Upper Tribunal
(Immigration and Asylum Chamber)

SM (withdrawal of appealed decision: effect) Pakistan [2014] UKUT 00064 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 November 2013	.....

Before

UPPER TRIBUNAL JUDGE PETER LANE
UPPER TRIBUNAL JUDGE SOUTHERN
UPPER TRIBUNAL JUDGE DAWSON
Between

SM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C. McCarthy, Counsel, instructed by Paragon Law
For the Respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

(1) Rule 17 (withdrawal) of the Tribunal Procedure (Upper Tribunal) Rules 2008 does not enable the Upper Tribunal to withhold consent to the withdrawal by the Secretary of State of the decision against which a person appealed to the First-tier Tribunal.

(2) Where such a decision is withdrawn in appellate proceedings before the Immigration and Asylum Chamber of the Upper Tribunal, that Tribunal continues to have jurisdiction under the Tribunals, Courts and Enforcement Act

2007 to decide whether the determination of the First-tier Tribunal should be set aside for error of law and, if so, to re-make the decision in the appeal, notwithstanding the withdrawal of the appealed decision. Such a withdrawal is not, without more, one of the ways in which an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 ceases to be pending.

(3) When re-remaking a decision in a 2002 Act appeal where the decision against which a person appealed has been withdrawn by the Secretary of State, the Upper Tribunal will need to decide whether:-

(i) to proceed formally to dismiss (or, in certain circumstances, allow) the appeal; or

(ii) to determine the appeal substantively, including (where appropriate) making a direction under section 87 of the 2002 Act.

(4) In deciding between (i) and (ii) above, the Upper Tribunal will apply the overriding objective in rule 2 of the 2008 Rules, having regard to all relevant matters, including:-

(a) the principle that the Secretary of State should, ordinarily, be the primary decision-maker in the immigration field;

(b) whether the matters potentially in issue are such as to require the Tribunal to give general legal or procedural guidance, including country guidance;

(c) the reasons underlying the Secretary of State's withdrawal of the appealed decision;

(d) the appeal history, including the timing of the withdrawal; and

(e) the views of the parties.

DECISION

1. Does rule 17 (withdrawal) of the Tribunal Procedure (Upper Tribunal) Rules 2008 require the Secretary of State to obtain the Upper Tribunal's consent, before the Secretary of State may withdraw the decision against which a person appealed to the First-tier Tribunal? What is the effect on appellate proceedings in the Immigration and Asylum Chamber of the Upper Tribunal of the withdrawal by the Secretary of State of that decision? Both questions arise starkly in the present case, which began as long ago as May 2010. As will be seen, they admit of no easy answers.

A. THE APPELLANT'S APPEAL HISTORY

2. The appellant, a citizen of Pakistan born on 12 January 1983, said she entered the United Kingdom on 11 April 2006, as a visitor. She claimed

asylum on 22 April 2010. The basis of her claim was that the appellant had married a Pakistan citizen in that country, who had subsequently moved to the United Kingdom and whom she came here to see in 2006. Her husband behaved abusively towards her, as a result of which the appellant moved to an address in Nottingham, where she began a relationship with another Pakistan national, bearing him a son on 17 January 2010. Before that, her husband had returned to live in Pakistan. She said she feared that he would kill her, were she to return, for having had another man's baby.

3. On 11 May 2010 the respondent Secretary of State decided that the appellant should be removed from the United Kingdom, by way of directions, pursuant to section 10 of the Immigration and Asylum Act 1999. The respondent did not believe the assertion that the appellant's husband would be interested in harming her. Alternatively, the respondent considered that it would not be unduly harsh for the appellant to return to a different area of Pakistan.

4. The appellant appealed against the removal decision and on 30 June 2010, her appeal was heard at Manchester by First-tier Tribunal Judge Cruthers. The judge dismissed the appeal, in a determination served on 5 July 2010.

5. Permission to appeal to the Upper Tribunal having been granted, on 30 March 2011 Deputy Upper Tribunal Judge Alis dismissed the appellant's appeal, finding that the determination of Judge Cruthers did not contain an error of law. Amongst the grounds advanced before the Deputy Judge were that there had been no consideration by the respondent or the First-tier Tribunal Judge of the best interests of the appellant's son, as required by section 55 of the Borders, Citizenship and Immigration Act 2009; and that the First-tier Judge had also failed to deal with the submission that, if returned, mother and son faced a significant danger of ostracism in Pakistan.

6. The latter issue caused the Court of Appeal to grant permission to appeal against the Deputy Judge's decision and on 15 November 2011, by consent, the Court ordered the case to be remitted to the Immigration and Asylum Chamber of the Upper Tribunal for a "fresh hearing". A statement of reasons records that the parties were agreed that the Deputy Judge's decision was "infected by an error of law", as regards the failure to deal with the issue of ostracism. This was particularly so, given that the judgment in SN (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 181 had been placed before the First-tier Tribunal Judge, together with a written argument on the issue. In SN, the Court of Appeal had remitted an appeal to the Upper Tribunal to determine whether "ostracism of a mother with an illegitimate child is a danger in Pakistan ".

7. On 2 February 2012 Upper Tribunal Judge Gleeson found that the decision of the Deputy Upper Tribunal Judge involved the making of an error of law. She set his decision aside, with the announced intention that the Upper Tribunal would proceed to re-make the decision in the appeal against the immigration decision of May 2010. In this regard, she noted the passage

in the statement of reasons where the parties agreed "that the matter should now be remitted to the Upper Tribunal... for it to determine the appeal afresh (subject to the preservation of the factual findings reached by Immigration Judge Cruthers)".

8. On 11 June 2013 Upper Tribunal Judge Gleeson gave directions with regard to the filing of certain evidence, in connection with the forthcoming hearing. It appears that information had been supplied on behalf of the appellant, to the effect that a further child was due to be born to her in July 2013, following a number of previous miscarriages. In particular, the directions required information to be filed as to the nationality of the existing son and of the child due to be born in July. It further appears that, at this stage, matters were proceeding on the basis that the appeal might be suitable for the giving of country guidance on the issue of ostracism of women with illegitimate children in Pakistan.

9. A case management hearing took place on 26 September 2013 before Upper Tribunal Judge Dawson. At that hearing, Ms Isherwood, the Presenting Officer, informed the Tribunal that the respondent wished to withdraw the removal decision of May 2010 (see [3] above), on the basis that it had been made without regard to the respondent's duty under section 55 of the 2009 Act. Counsel for the appellant, Mr McCarthy, however, contended that the consent of the Upper Tribunal was required under Upper Tribunal rule 17, in order for the respondent to withdraw the May 2010 decision; and that such consent should not be granted.

10. The questions set out in [1] above have arisen with some frequency in this Chamber, since its inception on 15 February 2010. In order to address them, on 7 November 2013, the present panel convened to hear oral submissions from Mr McCarthy and Ms Isherwood, based on their respective skeleton arguments, which had been served in accordance with our directions. At that hearing, it became evident that the Tribunal would be assisted by further written submissions and further directions were, accordingly, given for such submissions to be lodged by 21 November. The Tribunal wishes to acknowledge the quality of the oral and written submissions, which it has received.

B. RELEVANT PRIMARY AND SUBORDINATE LEGISLATION ETC

11. At this point, it is necessary to lay out relevant statutory provisions (we underline and put in bold those of particular significance):

> ***"Immigration and Asylum Act 2002***
>
> **82. Right of appeal: general**
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this Part "immigration decision" means—
>
> (a) refusal of leave to enter the United Kingdom,

(b) refusal of entry clearance,

(c) refusal of a certificate of entitlement under section 10 of this Act,

(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,

(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,

(f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,

(g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom),

(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal),

(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family);

(ia) a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c. 77) (seamen and aircrews),

(ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),

(j) a decision to make a deportation order under section 5(1) of that Act, and

(k) refusal to revoke a deportation order under section 5(2) of that Act.

...

84. Grounds of Appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—

(a) that the decision is not in accordance with immigration rules;

(b) that the decision is unlawful by virtue of Article 20A of the Race Relations (Northern Ireland) Order 1996 (discrimination by public authorities);

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

…

85. Matters to be considered

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

…

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

(5) But subsection (4) is subject to the exceptions in section 85A.

…

86. Determination of appeal

(1) This section applies on an appeal under section 82(1), 83 or 83A.

(2) The Tribunal must determine –

(a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and

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

(3) The Tribunal must allow the appeal in so far as it thinks that –

(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

…

(5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal.

…

87. Successful appeal direction

(1) <u>If the Tribunal allows an appeal under section 82, 83 or 83A it may give a direction for the purpose of giving effect to its decision.</u>

(2) A person responsible for making an immigration decision shall act in accordance with any relevant direction under subsection (1).

...

(4) A direction under subsection (1) shall be treated as part of the Tribunal's decision on the appeal for the purposes of section 11 of the Tribunals, Courts and Enforcement Act 2007.

...

99. Sections 96 to 98: appeal in progress

(1) This section applies where a certificate is issued under section 96(1) or (2), 97 or 98 in respect of a pending appeal.

(2) The appeal shall lapse.

...

104. Pending appeal

(1) An appeal under section 82(1) is pending during the period –

(a) beginning when it is instituted, and

(b) <u>ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).</u>

(2) An appeal under section 82(1) is not finally determined for the purposes of subsection (1)(b) while-

(a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination,

...

(4) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant leaves the United Kingdom.

(4A) <u>An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to subsections (4B) and (4C)).</u>

(4B) <u>Subsection (4A) shall not apply to an appeal in so far as it is brought on the ground relating to the Refugee Convention specified in section 84(1)(g) where the appellant—</u>

(a) is granted leave to enter or remain in the United Kingdom for a period exceeding 12 months, and

(b) gives notice, in accordance with any relevant procedural rules (which may include provision about timing), that he wishes to pursue the appeal in so far as it is brought on that ground.

