Case No: CO/9540/11

Neutral Citation Number: [2012] EWHC 1784 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 19th July 2012

Before :

HIS HONOUR JUDGE ANDREW GILBART QC
HONORARY RECORDER OF MANCHESTER
sitting as a deputy High Court Judge

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Between :

THE QUEEN (ON THE APPLICATION OF AA)	**Claimant**
- and –	
THE UPPER TRIBUNAL	**First Defendant**
and	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

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- -

Paul Draycott (instructed by **Paragon Law, Nottingham**) for the **Claimant**
John Hunter (instructed by **Treasury Solicitor**) for the **Interested Party**

Hearing dates: 1st June 2012

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JUDGMENT

JUDGE GILBART QC :

1. Although the Claim Form named the Home Secretary as the Defendant, this is actually a claim which seeks to quash a decision of the Immigration and Asylum Chamber of the Upper Tribunal. By a consent order the Upper Tribunal was substituted as Defendant and the Secretary of State for the Home Department added as an interested party. That decision of the Chamber was made on 20th May 2001, but not sent to the Claimant by the Home Office Appeals Determinations Management Unit until 7th July 2011. By that decision Senior Immigration Judge Gleeson refused permission to the Claimant to appeal to the Upper Tribunal against the decision of the First Tier Tribunal (" FTT") (made on 21st January 2011 and sent out on 27th January 2011) dismissing his appeal against the Home Secretary's decision of 22nd November 2010 to refuse him refugee recognition, humanitarian protection, discretionary leave to remain in the United Kingdom on human rights grounds, and to set removal directions to Iran.
2. The Claimant, who is of Kurdish ethnic origin, was born on 27th February 1993. He was brought up in a village near in Kermanshah province, Iran, which lies about 650 kilometres west of Tehran in the area of that country which has a very substantial Kurdish population. The village (which I do not name for obvious reasons) lies about 40 kilometres east of the Iraqi border. The claimant arrived in this country in January 2009. He was then just 15 years and 10 months old, and was unaccompanied. He claimed asylum the following day. His asylum claim was refused by the Home Secretary, as was his claim for humanitarian protection pursuant to Articles 2 and 3 of the European Convention on Human Rights (ECHR). The Home Secretary also considered that his removal from the United Kingdom would not amount to a breach of Article 8 of the ECHR but he was given discretionary leave to remain until 27th August 2010, pursuant to the published policy of the Home Office on Discretionary Leave

    "because (he was) an unaccompanied child for whom we are not satisfied that adequate reception arrangements in (his) own country are available"

3. His appeal against the refusal of asylum was heard by Immigration Judge Stott on 14th August 2009, and dismissed. Of the decision (issued on 17th August 2009) 22 paragraphs relate to the appeal against the refusal of asylum, one to consideration of his economic prospects were he to live in the United Kingdom, and one to the position under Article 8. As I shall refer to below, the Immigration Judge appears to have made an error about the Claimant's age. He was 16 years and 5 months old at the date of the hearing and decision (and his date of birth is set out at paragraph 1 of the decision) not 17 years old as the Immigration Judge took him to be when reaching his conclusions.
4. The Claimant's case was that
    a. he was a Sunni Muslim of Kurdish ethnicity who had lived in a village with his mother and grandfather. His father had been executed some 10 years before, and had been an active member of the military wing of the KDPI, a political movement which seeks greater autonomy for the Kurdish areas within Iran.
    b. His uncle, who lived with his mother and himself, had sought by persuasion threats and violence to persuade him to join the KDPI, to which he had succumbed. He has then distributed leaflets.
    c. His uncle had been arrested and the Claimant was informed that his own life was in danger.
    d. His mother arranged that he go to a friend's house, whence he was taken by lorry to Istanbul, and thence was driven to the United Kingdom in other vehicles.
    e. He claimed asylum on arrival in the UK. He feared that he would be persecuted were he to be returned to Iran. An expert witness whose report was before the Tribunal, Dr Fatah, showed that cruelty to young people could include cruelty to those of the claimant's age.
    f. Since his arrival in the UK, he had had no contact with his family, who have no telephone, and who live where there is no reliable postal service. It was likely that his mother and grandfather had been persecuted in his absence, so that if returned he would be alone and have to fend for himself.
5. The Home Secretary argued that

