Upper Tribunal
(Immigration and Asylum Chamber)

Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 9 May 2019	……

Before:

UPPER TRIBUNAL JUDGE GILL

Between

GERALD EZE DURUEKE
(ANONYMITY ORDER NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms O Ukachi-Lois, of Counsel, instructed by Charles Allotey & Co Solicitors.
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

(i) In reaching a decision whether to grant permission to appeal to the Upper Tribunal on a point that has not been raised by the parties but which a judge considering such an application for permission considers is arguably a Robinson obvious point or other point falling within para 3 of the head-note in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC), the evidence necessary to establish the point in question must be apparent from the grounds of appeal to the Upper Tribunal (whether or not the appellant is represented at the time) and/or the decision of the judge who decided the appeal and/or the documents on file. The permission judge should not make any assumptions that such evidence was before the judge who decided the appeal. Furthermore, if permission is granted on a ground that has not been raised by the parties, it is good practice and a useful aid in the exercise of self-restraint for the permission judge to indicate which aspect of head-note 3 of AZ applies.

(ii) Permission should only be granted on the basis that the judge who decided the appeal gave insufficient weight to a particular aspect of the case if it can properly be said that as a

consequence the judge who decided the appeal has arguably made an irrational decision. As the Court of Appeal said at para 18 of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence.

(iii) Particular care should be taken before granting permission on the ground that the judge who decided the appeal did not "sufficiently consider" or "sufficiently analyse" certain evidence or certain aspects of a case. Such complaints often turn out to be mere disagreements with the reasoning of the judge who decided the appeal because the implication is that the evidence or point in question was considered by the judge who decided the appeal but not to the extent desired by the author of the grounds or the judge considering the application for permission. Permission should usually only be granted on such grounds if it is possible to state precisely how the assessment of the judge who decided the appeal is arguably lacking and why this is arguably material.

DECISION AND REASONS

1. The appellant, a national of Nigeria born on 1 September 1977, appeals, with permission granted by Judge of the First-tier Tribunal P J M Hollingworth (hereafter the "permission judge"), against a decision of Judge of the First-tier Tribunal S J Clarke (hereafter the "judge", to distinguish her from the permission judge) who dismissed his appeal against the respondent's decision of 14 November 2018 to refuse his application of 27 July 2016 for leave to remain on the basis of his right to his private life in the United Kingdom. The hearing before the judge took place on 22 January 2019.

2. In AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC), the Upper Tribunal (Lane J, President, and Upper Tribunal Judge Blum) gave guidance on when it would be appropriate to grant permission to appeal to the Upper Tribunal on a ground that was not advanced by the applicant. The decision in AZ was published on 21 September 2018. The permission judge signed his decision on 3 April 2019. He therefore had the benefit of the guidance in AZ.

Immigration history

3. The appellant arrived in the United Kingdom on 13 April 2007 with leave as a student. He had leave as a student from 13 April 2007 until 30 April 2011 and from 21 January 2015 until 18 February 2016. On 17 March 2016, he made an application for leave to remain on compassionate grounds outside the Immigration Rules. The application was refused on 20 July 2016 without a right of appeal. On 27 July 2016, he requested the respondent to reconsider his application on human rights grounds. This is the request that was the subject of the decision of 14 November 2018 which gave the appellant a right of appeal.

The judge's decision

4. An expert report from Dr Bashir, Consultant Psychiatrist, was submitted to the judge. The report stated that the appellant had suffered from severe clinical depression. Ms Ukachi-Lois, who appeared for the appellant before the judge, informed the judge

that she did not rely upon the appellant's ill-health. However, the judge said ([5]) that some references were made to it during submissions.

5. The judge considered the appellant's private life claim under para 276ADE(1)(vi) of the Immigration Rules and concluded that he had not shown that there would be very significant obstacles to his reintegration in Nigeria. She noted that the appellant relied upon his lack of family members in Nigeria, his inability to accommodate and maintain himself if he was returned, and that he had suffered mental ill-health previously.

6. In relation to the appellant's mental health, the judge noted ([7]) that Dr Bashir stated that the appellant suffered from severe clinical depression but she also noted that the diagnosis was not made with reference to any criteria. She noted that the appellant was referred back to his GP and that the medical evidence showed that he was last prescribed setraline on 21 May 2018. In addition, she noted that the appellant was not making a case based upon medical issues.