(4C) Subsection (4A) shall not apply to an appeal in so far as it is brought on the ground specified in section 84(1)(b) where the appellant gives notice, in accordance with any relevant procedural rules (which may include provision about timing), that he wishes to pursue the appeal in so far as it is brought on that ground.

(5) An appeal under section 82(2)(a), (c), (d), (e) or (f) shall be treated as finally determined if a deportation order is made against the appellant.

Tribunals, Courts and Enforcement Act 2007

12. Proceedings on appeal to Upper Tribunal

(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal –

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either –

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

(3) In acting under subsection (2)(b)(i) the Upper Tribunal may also-

…

(b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.

(4) In acting under subsection 2(b)(ii), the Upper Tribunal –

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate.

Asylum and Immigration Tribunal (Procedure) Rules 2005

17. Withdrawal of appeal

(1) An appellant may withdraw an appeal –

(a) orally, at a hearing; or

(b) at any time, by filing written notice with the Tribunal.

(2) <u>An appeal shall be treated as withdrawn if the respondent notifies the Tribunal that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn.</u>

...

(3) If an appeal is withdrawn or treated as withdrawn, the Tribunal must serve on the parties a notice that the appeal has been recorded as having been withdrawn.

18. Abandonment of appeal

(1) Any party to a pending appeal must notify the Tribunal if they are aware that an event specified in –

(a) section 104(4), (4A) or (5) of the 2002 Act; or

(b) regulation 33(1A) of the Immigration (European Economic Area) Regulations 2000 ('the 2000 Regulations'), or, on or after 30 April 2006, paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations'), has taken place.

(1A) Where section 104(4A) of the 2002 Act applies and the appellant wishes to pursue his appeal, the appellant must file a notice with the Tribunal –

(a) where section 104(4B) of the 2002 Act applies, within 28 days of the date on which the appellant received notice of the grant of leave to enter or remain in the United Kingdom for a period exceeding 12 months; or (b) where section 104(4C) of the 2002 Act applies, within 28 days of the date on which the appellant received notice of the grant of leave to enter or remain in the United Kingdom.

(1B) Where the appellant does not comply with the time limits specified in paragraph (1A) the appeal will be treated as abandoned in accordance with section 104(4) of the 2002 Act.

...

(1F) Where an appellant has filed a notice under paragraph (1A) the Tribunal will notify the appellant of the date on which it received the notice.

(1G) The Tribunal will send a copy of the notice issued under paragraph (1F) to the respondent.

(2) Where an appeal is treated as abandoned pursuant to section 104(4) or (4A) of the 2002 Act or Regulation 33(1A) of the 2000 Regulations, or paragraph 4(2) of Schedule 2 to the 2006 Regulations, or finally determined pursuant to section 104(5) of the 2002 Act, the Tribunal must –

(a) serve on the parties a notice informing them that the appeal is being treated as abandoned or finally determined; and

(b) take no further action in relation to the appeal.

Tribunal Procedure (Upper Tribunal) Rules 2008

2. Overriding objective and parties' obligation to co-operate with the Upper Tribunal

(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes –

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Upper Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3**) The Upper Tribunal must seek to give effect to the overriding objective when it –**

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must –

(a) help the Upper Tribunal to further the overriding objective; and

(b) co-operate with the Upper Tribunal generally.

...

5. Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Upper Tribunal may regulate its own procedure.

(2) The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

...

17. Withdrawal

(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it –

(a) at any time before a hearing to consider the disposal of the proceedings (or, if the Upper Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Upper Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) Notice of withdrawal will not take effect unless the Upper Tribunal consents to the withdrawal except in relation to an application for permission to appeal.

(3) A party which has withdrawn its case may apply to the Upper Tribunal for the case to be reinstated.

...

(5) The Upper Tribunal must notify each party in writing that a withdrawal has taken effect under this rule.

...

17A. Appeal treated as abandoned or finally determined in an asylum case or an immigration case

(1) A party to an asylum case or an immigration case before the Upper Tribunal must notify the Tribunal if they are aware that –

(a) the appellant has left the United Kingdom;

(b) the appellant has been granted leave to enter or remain in the United Kingdom;

(c) a deportation order has been made against the appellant; or

(d) a document listed in paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006 has been issued to the appellant.

(2) Where an appeal is treated as abandoned pursuant to section 104(4) or (4A) of the Nationality, Immigration and Asylum Act 2002 or paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area)

Regulations 2006, or as finally determined pursuant to section 104(5) of the Nationality, Immigration and Asylum Act 2002, the Upper Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined.

(3) Where an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the Nationality, Immigration and Asylum Act 2002, but the appellant wishes to pursue their appeal, the appellant must send or deliver a notice, which must comply with any relevant practice directions, to the Upper Tribunal and the respondent so that it is received within thirty days of the date on which the notice of the grant of leave to enter or remain in the United Kingdom was sent to the appellant.

...

Practice Statements – Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (as at 25 September 2012)

7 Disposal of appeals in Upper Tribunal

7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (In accordance with the relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Re-making rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact-finding is necessary."

C. ANSWERING THE QUESTIONS

Main question (1): Does rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 require the Secretary of State to obtain the consent of the Upper Tribunal to the withdrawal by the Secretary of

State of the decision against which a person appealed to the First-tier Tribunal?

12. For our purposes, the key elements of rule 17 of the Upper Tribunal Rules are that "a party may give notice of the withdrawal of its case, or on any part of it" and that (except in relation to an application for permission to appeal), such notice "will not take effect unless the Upper Tribunal consents to the withdrawal" (rule 17(1) and (2)).

13. In the present proceedings, Mr McCarthy submitted that in the Upper Tribunal, an integral component of the Secretary of State's "case" is the immigration decision, against which an appeal under section 82 of the 2002 Act has been brought. For the respondent, Ms Isherwood submitted that "the decision appealed against is [the respondent's] alone to withdraw and is not properly to be regarded as part of the 'case' covered by UT Rule 17. The reasons for that decision (and/or for instituting or resisting an appeal to the UT) are that case (sic) and are subject to Rule 17 of the UT rules": [22] of the respondent's written submissions.

14. It is uncontroversial that wide and important powers of immigration control are conferred upon the Secretary of State by the Immigration Acts (as defined in section 61(2) of the UK Borders Act 2007); in particular, sections 1 (general principles), 3 (general provisions for regulation and control), 3A (further provision as to leave to enter), 3B (further provision as to leave to remain) and 4 (administration of control) of the Immigration Act 1971. In addition, it may be the case that further powers in the area of immigration lie with the respondent by virtue of the Royal Prerogative (see eg Munir v Secretary of State for the Home Department [2012] UKSC 32). In any event, the submission that Upper Tribunal rule 17 empowers the Upper Tribunal directly to prevent the Secretary of State from exercising the decision-making powers on immigration matters needs, we find, to be rested on extremely firm foundations.

The Chichvarkin cases

15. In R (on the application of) Evgenyi Chichvarkin and Antonina Chichvarkina v Secretary of State for the Home Department [2010] EWHC 1858, the Divisional Court was faced with a judicial review challenge to the Secretary of State's withdrawal of an immigration decision, against which the applicant husband and wife had appealed to the First-tier Tribunal. At [53] of its judgment, the Divisional Court noted that leading Counsel for the applicants "accepted that the power to withdraw was not derived from rule 17 [of the First-tier Tribunal Rules]: the power to withdraw arises as a matter of general public law, for the decision-maker has the implied power, subject to general principles of public law, to withdraw any decision taken under statute or prerogative, unless such power is excluded". The "principles of public law" were found by the Divisional Court (and, on appeal, by the Court of Appeal: [2011] EWCA Civ 91) not to embrace the proposition, advanced on behalf of Mr Chichvarkin and his wife, that the Secretary of State could withdraw a decision in the immigration field only if she conceded that that decision was wrong: [48] of the Divisional Court

judgment; and, in particular, it was not unlawful for her to withdraw a decision "if done for the purpose of avoiding the Tribunal becoming the primary decision-maker": [36] of the Court of Appeal judgment. The Court of Appeal held:-

> "It is not inconsistent with the statutory scheme or with the policy and purposes of the legislation for the Secretary of State to withdraw a decision because he considered it appropriate for the original application to be reconsidered or a new claim to be considered by him, as primary decision-maker, in the light of matters advanced in the appeal or of other developments" [39].

16. Both the Divisional Court and the Court of Appeal, accordingly, rejected the submission that the Secretary of State had acted unlawfully in withdrawing an immigration decision made in response to Mr Chichvarkin's application for leave to remain as a Tier 1 (Investor) Migrant, in light of the fact that, in his grounds of appeal to the Asylum and Immigration Tribunal, he and his wife had contended that requiring them to leave the United Kingdom "would be unlawful under section 6 of the Human Right Act 1998 and contrary to the UK's obligations under the 1951 Refugee Convention": [20] of the Divisional Court's judgment. The effect of the withdrawal of the immigration decision was that the Tribunal treated the appeal as withdrawn, pursuant to rule 17(2) of the 2005 Rules.

The position in judicial review

17. In the course of its judgment, the Divisional Court in Chichvarkin drew attention to the position in judicial review:-

> "We note that it is practically an every day occurrence in the Administrative Court for the SSHD, having given preliminary consideration to a claimant's challenge to a decision by way of judicial review, to withdraw the challenged decision, with a view to reconsideration. In a number of cases a favourable decision follows; but in many instances the SSHD makes a further unfavourable decision but, taking advantage of the reconsideration, she is able to deal more fully and/or accurately with the facts and matters advanced by the claimant. The claimant may accept the new unfavourable decision, but if he restores his challenge in a further claim for judicial review, the proceedings may well be better focussed, and more efficiently and promptly handled, by reason of the procedure followed" [46].