a. It was not accepted that his father had been involved with the KDPI, nor that that was the reason for his death nor that his uncle had been attached to it
b. He had only limited knowledge of the KDPI, which suggested that he was not living in the same house as a KDPI activist. Alternatively, if he was, then he knew more about the KDPI than he said (I interpose that the alternative point argued against the claimant can only have aided his claim for asylum and humanitarian protection, not weakened it)
c. There was no documentary evidence of his uncle's arrest, including none from his mother;
d. There was no evidence of the Iranian authorities being interested in him, nor in his family, which was not to be expected if his father had been executed for the reasons alleged
e. He would not be at risk in Iran because of his ethnicity
f. Returned asylum seekers face no significant problems on return to Iran.

6. In his conclusions, the Immigration Judge accepted that he was 17. That is puzzling, because he had started his decision by describing him (rightly) as having been born in January 1993, which would make him 16 years and 5 months at the date of the decision. He went on to reject his case, for these reasons:
   a. He did not accept that the Claimant's father had been in the KDPI, because he found an inconsistency in his evidence about whether he ever saw a membership card in the possession of his mother.
   b. He did not accept that his uncle "was as involved with the KDPI as he would have me believe."
   c. He rejected the Claimant's case about his leaving his family in the following terms

> "From the evidence the (Claimant) provided he has had no contact from his family in Iran since his arrival in the United Kingdom nor has he himself made any attempt to contact them. I accept that communications may be difficult but understand that organizations do exist in the United Kingdom which can

help family members to at least try to contact others in the family who remain in Iran. For the (Claimant) to have made no efforts whatsoever I find surprising bearing in mind that he is a 17 year old youth with no family in the United Kingdom and no apparent ties in this country. I am not therefore prepared to accept that he has left a family situation such as he would have me believe."

d. He did not understand how his flight from the country had been financed when the Claimant said that his mother and grandfather were poor farmers.
e. There was objective evidence that there was no automatic risk to returning asylum seekers, and he did not believe that the Claimant would be of any interest to the Iranian authorities.
f. He accepted that Dr Fatah was a witness of eminence, who had presented detailed evidence of the Iranian regime's repressive approach of "punishment by association with other family members "(sic)." He did not consider that he should give that weight in this case, given that the Claimant had not persuaded him of the involvement of his uncle or father in the activities of the KDPI.
g. He did not consider that his ethnicity would put the Claimant at risk.
h. He accepted that on his return, he would be questioned why he had been in the United Kingdom, but that, given his lack of involvement with the KDPI, he would be of no interest to the Iranian authorities.
i. He accepted that he had better prospects of economic advancement in the United Kingdom. He went on "that however is not the issue of the appeal, but I give due attention to the views of the Social Services Department as to his development and attempts to integrate since arriving in the United Kingdom."
j. He considered that his facility in reporting to the UK Immigration Authorities expeditiously was not a matter of pure chance. He noted that he had no evidence of his being given instructions on what to do, and therefore thought he must have used considerable ingenuity. He considered that that seriously affected his credibility.

k. He had not discharged the burden of showing that he was at risk of suffering persecution on his return, nor that he should be provided humanitarian protection due to the risk of him suffering serious harm should he be returned.

l. As to the position under Article 8, while he may have started to develop a private life in the United Kingdom,

> "it has been of relatively short duration since January 2009, and therefore I do not regard it as being disproportionate for him to be returned to Iran where on his own evidence his mother and grandfather were last residing."

7. As I shall come to, it was not seriously contested before me by the Secretary of State that that decision had grappled properly with the interests of the Claimant as a child of 16. That was a wholly realistic position for the Secretary of State to adopt.

