Upper Tribunal
(Immigration and Asylum Chamber)

VOM (Error of law – when appealable) Nigeria [2016] UKUT 00410 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London
On 19 July 2016

Decision Promulgated **

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Before

The Hon. Mr Justice McCloskey, President,
Vice President Ockelton and
Upper Tribunal Judge Dawson

Between

VOM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr R Khubber, of counsel, instructed by Lawrence Lupin Solicitors
Respondent: Ms J Anderson, of counsel, instructed by the Government Legal Department

In a statutory appeal, the right of appeal under s 13 of the 2007 Act does not arise until the Upper Tribunal has completed the process required by s 12.

INTERLOCUTORY DECISION

1. Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

We emphasise at the outset that the Appellant has the protection of anonymity. Accordingly, unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. This is a case in which both parties have been granted permission to appeal to the Upper Tribunal (the "UT"). We shall, for convenience, continue to describe the original appellant, VOM, as "the Appellant" and the Secretary of State for the Home Department, the original respondent, as "the Respondent".

The Issue

3. The issue hereby determined is whether a party to appeal proceedings in the Upper Tribunal (the "UT") has a right to apply for permission to appeal to the Court of Appeal against a determination of the UT incorporating the twin elements of (a) finding an error of law in the decision of the First-tier Tribunal (the "FtT") and setting such decision aside accordingly. While these are the specific contours of the question which has arisen in the instant case, it may be said that the broader question which arises is whether there is a right to apply for permission to appeal to the Court of Appeal against any act or determination of the UT which is not finally dispositive of the appeal of which it is seized. The resolution of this issue hinges on two provisions of primary legislation, namely Sections 12 and 13 of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act").

The Proceedings to Date

4. The stimulus for the successive appeals to the FtT and the UT in these proceedings was a decision of the Secretary of State, dated 26 September 2013, refusing to revoke a deportation order made in respect of the Appellant, a national of Nigeria aged 38 years. This decision has generated the following series of judicial interventions:

   (a) By its decision promulgated on 01 August 2014 the FtT dismissed the ensuing appeal under the Immigration Rules and allowed it under Article 8 ECHR.

   (b) By a decision dated 15 August 2014 a Judge of the FtT refused the Appellant's application for permission to appeal to the UT.

   (c) The Secretary of State also applied to the FtT for permission to appeal to the UT and, by oversight, this application was not determined.

   (d) By the decision of a Judge of the UT dated 04 December 2014, which omitted to take cognisance of the oversight noted immediately above, both parties were granted permission to appeal to the UT. As regards the Appellant, the case made in the grounds of appeal was that the

UT should have allowed his appeal under the Immigration Rules and Article 3 ECHR.

(e) The last-mentioned decision was set aside in part for irregularity by a further decision of a Judge of the UT dated 19 November 2015.

(f) By a separate decision of the same date the same Judge granted permission to the Secretary of State to appeal to the UT, based on arguable error of law in the appeal having been allowed under Article 8 ECHR.

5. The upshot of this entangled procedural history was a listing of the combined appeals before a Judge of the UT on 12 January 2016. This gave rise to the following determination dated 05 February 2016:

> *"The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law insofar as the assessment of exceptional circumstances in paragraph 398 of the Immigration Rules is concerned. I set aside the decision insofar as it relates to that finding. The First-tier Tribunal did not err in law in its findings with regard to Article 3 and I do not set aside that decision".*

The UT Judge formulated certain consequential case management directions relating to the provision of evidence and, further, provisionally relisting the appeal for hearing on 15 March 2016 for the purpose of remaking the decision of the FtT.

6. The last-mentioned judicial act of the UT was the impetus for an application by the Appellant, by a notice dated 25 February 2016, in the following terms:

> "*The Appellant seeks permission to appeal to the Court of Appeal against the decision of the UT –*
>
> *(i) On Article 8 ECHR and by way of the UT setting aside the decision of the FtT which had allowed the Appellant's appeal previously.*
>
> *(ii) On Article 3 ECHR, by way of the UT concluding that there were no material errors of law in the determination of the FtT on this ground such that the FtT's decision should not be set aside and reconsidered*".

In short, the Appellant contends that the twofold conclusion of the UT Judge (a) finding an error of law in the decision of the FtT (to the Appellant's detriment) and (b) setting aside such decision in consequence is vitiated by error of law. For the purposes of this decision no exploration of the asserted errors of law is necessary.