7. In relation to the appellant's claim that he would experience very significant obstacles to his reintegration in Nigeria because he had no family members in Nigeria and that he would be unable to accommodate and maintain himself in Nigeria, the judge took his case at its highest, on the assumption that he had no family members in Nigeria. She said, (at [8]-[9]):

> "8. The Appellant left his country in 2007 and if taking his case at its highest, and there are no family members there, and the house of the great uncle is not available to him now the uncle has died and the family members have locked it up, I go on to consider if he could return as a single male.
>
> 9. The Appellant came to the UK to study on *[sic]* the ACCA but did not complete the professional level because of ill-health. He told me he would like to complete his studies and I see no reason why he could not return to his country and either continue his studies there or make an out of country application to continue in the UK if this is what he so wishes. The aunt houses and maintains him and she said it would be too costly for her to continue to maintain him if he returned to Nigeria and lived there and for her to pay for his studies. I note the Appellant and his aunt appear not to have considered the option of him returning to his country and taking some form of employment to maintain himself. I was told by both witnesses there are no jobs but there is no objective evidence to show he could not obtain some work, and in the initial months the aunt who has around £100,000 in savings and is drawing her pensions as well as working as a nurse on around two shifts a week and earning around £2000 a month is well-placed to assist him financially when he returns to settle in his country."
>
> (My emphasis)

8. The judge was asked to accept that the appellant lives with his aunt, Ms Theresa Chinyere Odum, in the United Kingdom in a family relationship. She also took this aspect of his case at its highest, and said, at [10]-[11]:

"10. I was invited to accept the Appellant lives with the aunt in a family relationship, because she maintains and accommodates him and there is more than emotional dependency. Taking the case at its highest, if there is a family life and it would be interfered with if he returns to Nigeria, the aunt is from Nigeria and is now a British Citizen, but she returned there in 2017 for a funeral, and it would be proportionate for the Appellant to be removed to Nigeria because they could continue their relationship at a distance with her maintaining and accommodating him until he settles on his own feet. She can also provide emotional assistance to ease the transition and she can visit him as well.

11. I accept the Appellant suffered some sort of nervous breakdown but he is now not suffering from such issues. He attends a church almost daily, but there are churches in Nigeria to attend and there is nothing to prevent him from such regular attendance there outside his work hours. The community of a church would also ease his transition to independence."

9. The judge then considered s.117B of the Nationality, Immigration and Asylum Act 2002 and proportionality. She said, at [12]-[13]:

"12. The Appellant speaks English and I accept has been maintained by the aunt. However, he remained in the UK after his leave to remain expired, and he was not studying, and I do not accept his explanation for so remaining. He could have returned to his country and made another out of country application if he so wished. The Appellant only had precarious leave at best and has built up his private life when he had precarious leave. The Appellant has made a number of applications which were not successful since his refusal on 2 April 2013 with a right of appeal granted.

13. Therefore, drawing the strands together, the Appellant can return to his country where he lived until he was 29 years old. He has the benefit of some financial assistance from his aunt to ease him back to establishing himself before he can accommodate and maintain himself and he would not deplete her savings, and if he wishes he can continue to reside in his country or make another Tier 4 application to further his studies in the UK if he obtains the necessary offer from a suitable educational establishment. At present, he has no such offer because he has no leave to remain. For these reasons, it is proportionate and in the public interest for the Appellant to be removed."

The grounds and the grant of permission

10. The appellant's written grounds advanced two grounds, as follows:

(i) (Ground 1) The judge made findings on family life but failed to consider the impact of the respondent's decision on the appellant's aunt, contrary to Beoku-Betts v SSHD [2008] UKH 39. Furthermore, she failed to give reasons or any adequate reasons for her omission.

(ii) (Ground 2) The judge made perverse or irrational findings on a material matter; specifically, her findings that the appellant's aunt was well placed to assist the appellant financially when he returns to settle in Nigeria and that she would not deplete her savings. The grounds contend that there was no legal basis for these findings.

