiently equipped to conduct an adequate best interests assessment, what are its options? In particular, is one of the available alternatives a disposal order the effect whereof is that the Secretary of State must make a fresh, lawful decision, rectifying the failure to perform the section 55 duties in the first place? Furthermore, if an order of this kind is an available option, what is the test or criterion to be applied by the Tribunal in deciding whether to invoke it?
>
> 31. We consider that the unspoken premise in the SS (Nigeria) principle is in truth something of an assumption, namely, that in the typical case the Tribunal will be sufficiently armed and equipped to properly assess the child's best interests. This is expressed most strongly in the judgment of Mann LJ. It entails an expectation that, in the great majority of appeals, the Tribunal will have sufficient evidence to enable it to conduct this exercise properly. The most obvious source of this evidence, in the usual case, will be the material laid before the decision maker by the appellant. There is a very broad spectrum in this respect. At one end thereof the appellant, who may have no representation, composes some brief and possibly

confusing or incoherent sentences which are transmitted to the decision maker for consideration and form part of the evidence before the Tribunal. At the other end of the spectrum, the appellant's case is compiled by competent and experienced practitioners and consists of coherent and impressively composed representations, supplemented by materials such as birth certificates, school records, character testimonials and expert reports, whether medical or otherwise. Between these two extremes there may, potentially, be many different permutations. Furthermore, in some cases, the evidence will be clarified and amplified by well-planned and presented oral testimony. We suggest that the *SS (Nigeria)* principle must be considered in this light.

32. The *SS (Nigeria)* principle must also be balanced with what the Supreme Court has pronounced in its two landmark decisions and, indeed, what the Court of Appeal said in *SS* itself. As we have highlighted, one of the striking features of the decision in *SS* is the Court's acceptance of the argument that the child's best interests "must be properly gone into" and the Court or Tribunal must be "… armed … with the facts required for a careful examination of those interests …": see [34]. We consider that this chimes with what this Tribunal said more recently in *JO (Nigeria)* [2014] UKUT 00517 (IAC). First, it distilled from the opinion of Baroness Hale in *ZH (Tanzania)* [2011] UKSC 4 the principle that the decision maker must be properly informed (see [8]), highlighting the importance accorded to "the quality of the initial decision" at [36]. Second, this Tribunal acknowledged the stress in *Zoumbas v SSHD* [2013] 1 WLR 3690 on the importance of having "a clear idea of a child's circumstances" and the necessity for "a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment": per Lord Hodge, at [10]. Third, this Tribunal drew attention to the Tameside principle and the Padfield principle, at [10]. It stated:

> 'These principles also give sustenance to the proposition that the duties enshrined in section 55 cannot be properly performed by decision makers in an uninformed vacuum. Rather, the decision maker must be properly equipped by possession of a sufficiency of relevant information.'

Continuing, this Tribunal identified two guiding principles, each rooted in duty, at [11]:

> 'The first is that the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors. These principles have a simple logical attraction, since it is difficult to conceive how a decision maker could properly have regard to the need to safeguard and promote the welfare of the child or children concerned otherwise. Furthermore, they reflect long recognised standards of public law. Being adequately informed and conducting a scrupulous analysis are elementary pre-requisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.'

We consider that there is no disharmony between the decision of the Tribunal in *JO (Nigeria)* and the relevant decisions of the Supreme Court and the Court of Appeal. Furthermore, the contrary was not argued."

[43] In *MK* the Upper Tribunal continued its analysis at para [34]:

> "We consider that there are four significant aspects of section 55 of the 2009 Act which do not feature with any prominence in the jurisprudence of the Court of Appeal. The first is that the Secretary of State is the primary decision maker. The second is that the two duties enshrined in section 55 are imposed on the Secretary of State and no one else. The third is the guidance made under section 55(3) and the related statutory duty imposed on decision makers to have regard thereto: this has received at best scant attention, coupled with the fact that there is no meaningful way in which tribunals can give effect to certain aspects thereof. The fourth, as we have highlighted above, is that in the trilogy of decisions examined, the Court of Appeal has not decided the question of whether one of the options available to the Tribunal, where a breach of either or both of the duties imposed by section 55 is found, is to make an order the

> effect whereof is to require the Secretary of State to make fresh, lawful decision. Thus, the fetters imposed on this Tribunal by binding precedent are limited."

In short, the Upper Tribunal's assessment was that certain important considerations were not to be found in the ratio decidendi of the *SS (Nigeria)* decision. To this one may add that the views expressed in *SS* at paras [34]–[35] and [62] were not evidentially based. Nor did they entail any examination of the section 55(3) duty or the content of the statutory guidance made thereunder.

[44] The Upper Tribunal then turned to the question of whether in cases involving a tribunal finding of a breach by the Secretary of State of either, or both, of the section 55 duties the requisite consequential assessment of the best interests of the child or children involved should be made by the relevant tribunal or the Secretary of State: see *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 00223 (IAC paras [35]–[39]. It is appropriate to reproduce these passages in full:

> "We would highlight that where either the FtT or the Upper Tribunal finds that there has been a breach by the Secretary of State of either, or both, of the duties imposed by section 55 of the 2009 Act, a further assessment of and decision concerning the best interests of any affected child must be made. The author of such decision will be either the relevant Tribunal or the Secretary of State. There is no other candidate decision maker. We have raised the question of what test or criterion the Tribunal should apply in deciding which of the two candidate agencies should make the fresh decision. We turn to consider this discrete issue further.
>
> 36. In examining these issues, we consider it appropriate to reflect on the realities of the scenario of an appeal in which either the FtT or the Upper Tribunal decides that the impugned decision of the Secretary of State is unlawful by virtue of a failure to perform either or both of the duties imposed by section 55 of the 2009 Act. The following are typically recurring scenarios in practice:
>
> (a) In some cases (such as the present) the appellant is neither present nor represented. In this category of appeals, no further evidence bearing on the best interests of any affected child, nor any elucidation or amplification of extant relevant evidence, will be adduced by or on behalf of the appellant.

(b) In other cases, the Tribunal might be informed by the appellant or his representative that further relevant evidence can be adduced, giving rise to an application to adjourn the final determination of the appeal. In some instances of this kind, the source of such further evidence not infrequently includes an expert in the field of medicine or psychiatry or psychology or social care.

(c) A third, and different, scenario is one where it is evident to the experienced member/s of the Tribunal that the Secretary of State has failed to assemble relevant and available evidence in making the impugned decision. Such evidence may include a sentencing transcript, a criminal record, a pre-sentence report, a post-sentence prison or probation report or extant social services reports or records. As a general rule, evidence of this kind is in the custody of other public authorities and can be obtained by the Secretary of State on request.

(d) There is another realistic scenario, namely one wherein it may appear to the Tribunal that the impugned decision of the Secretary of State was undermined and impoverished by a failure to give effect to the requirement in Part 2 of the statutory guidance that, in appropriate cases, children should be consulted and their wishes and feelings should be taken into account "wherever practicable": see [19] above. This is most likely to occur in cases where it appears to the Tribunal that the information and representations put forward on behalf of the appellant invited further enquiries or elucidation or evidence gathering of this kind on the part of the Secretary of State.

These scenarios are not designed to be exhaustive. They are, rather, typical of the realities of immigration and asylum appeals in contemporary litigation. Furthermore, none of them is self-sealed: depending on the context of the individual case, some may partake of the ingredients of others.