18. The Divisional Court's reference to the position in judicial review is, we consider, significant for the purposes of construing the scope of Upper Tribunal rule 17. Amongst the functions of the Upper Tribunal is that of judicial review (see section 15 *et seq* of the Tribunals, Courts and Inquiries Act 2007). Part 4 of the Upper Tribunal Rules deals specifically with judicial review proceedings in the Upper Tribunal. However, rule 17 falls within Part 2 (General powers and provisions) and applies in relation to judicial review proceedings, as well as to the Upper Tribunal's appellate proceedings. We are not aware of any suggestion, let alone practice, in this or any other Chamber of the Upper Tribunal, to the effect that rule 17

requires the Secretary of State (or any other decision-maker whose decision is under challenge) to obtain the consent of the Tribunal in order to withdraw the decision challenged in a judicial review. It is difficult to see how rule 17 could properly be read to require the Secretary of State to obtain consent to withdrawing a decision which has given rise to an appeal under the 2002 Act, without also accepting that rule 17 necessitates such consent in judicial review proceedings.

Social security decisions and appeals

19. It is also instructive to look briefly at the position in social security and child support appeals. Section 8 of the Social Security Act 1998 provides that, subject to the provisions of Chapter II of the Act, "it shall be for the Secretary of State … to decide any claim for a relevant benefit … and … to make any decision that falls to be made under or by virtue of a relevant enactment". Section 9 provides for revision of decisions by the Secretary of State. By subsection (6):

> "(6) Except in prescribed circumstances, an appeal against a decision of the Secretary of State shall lapse if the decision is revised under this section before the appeal is determined."

20. Section 10 makes provision for certain decisions to be superseded; that is to say, replaced by new decisions, generally having effect from the date of the supersession (in contrast to revised decisions, which continue to operate as from the date of the "original" decision). The Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) make further specific provision regarding the relationship between decisions and appeals. These include regulation 3(4A):

> "(4A) Where there is an appeal against an original decision … within the time prescribed by Tribunal Procedure Rules, but the appeal has not been determined, the original decision may be revised at any time."

21. Regulation 30 prescribes circumstances, as permitted by the opening words of section 9(6), where a revised decision does not cause the appeal to lapse. These are where the revised decision is not more advantageous to the appellant than the decision before it was revised.

22. This admittedly outline account of the legislative framework of a different jurisdiction is instructive, in that it emphasises Parliament's concern to ensure that any limitations on the executive's decision-making powers are precisely delineated in the relevant legislation. The precision of the provisions to which we have just referred stand in marked contrast with the terminology employed in Upper Tribunal rule 17. Furthermore, the existence of this legislation in the social security jurisdiction means that the issue of whether rule 17(2) enables the Upper Tribunal to prevent the Secretary of State from withdrawing appealed decisions simply does not arise. The relationship between tribunal and executive functions is governed clearly and expressly by the relevant legislation, which leaves no

scope for a decision to be withdrawn without being superseded or revised. As a result, the respondent's stance in the present case on the interpretation of Upper Tribunal rule 17 can find no support in at least one major jurisdiction of the Upper Tribunal.

Conclusions on main question (1)

23. For all these reasons, we find that – far from resting on strong foundations - the submission on behalf of the present appellant that the word "case" in Upper Tribunal rule 17 encompasses the actual decision appealed, has not been made out. In so concluding, we nevertheless acknowledge Mr McCarthy's submission that, on the facts of the present appeal, the respondent's decision to withdraw the immigration decision of May 2010 has a direct correlation with the respondent's case before the Upper Tribunal, at least so far as Article 8 of the ECHR is concerned. The respondent appears to accept that the 2010 decision lacked a necessary element; namely, consideration of the best interests of the appellant's son. For reasons which we shall give in due course, that fact is not without significance in answering the question of how the Upper Tribunal should proceed, following withdrawal of the immigration decision. However, such a connection between the decision and the "case" is not such as to justify an interpretation of the rule, which would directly interfere with functions conferred on the Secretary of State by Parliament in the immigration field. Clearer wording would be needed before it could be held that a general procedure rule in subordinate legislation imposes a direct fetter on the discharge of those functions.

24. There is a reported case in which this Chamber proceeded on the basis that Upper Tribunal rule 17(2) does require the Tribunal's consent to the withdrawal of the appealed decision. In CS (Tier 1 – home regulator) USA [2010] UKUT 163 (IAC) the Upper Tribunal was faced with a transitional appeal against a decision of the AIT to dismiss an appeal against refusal of leave to remain as a student:-

> "7. Reconsideration was ordered by SIJ Waumsley in December 2009. The matter now comes before us as an appeal to the UT under the Tribunals, Courts and Enforcement Act 2007 s.10. At the outset Mr Laverty Senior Home Office Presenting Officer sought to withdraw the decision in order for the respondent to re-determine it, as he submitted that the Guidance had not been properly applied by the IJ and the interpretation reached was contrary to the terms of the Guidance. He recognised that under Rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 No. 2698, he required the consent of the Upper Tribunal to do so. We indicated that we did not give that consent and would determine the appeal ourselves."

25. We do not consider that CS materially supports the appellant's submissions on this issue. The Tribunal in that appeal was faced with a concession by the Presenting Officer. No such concession is, of course, advanced before us. As a result, the Tribunal in CS did not need to engage

with any contrary argument, such as is now advanced. In any event, CS is not reported for what it says about consent under rule 17.

Main question (2): What is the effect on appellate proceedings in the Immigration and Asylum Chamber of the Upper Tribunal of the withdrawal by the Secretary of State of the decision against which a person appealed under the Nationality, Immigration and Asylum Act 2002 to the First-tier Tribunal?

26. Embedded within this main question, are two further questions. The first is:

(1) Does the withdrawal of the decision bring an appeal in the Upper Tribunal automatically to an end in a 'jurisdictional' sense?

Error of law stage

27. There is a measure of agreement between the parties on this issue. In its initial task under section 12 of the 2007 Act, the Upper Tribunal plainly does not lose jurisdiction, following the respondent's withdrawal of the decision against which a person appealed to the First-tier Tribunal. Section 12(1) concerns the making by the Upper Tribunal of a finding as to whether the decision of the First-tier Tribunal "involved the making of an error on a point of law". Although the Tribunal's discharge of that function may be affected by the reasons why the respondent withdrew the decision, such a withdrawal does not deprive the Upper Tribunal of that function.

Re-making stage

28. A more challenging issue is the effect of withdrawal on the Upper Tribunal's function under section 12(2) of the 2007 Act. Following a finding that the First-tier Tribunal's decision did involve legal error, the Upper Tribunal must decide whether to set aside the First-tier Tribunal's decision and, if it does, must either remit the case to the First-tier Tribunal or re-make the decision (here, the appeal against the respondent's immigration decision). By the terms of the Practice Statement 7, the expectation is that, in many if not most cases, the Upper Tribunal will proceed to re-make the decision, rather than remitting it to the First-tier Tribunal. As can be seen from Part A above, that was the intention of both the Upper Tribunal in the present case and, it would appear, the Court of Appeal, in remitting the case to us.

29. We find that, at the re-making stage, there is, again, jurisdiction in the Upper Tribunal to proceed pursuant to section 12(2)(b)(ii) of the 2007 Act. The key provision is section 104 of the 2002 Act. Section 104 is plainly intended by the legislature to be a comprehensive statement of the ways in which appeals brought under section 82 may be brought to an end. As can be seen, such an appeal ceases to be pending when it is "finally determined, withdrawn or abandoned (or when it lapses under section 99)" (section 104(1)(d)). There is no indication in that section (or elsewhere in the 2002 Act) that the withdrawal of the decision appealed is one of the ways in which the appeal is brought to an end. On the contrary, the existence of section 104(4B) and 4(C) strongly indicates to the contrary. Those provide for an exception to statutory abandonment of an appeal on the grant of leave, insofar as the appeal is brought on Refugee Convention or discrimination grounds. Since the grant of leave to enter or remain must, in practice, have either followed, or else impliedly include, the withdrawal of the "adverse" immigration decision under section 82(2), against which the person concerned appealed, it cannot be contended that "mere" withdrawal of the decision appealed automatically deprives the Tribunal of jurisdiction under the 2002 Act.

30. Neither party in the present proceedings sought to rely upon the Upper Tribunal's determination in EG and NG (rule 17: withdrawal; rule 24: scope) [2013] UKUT 143 (IAC). There is nothing in that determination which holds that the withdrawal of the decision against which a section 82 appeal was brought has the effect of depriving the Upper Tribunal of jurisdiction. The Tribunal in EG and NG was concerned with the effect of the Secretary of State's withdrawal of her appeal against the determination of the First-tier Tribunal, which had allowed the appellants' section 82 appeals on human rights grounds. The effect of permitting the Secretary of State's withdrawal of her case before the Upper Tribunal (that is to say, her appeal to it) was to cause the appellants' section 82 appeals to be finally determined for the purposes of section 104(1)(b) because the restriction in section 104(2)(b) was thereby lifted.

31. What, then, of rule 17(2) of the 2005 Rules? As can be seen, this provides in terms that the withdrawal of the appealed decision means that the appeal against that decision "shall be treated as withdrawn". In her written submissions, Ms Isherwood commented that, although the First-tier Tribunal, were it re-making the decision, would be bound by rule 17(2) to regard the appeal as withdrawn, "the UT is arguably not so bound". Ms Isherwood was, we find, right to refrain from submitting that rule 17(2) of the 2005 Rules precludes the Upper Tribunal from proceeding to re-make an appellate decision in the circumstances with which we are concerned. The case is, after all, being re-made in the Upper Tribunal, not the First-tier Tribunal. As such, the Upper Tribunal is entitled (indeed, obliged) to apply its own 2008 Rules. There is no justification for construing section 12(4)(a) of the 2007 Act so narrowly as confine the Upper Tribunal to doing only what the First-tier Tribunal could do under its own procedure rules.