Statutory Framework

7. The statutory lineage begins with certain provisions of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). References in section 82 to "the Tribunal" denote the FtT.

Section 82

"***Right of appeal to the Tribunal***

(1) A person ('P') may appeal to the Tribunal where –

(a) the Secretary of State has decided to refuse a protection claim made by P,

(b) the Secretary of State has decided to refuse a human rights claim made by P, or

(c) the Secretary of State has decided to revoke P's protection status.

(2) For the purposes of this Part -

(a) a 'protection claim' *is a claim made by a person ('P') that removal of P from the United Kingdom -*

(i) would breach the United Kingdom's obligations under the Refugee Convention, or

(ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions -

(i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;

(ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) a person has 'protection status' if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;

(d) 'humanitarian protection' *is to be construed in accordance with the immigration rules;*

(e) 'refugee' has the same meaning as in the Refugee Convention.

(3) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part."

Section 104

*"**Pending appeal***

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

(a) beginning when it is instituted, and

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

(2) An appeal under section 82(1) is not finally determined for the purpose 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, or

(c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.

(4A) 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 [subsection (4B)] [5]).

(4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on [a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection)] [6] where the appellant–

(b) gives notice, in accordance with [Tribunal Procedure Rules]

These provisions of primary legislation must be considered in tandem with those of the 2007 Act rehearsed above."

8. While the principal ingredients of the statutory matrix are Sections 12 and 13 of the 2007 Act, we begin with Section 11, which provides in material part:

Section 11

*"**Right to appeal to Upper Tribunal***

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (8).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by –

(a) the First-tier Tribunal, or

(b) the Upper Tribunal,

on an application by the party.

(5) For the purposes of subsection (1), an 'excluded decision' is –

(a) any decision of the First-tier Tribunal on an appeal made in exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1)(a) of the Criminal Injuries Compensation Act 1995 (c. 53) (appeals against decisions on reviews),

(aa) any decision of the First-tier Tribunal on an appeal made in exercise of a right conferred by the Victims of Overseas Terrorism Compensation Scheme in compliance with section 52(3) of the Crime and Security Act 2010,

(b) any decision of the First-tier Tribunal on an appeal under section 28(4) or (6) of the Data Protection Act 1998 (c. 29) (appeals against national security certificate),

(c) any decision of the First-tier Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c. 36) (appeals against national security certificate),

(d) a decision of the First-tier Tribunal under section 9 –

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,

(iii) to set aside an earlier decision of the tribunal, or

(iv) to refer, or not to refer, a matter to the Upper Tribunal,

(e) a decision of the First-tier Tribunal that is set aside under section 9 (including a decision set aside after proceedings on an appeal under this section have been begun), or

(f) any decision of the First-tier Tribunal that is of a description specified in an order made by the Lord Chancellor.

(6) A description may be specified under subsection (5)(f) only if –

(a) in the case of a decision of that description, there is a right to appeal to a court, the Upper Tribunal or any other tribunal from the decision and that right is, or includes, something other than a right (however expressed) to appeal on any point of law arising from the decision, or

(b) decisions of that description are made in carrying out a function transferred under section 30 and prior to the transfer of the function under section 30(1) there was no right to appeal from decisions of that description.

(7) Where –

(a) an order under subsection (5)(f) specifies a description of decisions, and

(b) decisions of that description are made in carrying out a function transferred under section 30,

the order must be framed so as to come into force no later than the time when the transfer under section 30 of the function takes effect (but power to revoke the order continues to be exercisable after that time, and power to amend the order continues to be exercisable after that time for the purpose of narrowing the description for the time being specified).

(8) The Lord Chancellor may by order make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of subsection (2).”

Section 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 –

(a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;

(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. "

Section 13

*"**Right to appeal to Court of Appeal etc.***

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (14).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by–

(a) the Upper Tribunal, or

(b) the relevant appellate court,

on an application by the party.

(5) An application may be made under subsection (4) to the relevant appellate court only if permission (or leave) has been refused by the Upper Tribunal.

(6) The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and for which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers–

(a) that the proposed appeal would raise some important point of principle or practice, or

(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.

(6A) Rules of court may make provision for permission not to be granted on an application under subsection (4) to the Court of Session that falls within subsection (7) unless the court considers -

(a) that the proposed appeal would raise some important point of principle [or practice] , or

(b) that there is some other compelling reason for the court to hear the appeal.