11. The grant of permission went beyond the grounds. As I will need to deal with the terms in which permission was granted, I quote the reasons given by the permission judge for granting permission:

> "At paragraph 10 of the decision the Judge has referred to the Appellant living with the aunt in a family relationship. It is arguable that the Judge has attached insufficient weight to the strength of the family relationship given the background referred to by the Judge at paragraph 11. The Judge accepted that the Appellant suffered some sort of nervous breakdown but was now not suffering from such issues. It is arguable that the concept of real support fell to be considered against that background. It is arguable that the proportionality exercise has been affected in assessing the strength of family life and the consequences of the departure of the Appellant. At paragraph 12 the Judge accepted that the Appellant had been maintained by the aunt. At paragraph 9 of the decision the Judge has referred to the aunt stating that it will be too costly for her to continue to maintain the Appellant if he returned to Nigeria. It was arguable that the Judge has set out an insufficient analysis of the ability of the Appellant's aunt to maintain him if he were to return to Nigeria having proceeded at the conclusion of paragraph 9 to refer to the assets and income of the Appellant's aunt in evaluating that the Appellant's aunt would be well placed to assist the Appellant financially when he returned to settle in his country. It is arguable that the Judge has set out an insufficient analysis given the lack of reference to any obligations on the part of the Appellant's aunt or her financial commitments. At paragraph 10 of the decision the Judge has referred to the Appellant's aunt providing emotional assistance to ease the transition. It is arguable that if such emotional assistance was required to ease the transition a fuller analysis was required of the emotional assistance afforded to the Appellant by his aunt in the context of the maintenance of family life."

(My emphasis)

Submissions

12. At the commencement of the hearing, I asked Ms Ukachi-Lois to draw my attention to the following:

(i) the evidence that was before the judge to establish that family life was enjoyed between the appellant and his aunt;

(ii) the evidence that was before the judge to establish the impact on the appellant's aunt of the appellant leaving the United Kingdom; and

(iii) the evidence that was before the judge to establish the financial commitments and obligations of the appellant's aunt. I pointed out to Ms Ukachi-Lois that, given that the aunt had stated that she had savings of £100,000, her evidence that it would be too costly for her to provide financial assistance to the appellant if he were to return to Nigeria plainly called for an explanation.

13. Concerning (i), Ms Ukachi-Lois informed me that the evidence was that the appellant and his aunt lived together and that the aunt had supported the appellant when he had suffered from depression in the past. She also referred me to the witness statement of the appellant's aunt.

14. Concerning (ii) and (iii), Ms Ukachi-Lois read to me her notes of the oral evidence that the aunt gave before the judge. I checked this against the judge's manuscript record of the oral evidence of the aunt. As a result, it was clear (and Ms Ukachi-Lois agreed) that the oral evidence that the aunt gave concerning the impact on her of the appellant leaving the United Kingdom was as follows: *She would struggle to afford to support the appellant financially.* She also said: "*My savings were for many years, Not able to support. Schools on strike. Transportation and feeding would be too stressful. I am only family. 2008, Dad died. No family in Nigeria*".

15. In relation to ground 1, Ms Ukachi-Lois said that she was in difficulty because there was a lack of evidence before the judge concerning the impact on the appellant's aunt of the appellant leaving the United Kingdom. However, she submitted that it is only reasonable that there should be a further assessment of the impact on the aunt of the appellant leaving the United Kingdom so that a fair assessment of the appellant's case can be made.

16. In relation to ground 2, Ms Ukachi-Lois submitted that the judge's finding that it would not deplete the aunt's savings if she were to assist the appellant financially if he returns to Nigeria was irrational. This was because it *would* deplete her savings, contrary to the judge's finding.

17. In response, Mr Clarke submitted that the judge had noted at [10] that she had been asked to accept that the appellant enjoyed family life with his aunt. She took this at its highest. There was a paucity of evidence of any substance before the judge to show the impact on the appellant's aunt of his departure from the United Kingdom. At [12], the judge accepted that the appellant had been maintained by his aunt in the United Kingdom. She noted that there was no explanation for the appellant remaining in the United Kingdom once his leave had expired. At [8], the judge considered, at its highest, the appellant's claim that he has no family in Nigeria.

18. Mr Clarke submitted that, given the case that was advanced before the judge and the evidence that was before her, ground 1 is simply not established.

19. Mr Clarke submitted that ground 2 was a perversity challenge. i.e. that no properly directed Tribunal could reach the same conclusion on the basis of the evidence that was before the judge. It was not the case, as portrayed in the grounds, that the judge had made her decision on the basis that the appellant's aunt would support the appellant indefinitely. In Mr Clarke's submission, it was clear from [9] of the judge's decision that she considered that the appellant would be able to obtain a job to maintain himself and that his aunt would only need to provide him with financial

assistance in the initial months, whilst he settled down. Accordingly, he submitted that it was open to the judge to find that it would not deplete the savings of the appellant's aunt if she were to provide the appellant with such financial assistance in the initial months. She was accommodating and maintaining him at present, in any event.