32. That conclusion is sufficient for our purposes. But there is also the following point. Section 12(3)(b) of the 2007 Act empowers the Upper Tribunal, when remitting a case to the First-tier Tribunal, to "give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal". That general power, directly conferred by primary legislation, would on its face appear to enable the Upper Tribunal to direct the First-tier Tribunal to deal substantively with an appeal, which might otherwise fall to be treated as withdrawn pursuant to rule 17(2) of the 2005 Rules. Accordingly, if on the remittal of such a case the First-tier Tribunal could proceed irrespective of the respondent's withdrawal, then section 12(4)(a) of the 2007 Act contains no impediment to the Upper Tribunal's doing the same.

33. Rule 17(2) of the 2005 Rules applies "if the respondent notifies the Tribunal that the decision … to which the appeal relates has been withdrawn". Quite apart from the point mentioned in the preceding paragraph, it must be doubtful whether this "trigger" event can apply in the circumstances with which we are concerned. This is because the respondent will, of course, already have notified the Upper Tribunal of the withdrawal of the appealed decision. There would thus be no need for her to inform the First-tier Tribunal. If the respondent were nevertheless to seek to do so, the First-tier Tribunal would be entitled to treat the purported notification as ineffective for the purpose of invoking rule 17(2). We therefore do not consider that Ms Isherwood is right in her submission that, so far as the First-tier Tribunal is concerned, the appeal would be bound to be withdrawn pursuant to rule 17(2), at least if the case were being dealt with on remittal from the Upper Tribunal.

34. In any event, leaving aside the remittal scenario, it is by no means apparent that rule 17(2) of the 2005 Rules has the result of compelling the First-tier Tribunal, in all circumstances and without exception, to treat the appeal as withdrawn. We refer again to section 104(4A) and (4B) of the 2002 Act. It is unusual in this jurisdiction for a new decision of the respondent to be made immediately upon the withdrawal of the decision against which the appeal is brought. In a case where an appellant has brought his or her appeal "on the ground relating to the Refugee Convention specified in section 84(1)(g)" or "on the grounds specified in section 84(1)(b)", the consequence of treating the appeal as withdrawn – thereby ending it, pursuant to section 104(1)(b) – before it is known whether the appellant is to be granted leave to enter or remain, would effectively negate Parliament's intention in enacting section 104(4A) to (4C). In short, a strict adherence to rule 17(2) of the 2005 Rules may be legally problematic.

35. In saying so, we are conscious of the endorsement which rule 17(2) of the 2005 Rules received from the Court of Appeal in Chichvarkin. The challenge in Chichvarkin to the *vires* of rule 17(2) was, however, made on a quite different basis (as it had been in the Divisional Court proceedings that were the subject of the appeal) and the point made in the preceding paragraph does not appear to have been raised before either Court.

36. It is worthwhile observing that the Tribunal Procedure Committee has recently undertaken a public consultation regarding proposed Rules intended to replace the 2005 AIT Rules, in the course of which responses were invited as to whether rule 17(2) should be changed, so as to empower (rather than compel) the First-tier Tribunal to treat an appeal as withdrawn where the decision appealed is withdrawn by the respondent. The fact that this consultation was undertaken forms no part of our reasoning; but it perhaps serves to indicate the unusual nature of present rule 17(2), which as far as we are aware finds no counterpart in the procedure rules of other Chambers of the First-tier Tribunal.

(2) Is an appeal "bound to be academic" where the decision appealed is withdrawn?

37. We now reach the core of the respondent's submissions on this second main question. The respondent contends that even if, in jurisdictional terms, an appeal under section 82 of the 2002 Act against an immigration decision can survive the withdrawal of that decision, any subsequent determination of that appeal by a Tribunal *must* be academic, in the sense that the outcome of that appeal cannot be to put the appellant in any different position than he or she is in, as a consequence of the withdrawal by the respondent of the immigration decision.

38. Ms Isherwood's written submissions put the matter as follows:-

> "14. The Respondent's position is ...that on a correct reading of the statute the withdrawal of a decision appealed against means that the appeal becomes academic and should not be pursued absent a good reason.
>
> 15. Where an appeal has to be determined the deciding Tribunal is required by section 86(2)(a) of the 2002 Act to decide any matter raised as a ground and any matter which section 85 required it to consider. If the decision appealed against is withdrawn then no grounds raised against it require disposal as they have nothing upon which to bear."

39. In its directions which followed the hearing on 7 November, the Tribunal required the parties to comment on the significance, if any, on the interpretation of Upper Tribunal rule 17 of section 104 of the 2002 Act. Ms Isherwood's written submissions responded as follows:-

> "25. It was observed earlier that the definition in **section 104(1) and (2)** of when an appeal is 'pending'/'finally determined' bears upon the conduct of immigration cases in various ways, including the period for which section 3C operates to extend leave and the timing of certain further actions. Clarity is therefore operationally desirable in the effect and scope of UT Rule 17.
>
> 26. The Tribunal may also have in mind that **sections 104(4), (4A), (4B), (4C)** and **(5)** have direct statutory effect on a pending appeal without any need for Tribunal consent. Dealing with these provisions in turn:

- Section 104(4) provides for a section 82(1) appeal to be abandoned by an appellant's departure from the UK.

- Section 104(4A) (qualified by subsections (4A), (4B) and (4C)) operates to abandon an 82(1) appeal on the appellant being granted leave to enter.

- Section 104(4B) provides for an appellant to continue an appeal on asylum grounds only if he is granted leave for more than a year and completes the necessary administrative formalities.

- Section 104(4)(C) provides for an appellant who has been granted leave to enter or remain to continue an appeal on race discrimination grounds.

- Section 104(5) operates such that pending appeals under section 82(1) against certain classes of immigration decision are to be treated as finally determined if a deportation order is made against the appellant.

27. Each of these provisions invokes a requirement in UT Procedure Rule 17A (introduced for asylum cases and immigration cases as defined) for the parties to notify the Tribunal if the trigger events in question occur. Rule 17A(2) then directs the Tribunal as to what to do if an appeal is abandoned or is to be treated as finally determined by a provision of section 104.

28. The relevance of this is that it is not just voluntary attempts to withdraw part or all of a party's case under Rule 17 which can bring an immigration appeal to a close. It seems illogical that section 104 continues to operate upon Upper Tribunal's appeals (at whatever stage) yet the administratively sensible protocol for appeals to be rendered academic by withdrawal of the decision appealed against should not."

40. We find the respondent's submissions on her core case founder on section 104(4A) to (4C) of the 2002 Act. Those provisions make it plain that, in the circumstances specified in subsection (4A), the scheme in section 82 is modified by the statutory hypothesis, that the appeal is to be treated as abandoned. As we have seen, that hypothesis does not, however, have effect in the circumstances specified in subsections (4B) and (4C). In particular, those subsections make it clear that statutory abandonment "shall not apply" to an appeal, insofar as that appeal is brought on "the ground relating to the Refugee Convention specified in section 84(1)(g)" or "on the grounds specified in section 84(1)(b)", as the case may be. Crucially, section 104 does not proceed on the assumption that the scheme of sections 82 to 87 of the 2002 Act is such that the grant of leave (and consequent supersession of the earlier, negative decision against which the appeal was brought) has the automatic and independent effect of precluding the Tribunal from allowing or dismissing an appeal under section 86, by reference to the relevant ground described in section 84. Nor does section 104 operate on the earlier sections by "glossing" or

modifying them, so as to enable a refugee or discrimination appeal to continue, despite the grant of leave. On the contrary, section 104 assumes that, without an express legislative statement that the grant of leave constitutes deemed abandonment, that grant would not operate so as to end the appeal at all.

41. The significance of section 104(4B) and (4C) is recognised by Mr McCarthy in his written submissions:-

> "30. It is important to note that Section 104(4C) **admits of no discretion**. Where an appellant gives proper notice of his or her intention to continue an asylum case, Section 104(4C) 'shall not apply'. In these circumstances (e.g. where an appeal under Section 82 remains extant), Section 86(2), requires that '[The Tribunal] **must determine** – (a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1))' (emphasis added).
>
> 31. Thus, the effect of Section 104 is that where a person is granted leave to enter or remain, their appeal pursuant to Section 82(1) shall be treated as abandoned. The Appellant may, however, continue with an asylum appeal, upon providing proper notice in accordance with Section 104(4B). Thus, by the plain effect of Section 104(4B), it cannot be assumed that, even were the SSHD to re-make a decision before the Upper Tribunal does so in a case with a withdrawn decision, that this would be academic in the relevant sense of being of no consequence for the rights and obligations of the parties."

We agree with those submissions.

42. Two further points need mentioning. Before we do so, we remind ourselves that, as Lord Carnwath observed in Patel and others v Secretary of State for the Home Department [2013] UKSC 72, the drafting of the appeal provisions in the 2002 Act "defies conventional analysis. It is not only obscure in places and lacking in detail, but contains pointers in both directions": [35]. Nevertheless, as in AS and Patel, there is sometimes no alternative but to engage in detailed scrutiny of those provisions. In the present case, whilst noting (as the Court of Appeal did in AS) that the references in section 84 to grounds of appeal adopt the present tense, each of the grounds of appeal set out in section 84(1) receive their adjudication by the Tribunal under section 86(3), where it is noteworthy that both paragraphs (a) and (b) are framed in the past tense, requiring the allowing of the appeal where the decision against which the appeal is brought "was not in accordance with the law" or that "a discretion exercised in making a decision... should have been exercised differently". Secondly and relatedly, an appeal which continues by virtue of section 104(4B) or (4C) must, because of section 86(3), still have as its subject matter the original "negative" decision against which the appeal was originally brought. Otherwise, section 104(4B) and (4C) would have no meaning.