(7) An application falls within this subsection if the application is for permission (or leave) to appeal from any decision of the Upper Tribunal on an appeal under section 11.

(8) For the purposes of subsection (1), an 'excluded decision' is –

(a) any decision of the Upper Tribunal on an appeal under section 28(4) or (6) of the Data Protection Act 1998 (c. 29) (appeals against national security certificate),

(b) any decision of the Upper Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c. 36) (appeals against national security certificate),

(c) any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal),

(d) a decision of the Upper Tribunal under section 10–

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal, or

(iii) to set aside an earlier decision of the tribunal,

(e) a decision of the Upper Tribunal that is set aside under section 10 (including a decision set aside after proceedings on an appeal under this section have been begun), or

(f) any decision of the Upper Tribunal that is of a description specified in an order made by the Lord Chancellor.

(9) A description may be specified under subsection (8)(f) only if –

(a) in the case of a decision of that description, there is a right to appeal to a court from the decision and that right is, or

includes, something other than a right (however expressed) to appeal on any point of law arising from the decision, or

(b) decisions of that description are made in carrying out a function transferred under section 30 and prior to the transfer of the function under section 30(1) there was no right to appeal from decisions of that description.

(10) Where –

(a) an order under subsection (8)(f) specifies a description of decisions, and

(b) decisions of that description are made in carrying out a function transferred under section 30,

the order must be framed so as to come into force no later than the time when the transfer under section 30 of the function takes effect (but power to revoke the order continues to be exercisable after that time, and power to amend the order continues to be exercisable after that time for the purpose of narrowing the description for the time being specified).

(11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.

(12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate –

(a) the Court of Appeal in England and Wales;

(b) the Court of Session;

(c) the Court of Appeal in Northern Ireland.

(13) In this section except subsection (11), 'the relevant appellate court', *as respects an appeal, means the court specified as respects that appeal by the Upper Tribunal under subsection (11).*

(14) The Lord Chancellor may by order make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of subsection (2).

(15) Rules of court may make provision as to the time within which an application under subsection (4) to the relevant appellate court must be made."

9. The term "excluded decisions" in Section 13(1) of the 2007 Act is given flesh by a Statutory Instrument, namely the Appeals (Excluded Decisions)

Order 2009 (the "2009 Order"). Article 2 lists two decisions of the FtT which are "excluded decisions". In Article 3 there is a list comprising thirteen "excluded decisions" of both the FtT and the UT. While only the last of these, Article 3 (m), which was added by the Tribunals, Courts and Enforcement Act 2007 (Miscellaneous Provisions) Order 2010, effective from 15 February 2010, falls to be considered in the present context, it is appropriate to reproduce Article 3 in full:

> *"For the purposes of sections 11(1) and 13(1) of the Tribunals, Courts and Enforcement Act 2007, the following decisions of the First-tier Tribunal or the Upper Tribunal are excluded decisions -*
>
> *(a) any decision under section 20(7), (8B) or (8G)(b) (power to call for documents of taxpayer and others), 20B(1B) or (6) (restrictions on powers under sections 20 and 20A) or 20BB(2)(a) (falsification etc. of documents) of the Taxes Management Act 1970 [1];*
>
> *(b) any decision under section 35A(2) (variation of undertakings), 79A(2) (variation of undertakings) or 219(1A) (power to require information) of the Inheritance Tax Act 1984;*
>
> *(c) any decision under section 152(5) (notification of taxable amount of certain benefits) or 215(7) (advance clearance by Board of distributions and payments) of the Income and Corporation Taxes Act 1988;*
>
> *(d) any decision under section 138(4) of the Taxation of Chargeable Gains Act 1992 (procedure for clearance in advance);*
>
> *(e) any decision under section 187(5) or (6) (returns and information) of, or paragraph 3(2) or 6(2) of Schedule 21 (restrictions on powers under section 187) to, the Finance Act 1993;*
>
> *(f) any decision under paragraph 91(5) of Schedule 15 to the Finance Act 2000 (corporate venturing scheme: advance clearance);*
>
> *(g) any decision under paragraph 88(5) of Schedule 29 to the Finance Act 2002 (gains and losses from intangible fixed assets: transfer of business or trade);*
>
> *(h) any decision under paragraph 2, 4, 7, 9, 10, 11 or 24 of Schedule 13 to the Finance Act 2003 (stamp duty land tax: information powers);*
>
> *(i) any decision under section 306A (doubt as to notifiability), 308A (supplemental information), 313B (reasons for non-disclosure: supporting information) or 314A (order to disclose) of the Finance Act 2004;*