37. In the scenarios outlined above, in the wake of a finding by either Tribunal that the Secretary of State has breached either of the duties enshrined in section 55 of the

2009 Act the possibility of the exercise of case management powers by either of the two Tribunals arises. In the case of the FtT, the procedural regime is contained in the Tribunal procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, in operation from 20 October 2014. Rule 4(2) establishes an umbrella power to give a direction "in relation to the conduct or disposal of proceedings at any time". Rule 4(3), without prejudice to the generality of the aforementioned power, empowers the FtT to, inter alia:

> '…… permit or require a party or another person to provide documents, information, evidence or submissions to the Tribunal or a party.'

There is also a power of adjournment or postponement. Equivalent powers are conferred on the Upper Tribunal by rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Furthermore, in both Tribunals, the overriding objective includes a specific provision that the parties must help the Tribunal to further such objective and co-operate with the Tribunal generally. We consider that the powers highlighted above could, in principle, be exercised by either Tribunal in the wake of a finding of a breach by the Secretary of State of either, or both, of the duties enshrined in section 55 of the 2009 Act. The context of the individual case would be determinative of the Tribunal's decision whether to have resort to any of these powers.

38. We consider that there can be no objection in principle to an order of the Tribunal the effect whereof is to require the Secretary of State, rather than the Tribunal, to perform the two duties imposed by section 55. There is no jurisdictional bar of which we are aware. It has long been recognised that there is a category of cases in which it is open to both tiers to allow the appeal on the basis that the Secretary of State's decision was not in accordance with the law without further order, thereby obliging the Secretary of State, as primary decision maker, to re-make the decision, giving effect to and educated and guided by such correction and guidance as may be contained in the Tribunal's determination. This is not contested on behalf of the Secretary of State. In this context, we draw attention to the decision of the Upper Tribunal in *T (Section 55 BCIA 2009 – Entry Clearance) (Jamaica)* [2011] UKUT 00483 (IAC). In [24] of this decision, one finds echoes of what was said

by Lloyd LJ in *DS (Afghanistan),* at [71] (supra). In that case, the vitiating factor in the impugned decision, as found by the FtT, was a failure to apply section 55 of the 2009 Act: see [14]. The Upper Tribunal allowed the appeal on the main ground that section 55 did not apply to the child in question, who was outside the United Kingdom. In an obiter passage, the President added, at [25]:

> 'Where an immigration decision is flawed for failure to have regard to an applicable policy outside the Immigration Rules, then immigration Judges of both Tribunals have no appellate function to review the merits of the exercise of discretion or a judgment that is required to be made. Except in most unusual circumstances, the most that can be done is for the appellate decision to record that the decision-making process is flawed and incomplete and so the application or decision in question remains outstanding and not yet properly determined (see AG and Others Kosovo [2007] UKAIT 00082).'

This is one illustration of an appeal context in which the effect of the Tribunal's order determining the appeal is to require the respondent to make a fresh, lawful decision. We are conscious that such an order was not made in T (Jamaica). However, the President observed, in [32]:

> 'The scheme of the Tribunals, Courts and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal.'

The order made was one of remittal to the FtT. Notably, the Upper Tribunal's directions in [34] – [38] directly required the respondent to undertake further specific enquiries and, echoing the terms of the statutory guidance and the observations of Baroness Hale in *ZH (Tanzania),* to interview the affected child.

39. Our survey of the relevant jurisprudence, governing principles and statutory framework yields the following conclusions:

> Where either the FtT or the Upper Tribunal decides that there has been a breach by the Secretary of State of either of the duties imposed by section 55 of the 2009 Act, both Tribunals are empowered, in their final determination of the appeal, to assess the best interests of any affected child and determine the appeal accordingly. This exercise will be appropriate in cases where the evidence is sufficient to enable the Tribunal to conduct a properly informed assessment of the child's best interests.
>
> However, there may be cases where the Tribunal forms the view that the assembled evidence is insufficient for this purpose. In such cases, two options arise. The first is to consider such further relevant evidence as the appellant can muster and/or to exercise case management powers in an attempt to augment the available evidence. The second is to determine the appeal in a manner which requires the Secretary of State to make a fresh decision. While eschewing prescription, we observe that this course may well be appropriate in cases where it appears to the appellate tribunal that a thorough best interests assessment may require interview of an affected child or children in accordance with Part 2 of the Secretary of State's statutory guidance.
>
> In choosing between the two options identified above, Judges will be guided by their assessment of the realities of the litigation in the particular case and the basis on which the Secretary of State has been found to have acted in breach of either or both of the section 55 duties. It will also be appropriate to take into account the desirability of finality and the undesirability of undue delay."

The passages reproduced above require no elaboration.

[45] The first detailed consideration by the Upper Tribunal of the section 55 duties preceded *MK*. It is found in *JO and Others (Section 55 Duty) Nigeria* [2014] UKUT 00517 (IAC)*. What that case decided is rehearsed in the headnote:

> "(1) The duty imposed by section 55 of the Borders Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors.

> (2) Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.
>
> (3) The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to Secretary of State and the ultimate letter of decision."

This is the digest of what is contained in paras [10]–[13] of the tribunal's judgment. The emphasis throughout these passages is on the necessity of the decision maker being properly informed and then, thus equipped, conducting a careful examination of all relevant information and factors in order to determine what the best interests of any affected child are. These requirements arise in every case and are prerequisites to conducting the balancing exercise under Article 8(2) ECHR which typically follows.

[46] Addressing the discrete issue of the statutory guidance under section 55(3), the Upper Tribunal, drawing attention to the principles in para 2.7 of "Every Child Matters" (see para [24] above) stated at para [12]:

> "I consider that these provisions, considered in tandem with the principles enunciated by the Supreme Court and the public law duties rehearsed above, envisage a process of deliberation, assessment and final decision of some depth. The antithesis, namely something cursory, casual or superficial, will plainly not be in accordance with the specific duty imposed by section 55(3) or the overarching duty to have regard to the need to safeguard and promote the welfare of any children involved in or affected by the relevant factual matrix. Ditto cases where the decision making process and its product entail little more than giving lip service to the guidance."

The judgment continues at para [13]:

> "The question of whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the Court or tribunal considering this question will frequently, as in the

> present case, be confined to the application or submission made to the Secretary of State and the ultimate letter of decision, as the recent decision of the Court of Appeal in *Baradaran v Secretary of State for the Home Department and* Another [2014] EWCA Civ 854 graphically illustrates. These materials will, therefore, call for scrupulous judicial examination in every case. In this context, I concur with the statement of Wyn Williams J in *R (TS) v SOSHD and Northamptonshire CC* [2010] EWHC 2614 (Admin), at [24]:
>
> > "…. The terms of the written decision must be such that it is clear that the substance of the duty was discharged."
>
> The question of whether the Secretary of State's decision is expressed in adequate and satisfactory terms will inevitably be contextual. Thus, generalisations are to be avoided."

[47] Following the decisions of the Upper Tribunal in *JO (Nigeria)* and *MK (Sierra Leone)* there were four decisions of the Northern Ireland High Court (noted *infra*). *JG v The Upper Tribunal, Immigration and Asylum Chamber* [2019] NICA 27 was the first case (and to date the only case) in which section 55 issues have been considered by the Northern Ireland Court of Appeal ("NICA"). There the impugned decision of the Secretary of State was to deport the appellant to his country of origin, China, rejecting his claim that this would infringe his Article 8 ECHR rights and those of his family, in contravention of section 6 of the Human Rights Act 1998. The two children involved were aged 11 and 2 years respectively. There was expert evidence of the older boy's deteriorating mental health. One of the grounds of appeal was based on the failure of the Secretary of State to have regard to the statutory guidance made under section 55(3). In its judgment the Court of Appeal observed at para [28]:

> "The present case is typical of its kind: it is abundantly clear that no attempt was made by SSHD's decision maker to comply with the section 55(3) duty. The contrary, sensibly, was not suggested."