43. We therefore conclude that the withdrawal by the respondent of the immigration decision against which a section 82 appeal was brought does

not mean that the appeal must thereafter be treated as academic, in the sense described above. This means that we also reject the respondent's submissions that any determination of a section 82 appeal in these circumstances can be of no more than "advisory" in its effect, so far as the respondent is concerned, and that, in particular, the Tribunal in these circumstances may never give a direction under section 87, for the purpose of giving effect to its decision to allow an appeal. We shall have more to say about this issue in due course.

D. HOW SHOULD THE UPPER TRIBUNAL PROCEED, FOLLOWING WITHDRAWAL BY THE RESPONDENT OF THE DECISION AGAINST WHICH THE APPEAL WAS BROUGHT?

44. It is time to take stock of the position we have reached. Rule 17 of the Upper Tribunal Rules does not enable the Upper Tribunal to prevent the Secretary of State from withdrawing a decision, against which the appellant appealed pursuant to section 82 of the 2002 Act. The withdrawal of that decision, however, does not terminate the appellate jurisdiction of the Tribunal, as regards that appeal. The scheme of the 2002 Act is such that, as well as continuing to have formal jurisdiction, the Upper Tribunal may complete its appellate functions under section 12 of the 2007 Act by re-making the decision in the appeal under section 86 of the 2002 Act, and, if appropriate, by giving effect to it by means of directions under section 87, so as to put the appellant in a different position, compared with that he or she would find themselves in, merely as a result of the withdrawal of the decision.

45. The fact that the 2002 Act enables the Tribunal to proceed to make a decision that can put the appellant in such a different position carries its own challenges. Given the mandatory terms of section 86(2) ("the Tribunal must determine any matter raised as a ground…"), as well as subsections (3) and (4), whereby the Tribunal must allow or dismiss the appeal, it may be asked how the Tribunal can do otherwise than engage with the substantive issues, where the decision appealed has been withdrawn. It can immediately be seen, however, that whilst such a substantive determination might be desirable in certain circumstances, in many others it may not.

46. In addressing this issue, we bear in mind the overriding objective, contained in rule 2 of the Upper Tribunal Rules. For present purposes, the salient provisions are these:-

> "2. (1) The overriding objective of the Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes –
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

...

(e) avoiding delay, so far as compatible with proper consideration of the issues.

...

(4) Parties must –

(a) help the Upper Tribunal to further the overriding objective;

(b) co-operate with the Upper Tribunal generally."

Formal or substantive disposal?

47. We consider that section 86 of the 2002 Act permits the Tribunal to make a "formal" disposal of an appeal, where (1) the decision appealed against has been withdrawn; and (2) applying the criteria we are about to articulate, the Tribunal concludes that, having regard to the overriding objective, it is not in the interests of justice for the Tribunal, in the context of the present proceedings, to adjudicate substantively on the matters potentially in issue between the parties. This is possible because section 86 does not purport to prescribe the *way* in which a matter described in subsection (2)(a) must be determined. Accordingly, where, in all the circumstances, the Tribunal concludes that "formal" determination under section 86 is appropriate, following withdrawal of the immigration decision, the Tribunal should (i) decline to hear argument as to whether the (now withdrawn) decision was not in accordance with the law; and (ii) proceed formally to dismiss the appeal, without making any direction under section 87.

48. The position may be otherwise where pursuant to rule 23A(2) of the 2005 Rules the appellant could be awarded costs representing the whole or part of any fee he or she has paid in order to bring the appeal, were the appeal to be allowed. In such a case, where the reasons underlying the respondent's withdrawal of the appealed decision demonstrate that some defect or other deficiency exists in that decision, the appropriate course may be formally to allow the appeal. The important point is that, either way, the formal disposal of proceedings will preserve the appellant's position, pending the fresh decision that must be forthcoming, in the wake of withdrawal.

49. We decline to categorise formal disposal, as just described, as constituting the "default" position, in the sense that an appellant will be required to demonstrate special reasons why that course should not be followed. We do, however, consider that, for the reasons we are about to give, the likely result in practice, where a decision is withdrawn and the Upper Tribunal finds itself at the re-making stage under section 12(2)(b)(ii) of the 2007 Act, will be formal disposal.

Factors to be considered

(i) Secretary of State should normally be primary decision-maker

50. An important factor, pulling in favour of formal as opposed to substantive disposal, is articulated in the judgments of the Court of Appeal in Chichvarkin; namely that:

> " ordinarily the SSHD is the primary decision-maker in respect of immigration, asylum and human rights decisions: see, for example, Article 4(1) of the Qualification Directive (Council Directive 2004/83); Directive 2005/85 ("The Procedures Directive"), Articles 4(1), 8(2), 12(6) and 39; sections 3(1)(a), 4(1) and 11(1) of the Immigration Act 1971": [35].

51. Everyone working in the immigration jurisdiction knows only too well the tension that exists in the legislation and resultant case law between, on the one hand, the principle that the respondent should be primary decision-maker and, on the other, the desirability of ensuring that appellate proceedings deal comprehensively with every reason raised by a person for remaining in, or coming to, the United Kingdom: see esp, section 120 (requirement to state additional grounds for application) of the 2002 Act. In AS (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1076, the Court of Appeal held that the Tribunal had an obligation to deal with grounds raised by an appellant in a section 120 notice, even if those grounds had not been contained in the original application made to the respondent.

52. Although Chichvarkin was largely concerned with a public law challenge to the respondent's decision to withdraw the decision against which the appellants had appealed (thus triggering withdrawal under rule 17 of the 2005 Rules), it is directly relevant for our purposes, as a powerful reiteration of the desirability of primary decision-making in this field, notwithstanding AS (Afghanistan) (which the Court distinguished for these purposes). In particular, where, as in Chickvarkin, the asylum claim has not been considered by the respondent (including by means of a full interview with the appellant), this must constitute a strong pointer towards formal as opposed to substantive determination by the Upper Tribunal, following withdrawal of the appeal decision. In so saying we are aware that withdrawal followed by a grant of leave (but not refugee status) would result in any extant appeal continuing, pursuant to section 104(4B).

53. By contrast, where asylum has been raised and fully considered (and rejected) by the respondent, prior to the appeal being instituted, the principle of primary decision-making lying with the respondent does not arise or, insofar as the case for the appellant is subsequently put on a different basis, may not arise to the same extent. In such circumstances, the termination of the current appellate proceedings by formal disposal may well not be appropriate, having regard to the overriding objective and

section 104(4B). See also the facts of the present case at Part A above and our decision on the case at Part F below.

(ii) Wider public interest reasons: the case law on 'academic' appeals

54. The next factor concerns whether there are wider public interest reasons, potentially involving persons other than the appellant and his immediate family etc, why it may be desirable to determine the appeal substantively, notwithstanding withdrawal of the appealed decision. In this regard, it is helpful to consider case law concerning when it may be appropriate for the High Court in public law proceedings to determine issues that have become "academic", in the sense that the person who brought the proceedings has obtained that which they brought the proceedings to get. The case law is helpful, even though the context with which we are presently concerned is different, in that we are considering when it would be appropriate for the Upper Tribunal to re-make a decision pursuant to section 86 of the 2002 Act, in a way that *may* give the appellant more than he or she has received, as a result of the withdrawal of the decision. Where he or she has actually been granted the leave for which they applied, as well as the refugee or other status they sought, the appeal will, of course, be statutorily abandoned by reason of section 104 of the 2002 Act. Accordingly, unlike the position in the High Court, "purely" academic cases are unlikely to arise in immigration and asylum appeals.

55. A useful analysis of the principles to be applied in deciding whether a court should permit a party to pursue a public law case that has become academic is contained in the judgment of Silber J in Zoolife International Limited v Secretary of State for Environment, Food and Rural Affairs [2007] EWHC 2995, recently approved by Singh J in K v Entry Clearance Officer Tashkent [2012] EWHC 2875. Silber J said this:

> "32. The starting point for considering whether a court should permit a party to pursue an academic point in a public law case is the classic statement of Lord Slynn of Hadley in **R v. Secretary of State for the Home Department ex parte Salem** [1999] I AC 450 in a speech with which other members of the Appellant Committee agreed when he explained (with my emphasis added) that:
>
> > '…. *I accept, as both counsel agree, that in case where there is an issue involving a public authority as to questions of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House, there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se... The discretion to hear disputes, even in the area of public law, must be exercised with caution and appeals which are academic between the parties should not be heard* ***unless there is good reason in the public interest for doing so*** *as for example (but only by way of example) where a discrete point of statutory construction which does not involve detailed consideration of the facts, and where large number of similar*

cases exist or are anticipated so that the issue will most likely need to be resolved in the near future'.

33. One of the reasons for this approach was expressed by Lord Goff in **R v. Secretary of State for the Home Department ex parte Wynne** [1993] 1 WLR 115 at 120A-B where he said that:

> '*It is well established that this House does not decide hypothetical questions. If the House were to do so, any conclusion, and the accompanying reasons, could in their turn constitute no more than obiter dicta expressed without the assistance of a concrete factual situation, and would not constitute a binding precedent for the future'*.