(j) *any decision under section 697(4) of the Income Tax Act 2007 (opposed notifications: determinations by tribunal);*

(k) *any decision under regulation 10(3) of the Venture Capital Trust (Winding up and Mergers) (Tax) Regulations 2004 (procedure for Board's approval);*

(l) *any decision under regulation 5A (doubt as to notifiability), 7A (supplemental information), 12B (reasons for non-disclosure: supporting information) or 12C (order to disclose) of the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007[4].*

(m) *any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British Nationality Act 1981, [section 82 of the Nationality, Immigration and Asylum Act 2002] , or regulation 26 of the Immigration (European Economic Area) Regulations 2006."*

10. We draw attention also to certain provisions of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "2008 Rules") which have featured in the debate. First there is the overriding objective:

Rule 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."

Next, the UT is given extensive case management powers:

Rule 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.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may -

(a) extend or shorten the time for complying with any rule, practice direction or direction;

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case;

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party;

(e) deal with an issue in the proceedings as a preliminary issue;

(f) hold a hearing to consider any matter, including a case management issue;

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing;

(i) require a party to produce a bundle for a hearing;

(j) stay (or, in Scotland, sist) proceedings;

(k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and—

(i) because of a change of circumstances since the proceedings were started, the Upper Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Upper Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case;

(l) suspend the effect of its own decision pending an appeal or review of that decision;

(m) in an appeal, or an application for permission to appeal, against the decision of another tribunal, suspend the effect of that decision pending the determination of the application for permission to appeal, and any appeal;

(n) require any person, body or other tribunal whose decision is the subject of proceedings before the Upper Tribunal to provide reasons for the decision, or other information or documents in relation to the decision or any proceedings before that person, body or tribunal.

(4) The Upper Tribunal may direct that a fast-track case cease to be treated as a fast-track case if -

(a) all the parties consent; [or]

(b) the Upper Tribunal is satisfied that [...]the appeal or application could not be justly determined if it were treated as a fast-track case [.]

(5) In a financial services case, the Upper Tribunal may direct that the effect of the decision in respect of which the reference has been made is to be suspended pending the determination of the reference, if it is satisfied that to do so would not prejudice -

(a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice; [...]

(b) the smooth operation or integrity of any market intended to be protected by that notice [; or]

(c) the stability of the financial system of the United Kingdom.

(6) Paragraph (5) does not apply in the case of a reference in respect of a decision of the Pensions Regulator.

(7) In a wholesale energy case, the Upper Tribunal may direct that the effect of the decision in respect of which the reference has

been made is to be suspended pending the determination of the reference."

We would also highlight, briefly, Rule 21, which contains the power exercised in this case to grant permission to appeal to the UT in circumstances where the FtT has refused to do so and the outworkings thereof, found in Rules 22 and 22A.

11. Completing the statutory jigsaw we draw attention to the so-called "second appeal" test viz the test to be applied in the determination of applications for permission to appeal from the UT to the Court of Appeal. Section 13(6) of the 2007 Act provides:

> *"The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and for which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers -*
>
> *(a) that the proposed appeal would raise some important point of principle or practice, or*
>
> *(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.*
>
> *(6A) Rules of court may make provision for permission not to be granted on an application under subsection (4) to the Court of Session that falls within subsection (7) unless the court considers -*
>
> *(a) that the proposed appeal would raise some important point of principle [or practice] , or*
>
> *(b) that there is some other compelling reason for the court to hear the appeal"*.

The exercise of the power conferred on the Lord Chancellor by this provision is contained in the Constitutional Reform Act 2005.

12. We would also mention the combined Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal Practice Direction, dated 10 February 2010, issued by the Senior President of Tribunals. Part 3 of this instrument reflects the staged nature of the UT's decision making process contemplated by section 12 of the 2007 Act. Paragraph 3.1 provides:

> *"Where permission to appeal to the Upper Tribunal has been granted, then, unless and to the extent that they are directed otherwise, for the purposes of preparing for a hearing in the Upper Tribunal the parties should assume that:-*

(a) the Upper Tribunal will decide whether the making of the decision of the First-tier Tribunal involved the making of an error on a point of law, such that the decision should be set aside under section 12(2)(a) of the 2007 Act;

(b) except as specified in Practice Statement 7.2 (disposal of appeals by Upper Tribunal), the Upper Tribunal will proceed to re-make the decision under section 12(2)(b)(ii), if satisfied that the original decision should be set aside; and

(c) in that event, the Upper Tribunal will consider whether to re-make the decision by reference to the First-tier Tribunal's findings of fact and any new documentary evidence submitted under UT rule 15(2A) which it is reasonably practicable to adduce for consideration at that hearing."