The court's more detailed consideration of the twofold section 55 duties is at paras [19]–[25]. In this exercise consideration was given to four decisions of the Northern Ireland High Court: *Re TL's Application* [2017] NIQB 137, *Re ED's Application* [2018] NIQB 19, *Re OR's Application* [2018] NIQB 27 and *Re EFE's Application* [2018] NIQB 89.

[48] At para [20] the NICA noted that in *Re EFE* the High Court had observed at para [10] that the section 55(3) duty:

> "… may be viewed as the servant, or hand maiden, of subsection (1). It is plainly designed to ensure that the duty imposed by subsection (1) is properly discharged in those cases in which it arises."

The High Court added at para [12] that compliance with section 55(3):

> "… will have the further merit of increasing the prospects of exposing cases in which, for whatever reason, there has not been sufficient focus on concentration on the child in a case in which an application has been made to the Secretary of State, typically on behalf of two or more claimants, namely a parent or parents and a child."

The judgement in *JG* continues at para [21]:

> "In both ED and EFE the High Court gave consideration to the question of the consequences of a breach of Section 55(3). In ED at [20] the court discussed the possibility that in the abstract there could be a case where, giving effect to the principle that substance prevails over form in certain juridical contexts, the decision maker has inadvertently and by good fortune reached a decision which in substance discharges the statutory obligation to have regard to the statutory guidance. The court suggested that in considering this possibility it would be necessary to examine (a) all of the information concerning the affected child known to the decision maker (b) the impugned decision and (c) the statutory guidance.

This is followed by reproducing *EFE*, para [14]:

> "The groundwork thus completed, the court will then conduct an exercise of analysis and evaluative judgement. In my view, where an exercise of this kind yields the conclusion that the impugned decision might have been different if the statutory guidance had been consciously and conscientiously taken into account the argument will fail. This possibility, which must of course be a sustainable and realistic one, suffices for this purpose."

[49] Continuing, the judgment noted that his theme had also been considered in *EFE* at para [14]:

> "Turning to the content of the section 55(3) duty, for this purpose I do not have to stray beyond what is already

> rehearsed in paragraphs [17] and [18] of ED. In short, one finds in the statutory guidance what may be described as a minimum the possibility of certain steps being taken by the caseworker or decision maker. Each of these steps is designed to ensure that the decision maker properly discharges the inalienable duty under section 55(1)(a) of the 2009 Act of having regard to the need to safeguard and promote the welfare of the affected child or children concerned. In the abstract I find it very difficult indeed to conceive of a case in which a failure to perform the simple, uncomplicated exercise which is required as a matter of obligation by section 55(3) could in some way be excused or substituted. In principle, there are two possibilities:
>
> (i) a finding by the court that the duty has in substance been discharged; and
>
> (ii) a finding by the court that a failure to discharge the duty is of no material consequence."
>
> We are satisfied that the High Court was not purporting to suggest that these are the only possible tools of analysis, or tests, to be applied in cases where a breach of the section 55 (3) duty is demonstrated."

Certain reflections on how s 55(3) had been operating in practice since its inception followed, at para [22]:

> "It is timely to add the following. Section 55 of the 2009 Act has been in operation for approximately 10 years. It features frequently in both statutory appeals and judicial reviews. During its ten-year existence, in the course of which as President of UTIAC I spent four consecutive years dealing only with immigration and asylum appeals and judicial reviews, I have not experienced a single case in which the decision maker has purported to give effect to the Section 55(3) duty. Furthermore, this was the experience of multiple judicial colleagues. There appears to be a Home Office policy of simply ignoring this solemn statutory obligation. I have made orders in countless cases allowing either appeals or judicial reviews on the basis of SSHD's contravention of Section 55(3). None of these orders has been challenged on appeal."

[50] The NICA identified an unmistakable nexus between the separate duties in section 55(1) and (3), at para [23]:

> "The nexus between the separate duties contained in Section 55(1) and (3) is undeniable. In every case where a breach of the Section 55(3) duty occurs the protection afforded to the child by Section 55(1) is weakened and undermined. Section 55(3) exists to promote and ensure the due fulfilment of the substantive obligation under Section 55 (1). The former duty is to have regard to the need to safeguard and promote the welfare of potentially affected children in the United Kingdom. As the relevant decisions of the United Kingdom Supreme Court demonstrate, the welfare of a child and its best interests have been treated as synonymous: *ZH Tanzania* [2011] UKSC 4 at [26], [43] and [46] (per Baroness Hale and Lord Kerr) and *Zoumbas v Secretary of State for the Home Department* [2013] UKSC at [10] (per Lord Hodge)."

The mischiefs associated with every breach of the section 55(3) duty were described by the court in the following terms, at paras [24]–[25]:

> "[24] Every breach of the Section 55(3) duty exposes the child concerned to the real risk that his or her best interests will simply be disregarded. Absent a conscious and conscientious assessment of the child's best interests by the decision maker, those interests are likely to be ignored in the decision-making process. The scales will not have been properly prepared. The child's entitlement is to have its best interests balanced with the other facts and factors in play, in particular the public interest engaged by the immigration function being performed: most frequently the public interest in maintaining firm immigration control, stemming from the ancient right of states to control their borders, and the public interest in deporting the certain foreign offenders. Every member of this vulnerable societal cohort is exposed to the risk of being denied this entitlement where the section 55(3) duty is breached. This is not diluted by any counter-balance or remedial mechanism.
>
> [25] Furthermore, every breach of the Section 55(3) duty defies the will of Parliament. Such breaches are exposed only where resort is had to the court or tribunal. It is well-known that legal challenges do <u>not</u> occur in large numbers of cases for a variety of reasons - mostly human, financial and prosaic in nature. The result is that large

> numbers of children are being denied the protection which Parliament deemed necessary for them."

[51] At paras [31]–[33] the NICA quoted with approval the view of the High Court in *EFE* that in a case of a demonstrated breach of section 55(3) duty two particular questions arise, namely (a) whether the duty had been in substance discharged and (b) whether the failure to discharge the duty was of any material consequence. While doubting whether the first of these possibilities would have any practical traction NICA nonetheless approved both. While cautioning – at para [33] – that there is "no single, universal test to be applied by the court or tribunal where a breach of the section 55(3) duty is demonstrated", the court added at para [33]:

> "Fundamentally, the enquiry for the court or tribunal in every case will be whether the decision maker (i) conducted an assessment of the child's best interests and next, having done so, (ii) had regard to the need to safeguard and promote those interests. This will be the central focus of judicial attention in every case involving a possible breach of the section 55(3) duty. It is appropriate to add that where a decision maker does comply with the section 55(3) duty, this will betoken no guarantee of the court or tribunal concluding that the section 55(1) duty was discharged."