34. These statements refer to the approach of the House of Lords but there is no reason why they should not apply with equal force to other courts. This approach to academic issues was considered further in the speeches by the members of the Appellate Committee **in R (on the application of Rushbridger) v. Attorney General** [2004] 1 AC 357 in which:

    (a) Lord Hutton explained that '*it is not the function of the courts to decide hypothetical questions which do not impact on the parties before them'* (page 371 E [35]);

    (b) Lord Hutton expressly approved at page 371 [35] the statement of Lord Justice-Clerk (Thompson) in **Macnaughton v Macnaughton's Trustees** [1953] SC 387-392 that '*our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs*'; and

    (c) Lord Scott of Foscote stated that '*the valuable time of the courts should be spent on real issues*' (page 374 E[45]).

35. Similar principles have been applied in the Administrative Court, for example, by Munby J in **Smeaton v Secretary of State** [2002] 2 FLR 146, 244 [420] ('*the facts remain that the court-including the Administrative Court- exist to resolve real problems and not disputes of merely academic significance'*) and by Davis J in **BBC v Sugar** [2007] 1 WLR 2583, 2606 [70] ('*to grant remedies by reference to a decision made in now outmoded circumstances seems to me to be an arid and academic exercise. It is not something that, as an Administrative Court Judge, I would have been minded to do'*). Although these statements indicate that if an issue is academic, the court cannot determine it, these statements must be subject to what was said in **Salem** and which has, as far as I can discover, not been disapproved of or qualified in any manner in any later case.

36. In my view, these statements show clearly that academic issues cannot and should not be determined by courts unless there are exceptional circumstances such as where two conditions are satisfied in the type of

application now before the court. The first condition is in the words of Lord Slynn in **Salem** (supra) that '*a large number of similar cases exist or anticipated*' or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive. If the courts entertained academic disputes in the type of application now before the court but which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary costs.

37. These points are particularly potent at the present time where the Administrative Court is completely overrun with immigration, asylum and other cases and where it would be contrary to the overriding objectives of the CPR for an academic case to be pursued. After all one of those overriding objectives is '*dealing with a case justly [which] includes, so far as is practicable ...(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases*' (CPR Part 1.1) It is noteworthy that there have been a number of cases where the court has considered it appropriate to hear an academic issue but those cases, which often concerned statutory construction or the impact of the European Convention on Human Rights on English statutes, satisfied the two tests which I have set out in paragraph 36 above (see generally the examples given in **R (on the application of B) v Dr SS, Dr AC and the Secretary of State for the Home Department of Health** [2005] EWHC 86 (Admin) [47])."

56. In R (on application of) Osman Omar v Secretary of State for the Home Department [2012] EWHC 3448 (Admin), Beatson J (as he then was) was faced with a judicial review by a person whose application for leave had been rejected for non-payment of a fee but who had subsequently been given leave to remain. The challenge was, amongst other things, to the validity of the regulations concerning payment of application fees and the effect of non payment:

"3. There are now only three issues before the court. The first is whether the Secretary of State for the Home Department acted unlawfully on 12 July 2010 in refusing to accept the claimant's application for an extension of discretionary leave without a fee. This involves a challenge to the decision made on 12 July 2010, to the *vires* of the relevant regulations, which provide for a fee and do not provide for it to be possible for the Secretary of State to waive it in the case of an applicant who seeks leave on human rights grounds but cannot afford the fee because he is either destitute or in receipt only of NASS support. It is the challenge to the regulations which requires permission. The second is whether, in the light of the defendant's decision on 9 November 2011 to grant the claimant three years discretionary leave, there remains no live issue in these proceedings. The third is whether, if no live issue remains, the court should nevertheless deal with the first issue on the ground that it raises wider points of public importance because of the number of similar cases that exist or are anticipated and because the decision sought is not fact-sensitive: see *R v SSHD ex p. Salem* [1999] 1 AC 450 at 456 – 457 and *R (Zoolife International) v Secretary of State for the Environment* [2007] EWHC 2998 (Admin) at [36].

…

36. Mr Johnson submitted that there remains no live issue in this case. The claim is, he maintained, “academic”, and particularly in relation to the challenge to the regulations, for which permission has not been given, the court should not entertain it. The term “academic” is one which is widely used in relation to cases in which one or other of the parties maintain there is no longer a live issue. It may signify that, even if the claimant gets the relief which he seeks, that will produce no immediate or practical result because he has his discretionary leave.

37. The term can, however, be misleading. It cannot be said that this claim is “academic” in the sense of being of purely theoretical or speculative interest. The issue raised in these proceedings has been around for a while but not decided. It arose in *R (Francis) v Secretary of State* [2010] EWHC 1122 (Admin), which was decided in May 2010. The claimant in that case also challenged the requirement to pay a fee to secure leave to remain and Mitting J stated (at paragraph 5) that, the heart of her claim was a challenge to the lawfulness of the secondary legislation which prescribes that a fee must be paid when an individual applies for leave to remain, in that case the 2009 Regulations, but that it was “academic” because after proceedings were lodged the Secretary of State made a decision to remove the claimant.

…

44. In *R (Ferguson and Wilkie) v Secretary of State* [2010] EWHC 3756 (Admin) I also referred to the perception by those who advise claimants that what had happened in that situation was that the Secretary of State had at first chosen to resist the claims, but then decided not to allow them to be litigated, perhaps because it was thought that the court would take a different view to the Secretary of State. I stated (at paragraph 24) that “it cannot be right for a defendant in a public law case to avoid taking decisions by last-minute concessions in a way which puts people at great uncertainty, and which means that those who are less well-advised than [the claimants in those cases] are left in an unsatisfactory position”. The fact that was not the position in that case, was one of the reasons I did not consider that the matter in that case could properly be litigated.

45. The concern I then expressed, however, remains. Is it right that issues raising important points of principle which are in dispute between the defendant and those whose position in this country is regulated by the defendant and the UK Border Agency under the legislation, the Regulations and the defendant’s rules and policies should not be resolved because they are continuously kicked into touch by individual decisions made after proceedings are instituted. It is said in these proceedings that the decision dated 9 November 2011 granting the claimant discretionary leave had nothing to do with these proceedings and, in the absence of any other indication, I accept that this is so.

46. If, however, it appears that *ad hoc* decisions are being made to preclude the determination of difficult questions where those advising the Secretary of State consider her position is difficult or because of the undoubted strains and stresses to which the system administered by the Secretary of State through the UK Border Agency is subject, the court may have to think again about the general policy. It cannot be an efficient use of resources to create

situations in which individuals are forced, often at public expense, to institute legal proceedings and take up the time of a grossly overworked Administrative Court, only to find at a late stage in the proceedings that the Secretary of State has made a decision which arguably makes the issue moot. The consequence may be, not that the proceedings are abandoned, but that there is then satellite litigation on what might be called the subsidiary point of whether this is one of those rare cases in which the court should nevertheless adjudicate."

...

57. Beatson J resolved the issue as follows:

"59. I have concluded that, in the circumstances of this case, the concessions made by the defendant and the fact that the Regulations have been replaced do not preclude the court from considering the substance of the claim. Permission has been given in this case and it is only in respect of the direct challenge to the regulations that it has not. For the reasons I shall give, that challenge is, in my judgment, clearly arguable. The substantive issue raised by the claimant is an issue which arises regularly. It arose in *Francis*. It will arise in the case of *Ahmed* (CO/9926/2011) which, as I have stated, is listed for hearing at the end of January 2013. The defendant has also invited the claimant to withdraw the claim on the ground that the claimant's claim has become academic because leave has now been granted and will not doubt so argue at the hearing.

60. Secondly, I accept Mr MacKenzie's submission that the claimant's case is not fact-sensitive. In the re-amended grounds, he expressly does not ask the court to determine whether the Secretary of State should in fact exercise discretion to waive the fee in the claimant's case. What is sought is a determination of whether such discretion is provided for in statute, and whether the Secretary of State must consider exercising it. While the actual exercise of discretion in the claimant's case would be fact-sensitive, the question of whether such discretion (to waive the fee) must exist in law is not.

61. Thirdly, as to the question posed by Lord Woolf in *Quintavelle*, whether there is any relief which could be appropriately granted and which would be of value to those who have to decide matters such as this, the claimant clearly has standing to seek relief in respect of the absence of any discretion to waive fees for people in his position because he was affected by the provision in the 2010 Regulations, and is at risk of being affected by the similar provision in the 2012 Regulations."

58. The Administrative Appeals Chamber of the Upper Tribunal considered the issue of when it is appropriate to hear academic appeals, in its decision in KF and others v Birmingham Solihull Mental Health Foundation Trust and Another [2010] UKUT 185 (AAC). Delivering the Tribunal's judgment, Walker J said:-

"4. The general principle is that appellate courts (and tribunals) will decline to hear 'academic' appeals in private law cases (*Sun Life*

Assurance v Jervis [1944] AC 111 and *Ainsbury v Millington* [1987] 1 WLR 379, in which Lord Bridge of Harwich stressed that 'courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved' (at 381B-C), whilst acknowledging that different considerations might apply in 'friendly actions' or test cases). That general principle may not apply with quite the same force in public law cases, where the established view is that academic appeals should not be heard 'unless there is a good reason in the public interest for doing so' (*R v Secretary of State for the Home Department, explanation parte Salem* [1999] 1 AC 450, per Lord Slynn at 457A-B).

5. However, despite the general rule there will always be circumstances in which it is appropriate in the context of either public or private law proceedings for such an appeal to be heard (see eg *Birmingham City Council v R* [2006] EWCA Civ 1748*;* [2007] Fam 41 and *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318). Notwithstanding the considerable measure of agreement between the parties, we are entirely satisfied that the present proceedings are one such (joined) appeal. Both parties accept that there are important issues of principle to be determined. The appeals concern relatively narrow points of construction on which the parties have a legitimate interest in seeking clarification and guidance. The circumstances which arose in the present appeals were in no way unusual and will arise again. The parties and their representatives, along with others in similar situations, are entitled to expect a decision on the points at issue. We also bear in mind both that one of the functions of the Upper Tribunal is to provide authoritative guidance to the First-tier Tribunal and that these appeals concern one of the most precious of human rights, the individual's right to liberty.