8. On 25th August 2010, when the Claimant was aged 17 years and (almost) 7 months, he applied for further leave to remain. His claims for asylum and humanitarian protection were again refused by letter of 22nd November 2010. The rejection of the asylum and humanitarian protection claims followed the reasoning of Immigration Judge Stott. It also relied on SB (risk on return-illegal exit) Iran CG [2009] UKAIT 00053 and concluded that while he would be required to pay a fine on his return for making an illegal exit, there was no risk of persecution or ill treatment by the authorities. The Home Secretary considered that he could relocate to an area of Iran where Kurds are not a minority, and considered that his fitness, health and skills would enable him to get employment or continue with his studies. Unhappily, while this section of the decision letter contains some important material, it also contains some surprising errors. It reads

> 35 Consequently, it is considered that internal relocation remains a variable (sic) option for you, as it was not accepted that you have come to the adverse attention of the authorities. Therefore it is not unreasonable for you to relocate within Iran, namely Mahabad. (sic)
>
> 36 Nonetheless if you fear hardship upon return there are options open to you which you should consider……….you could take advantage of the International Organisation for Migration's

voluntary return programme, which will entitle you to reintegration assistance and financial support to make your return sustainable. This assistance will enable you to undertake training, further education, or to invest in a trade or career. It is open to you to make an application to the IOM at any stage before your removal from the United Kingdom.

37 The IPM will also assist with onwards travel in Afghanistan (sic) to enable you to return to your family if you need it."

(Mahabad is in fact a city in another part of the area in western Iran with a large Kurdish population.)

9. The Home Secretary also considered his case under Article 8 ECHR for the purposes of granting discretionary leave, and rejected it. She noted that he was a 17 ½ year old healthy male, who was attending College and had made many friends. She noted that he had been in the UK for 1 year and 10 months, but had spent most of his life in Iran. She considered that he could re-establish his private life in Iran, and could keep in touch with his friends in the United Kingdom through modern means of communication. She therefore concluded that any interference with his private life in the UK would be in accordance with the law and proportionate to the legitimate aims of the United Kingdom in maintaining effective immigration control.
10. The Home Secretary then stated that because the Claimant was now over 17 ½ years old, he no longer qualified for leave to remain in accordance with her published policy for dealing with asylum claims by unaccompanied minors.
11. The letter stated that regard had been had to the statutory guidance *("Every Child Matters: Change for Children")* issued under section 55 of the Borders Citizenship and Immigration Act 2009. ("BCIA 2009")
12. The Claimant appealed to the FTT. He had submitted further evidence from himself. He also submitted evidence from Mr John Hurrell, the Assistant Manger of the 15 Plus service of Nottingham City Council, which was the responsible Social Services Authority. That written evidence (supported by oral evidence from Mr Hurrell before the Tribunal) dealt with his adaptation to British multi-cultural society and its greater "openness to new and different ideas and cultural variations." That evidence from Mr Hurrell also expressed the view that his return to Iran from an open society where he could express

his opinions without fear would put him "in extreme danger." He would, he contended, have to suppress his thought processes, which would have serious repercussions for his development. He expressed the view that it would be cruel to give the Claimant a period of freedom, and then return him to a society where he would have to keep his responses in check.

13. The Claimant also showed that he had been in touch with British Red Cross asking it to locate his relatives. The Red Cross responded on 19th January 2011 asking him for details of the last known address, district and province.
14. His case was heard on 10th January 2011 by Designated Immigration Judge Garratt and Immigration Judge Landes. The decision was made on 21st January 2011, and issued on 27th January 2011. At that hearing the Claimant was represented by counsel, and gave evidence himself.
15. His counsel also called, among other witnesses, Mr Hurrell. His evidence is recorded as follows. He said that the Claimant first came to the attention of the service in January 2009 when he showed keenness to enter into the British way of life and was pleased that he was given the opportunity to learn English. Mr Hurrell thought that the claimant's attendance at college was exemplary. The claimant had achieved the standard one would expect from a conscientious student. He reported that the claimant was growing in confidence and. has grasped the concept of a multicultural society. He was aware that the claimant had a wide circle of friends and enjoyed a social life. He knew that the claimant wanted to become a police officer if granted permanent leave to remain and this supported his view that the claimant had a healthy regard for social justice and the general wellbeing of the community. In conclusion Mr Hurrell stated that if the claimant were returned to Iran it would have serious repercussions for his development and could be perceived as "cruel" to a young man given a period of freedom. The Claimant had done everything asked of him and was well respected.
16. The claimant also submitted correspondence with the British Red Cross whom he had contacted to trace his relatives in Iran.
17. It is to be noted that while Counsel for the Claimant drew the Tribunal's attention to section 55 of BCIA 2009, and to the UN Convention on the Rights of the Child, contending (correctly) that the Tribunal was under a duty to treat the interests of the Claimant, a child, as a primary consideration, the advocate

for the Home Secretary of State is not recorded as making any submissions at all on this issue, nor as having provided the Tribunal with any assistance on behalf of the Home Secretary on the relevance of the interests of the child. As I shall come to below, I regard that as a regrettable and unfortunate omission.