The sequencing which the final decision making may involve is reflected in the next three succeeding provisions:

"3.2 The parties should be aware that, in the circumstances described in paragraph 3.1(c), the Upper Tribunal will generally expect to proceed, without any further hearing, to re-make the decision, where this can be undertaken without having to hear oral evidence. In certain circumstances, the Upper Tribunal may give directions for the giving of oral evidence at the relevant hearing, where it appears appropriate to do so. Such directions may be given before or at that hearing.

3.3 In a case where no oral evidence is likely to be required in order for the Upper Tribunal to re-make the decision, the Upper Tribunal will therefore expect any documentary evidence relevant to the re-making of the decision to be adduced in accordance with Practice Direction 4 so that it may be considered at the relevant hearing; and, accordingly, the party seeking to rely on such documentary evidence will be expected to show good reason why it is not reasonably practicable to adduce the same in order for it to be considered at that hearing.

3.4 If the Upper Tribunal nevertheless decides that it cannot proceed as described in paragraph 3.1(c) because findings of fact are needed which it is not in a position to make, the Upper Tribunal will make arrangements for the adjournment of the hearing, so that the proceedings may be completed before the same constitution of the Tribunal; or, if that is not reasonably practicable, for their transfer to a different constitution, in either case so as to enable evidence to be adduced for that purpose."

The exercise of fitting the decision of the UT dated 12 January 2016 into the framework of both section 12 and the Practice Direction is easily performed.

The Parties' Contentions In Outline

13. The cornerstone of the submissions of Mr Khubber on behalf of the Appellant was that the words "a decision made by the Upper Tribunal" in Section 13(1) of the 2007 Act embrace – within the compass of Section 12(1) and (2) – a finding that the decision of the FtT involved the making of an error on a point of law and/or a consequential decision of the UT setting aside the decision of the FtT. Mr Khubber submitted that the statutory language is sufficiently broad and unqualified to warrant this construction. He further submitted that this is supported by the restrictive nature of the second appeal test. He argued that the determination of the UT under scrutiny in this case is not an "excluded decision" within the meaning of Article 3(m) of the 2009 Order. Finally, he submitted that to reject the construction espoused by him would violate an appellant's right of access to a court.

14. The main thrust of the argument development by Ms Anderson on behalf of the Secretary of State was that the construction of Sections 12 and 13 of the 2007 Act advocated by the Appellant would produce an unsatisfactory and unworkable result which Parliament cannot have intended. She submitted that the statutory regime contemplates a single, indivisible appeal (our formula) from the UT to the Court of Appeal only at the stage when the UT appeal process is finally completed. This, it was submitted, would give effect to the presumed parliamentary intention of a sensible, coherent and workable appeal model. Ms Anderson's alternative submission was that the appeal which the Appellant purports to pursue is precluded by Article 3(m) of the 2009 Order in any event.

Discussion

15. We take as our starting point the well known principle that no appeal lies to a superior court or tribunal unless expressly created by statute. This principle is stated unambiguously in Halsbury's Laws of England, Volume 37 (4th Edition Reissue), paragraph 1501:

> *"An appeal is an application to a superior Court or Tribunal to reverse, vary or set aside the judgment, order, determination, decision or award of an inferior Court or Tribunal in the hierarchy of Courts or Tribunals on the ground that it was wrongly made or that as a matter of justice or law it requires to be corrected.* ***A right of appeal is conferred by statute or equivalent legislative authority; it is not a mere matter of practice or procedure and neither the superior nor the inferior Court or Tribunal nor both combined can create or take away such a right.****"*

[Emphasis added.]

As Lord Atkin stated with admirable simplicity in Evans v Bartlam [1937] AC 473, at 480:

> *"Appellate jurisdiction is always statutory……".*

Most recently one finds this fundamental principle illustrated in the decision of the Supreme Court in Re D (A Child) [2016] UKSC 34 which

involved the construction of section 40 of the Constitutional Reform Act 2005 and the Brussels II (Revised) Regulation.