20. Ms Ukachi-Lois submitted that, if I were to set aside the judge's decision, the Upper Tribunal could re-make the decision on the appeal. However, given the paucity of the evidence that was before the judge, she requested that the appellant be given an opportunity to provide further evidence about his aunt's financial circumstances.

21. I reserved my decision.

Assessment

22. Ms Ukachi-Lois informed me that the evidence that was before the judge to establish that the appellant enjoyed family life with his aunt was the fact that the appellant and his aunt had lived together and that the aunt had supported the appellant when he had suffered from depression in the past. It is clear from [10] that the judge decided the appellant's appeal taking his claim that he enjoyed family life with his aunt at its highest. She found that they could continue their relationship with each other at a distance. That finding was fully open to her, given the witness statement of the appellant's aunt. She said in her witness statement that she brought the appellant to the United Kingdom in 2007, when he was 29/30 years old, so that he could study accountancy and achieve an ACCA qualification. Accordingly, their enjoyment of their relationship with each other over many years, from his birth until he was 29/30 years old, was from a distance.

23. Ground 1, which contends that the judge had erred by failing to consider the impact on the appellant's aunt of his departure, cannot succeed because it was plain at the hearing before me that Ms Ukachi-Lois was in difficulty referring me to any evidence that was before the judge to establish the impact on the appellant's aunt. I have set out that evidence at my para 14 above. It is plain that the judge specifically considered, at [9], the aunt's evidence that it would be too costly for her to maintain the appellant in Nigeria and pay for his studies. She said that neither the appellant nor his aunt had considered the possibility of the appellant obtaining a job in Nigeria and that, although both witnesses told her that there were no jobs in Nigeria, there was no objective evidence to show that he could not obtain some work.

24. I stress that, apart from the evidence set out at my para 14 above, which the judge considered at [9], there was simply no evidence before the judge to show the impact on the appellant's aunt of the appellant leaving the United Kingdom. The judge assessed such evidence as was before her.

25. Ms Ukachi-Lois was relegated to submitting that it was only reasonable that there should be a further assessment of the impact on the appellant's aunt of the appellant leaving the United Kingdom so that a fair assessment of the appellant's case can be made. However, the judge *has made* a fair assessment of such evidence as was before her. This submission just ignores the fact that the judge's decision can only be set aside if she has made an error on a point of law such that it should be set aside.

26. I therefore reject ground 1.

27. Ground 2 is likewise hopeless. It simply ignores the judge's reasoning, that there was no objective evidence that the appellant could not obtain some work in Nigeria and that, in the initial months, the aunt was well placed financially to assist him to settle in his country.

28. Furthermore, and as I said at the hearing, the evidence of the appellant's aunt, that it would be too costly for her to maintain him and pay for his studies, plainly called for an explanation given that she had savings of £100,000. This is a large sum of money. Few people of ordinary means have access to such savings. Since it was for the appellant to establish his case, it was for him to provide evidence to show precisely why it would be too costly for his aunt to help him to settle down in Nigeria, whether or not he pursued his studies there, and that the financial cost of her doing so was such that the decision was disproportionate. It is clear that the aunt was not questioned in oral evidence to explain why she said it would be too costly for her to maintain the appellant, nor was she asked to give evidence of her liabilities and commitments.

29. In her submissions at the hearing, all that Ms Ukachi-Lois could say in relation to ground 2 was that the judge's finding that the aunt's savings would not be depleted was irrational because it *would* deplete the aunt's savings if she were to assist the appellant financially after he returned to Nigeria. However, the fact is that the judge found that there was no reason why the appellant would not be able to obtain a job in Nigeria and therefore that the aunt only needed to assist him financially in the initial period whilst he settled down. It is plain that she found, implicitly, that the aunt's savings would not therefore reduce significantly. In reality, ground 2 amounts to no more than a disagreement with the judge's reasoning. The judge's finding that the aunt's savings would not be depleted, cannot be said to be irrational, on any legitimate view.

30. I therefore reject ground 2.

31. I turn to consider the grounds upon which permission was granted.

32. Plainly, the grant of permission went beyond the grounds. In summary, it raised three points that did not feature in the appellant's written grounds, as follows:

    (i) that the judge arguably attached insufficient weight to the strength of the family relationship given the background referred to by the judge at [11];

    (ii) that the judge arguably set out an insufficient analysis of the aunt's financial position given the lack of reference to the aunt's obligations or her financial commitments; and

    (iii) that, if emotional assistance was required to ease the appellant's 'transition' after his return to Nigeria, then arguably "*a fuller analysis was required*" of the emotional assistance afforded to the appellant by his aunt in the context of the maintenance of family life.