18. The appeal was dismissed. His claim for leave to remain in this country on asylum, humanitarian protection and human rights grounds failed. I must deal with some aspects of the decision in detail.

19. The Tribunal decided to consider whether it should accept the adverse conclusions on credibility reached by the first Tribunal. It did so thoroughly, and concluded that it did not accept the Claimant's asylum claim. It concluded at paragraph 57 that "he came to the United Kingdom for economic reasons and not because of fear of persecution as a family member of KDPI activists and because of his enforced involvement in KDPI activity." However it went on to conclude that returning him "may subject him to prosecution" (ibid). It then addressed that risk, on the basis that he was a failed asylum seeker who had been in the United Kingdom for two years and was on the verge of becoming an adult of 18 years. It considered the case of *SB (Risk on Return-illegal exit) Iran CG [2009]UKAIT 00053* and concluded that there no factors enhancing the risk of his being persecuted or ill treated. When addressing whether he would have funds to pay a fine, it stated that (paragraph 58) " we have noted that his mother and grandfather were able to raise sufficient funds for him to come to the United Kingdom and no doubt will be able to assist with funds to meet any fine." It then discounted any risk of he being persecuted because of his ethnicity, or because he was a Sunni Muslim (paragraphs 59 and 60).

20. The Tribunal then considered the circumstances awaiting him on his return, in the following terms (paragraph 61). It is necessary to refer to it in full given certain submissions made to the court

> 61. We were referred to the Court of Appeal decision in *CL (Vietnam)* [2008] EWCA Civ 1551 concerning the need for a decision-maker to make a proper assessment of the circumstances awaiting a child in the receiving state on removal. This was in the 'context of the appellant having no family to meet him to assist his return and the potential difficulties for a young Kurd travelling through Iran to his home region.
> Although we have found that the appellant has not lost touch with family members as claimed, we bear in mind that he will, nevertheless, have to

travel from the point of return to his home region. He can, we conclude, receive the financial assistance to do so from his family and in the event that lone travel, is perceived to raise difficulties particularly for a young Kurd, then no doubt family members can accompany him or arrange for an escort."

21. The Tribunal said that it was not satisfied that the appellant was a refugee within the meaning of the 1951 Convention. As I shall refer to below, that conclusion was not the subject of challenge before me. It also concluded that his claim to humanitarian protection should be dismissed.

22. The Tribunal then dealt with what it referred to as his "Human Rights" claim. It is necessary to recite the 5 paragraphs which it devoted to this issue

> 64. We have considered the appellant's Article 8 claim adopting the five stage approach recommended in *Razgar*. The respondent accepts that the appellant has established a private life in the United, Kingdom involving his relationship with his girlfriend, his other friends and social life and his education. We are not satisfied that the appellant has established a family life as it is clear that his relationship with his girlfriend is in its early stages and there is no question of them living together.
> 65. Having established that the appellant has a private life we move on to conclude that interference with that right will have consequences of such gravity as potentially to engage the operation of Article 8. On the basis that such interference by the respondent is in accordance with the law the issue for us to decide is whether such interference is necessary and proportionate in the interests of the public aim of immigration control sought to be achieved.
> 66. We acknowledge that the appellant has provided significant information which, we accept, shows that he has enthusiastically taken to his studies and would like, eventually, to train as a policeman in the United Kingdom, It is even stated, that it would be 'cruel' to return him to Iran. But we have to bear in mind that we have found that the appellant is an economic migrant and, although the grant of conditional leave to remain, enabled him to establish his private life we do not see that to return him will amount to a disproportionate breach of that right.
> 67. When the appellant comes to leave the United Kingdom it is almost certain that he will be over 18 years of age and will, we are satisfied, be returning to Iran where he can re-establish his relationships with his family. Although the appellant has benefited from education in the United Kingdom we bear in mind that he has been here for only about two years and is at an age where he can easily re-establish himself in his country of origin. We do not accept that there will be no reception for the appellant because of our findings and those of the first Immigration Judge about the existence and location of his family members.
> 68. The appellant has been found to be intelligent and resourceful so we do not conclude that his return will be marked with significant difficulty. We acknowledge that the interests of children in asylum cases require careful consideration as, was recently confirmed by the President of the Tribunal in *LD (Article 8 — best interests of child) Zimbabwe* [2010]