16. Next we remind ourselves of some basic legal doctrine. We commence with the truism that the interpretation of any statute is a far from academic jaunt. Exercises in statutory interpretation are, per Lord Bingham of Cornhill:

> "*... directed to a particular statute, enacted at a particular time, to address (almost invariably) a particular problem or mischief*".

(R v Z [2005] UKHL 35, at [17]).

In R (Quintavalle) v the Secretary of State for Health [2003] 2 AC 687, Lord Bingham stated at 695:

> "*The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment*".

17. Bearing in mind the latter principle, we would observe that the delivery of swift, inexpensive and uncomplicated justice has long been the overarching ethos of tribunal adjudication. See, for example, the discussion in Wade and Forsyth, Administrative Law (10th Edition), per pp 773 – 774. This forms part of the context in which the 2007 Act was introduced. The background to this enactment includes the report of Sir Andrew Leggatt, followed by a White Paper (CM.6243/2004) which accepted many of its recommendations. Sir Andrew's report contains the following noteworthy passage, at paragraph 1.2:

> *"... Tribunal's procedures and approach to overseeing the preparation of cases and their hearing can be simpler and more informal than the courts, even after the civil justice reforms."*

One of the main aims of the legislation which followed, in the form of the 2007 Act, was to introduce the "*user-oriented service*" strongly recommended by Sir Andrew (see paragraph 1.4 of his report).

18. A second, inter-related aspect of the context in which the 2007 Act was devised is the overriding objective, with its emphasis on expedition, finality and the suppression of avoidable delay. The overriding objective was, by 2007, firmly established in civil proceedings, was gaining a foothold in criminal proceedings and was being introduced in tribunal proceedings, at both tiers. As regards the Upper Tribunal, it is contained in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, which came into operation on 3 November 2008. Generally, in the United Kingdom legal system the overriding objective and related measures, including wholesale reform of rules of procedure in both courts and tribunals, progressively gained traction during a period in which the imperative of defeating the so-called unholy trinity of avoidable delay, excessive costs and unwarranted complication became increasingly

dominant. By 2007 the Civil Procedure Rules were firmly entrenched, having been introduced on 26 April 1999.

19. While the developments in civil and tribunal procedure noted above have occurred during the last two decades, there is nothing novel about them. The principle that legal proceedings should be concluded as expeditiously as possible is expressed in the longstanding Latin maxim *interest rei publicae ut sit finis litium*. Over a century has passed since this maxim was recognised as possessing "*extreme value*": by Lord Loreburn LC in Brown v Dean [1910] AC 373, at 374. The operation of this maxim in the discrete context of statutory construction and appeal rights is illustrated in R v Pinfold [1988] QB 462, where Lord Lane CJ stated at 464:

> "*… One must read those provisions against the background of the fact that it is in the interests of the public in general that there should be a limit or a finality of legal proceedings, sometimes put in a Latin maxim, but that is what it means in English*".

This maxim was also applied in a comparable legal context, albeit in matrimonial proceedings, in Hewitson v Hewitson [1995] 1 ALL ER 472 (see particularly per Butler-Sloss LJ at [63] – [65]. Finally, in this context, we remind ourselves of the presumption of statutory construction that the law should serve the public interest: Bennion on Statutory Interpretation (Sixth Edition), page 722.

20. We further take into account that, while this has manifested itself in contexts other than the present, one of the emerging features of the modern legal system is that of strong resistance to what has become known as "satellite" litigation. This species of litigation takes the form of proceedings in a higher court or tribunal, frequently via judicial review challenges, brought in circumstances where the process of the lower court or tribunal is incomplete. This is illustrated particularly, and perhaps most famously, in R v Director of Public Prosecutions, ex Parte Kebeline [2000] 2 AC 326, at 371 per Lord Steyn. This is further illustrated in the rejection of judicial review challenges to aspects of inquest proceedings pursued at a stage when the process is not complete. See in particular McLuckie v Coroner for Northern Ireland [2011] NICA 34, at [26].

21. This feature of contemporary litigation may be viewed as the up-to-date application of the venerable maxim discussed above. It is the rationale of decisions such as Allen v Allen [1985] Fam 8, which held that a construction of statutory provisions requiring a litigant to pursue separate and distinct courses of appeal against various decisions arrived at in the same proceedings will if possible be avoided. This approximates very closely to the context under scrutiny in the present case.