6. In doing so, however, we acknowledge that there are inherent dangers in a court or tribunal (especially an appellate court or tribunal) expressing views on matters which do not arise for decision on the narrow facts of the case, as the *Court of Appeal observed in Office of Communications v Floe Telecom Ltd* [2009] EWCA Civ 47). We also bear in mind the cautionary words of Carnwath LJ, the Senior President of Tribunals, commenting on the role of the Upper Tribunal in interpreting the scope of the new armed forces compensation scheme, namely that 'Although I understand the panel's wish to give guidance as to the operation of the scheme as a whole, there are always dangers in introducing a new legal argument without the factual findings to support it' (*Secretary of State for Defence v Lance Corporal (Now Corporal) Duncan & Anor* [2009] Civ 1043; [2010] AACR 5, at [125]). However, the present appeals are not ones in which a successful party is seeking to appeal against the reasoning in the judgment of a lower tribunal on points not necessary for its decision (as in Floe Telecom). In addition, in at least two of the appeals (*KF* and *MO*) the patients may have good reason for wishing to appeal against the actual orders made, even though to some extent events have moved on. In all three appeals, even if no relief is now sought in respect of the actual order, there remains an important issue of principle which touches on the liberty of the subject. Furthermore, this is not a case in which The Upper Tribunal has introduced new legal arguments, as appeared to be the case in Duncan; rather, we are seeking to resolve actual issues

which have arisen on the facts of the present appeals. In addition, these appeals raise a number of practical problems which may affect a substantial number of other cases before the First-tier Tribunal."

59. What, then, should we derive from these High Court and AAC cases on "academic" proceedings, bearing in mind the somewhat different statutory context in which the Immigration and Asylum Chamber must operate? There are two main points. The first is the principle of restraint, most strongly expressed in the requirement that there must be exceptional features before a court will proceed to adjudicate substantively on an issue that, as between the parties, has become academic. The second is that, in deciding whether a case is exceptional, the court will consider if there is an issue to resolve that will have direct relevance in other cases, thereby potentially saving time and expense in litigating future disputes, and which is not fact-sensitive.

(ii) General guidance in the immigration jurisdiction

60. Just as with the Administrative Appeals Chamber, there is a need for the Immigration and Asylum Chamber of the Upper Tribunal to give guidance on matters of general concern, as regards not only legal and procedural issues but also (uniquely to our jurisdiction) authoritative country guidance (Practice Direction 12, as amended). A useful articulation of the need for legal guidance as a reason for proceeding is to be found in the case of CS (see above). Although there the Tribunal was, as we have noted, proceeding pursuant to a concession from the respondent that consent was required to withdraw the immigration decision, what Blake J said is, nevertheless, highly relevant for the purposes of deciding whether to proceed substantively, following withdrawal of the appeal decision:-

> "(8) We [refuse consent] for three reasons taking into account the overriding objective to the UT Rules:
>
> (i) reconsideration had been ordered in December 2008 but consent [to] withdraw the decision was only being sought on 30 April 2010 after the appellant had incurred the costs of representation at this appeal.
>
> (ii) The IJ's decision had been based on a reading of the Guidance that was now accepted by the respondent to have been wrong. It was important in the public interest that the error be brought to general attention so the parties had the benefit of a reasoned decision of the UT on the question.
>
> (iii) The IJ's decision in part relied on some observations of the AIT in MM (above) and if that reasoning is flawed it is important that the UT says so."

(iii) Other factors: timing, reasons for withdrawal

61. As well as dealing with the importance of giving general guidance, [8] of CS is significant for articulating the fact that both the timing of, and reasons for, the respondent's withdrawal of her decision may be such as to necessitate the Upper Tribunal to embark on a substantive analysis, leading to a fully-reasoned, authoritative decision. In particular, where the reasons for withdrawal of the decision, as articulated by the respondent, indicate that the only legally correct result would be a decision in favour of the appellant (for example, to grant leave to remain on the basis that she meets the relevant requirements of the Immigration Rules), then, in the context of the overriding objective, it may well be appropriate for the Upper Tribunal to bring matters to an end, by a substantive decision in the appellant's favour.

(iv) Bad faith

62. As we have seen, in Chichvarkin, the Court of Appeal rejected what was, in effect, an attempt to impose legal fetters on the respondent's power to withdraw decisions in the immigration field, which would have been wider than the well-established ones, based essentially on irrationality. In K v Entry Clearance Officer Tashkent Singh J, faced with a challenge to decisions which had subsequently been withdrawn and replaced by different ones, accepted that:-

> "… in an extreme case, circumstances might arise in a hypothetical context in which, where bad faith is alleged in a decision-making process, the court might well be justified in entertaining a claim for judicial review, even where the resulting decision has by then been withdrawn by a public authority and a new decision has replaced it but, I stress, no such allegation of bad faith has in fact been made in this case." [29]

63. Any "bad faith" or other irrationality challenge to the decision of the respondent to withdraw an appealed decision must not be lightly made and must be supported by cogent evidence. A direct challenge to the withdrawal would need to be brought by means of judicial review. But, in deciding whether to proceed to make a substantive decision, together with a direction compelling the respondent to act in accordance with it, the Upper Tribunal would, in such a hypothetical case, clearly have regard to whether bad faith etc. had been made out. To take a hypothetical example, if the respondent had (i) refused an application by reference to Rules in force at the date of decision; but (ii) acknowledged that, under those Rules as then in force, the application should have been allowed; and (iii) proceeded to withdraw that decision in order to make one by reference to the new Rules, under which the applicant would lose, the Upper Tribunal would be fully justified in allowing the applicant's appeal against the unlawfulness of the decision appealed, and directing a grant of appropriate leave. We emphasise, however, that we would not expect the respondent so to behave in reality.

(v) Views of the parties

64. There remains an important factor in deciding between formal and substantive disposal of an appeal, in the situation with which we are concerned; namely, the views of the parties. If the appellant is content to await the decision of the respondent, which must eventually follow from the withdrawal of the decision against which the appeal is made, the Tribunal will need to have regard to that stance. The appellant may go so far as to request consent under Upper Tribunal rule 17 to withdraw his appeal, before the result of the respondent's reconsideration is known. The appellant's attitude may not be decisive; since a need to give legal guidance for the benefit of other appeals may point towards substantive determination. But, equally, the Tribunal will need to have regard to the fact that a case neither party wishes to argue may not be the best vehicle for giving such guidance.

Relevance of the factors at 'error of law/set aside' stage

65. So far under this heading, we have examined the position on the re-making of a decision on an appeal, pursuant to section 12(2)(b)(ii) of the 2007 Act. Before the Upper Tribunal reaches that stage, however, it must have found an error of law in the determination of the First-tier Tribunal and set that determination aside. In her written submissions, Ms Isherwood suggested that "the withdrawal of the decision appealed against is unlikely to affect whether or not the FtT erred in law" [22]. With respect, we are not sure that is correct. The history of the present case points to the contrary. The fact that the First-tier Tribunal Judge may have erred in law, not just in relation to the issue of social ostracism but also in relation to Article 8/best interests, is suggested by the respondent's decision to withdraw the immigration decision, on the basis that it was not made by reference to section 55 of the 2009 Act. Conversely, where an appeal has been allowed by the First-tier Tribunal, the subsequent withdrawal of the immigration decision may indicate that the respondent shares the concern that the First-tier Tribunal must have had about the decision, in allowing the appeal.

66. Accordingly, where the Upper Tribunal is considering an appeal against the decision of the First-tier Tribunal, and the decision that triggered the appeal to the First-tier Tribunal is then withdrawn, the Upper Tribunal must proceed pursuant to section 12 of the 2007 Act to decide whether or not the First-tier Tribunal's determination contains an error of law and in doing so, the Upper Tribunal should have regard to the reasons why the respondent has withdrawn her decision. If the First-tier Tribunal did not err in law, then that is the end of the appeal. If the Upper Tribunal finds that the First-tier Tribunal did err in law, then whether it proceeds to the stage of re-making the appeal under section 12(2)(b)(ii) may well depend on the view that the Upper Tribunal takes of whether the re-made appeal would need to be substantively, as opposed to formally, determined, according to the factors we have described above. In this regard, we

observe that at the end of its decision in KF and others, the Administrative Appeals Chamber found that the First-tier Tribunal had erred in law but decided not to set that Tribunal's decision aside "as that would serve no useful purpose on the particular facts of this case" [62].

Remittal to the First-tier Tribunal?

67. As can be seen, the discussion so far on whether to re-make the appeal formally or substantively, following withdrawal of the appealed decision, has proceeded on the assumption that the Upper Tribunal would re-make that decision itself, pursuant to section 12(2)(b)(ii), rather than remitting it to the First-tier Tribunal. There are powerful reasons why re-making in the Upper Tribunal is likely to be the most appropriate course, pursuant to the overriding objective and Practice Statement 7. If the matter is to be disposed of by a formal determination, it would make no sense for the case to be remitted. If, however, the Upper Tribunal decides in favour of substantive determination, the factors which drove that conclusion are likely to be such as to render it more appropriate for the Upper Tribunal to re-make the decision in the appeal. In particular, the giving of legal, procedural and country guidance is a function of the Upper Tribunal, not the First-tier Tribunal. If a substantive decision is required and the result is apparent to the Upper Tribunal, then, again, the best course will be for the Upper Tribunal to reach that result in a determination.