[52] The overarching conclusion in *JG* was that a material breach of section 55(3) duty, giving rise to a breach of the Article 8 ECHR rights of the appellant and the other family members concerned, had occurred. The court granted leave to appeal and allowed the appeal accordingly. The final issue addressed was that of the order to be made in consequence. This gave rise to the following analysis, at para [37]:

> "The court has given consideration to what the consequence of its overarching conclusion should be. This issue was considered by the Upper Tribunal *in MK (Sierra Leone)* (ante) at [26]–[39]. The approach of the Upper Tribunal in these passages was considered by the Court of Appeal subsequently, without disapproval: see especially R (on the application of *MA (Pakistan) & Others) v Upper Tribunal (Immigration and Asylum Chamber) & Another* [2016] ECWA Civ 705 at [59] (per Elias LJ). The feasibility of the court or tribunal concerned, in the wake of a demonstrated breach of the section 55(3) duty, actually pursuing any of the enquiries or steps specified in SSHD's statutory guidance appears to this court to be largely theoretical. Steps could of course be taken to ensure that the affected child's/children's views are considered via separate representation, reception of new evidence and a

> further hearing. But this course would inevitably generate much litigation delay and increased expense. Furthermore, why this burden should fall on the court or tribunal rather than the primary decision maker, SSHD, is unclear. It is far from surprising that these considerations did not feature in the earlier English Court of Appeal decisions preceding, and considered in, *MA (Pakistan)* – and indeed in *MA (Pakistan)* itself -given that the section 55(3) duty was not in play."

This was followed by, at para [38]:

> "Furthermore, every breach of the section 55(3) duty is a failure on the part of the primary decision maker, SSHD. The proposition that SSHD, rather than the court or tribunal, should deal with the consequences of a judicially diagnosed breach of the section 55(3) duty is harmonious with section 55 itself and consistent with the distinctive roles of the executive and the judiciary generally. In addition, this court is obliged to operate within the constraints of the overriding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature. This involves inter alia distributing its finite judicial resources proportionately among all the cases in its system. The UT and the FtT are subject to the same duty."

[53] The NICA was obliged to confront the reality that under section 14 of the Tribunals, Courts and Enforcement Act 2007 remittal to the Secretary of State was not an option. This was considered unsatisfactory given that the Secretary of State is the primary decision maker and the agency best equipped to have regard to the section 55 guidance and, furthermore, had not yet performed its section 55(3) duty. Limited by the operative statutory constraints, the court determined that the appropriate course was to remit the case to a different constitution of the FtT.

The Decision in Arturas

[54] Our review of the section 55 case law brings us to the most recent development, namely the decision of the Upper Tribunal ("UT") in *Arturas*. The comprehensive judgement of the President, Lane J, makes a notable contribution to the jurisprudence in this field. It reviews certain of the decided cases set out earlier in this judgment, paying particularly close attention to *JG*. In para [2] above we have drawn attention to certain consequences of the decision in *Arturas*. We consider that some aspects of *Arturas* require to be carefully examined.

[55] In *Arturas* the components of the litigation framework were a decision by the Secretary of State to deport the appellant from the United Kingdom, an unsuccessful

appeal to the FtT, ensuing refusals of permission to appeal by both the FtT and the UT and a successful application to the Northern Ireland High Court for judicial review of the last-mentioned decision. As appears from para [12] of the UT's decision, leave to apply for judicial review was confined to the best interests/section 55 grounds. The first striking feature of the decision of the UT is that, as para [129] makes clear, the tribunal considered itself bound by *JG* to allow the appeal as it found itself unable to distinguish *JG* on the facts. It did not explain why it felt itself unable to do so. Rather, the elaboration which follows is couched in general terms:

> "The subject matter in **JG** was, as we have sought to demonstrate, far from being the sort of unusual or exceptional case envisaged by the Court of Appeal in England and Wales. Where this appeal governed by the law of England and Wales or the law of Scotland, it would be clear that the grounds of appeal could not succeed."

[56] So what was the basis on which the appeal in *JG* succeeded? In that case, as recorded at paras [6]–[7], the evidence before the FtT was the report of an educational psychologist addressing the mental health of the older of the appellant's two children. At para [26] the court noted the incontrovertible fact that the Secretary of State had failed to discharge the duty imposed by section 55(3). At paras [3] and [29] the court drew attention to substantial gaps in the documentary evidence presented by the Secretary of State. The court concluded that there had been a failure to conduct a satisfactory assessment of the older child's best interests. The terms in which it thus concluded, *JG* [2019] NICA 27, para [35]:

> **"**Evaluating the evidence as a whole, and mindful of the significant lacunae highlighted above, it is impossible to be confident that a satisfactory assessment of the older child's best interests was made by SSHD's decision maker. The section 55(3) duty to have regard to the statutory guidance raises the possibility of a range of further enquiries and actions outlined in such guidance including taking steps to ensure that the child's views are ascertained and fully taken into account. This court cannot discount the possibility that consideration of the statutory guidance would have prompted certain actions on the part of the decision maker giving rise to a fuller and more thorough assessment of the older child's best interests, as a prerequisite to discharging the related statutory obligation to have regard to the need to safeguard and promote those interests. Realistically, this could have resulted in a different outcome for the Applicant and, in consequence the child concerned. Nor can this court be satisfied that the psychologist's report, belatedly commissioned, is comprehensive in its assessment of the best interests of the

> child concerned. In short, the stakes are at a high level for this pre – teenage boy. The undisputed breach of the section 55(3) duty in this case cannot be dismissed as merely technical, trivial or inconsequential. A material breach of this duty has been demonstrated to our satisfaction. "

Concluding further that a breach of Article 8 ECHR had thereby been established the court made the following order: leave to appeal was granted; the substantive appeal was allowed; the decision of the UT was set aside; and the case was remitted to the FtT for *de novo* consideration and determination.

[57] As the preceding resume demonstrates the decision of this court in *JG* was incontestably fact sensitive. The factual matrix in *Arturas* is rehearsed in paras [4]-[9]. It does not resemble, even remotely, its counterpart in *JG*. It follows that the UT's assessment that the two cases could not be distinguished on their facts is, with respect, unsustainable.

[58] The analysis does not end at this point, however. This is so because as the remainder of para [129], considered in conjunction with earlier passages, indicates one aspect of the reasoning of the UT is its view that if the appeal in *JG* had been brought in the jurisdiction of England and Wales or that of Scotland it would have failed. The terminology used in this passage is that of "the law of England and Wales or the law of Scotland", repeated in para [132]. The UT further appears to suggest that an appeal of this kind can succeed only if it is "… the sort of unusual or exceptional case envisaged by the Court of Appeal in England and Wales."

[59] **Scotland**. We pause to address one discrete issue. It appears to this court that the judgement of the UT establishes no basis for incorporating references to the law of Scotland. The only mention of Scotland in the judgment is found in its consideration of *ZG v Secretary of State for the Home Department* [2021] CSIH16, a decision of the Inner House, at paras 90]–[97]. *ZG* is a paradigm illustration of a carefully reasoned appellate court decision which, ultimately, turned on the question of whether the main issue – in that case, the assessment of the best interests of the child concerned – had been lawfully determined by the first instance tribunal. This intensely fact sensitive question was answered in the affirmative by the Inner House for the reasons summarised by Lord Doherty at para [38]. At para [37] the House had the following to say of the outcome of *JG*:

> "Crucially [the NICA] concluded that the evidence before the FtT has not provided it with a proper basis to identify the best interests of the elder of the applicant's two children and to treat those interests as a primary consideration when it determined whether the interference with this child's Article 8 right to family life was justified. A psychology report which the applicant had

> submitted to the FtT was dismissed by the court as not having addressed the material issues. The FtT had not had the benefit of materially different information from the information which had been before the respondent."