22. The key to answering the question of whether the Appellant can seek to pursue an appeal to the Court of Appeal at this stage of the proceedings, via an application for permission to appeal, lies, firstly, in the construction of Section 12 of the 2007 Act. Our analysis and dissection of Section 12 are as follows:

(g) The function, and responsibility, of the UT is to determine whether an appealable decision of the FtT is vitiated by error of law: see Section 11.

(h) In performing this function, the first task of the UT is to determine whether the decision of the FtT "involved the making of an error on a point of law": per Section 12(1).

(i) If the UT "finds" (the statutory word) that the decision of the FtT did not involve the making of an error on a point of law, the appeal is dismissed and the decision of the FtT affirmed.

(j) If the UT finds that the decision of the FtT involved the making of an error on a point of law, it must then progress to a second stage which entails deciding whether to set aside the decision of the FtT – see Section 12(2)(a) – an exercise which entails the assessment of whether the error of law diagnosed is material. This is the rationale underpinning the discretionary power conferred on the UT in this respect.

(k) Where the UT, having found that the decision of the FtT involved the making of an error on a point of law, concludes, at the second stage, that the error was not material the appeal is dismissed and the decision of the FtT affirmed.

(l) If, on the other hand, the UT decides that the error of law was material, this completes the second stage and triggers a third stage, at which a further decision must be made, namely whether to remit the case to the FtT with directions for its reconsideration or to remake the decision of the FtT.

(m) The operation of Section 12, therefore, throws up a series of possible steps, stages and outcomes. The chief characteristic of some of these is that they are intermediate in nature. This analysis applies to:

    (i) A finding that the decision of the UT was erroneous in law.

    (ii) A determination, whether in tandem with or separate from (a), to set aside the decision of the FtT.

    (iii) A determination, normally made in tandem with a positive set aside determination, of whether to remit the case to the FtT or retain it in the forum of the UT for the purpose of remaking the decision.

23. In the present case, the act of the UT under scrutiny combined the three elements of finding an error of law of the FtT in one specified respect, setting aside the decision of the FtT in such respect and retaining the appeal in the forum of the UT for the purpose of remaking the decision of the FtT. The Appellant's contention is that Section 13 of the 2007 Act permits intervention by the Court of Appeal at this stage. This contention can be sustained only if the UT decision of 05 February 2016 constitutes, in the language of Section 13(1) "*a decision made by the Upper Tribunal*

other than an excluded decision". The question is whether it is a "decision" within the meaning and intent of section 13.

24. The contention that the Appellant is entitled to seek permission to appeal to the Court of Appeal in order to challenge this type of purely intermediate determination possesses, in our view, superficial attraction only. The fundamental question is whether Parliament intended that an interim determination of this species should be challengeable on appeal at an interlocutory stage of the appeal process. We have identified above a series of principles and imperatives which, we consider, inform and illuminate the correct answer to this question. These were canvassed with the parties' counsel in the course of the hearing, eliciting no suggestion that this approach is in any way misguided. The panel explored with Mr Khubber, *inter alia*, the inter-related questions of what imperative is served by the intervention of an appeal to the Court of Appeal at this stage of these proceedings and what mischief flows from the assessment that this recourse is not available to the Appellant now but arises only when the process of the UT is completed. We are unable to identify in counsel's submissions any imperative to be served or any mischief to be avoided in the construction advanced on behalf of the Appellant.

25. Quite the contrary. We consider that the combination of principles and imperatives identified above impel overwhelmingly to the conclusion that Parliament cannot have intended to establish a right to seek permission to appeal to the Court of Appeal against an intermediate decision of this *genre*. This intermediate decision will, ultimately, merge with the final decision of the UT, thereby generating a composite decision and it will be open to the Appellant to seek to challenge any aspect thereof if so advised. Contrary to the submissions of Mr Khubber, this does <u>not</u> deny the Appellant the right of access to a court. The Appellant is actively enjoying the exercise of this right at present and the only <u>further</u> right which arises is a right to seek to pursue an appeal against the final, dispositive decision of the UT in accordance with the terms which the legislature has chosen to prescribe. There is no denial of this discrete right. Rather, the correct analysis is that it does not arise at this stage of the proceedings.

26. We further consider that this analysis is reinforced by the finding/decision dichotomy clearly identifiable in section 12 and, as a matter of linguistic construction, the strong indication that in cases where an error of law is found this will simply constitute one element of an uncompleted whole, a <u>partial</u> decision at most, a judicial act not constituting a "decision" within the meaning and intent of s 13. We elaborate on this assessment as follows.