68. Those considerations have force, irrespective of the issue of rule 17(2) of the 2005 Rules. In view of what we have just said, it is perhaps unnecessary to hypothesise a scenario in which, on appeal to the Upper Tribunal against a First-tier Tribunal determination, the decision appealed under section 82 is withdrawn; the Upper Tribunal finds an error of law in the First-tier Tribunal determination and sets it aside, considers the re-making requires a substantive determination but decides that remittal is the appropriate course of action, in order for the First-tier Tribunal to produce a substantive determination. But, having set out such a hypothetical example, we find that rule 17(2) of the 2005 Rules would not preclude the First-tier Tribunal from producing such a determination. Our reasons are set out above at paragraphs 32 and 33.

E. SUMMARY OF FINDINGS

1. Does rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 enable the Tribunal to withhold consent to the withdrawal by the Secretary of State of the decision against which the appeal was brought?

69. No. The word "case" in rule 17 does not cover the decision made by the Secretary of State in the exercise of her functions under the Immigration Acts. Clearer wording would be needed before it could be held that a general procedure rule in subordinate legislation imposes a direct fetter on the discharge of such functions. The interpretation of rule 17 contended

for by the appellant finds no support in the practice of the Administrative Appeals Chamber of the Upper Tribunal. Such an interpretation also faces the difficulty that it would have to apply in judicial review cases in the Upper Tribunal, where there is no suggestion that a minister or public body whose decision is under challenge by means of judicial review requires the consent of the Tribunal to withdraw that decision.

2. What is the effect on appellate proceedings in the Immigration and Asylum Chamber of the Upper Tribunal of the withdrawal by the Secretary of State of the decision against which a **person appealed under the Nationality, Immigration and Asylum Act 2002 to the First-tier Tribunal?**

70. The withdrawal does not affect the jurisdiction of the Upper Tribunal under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 to decide whether the decision of the First-tier Tribunal "involved the making of an error on a point of law". Furthermore, the withdrawal does not extinguish the jurisdiction of the Upper Tribunal under section 12(2)(b)(ii) of the 2007 Act to re-make the decision in the appeal brought under the 2002 Act. Section 104 of the 2002 Act is a comprehensive legislative statement of the circumstances in which an appeal is to be regarded as pending. The withdrawal of the decision appealed is not mentioned in section 104 as one of the ways in which an appeal comes to an end. Although rule 17(2) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 requires the First-tier Tribunal to treat an appeal as withdrawn when the respondent notifies that Tribunal that the decision appealed is withdrawn (thereby "triggering" section 104(1)(b)), rule 17(2) sits uncomfortably with section 104(4B) and (4C) and, in any event, does not bind the Upper Tribunal. Its existence does not circumscribe what the Upper Tribunal may do by way of re-making the decision in an appeal pursuant to section 12(2)(b)(ii) of the 2007 Act, following the setting aside of the First-tier Tribunal's determination.

71. The scheme of the 2002 Act is such that the Tribunal's functions under section 86 of determining whether to allow or dismiss an appeal continue, notwithstanding the withdrawal of the decision against which the appeal was brought. Section 104(4B) and (4C) expressly provide for an appeal to continue on certain grounds, even after the grant of leave; and this can only be by reference to the Tribunal's functions under section 86 of allowing or dismissing an appeal according to whether the decision appealed (albeit no longer extant) was or was not "in accordance with the law". Thus, the respondent's withdrawal of the decision which was appealed to the First-tier Tribunal does not prevent the Upper Tribunal, if re-making the decision in the appeal, from allowing or dismissing the appeal or from giving effect to its decision by means of a direction under section 87 of the 2002 Act. In particular, there is no merit in the submission that the Upper Tribunal's decision in such circumstances can never be anything more than "advisory", so far as the respondent is concerned.

3. How should the Upper Tribunal proceed, following withdrawal by the respondent of the decision against which the appeal is brought?

72. Section 86 of the 2002 Act does not purport to prescribe the way in which matters raised as grounds of appeal must be determined. In re-making a decision in an appeal, pursuant to section 12(2)(b)(ii) of the 2007 Act, where the respondent's decision has been withdrawn, the Upper Tribunal may make a formal disposal of the appeal if, in all the circumstances, having regard to the overriding objective and the matters mentioned below, that appears to be the most appropriate way of disposing of the proceedings. In such cases, the Tribunal would decline to hear argument and need not reach a substantive, reasoned determination. The formal disposal will normally be to dismiss the appeal, unless the issue of costs, coupled with the reasons underlying the respondent's withdrawal of the appealed decision, point towards allowing the appeal. In either case, the formal disposal of proceedings will preserve the appellant's position, pending the fresh decision of the respondent.

73. In deciding, by reference to the overriding objective, whether to proceed to deal substantively with the appeal, in the wake of the respondent's withdrawal, the Tribunal will have regard to all relevant matters, including:

(a) the principle that the respondent should, ordinarily, be the primary decision maker in the immigration field;

(b) whether the matters potentially in issue in the appeal are such as to require the Tribunal to give general legal or procedural guidance, including authoritative country guidance;

(c) the reasons underlying the respondent's withdrawal of the appealed decision (in particular, whether they demonstrate a legal defect in that decision, which the Tribunal should find, so as to allow the appeal substantively, perhaps with a direction under section 87);

(d) the appeal history, including the timing of the withdrawal;

(e) the views of the parties.

74. The withdrawal of the respondent's decision may have a part to play in the Upper Tribunal's findings, pursuant to section 12(1) of the 2007 Act, on whether the determination of the First-tier Tribunal contains an error of law. In any event, withdrawal does not discharge the Upper Tribunal's duty to reach a decision on that issue. The factors described above as being relevant to whether the Tribunal would re-make any decision in the appeal on a formal or substantive basis may, however, influence the exercise of the Upper Tribunal's discretion under section 12(2)(a) whether to set aside the First-tier Tribunal's determination, if an error of law in that determination is found.

75. Remittal of a case to be re-decided by the First-tier Tribunal is unlikely to be compatible with the overriding objective or Practice Statement 7. But where such a case is remitted, rule 17(2) of the 2005 Rules would not preclude the First-tier Tribunal from reaching a substantive determination.

76. In paragraph 1 above, we said that the answers to the two main questions posed did not admit of easy answers. By now, the truth of that statement will be apparent. The conclusions we have reached do, however, have two positive aspects. First, they maintain what we consider to be the proper demarcation line between executive and judicial decision-making, by acknowledging that primary responsibility for making decisions under the Immigration Acts lies with the Secretary of State, rather than the Tribunal; and that legislative exceptions to this need to be clear and are not lightly to be inferred. Secondly, having identified the means whereby the 2002 Act can lead to substantive appellate decisions, even after withdrawal of the decision that was appealed, attention can then be focussed on the principles to be applied in determining whether such a substantive decision is necessary or desirable in a particular case, drawing on broadly analogous principles which apply in the courts.

F. APPLYING OUR CONCLUSIONS TO THE PRESENT APPEAL

77. In the present case, the Secretary of State had no option but to withdraw the entirety of the May 2010 decision to remove the appellant by way of directions, in order to re-determine whether the appellant should be granted leave, by reference to the best interests of her then-existing only child, born in the United Kingdom. To that limited extent, the principle of primary decision-making by the respondent has force. However, there was no suggestion from the respondent that her view on the appellant's entitlement to refugee status had changed since May 2010, whether by reference to the proceedings in the Court of Appeal or otherwise. This case has now been ongoing for some three and a half years. The respondent's decision to withdraw the immigration decision was communicated to the Upper Tribunal only in September 2013. The fact that the May 2010 decision was defective in this regard should have been apparent to the respondent far earlier.

78. As we already noted, following remittal by the Court of Appeal, the Upper Tribunal has proceeded on the basis that the appeal may be suitable for giving country guidance on the issue of the risk of harm arising from possible ostracism of mothers with illegitimate children, returning to Pakistan. If the result of the respondent's reconsideration is to grant leave to the appellant, by reference to (now) her two children, that discretionary leave is highly likely to exceed one year, according to the respondent's current policies. As a result, assuming that the respondent decided not to grant the appellant refugee status, the latter would be entitled to continue her appeal, pursuant to section 104(4B) of the 2002 Act, provided of course that the appeal proceedings had not been formally concluded by the Upper Tribunal, following the withdrawal of the appeal decision. Whilst it is acknowledged that, in those circumstances, the appellant would have

a right of appeal against the refusal of his or her asylum claim, pursuant to section 83 of the 2002 Act, that appeal would have to be brought afresh, in the First-tier Tribunal. This could well, in turn, affect whether the appellant's case could be used in order to give authoritative country guidance.

79. In all the circumstances, we decline to adjudicate on the appeal under section 86, on a purely formal basis, following the withdrawal of the decision against which the appellant appealed to the First-tier Tribunal.

80. It is, however, the case that neither party is currently prepared to proceed to a substantive hearing of the appeal as a potential country guidance case. We have, therefore, decided that the hearing of the appellant's appeal should be adjourned for a period of three months. If, in the meantime, the appellant is granted leave to remain in the United Kingdom, the respondent will be obliged by Upper Tribunal rule 17A to inform the Upper Tribunal of that fact. If the period of leave is such as potentially to cause the appeal to be statutorily abandoned but the appellant wishes to pursue her appeal on grounds relating to the Refugee Convention, she will need to comply with rule 17A(3), by notifying the Tribunal accordingly.

81. At the end of the period of three months, the case will be listed for a case management hearing. If by that time the respondent has not made a fresh immigration decision, or if she has done so in circumstances where the appeal continues pursuant to section 104(4B), the Tribunal will, at that hearing, give case management directions for the forthcoming substantive hearing.

Signed

Date

Upper Tribunal Judge Peter Lane