Thus, the Inner House reasoned, *JG* was an illustration of the second of the three scenarios identified in *MK (Sierra Leone)* [see para [40] *supra*], namely –

> "[a case] where the Tribunal forms the view that the evidence is insufficient (… to conduct a properly informed assessment of the child's best interests … thus triggering the first of two options, namely) …. to consider such further relevant evidence as the appellant can muster and/or to exercise case management powers in an attempt to augment the available evidence."

[60] Significantly, the Inner House in *ZG* did not identify anything untoward in the reasoning of the NICA in *JG*. Its decision contains no hint that *JG* (or any of the preceding first instance Northern Ireland cases) is in some way out of kilter with the leading cases in either of the other two jurisdictions. Furthermore, it is noteworthy that this in a context where the Inner House had considered the leading UK jurisprudence: see paras [20]–[25] and [27].

[61] In advance of the hearing the court formulated certain questions to be addressed by the parties in their written and oral argument. Both parties responded positively. One of the questions posed by the court was whether it is possible to identify in the decision in *Arturas* the foundation of the Upper Tribunal's statement in *Arturas* that Northern Irish law in the subject matter under scrutiny differs from that in England and Wales and Scotland. The relevant submission on behalf of the Secretary of State did not support this aspect of the *Arturas* decision. This submission highlighted that in *ZG* the Inner House had distinguished *JG* on its facts. The submission further drew attention to the observation of the Inner House that in immigration appeals the jurisdiction of the FtT is wider than that exercised in judicial review challenges. The appellant's position was in substance the same.

[62] We return to the phraseology of "*the sort of unusual or exceptional case envisaged by the Court of Appeal in England and Wales*" in para [129] of the UT's decision. We interpret this as referring in particular to *SS (Nigeria)* and *AJ (India)*, which we have summarised above. These decisions were the subject of detailed consideration by the UT (differently constituted) in *MK (Sierra Leone)*, also summarised above (at paras [42 – [44]): see paras [28]–[34]. In *JG* this court referred to these passages in its consideration of the appropriate order to be made: see para [37]. As the relevant passages in *MK (Sierra Leone)* make abundantly clear, one key element of the debate was that having regard to the statutory arrangements then prevailing one of the options available to the relevant tribunal (whether the FtT or the UT) was, in the event of finding a breach of either of the section 55 duties an order the effect whereof would

be to require the Secretary of State to make a fresh decision, undertaking the necessary assessment, could be made. However, with effect from April 2015 at latest this, by virtue of statutory reform, was no longer possible. This was explicitly recognised by this court in *JG*: see para [39]. While, for the reasons given, this court lamented that this option was no longer available – see paras [37]–[39] – its order faithfully reflected this reality.

[63] This is, self-evidently, an important feature of the context in which *SS (Nigeria)* and *AJ (India)* were decided. At that time effective remittal by either the FtT or the UT to the Secretary of State in the wake of a tribunal finding that either of the duties enshrined in section 55 had been breached was an available option, via the "otherwise not in accordance with the law" statutory ground of appeal. In both of those cases the English Court of Appeal expressed the expectation that this outcome would generally not be usual because it would normally be possible for the FtT, exercising its wider jurisdiction, to determine the relevant issues. This ground of appeal, however, was extinguished soon thereafter. This occurred as a result of the radical overhaul of sections 82 and 84 of the Immigration and Asylum Act 2002 (the "*2002 Act*") effected by the Immigration Act 2014 (the "2014 Act"): see section 15. These fundamental changes took effect on 20 October 2014: see the Immigration Act 2014 (Commencement Number 3, Transitional and Saving Provisions) Order 2014. From this date the statutory landscape within which the decisions in *SS (Nigeria)* and *AJ (India)* had been made altered radically. The decision in *Arturas* does not engage with any of the foregoing matters.

[64] In *SS (Nigeria)* and *AJ (India)* one finds strong exhortations from the English Court of Appeal that the relevant tribunal should undertake the task of making the fresh decision required in the wake of a court or tribunal finding that either of the section 55 duties has been breached. In *JG* this court, having accurately identified the statutory options at its disposal, in para [39], ordered remittal to the FtT. At para [41] it explained that remittal to the FtT rather than the UT was preferable, given the distinctive functions of these two tribunals. This court did not opt for the third of the alternatives available, namely remaking the impugned tribunal decision itself. This was of course a statutory option. However, the first instance tribunal – here the FtT – which has the fact-finding responsibility has available to it a range of procedural powers and arrangements which are not mirrored in NICA. See The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (Part 2 in particular) as amended and the related Practice Directions.

[65] This indeed applies to other first instance courts and tribunals. It is the well-established practice of NICA to make remittal orders of this kind in a broad range of contexts, including all manner of appeals from tribunals, appeals from magistrates' courts and appeals from the several divisions of the High Court (in the exercise of its power under section 38(1)(b) of the Judicature (NI) Act 1978). The course taken in *JG* was entirely orthodox.

[66] As appears from the foregoing, insofar as the UT was purporting to suggest in para [129] of *Arturas* that by virtue of *SS (Nigeria)* and *AJ (India)* the remittal order made by this court in *JG* should be confined to an "unusual or exceptional case" we beg to differ. This order was fully harmonious with the role of the FtT as decision maker (as well as adjudicator) and entirely in alignment with the *SS* and *AJ* exhortations. Furthermore, it entailed an exercise of judicial discretion no aspect whereof is challenged in *Arturas*. Additionally, the UT did not suggest that it considered itself in some way bound by the *ratio decidendi* of *JG* to decide the appeal in *Arturas* in the same way. Rather, the constraint which is identified related solely to the *facts* of *JG*. Given that there was no legal rule or principle in the *JG* decision constraining the choices available to the UT, we consider that this was not a sustainable basis juridically for the constraint expressed.

[67] Given the element of judicial discretion in play in the disposal order for which the Court of Appeal opted in *JG* it would, in the abstract, be surprising if there were any sustainable grounds for challenging this. This feature of the order in *JG* is not considered in *Arturas*. Nor is any consideration given to the basis upon which this court exercised its discretion to remit the case to the FtT. In *JG* this court specifically identified what it considered to be the unsatisfactory features of the evidence bearing on the best interests of the two affected children which had been before the FtT at the initial appellate stage: see. The Inner House in *ZG* had no difficulty in identifying this aspect of *JG*. Progressing from the particular to the general, this court then identified a host of reasons why the section 55(3) duty must be taken seriously and performed efficaciously and conscientiously: see paras [19]–[25], [33] and [37]. The decision in *Arturas* does not take issue with any of these passages.

[68] In *Arturas*, at para [110], the decision in *JG* is criticised (in terms) on the ground that it overlooked *AJ (India)*. This is not tenable. The cases considered by this court in *JG* included *MK (Sierra Leone)* in which there was extensive consideration of the leading English Court of Appeal cases. Furthermore, having identified at paras [3] and [29] significant evidential deficits in what was before the FtT, and having reached the uncontentious conclusion that a breach of section 55(3) had been established, this court gave consideration to the consequences thereof, at para [29]ff. In its reasoning and by its order this court explicitly recognised that the options available to it excluded any order requiring the Secretary of State to remake the impugned decision. By its order the case remained in the tribunal system. Though given the opportunity to do so, the Secretary of State has not argued in the present appeal that the *JG* order was not harmonious with the *SS (Nigeria)* and *AJ (India)* exhortations.

[69] In *Arturas*, the decision in *JG* is criticised on the further ground of its description of the Secretary of State as "primary decision maker." This invites a twofold riposte. First, this description is correct. Second, as the decision in *JG* considered as a whole makes clear, this court was at pains to stress the opportunities lost in every case where the Secretary of State breaches its duties under section 5(3) by virtue of the practical difficulties attendant upon the FtT's ability to remedy such breaches.