33. In relation to point (i), the permission judge went on to draw from the facts as disclosed in the judge's decision to support his view that it was arguable that the judge had attached insufficient weight to the strength of the family relationship, stating that it was arguable that the concept of "*real support*" fell to be construed against the background that the appellant had suffered from some sort of nervous breakdown in the past.

34. The authorities are clear that, in an asylum or human rights case, a Tribunal must take a *Robinson obvious* point in the claimant's favour. The term *Robinson obvious* derives from the judgment in R v SSHD ex parte Robinson [1998] QB 929. A *Robinson obvious* point is one that has a *strong* prospect of success.

35. In AZ, the Upper Tribunal discussed the relevant jurisprudence at [61]-[74] of its decision beginning with Robinson. In head-note (3), the Upper Tribunal said:

> "3. Permission to appeal to the Upper Tribunal should be granted on a ground that was not advanced by an applicant for permission, only if:
>
> (a) the judge is satisfied that the ground he or she has identified is one which has a strong prospect of success:
>
> (i) for the original appellant; or
>
> (ii) for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom's international Treaty obligations; or
>
> (b) (possibly) the ground relates to an issue of general importance, which the Upper Tribunal needs to address."

36. However, the permission judge did not indicate that the grounds he was raising came within head-note 3.(b) nor can it reasonably be said, on any legitimate view, that they did. Since the points he raised were not for the Secretary of State, head-note 3(a)(ii) is inapplicable. This leaves head-note para 3.(a)(i), a *Robinson obvious* point in the appellant's favour.

37. However, as the Upper Tribunal said in AZ, it is clear from the authorities that mere arguability is not sufficient. A higher hurdle must be surmounted. The point in question has to be obvious, in the sense of being one with a strong prospect of success, were permission to be granted. Even at the permission stage, the question is whether the point in question has a strong prospect of success and not whether it is arguable that it has, as is clear from para 3(a) of the head-note in AZ.

38. The judge's decision did not mention what evidence was before her concerning the strength of the relationship between the appellant and his aunt. As can be seen from my para 13 above, Ms Ukachi-Lois informed me that the evidence was that the appellant and his aunt had lived together and that the aunt had supported the appellant when he had suffered from depression in the past. However, the judge was fully aware of this evidence and referred to it in her decision. There was no reason to think that she did not have it in mind when she considered proportionality.

39. If there was relevant evidence concerning the strength of the relationship between the appellant and his aunt that the judge had overlooked, the expectation is that this would have been mentioned in the appellant's written grounds, whether or not he

was represented. However, there was no suggestion in the appellant's written grounds that the judge had overlooked relevant evidence in this regard.

40. It therefore appears that, in stating that the judge may have attached insufficient weight to the strength of the family relationship and in referring to the need to consider the concept of "*real support*" in the context of the fact that the appellant had previously suffered a nervous breakdown, the permission judge in fact considered that the judge ought to have given *more weight* to the relationship than she did and to the fact that the appellant's aunt had provided him with emotional support in the past when he suffered a nervous breakdown.

41. It is therefore difficult to avoid the conclusion that the permission judge was merely disagreeing with the reasoning of the judge. Furthermore, the authorities clearly establish that arguments as to weight do not ordinarily establish an error of law. Ms Ukachi-Lois (correctly, in my judgment) did not pursue point (i) at the hearing. It is plain that point (i) discloses no error of law in the decision of the judge.

42. Point (ii) is that it is arguable that the judge had insufficiently analysed the ability of the appellant's aunt to maintain him if he were to return to Nigeria given her failure to refer to the aunt's obligations and financial commitments. However, it was clear at the hearing before me, that there was simply no evidence before the judge of the financial obligations or commitments of the appellant's aunt. Furthermore, the aunt was not asked to explain precisely why she said it would be too costly for her to provide financial assistance to the appellant in Nigeria, which plainly called for an explanation in view of the amount of her savings, as I said at the hearing.

43. Finally, point (iii) is that it is arguable that the judge had failed to give "*a fuller analysis …. of the emotional assistance afforded to the appellant by his aunt in the context of the maintenance of family life*". This is an empty point as exemplified by the fact that Ms Ukachi-Lois did not pursue it at the hearing.