27. What is notable is that while there may be pauses in the process, s 12 does not allow the UT to stop until it has completed its task. The UT is not permitted merely to determine that the FtT decision contains an error and cannot stand. If it reaches that stage the UT is compelled by the statute (the word in s 12(2)(b)(ii) is 'must') to replace the decision or make arrangements for its replacement, that is, it must remit the case to the FtT or remake the decision itself. Both the language and the process preclude

the characterisation of any of the steps on the way to the conclusion as a 'decision'. The language precludes it because the section eschews the use of the word 'decision' and its cognates for each of the steps we have set out except any remaking of the decision of the FtT at the end of the process. The process precludes it because if either of the earlier steps were a 'decision' within the meaning and intent of the section it would in principle be appealable; and an appeal would destroy the continuity of the process enforced by s 12 as a whole, thereby rendering otiose and impotent the imperative command effected by the word 'must' in s 12(2)(b).

28. Instead, the section begins with a very clear signpost: the steps are steps 'in deciding an appeal under s 11'. This means that the whole process is 'deciding an appeal' (which expresses with precision the full scope of the statutory power of the UT in this context): the intermediate steps are not deciding anything at all but are simply interim stages within the process of 'deciding an appeal' en route to the ultimate outcome, namely the UT's decision on the appeal.

29. Of course it goes without saying that the finding that the making of the FtT decision involved the making of an error of law and the determination of the question whether it should be set aside are judicial acts. But, for the reasons we have given, although they are *parts* of a decision-making process they are not themselves to be categorised as 'decisions' within the meaning and intent of s 13 .

30. There is a further point, raised by Ms Anderson, which we consider to have some force. There are numerous decisions of the Court of Appeal, where there has been an appeal against the decision of the UT reached after termination of the process envisaged by s 12 and where the argument before the court has been that the UT ought not to have found an error of law. Sometimes those arguments are successful, and the Court of Appeal has restored the decision of the FtT or remitted the case to the UT. If Mr Khubber's argument is right, the argument in these cases would have been directed to either the first (error of law) or second (set-aside) determination of the UT, which would typically have occurred some time before the final decision on the appeal. Mr Khubber's argument unavoidably involves the proposition that countless appeals to the Court of Appeal have been well out of time. This reflection, in our judgement, confounds further the statutory construction espoused on behalf of the Appellant

31. In order to deal with one discrete issue canvassed at the hearing we also indicate what our view would be if we had been persuaded that the UT had already made in this case a 'decision' carrying in principle a right of appeal. In our judgement, if <u>any</u> of the steps taken so far by the UT constitutes a 'decision' within the meaning and intent of s 13, such is an 'excluded decision' within the meaning of Article 3(m) of the 2009 Order.

32. Article 3(m) excludes 'any procedural, ancillary or preliminary' decision made in relation to an appeal. We consider that there are good reasons for categorising the steps so far taken by the UT in this appeal as having

the characteristics not merely of one but of all three of those categories. They are 'procedural' because they are part of the statutory procedure prescribed by s 12 and do not finally determine the merits of the appeal. They are 'ancillary' because they provide necessary support to the prime task of 'deciding an appeal under s 11 (see s 12(1)), an adjunct to the central and ultimate task of the UT. They are 'preliminary' because they have to be made at an early rather than late stage of the process, necessarily preceding the performance of the ultimate task of the UT. If there were any doubt about their exclusion, we would pray in aid the same reasoning that we have deployed earlier: if these are 'decisions' there is no good reason to interpret the 2009 Order so as not to have them 'excluded' and there are very good reasons for interpreting the Order as excluding them from any right of appeal.

Conclusion

33. The appeal which the Appellant seeks to pursue at this intermediate of these proceedings would be an expensive and delaying distraction, a diversion having no discernible utility, fulfilling no identifiable imperative, countering no mischief and, fundamentally, vindicating no legal right.

34. We conclude that an appeal lies to the Court of Appeal only against a decision of the UT which is finally dispositive of an appeal from the FtT. We thus decide on the ground that this is the correct construction of Sections 12 and 13 of the 2007 Act. Our alternative conclusion is that no appeal lies to the Court of Appeal against any decision of the UT other than one which is finally dispositive of an appeal from the FtT as this is an excluded decision within the compass of Article 3(m) of the 2009 Order.

Lord McCloskey.

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

Date: 09 August 2016