[70] In this context, we should mention that the parties drew to the attention of this court two FtT case management orders made consequential upon appellate remittal orders based on breaches of section 55(3). In one of these cases (*Arturas*, by coincidence) the FtT directed the provision of a fresh bundle of evidence by the appellant to include updated witness statements and any "supporting documentation", to be followed by the Secretary of State's response. In another case, the FtT made an order adjourning the hearing to facilitate the provision by the Secretary of State of "a supplementary decision letter dealing with the section 55 issue" in light of the *JG* decision, to be followed by the appellant's response. As the submissions of both parties to this court made clear, it is commonplace for the FtT to consider additional evidence not previously considered by the Secretary of State.

[71] It is appropriate to add that in every case where an appellate court is disposed to allow an appeal against the decision of a tribunal or court and determines that remittal is appropriate this has the important consequence of ensuring that the appeal rights at the disposal of the litigant concerned are revived. The only court to which an appeal lies from decisions of the NICA is the UK Supreme Court and the scope for appeals of this kind is extremely limited.

[72] There are certain further features of the decision in *Arturas* which we would highlight:

(i) Breach of the section 55(3) duty does not feature in <u>any</u> of the Supreme Court or English Court of Appeal decisions considered above and in *Arturas*.

(ii) One of the clear themes of *Arturas* – reflected in paras [15]–[16], [30]–[31] and [98]ff – is that the section 55(3) statutory guidance is of intrinsically limited effect and scope. It is suggested, in particular, that there is a sharp difference between the duties owed by UKBA to children and those owed by other statutory agencies. While this partially correct, we consider that the statutory guidance is at some pains to highlight those respects in which these duties may be considered comparable and complementary whilst simultaneously emphasising – repeatedly – the themes of interaction, good communication and information gathering. In our view the terms of the guidance are incontestable in these respects.

(iii) The statutory guidance recognises, in substance, that the realities of an individual case may be altogether different from the "ordinary position" identified in para [101], namely that the child's best interests lie in remaining with its parents.

(iv) The elaborate arrangements in the statutory guidance for the training, supervision and accountability of UKBA officials in the sphere of the section 55(1) duty, by themselves, confound the view that the duties owed by UKBA officials to children are as limited as *Arturas* suggests.

(v) The reasoning of the UT neither engages with, nor differs from, the heavy emphasis in *JO (Nigeria)* and *MK (Sierra Leone)* on the need for decision makers to be properly informed before assessing a child's best interests. The "primary responsibility" on parents and carers mentioned in para 2.7 of the statutory guidance is to be distinguished from "exclusive" responsibility. This does not dilute in any way the uncompromising and inalienable statutory duty imposed on UKBA officials by section 55(1).

(vi) "Every Child Matters (etc)" is an instrument of guidance. It does not purport to be exhaustive or all encompassing and does not by its terms exclude the possibility that, in some fact sensitive context, a suitable report, expert or otherwise, should be commissioned by UKBA.

[73] Furthermore, the decision of the UT *Arturas* does not grapple with the juridical reality that section 55(3) imposes on UKBA officials in all cases to which it applies a statutory duty. We would observe that statutory duties are solemn in nature and compliance with them is not optional. One troubling feature of *Arturas* is that it effectively absolves UKBA of its solemn legal obligations. *Arturas* does not challenge the suggestion in *JG* that there is no evidence of UKBA ever having discharged the section 55(3) duty. Nor does *Arturas* challenge the reasoning in *JG* (and earlier decisions) that the agency best equipped to discharge the section 55(3) duty is UKBA, while in contrast the tools available to the relevant tribunal are substantially more limited. No court or tribunal can lay claim to the training, expertise, communications arrangements and information gathering procedures detailed extensively in the statutory guidance. The *JG* description of the Secretary of State being the primary decision maker is to be considered in this light.

[74] Moreover, *Arturas* does not engage with any of the following propositions in *JG* at para [23]ff:

(i) In every case where a breach of the section 55(3) duty occurs the protection afforded to the child by section 55(1) is weakened and undermined.

(ii) Section 55(3) exists to promote and ensure the due fulfilment of the substantive obligation under section 55(1).

(iii) Every breach of the section 55 duty exposes the child concerned to the real risk that his or her best interests will simply be disregarded or inadequately assessed.

(iv) Every breach of the section 55(3) duty generates the risk that the notional scales will not have been properly prepared, with the result that the balancing of the child's best interests with the other factors in play will be inadequate.

(v) Every breach of the section 55(3) duty defies the will of Parliament. Such breaches are exposed only where resort is had to the court or tribunal. It is well

known that legal challenges do not occur in large numbers of cases. The result is that large numbers of children are being denied the protection which parliament has deemed necessary for them.

[75] For the reasons elaborated above this court does not agree with the UT's assessment of the content of the statutory guidance. Independently, this court expresses concern that in *Arturas* there is disproportionate emphasis on the "south" side of the notional bright line, namely the content of the guidance at the expense of its "north" side, namely the solemn and unqualified statutory obligation of UKBA officials to have regard to the guidance in every case where this is required. The decision in *Arturas* does nothing to encourage compliance by the Secretary of State and UKBA with their statutory duty to children. It is, rather, to the opposite effect. The persistent failure of UKBA to discharge this duty has been exposed judicially over a period of years and evidently continues unabated. This is a self-evidently disturbing state of affairs.

[76] As noted in para [2] above, in *Arturas* the Upper Tribunal decided that in the construction and application of section 55(3) of the 2009 Act there are material differences between this jurisdiction and those of England and Wales and Scotland. This, obviously, is a conclusion of some moment. It has prompted this court to examine *Arturas* in detail. Furthermore, this court has given careful consideration to whether, within the boundaries of the doctrine of precedent, it should modify its decision in *JG* or decline to follow it (see *Re Rice's Application* [1998] NI 265 and the exegesis of the doctrine of precedent contained in the judgment of Carswell LCJ at 270 – 271, together with the summary in *Re Stepanoviciene [*2019] NIQB 90 at paras [22]-[25]). Having conducted this exercise we are satisfied that *JG* requires no modification.

The Art 8 ECHR Procedural Dimension

[77] By virtue of the Convention jurisprudence Article 8 ECHR encompasses a procedural dimension separate from, though complementary to, its substantive content. This arises in an implied way through the channel of procedural obligations. The nature of this right was summarised in *R (AM A Child)* [2017] UKUT 262 (IAC) at paras [58]–[60]. It reposes in a series of decisions of the ECtHR, some of which are noted in para [58] of *AM*. This discrete procedural right is formulated by the Strasbourg Court in, for example, *Tanda-Muzinj v France* [Application No 2260/10] at para [68]:

> "The court further reiterates, by way of comparison, that in the event of deportation, aliens benefit from the specific guarantees provided for in Article 1 of Protocol No. 7. Whilst such guarantees with regard to the family life of aliens are not regulated by the Convention under Article 8, which contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and

> such as to afford due respect to the interests safeguarded by Article 8 (see, in general, McMichael v the United Kingdom, 24 February 1995, § 87, Series A no. 307-B, and, in particular, Cılız v the Netherlands, no. 29192/95, § 66, ECHR 2000-VIII, and Saleck Bardiv Spain, no. 66167/09, § 30, 24 May 2011). In this area, the quality of the decision-making process depends on the speed with which the State takes action (see Ciliz, cited above, § 71; Mubilanzila Mayeka and Kaniki Mitunga v Belgium, no. 13178/03, § 82, ECHR 2006-XI; Saleck Bardi, cited above, § 65; and Nunez v Norway, no. 55597/09, § 84, 28 June 2011)."