44. For all of the reasons given above, it is clear that the three points raised by the permission judge were not only hopeless, they could not on any reasonable view have been adjudged as arguable *Robinson obvious* points, i.e. with a strong prospect of success.

45. For all of the reasons given above, the judge did not make any error of law. The appellant's appeal to the Upper Tribunal is therefore dismissed.

46. Turning to the grant of permission in AZ, Judge of the First-tier Tribunal Holmes raised an issue concerning the delay (of about eight months) between the date of the hearing and the preparation of the decision. He referred to two cases on delay in his grant of permission: Mario [1998] Imm AR 281 and Sambasivam [1999] OATRF 1999/0419/4. However, the Upper Tribunal considered ([71]) that Judge Holmes had not correctly identified the relevant case law and that, in particular, he had failed to have regard to the more recent Tribunal authority of Arusha and Demushi (deprivation of citizenship – delay) [2012] UKUT 80 (IAC) which relied upon the Court of Appeal's judgment in RK (Algeria) [2007] EWCA Civ 868. The Tribunal said this at [70]-[71]:

"70. The basic point to be borne in mind is that there must be an extremely sound reason for, in effect, compelling the parties to an appeal to engage with a matter that neither of them has identified.

71. The present case is an object lesson in what can happen when this principle of restraint is not respected…."

47. In AZ, the Tribunal said (at [72]) that far from it being a case in which the ground raised by Judge Holmes of his own volition was strongly arguable, it was not a ground at all.

48. This can certainly be said of point (i) raised by the permission judge in the instant case, because issues going to weight rarely give rise to an error of law, as has been said on many occasions (for example, Blake J, the then President, in Green (Article 8 – new rules) [2013] UKUT 254 (IAC)). It is difficult to see what error of law the permission judge had in mind in relation to point (iii) above which was not even pursued by Ms Ukachi-Lois at the hearing.

49. However, the position is even worse in relation to point (ii). This is because the evidence which necessarily would have had to have been adduced to the judge in order to make good this point had not even been adduced. There was simply no evidence before the judge which could have enabled her to conduct any analysis of the financial commitments of the appellant's aunt.

50. At para 70 of AZ, the Tribunal said that there must be an extremely sound reason for compelling the parties to engage with a matter that neither had identified. In the instant case, two of the three points were not even pursued at the hearing and one could not be established because the evidence necessary to establish the point was simply not before the judge.

51. It is important to bear in mind that a grant of permission when it is not properly warranted wastes the limited resources of the Upper Tribunal, puts the parties to unnecessary expense, delays bringing finality to the case in question and contributes to delaying the disposition of other meritorious cases. It is therefore necessary to exercise self-restraint, as the Tribunal said in AZ.

52. The following points of general guidance emerge from the instant case:

(i) In reaching a decision whether to grant permission to appeal to the Upper Tribunal on a point that has not been raised by the parties but which a judge considering such an application for permission considers is arguably a *Robinson obvious* point or other point falling within para 3 of the head-note in AZ, the evidence necessary to establish the point in question must be apparent from the grounds of appeal to the Upper Tribunal (whether or not the appellant is represented at the time) and/or the decision of the judge who decided the appeal and/or the documents on file. The permission judge should not make any assumptions that such evidence *was* before the judge who decided the appeal. Furthermore, if permission is granted on a ground that has not been raised by the parties, it is good practice and a useful aid in the exercise of self-restraint for the permission judge to indicate which aspect of head-note 3 of AZ applies.

(ii) Permission should only be granted on the basis that the judge who decided the appeal gave insufficient weight to a particular aspect of the case if it can properly be said that as a consequence the judge who decided the appeal has arguably made an irrational decision. As the Court of Appeal said at para 18 of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence.

(iii) Particular care should be taken before granting permission on the ground that the judge who decided the appeal did not "*sufficiently consider*" or "*sufficiently analyse*" certain evidence or certain aspects of a case. Such complaints often turn out to be mere disagreements with the reasoning of the judge who decided the appeal because the implication is that the evidence or point in question *was* considered by the judge who decided the appeal but not to the extent desired by the author of the grounds or the judge considering the application for permission. Permission should usually only be granted on such grounds if it is possible to state precisely how the assessment of the judge who decided the appeal is arguably lacking and why this is arguably material.

Decision

There was no error of law in the decision of Judge of the First-tier Tribunal S J Clarke.

Accordingly, the decision of the Judge of the First-tier Tribunal to dismiss the appellant's appeal against the respondent decision stands.

Signed Date: 6 June 2019
Upper Tribunal Judge Gill