The context in which this decision (in common with others) was made was that of deportation. In *Lazoriva v Ukraine* [2018] ECHR 6878/14 the court stated at para [63]:

> "Whilst Article 8 contains no explicit procedural requirements, the applicant must be involved in the decision-making process, seen as a whole, to a degree sufficient to provide him or her with the requisite protection of his interests, as safeguarded by that Article …."

[78] In *AM* the Upper Tribunal offered the following test, at para [60]:

> "The test to be distilled from the Strasbourg jurisprudence is whether those affected by the decision under scrutiny have been involved in the decision-making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests. This procedural aspect of Article 8 is designed to ensure the effective protection of a person's substantive Article 8 rights. As the decision of the Court of Appeal in *Gudanaviciene* makes clear there is a close association with the protections afforded by Article 6 ECHR when issues concerning the procedural embrace of Article 8 arise: see the judgment of Lord Dyson MR at [70] – [71]. "

As this passage indicates, the association between a person's procedural rights under Article 8 and the familiar fair hearing rights protected by Article 6 ECHR can provide a useful tool in determining whether rights of the former kind have been violated. This is clear from decisions such as *R (Gudanaviciene) v Lord Chancellor* [2015] 1 WLR 2247 at paras [70]–[71].

[79] We consider that every breach by the Secretary of State of their statutory duty under s 55(3) is *prima facie* in contravention of each affected person's Art 8 right to a procedurally proper decision-making process in the determination of their

substantive Art 8 right to respect to respect for family and private life. As appears from what follows, the question for the UT (in statutory appeals) and the High Court (in judicial review cases) will be whether such breach was satisfactorily remedied by the FtT.

The Consequences of the Section 55(3) Violation

[80] The failure by the Secretary of State's officials to have regard to the statutory guidance in breach of their duty under section 55(3) of the 2009 Act is both uncontested and incontestable. It is necessary to address the consequences of this breach of statutory duty.

[81] We take as our starting point the two main statutory provisions. These are section 14 of the 2007 Act and section 55 of the 2009 Act. Both are silent on what the consequences of a failure of this kind should be. Furthermore, there is no judicial decision binding on this court mandating any particular course.

[82] As appears from the above, this issue has been considered by this court, the English Court of Appeal, the Scottish Court of Session and the Upper Tribunal. In *JG* this issue received extensive consideration, at paras [29]–[38]. In these passages this court considered that in a case of a demonstrated breach of the section 55(3) duty the two main questions which would typically arise were (a) whether the duty had been in substance discharged and (b) whether the failure to discharge the duty was of any material consequence. As noted in para [47] above, while doubting whether the first of these possibilities would have any practical traction, this court nonetheless approved both. In the present case, Mr McGleenan on behalf of the Secretary of State advocated espousal of the first option.

[83] For this appellant and her two children the UK chapter of their story began in September 2018. Their subsequent journey through the relevant administrative and legal branches of the UK has occupied a period of some 4½ years. The appellant's older child, her son, is now aged 20. However, section 55 of the 2009 Act continues to apply fully to her daughter, who is now aged 16. It is the daughter who has lain at the heart of the appellant's case since asylum was first claimed.

[84] At this point it is necessary to bear in mind both the date of the Secretary of State's impugned decision (April 2019) and the ingredients of the best interests assessment namely the brevity of the daughter's residence in the UK (some six months) and her related lack of integration in this country. This best interests assessment, which lacked the added content that a proper discharge of the section 55(3) duty could have provided, is now approaching its fourth anniversary. This is a potent consideration *per se*. Insofar as any fortification is required this is found in the submissions of Mr Mulholland KC and Mr Peters, of counsel, that the best interests passages in the impugned decision of the Secretary of State are couched in perfunctory and formulaic terms.

[85] In a context where the fourth anniversary of the impugned decision of the Secretary of State is approaching and three years have elapsed since the decision of the FtT, there is no evidence before this court about how the life circumstances of the appellant's 16 year old daughter have evolved during these important teenage years or of anything else potentially having a bearing on the assessment of her best interests. Those interests are not necessarily confined to matters touching upon her right to respect for private and family life under Article 8 ECHR. Furthermore, we remind ourselves that this teenage girl is the person in respect of whom the prohibition against torture or inhuman or degrading treatment under Article 3 ECHR falls to be considered.

[86] This court further takes into account the vintage of the so-called "country evidence" relating to conditions in Nigeria in relation to the FGM issue. It is now of almost four years vintage and its lack of currency is an illustration of one of the issues which the FtT will be well equipped to investigate and evaluate. The same observation applies to the discrete issue of the reasonableness and feasibility of internal relocation in Nigeria.

[87] To the foregoing we would add the following. Mr McGleenan submitted, correctly, that in any case where issues under either section 55(1) or section 55(3) of the 2009 Act have not been ventilated at any relevant stage, administrative or judicial, this will be a matter of some significance. Its significance will turn largely on whether the issues later raised – whether for the first time or in different or fuller terms – are in the opinion of the court or tribunal concerned of any merit or substance. However, any failures of this kind on the part of an appellant will not be automatically fatal.

[88] This court considers it compatible with the judicial oath of office and the judicial duty to act in accordance with the rule of law that judges should be alert to possible section 55(1) and section 55(3) issues in every case where children form part of the litigation equation. Recourse to the plea that such issues were not expressly raised in grounds of appeal finds no justification in either section 55 itself or section 14 of the 2007 Act. The more so when one recalls that a breach of neither of these statutory provisions operates as either conferring a right of appeal to the FtT or as a ground for allowing an appeal. Furthermore, since the twin section 55 duties belong to the realm of one of the protected Convention rights, namely Article 8 ECHR, tribunals and courts must be alert to their inalienable duty under section 6 of the Human Rights Act 1998.

[89] There is a further consideration of some moment. It has frequently been stated that judicial decision making in the fields of immigration and asylum is undertaken by expert tribunals. The Supreme Court has explicitly recognised this. See for example *R (on the application of MM (Lebanon)) (appellant) v Secretary of State for the Home Department (Respondent)* [2017] UKHL 10, at para [107] and *R (on the application of Cart) (appellant) v The Upper Tribunal (Respondent)* [2011] UKISC 28 at para [13]. The Northern Ireland Court of Appeal does not share this expertise. This court is also alert to the case management powers which the FtT can exercise: see the illustrations

provided in para [67] above, coupled with (for example) rules 2 – 5 of the 2014 Rules. It was explicitly acknowledged on behalf of the Secretary of State that this court did not err in the order which it made in *JG*, whereby the case was remitted to the FtT.

[90] We accept that, in principle, a breach of the s 55(3) duty by the Secretary of State's/UKBA's agents can be remedied (however unsatisfactorily) by either the FtT or the UT. This is the irresistible effect of the post – 2014 statutory arrangements, as *JG* recognised. However, in the instant case neither the FtT nor the Upper Tribunal engaged with the Secretary of State's breach of the section 55(3) duty. Thus, the breach remains unremedied. The potency of this indelible juridical reality is unmistakeable. Furthermore, this court has no basis for concluding that this breach of the statutory duty had no material impact on such best interests assessment as was conducted by the two tribunals.

[91] The analysis of Lord Bingham of Cornhill in *Razgar v SSHD* [2004] UKHL 27, at para [5], must be considered in this context:

> "In the ordinary course of review, the reviewer assesses the decision under challenge on the materials available to the decision-maker at the time when the decision was made. In *Sandralingham v Secretary of State for the Home Department* [1996] Imm AR 97, 112, however, the Court of Appeal held that in asylum cases the appellate structure under the Asylum and Immigration Appeals Act 1993 was to be regarded as an extension of the decision-making process, with the result that appellate authorities were not restricted to consideration of facts in existence at the time of the original decision. This decision was given statutory effect in section 77(3) of the 1999 Act … By section 85(4) of the Nationality, Immigration and Asylum Act 2002 … it is provided that:
>
> > 'On an appeal under section 82(1) [immigration decisions] or 83(2) [asylum claims] against a decision an adjudicator may consider evidence about any matter which he thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.'"

[92] Furthermore, the following passages in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, paras [14]–[16], repay careful reading:

"**The task of the appellate immigration authority**

Much argument was directed on the hearing of these appeals, and much authority cited, on the appellate immigration authority's proper approach to its task, due deference, discretionary areas of judgment, the margin of appreciation, democratic accountability, relative institutional competence, a distinction drawn by the Court of Appeal between decisions based on policy and decisions not so based, and so on. We think, with respect, that there has been a tendency, both in the arguments addressed to the courts and in the judgments of the courts, to complicate and mystify what is not, in principle, a hard task to define, however difficult the task is, in practice, to perform. In describing it, we continue to assume that the applicant does not qualify for leave to enter or remain under the Rules, and that reliance is placed on the family life component of article 8.

The first task of the appellate immigration authority is to establish the relevant facts. These may well have changed since the original decision was made. In any event, particularly where the applicant has not been interviewed, the authority will be much better placed to investigate the facts, test the evidence, assess the sincerity of the applicant's evidence and the genuineness of his or her concerns and evaluate the nature and strength of the family bond in the particular case. It is important that the facts are explored, and summarised in the decision, with care, since they will always be important and often decisive. …

The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the

> law; and so on. In some cases much more particular reasons will be relied on to justify refusal, as in *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2002] INLR 55 where attention was paid to the Secretary of State's judgment that deportation was a valuable deterrent to actual or prospective drug traffickers, or *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606, [2002] QB 1391, an article 10 case, in which note was taken of the Home Secretary's judgment that the applicant posed a threat to community relations between Muslims and Jews and a potential threat to public order for that reason. The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed. It is to be noted that both *Samaroo* and *Farrakhan* (cases on which the Secretary of State seeks to place especial reliance as examples of the court attaching very considerable weight to decisions of his taken in an immigration context) were not merely challenges by way of judicial review rather than appeals but cases where Parliament had specifically excluded any right of appeal."

These passages aptly describe, in general terms, the task of every FtT and UT to be performed in every case to which s 55 of the 2009 Act applies.

[93] The foregoing analysis and considerations impel to the conclusion that the appropriate order in this case is to allow the appeal and remit to the FtT, differently constituted, for the purpose of making a fresh decision. For the combination of reasons rehearsed in the preceding paragraphs this court is of the clear view that the uncontested breach of section 55(3) in this case cannot be dismissed as immaterial or technical and can be remedied only by appropriate judicial investigation and determination. The FtT, given its case management powers, is the forum best suited for this exercise. The FtT will doubtless wish to consider in particular paras [85] – [86] above, in tandem with its case management powers.

Some discrete issues

[94] In the case management phase of this appeal the court raised specific issues and questions with the parties and invited them to supplement their skeleton arguments accordingly. Both parties participated co-operatively in this exercise, for which the court is grateful. Having regard particularly to the terms in which counsel for the

Secretary of State responded, we take this opportunity to make the following matters clear beyond peradventure:

(i) The breach of section 55(3) is committed by a failure of the Secretary of State's officials and/or the tribunal, on appeal, to have regard to the statutory guidance.

(ii) We repeat: in such cases the issue before the tribunal, on appeal, or the High Court on judicial review is not whether the impugned decision is in some way vitiated by a failure to take one or more of the steps specified in the guidance. Arguments to this effect are fallacious because they conflate the two quite separate stages in play. Rather, the breach is constituted by a failure to have regard to the guidance.

(iii) At the first stage, the official, or tribunal, must have regard to the statutory guidance. This will not necessarily generate a second stage. However, in cases where a second stage is triggered the focus on appeal or judicial review will be on what occurred at that stage.

(iv) The duty is to consciously and conscientiously have regard to the statutory guidance. Tribunals and courts will always be alert to the superficial and perfunctory.

(v) Almost invariably only the Secretary of State or, on appeal, the tribunal will be able to demonstrate that conscientious regard was had to the statutory guidance. The litigant will normally be powerless in this respect. This must be borne in mind should arguments based on burden of proof be ventilated, particularly in the context of a jurisdiction whose public law and inquisitorial characteristics are incontestable.

(vi) While, for the reasons explained above, a failure by the litigant to raise either a section 55(1) issue or a section 55(3) issue at the earliest stage will not necessarily be fatal, tribunals and courts will always be alert to probe the reasons for this and to identify any possible misuse of their process.

(vii) In cases where a breach of the section 55(3) duty is demonstrated, ie the typical case, the FtT must attempt to remedy this failure. Alertness, diligence, careful preparation and due enquiry on the part of both any instructed legal representatives and the FtT will be required. Given the heightened attention which section 55(3) has increasingly been receiving at various judicial tiers, this court is confident that previous oversights and aberrations should be unlikely to occur.

(viii) In cases where the section 55(3) breach is not adequately remedied by the FtT this may give rise to a successful appeal or a successful judicial review challenge in the event of permission to appeal being refused.

(ix) The two species of legal challenge which section 55(3) issues have generated are statutory appeal and judicial review. As this judgment has made clear, in the case of statutory appeals the FtT exercises what might be described as an "extended" jurisdiction. However, in the case of judicial review the High Court exercises a specific, narrower supervisory jurisdiction which does not mirror that of the FtT.

(x) We agree with the submission on behalf of the Secretary of State that it is plainly preferable that section 55 issues should be canvassed in clear terms and at the earliest opportunity. However, in an imperfect world, this will not always be feasible and, as a matter of law, a failure to do so will not be fatal *per se*. The world inhabited by the genuine asylum applicant is one in which normative ideals are frequently far from achievable.

Order

[95] The powers of this Court on an appeal from the UT are contained in section 14(2) of the Tribunals, Courts and Enforcement Act 2007, which provides:

> "(2) The relevant appellate court–
>
> (a) may (but need not) set aside the decision of the Upper Tribunal, and
>
> (b) if it does, must either–
>
> (i) *remit* the case to the Upper Tribunal or, where the decision of the Upper Tribunal was on an appeal or reference from another tribunal or some other person, to the Upper Tribunal or that other tribunal or person, with directions for its reconsideration, or
>
> (ii) *re-make* the decision. […]
>
> (4) In acting under subsection (2)(b)(ii), the relevant appellate court–
>
> (a) may make any decision which the Upper Tribunal could make if the Upper Tribunal were re-making the decision or (as the case may be) which the other

tribunal or person could make if that other tribunal or person were re-making the decision, and

(b) may make such findings of fact as it considers appropriate." [Emphasis added]

[96] For the reasons given the appeal is allowed and the case is remitted to a newly constituted FtT for *de novo* consideration and determination in accordance with the judgment of this court.