UKUT 278 which specifies the interests of a child should be a primary consideration in immigration cases. But we remind ourselves again that the appellant is approaching 18 years of age and is likely to be an adult when he is returned. He has also shown, throughout, that he is capable of understanding the meaning of the claims he has made. We are therefore not satisfied that the appellant's return will amount to a breach of either his Article 3 or Article 8 rights, particularly those related to the private life he has established in the United Kingdom."

23. Accordingly, the Tribunal dismissed his appeal on asylum, humanitarian protection and human rights grounds.

24. An application was made for permission to appeal to the Immigration and Asylum Chamber of the Upper Tribunal on the following grounds

    a. In considering what would happen on the Claimant's return, The FTT had been wrong to regard the first Tribunal (Immigration Judge Stott) as having concluded that the Claimant was in contact with his family

    b. It had been wrong to dismiss the relevance of the letter from the Red Cross as a self serving attempt to show that the first judge was wrong to conclude that he was in contact with his family members in Iran;

    c. There was a real risk of his being prosecuted and persecuted on his return

    d. There would be no appropriate reception conditions in Iran. Reference was made to the judgement of Keene LJ in *CL (Vietnam) v SSHD* [2008] EWCA Civ 1551 [2009] Imm AR 403, [2009] 1 WLR 1873

    e. The FTT had failed to take into account the obligations imposed on the Secretary of State under section 55 of BCIA 2009 of which duty the Secretary of State was in breach;

    f. In accordance with the judgement of Wyn Williams J in *R(TS) v SSHD* [2010] EWHC 2614 (Admin) [2011] Imm AR 164 Admin. the FTT had failed in its conclusions to address the evidence of Mr Hurrell that the claimant's welfare would be jeopardised or appreciably adversely affected, and that the section 55 duty was a continuing one;

    g. The Home Secretary had not considered the material from Nottingham City Council in its refusal letter and it had not been addressed by the FTT in consideration of the Article 8 claim.

25. The application for permission to appeal was refused by Senior Immigration Judge McGeachy on 18th February 2011, in the following terms:

> "The grounds of appeal assert that the Tribunal erred in stating that the appellant would be able to make contact with his family before arguing that the punishment that the appellant would face for leaving Iran without permission would be persecutory. They also claim that the Tribunal erred in their consideration of the Article 8 rights of the appellant and the fact that he was a minor and that therefore Section 55 of the Border, Citizenship and Immigration Act 2007 (sic) came into play. They assert that given the appellant's age it would be cruel for him to have to face imprisonment on return.
> The Tribunal were entitled to reach the conclusions they did with regard to the appellant's claim that he faced persecution for the Convention reason of his political opinions on return. That conclusion has not been challenged.
> When considering the implications of the appellant being returned to Iran they were entitled to rely on the decision of the Tribunal in *SB (Iran) CG* [2009] UKAIT 00053. The reality is that the appellant will be an adult on 27 February. Their conclusions in paragraphs 64 onwards with regard to the rights of the appellant under Article 8 of the ECHR were open to them.
> They took into account the determination in *LD (Article 8 - best interests of child) Zimbabwe* [2010] UKUT 278 which covers the issues raised in Section 55 of the 2007 (sic) Act.
> The grounds disclose no arguable error of law in the determination."

26. That application was renewed. The grounds set out above were further developed. I need only refer to the matters raised on the Article 8 claim. The original arguments were put forward. As now argued, it was contended that
    a. The section 55 BCIA issue had to be determined as at the date of the hearing on 10th January 2011, and not as at the date of removal: reference was made to a number of authorities, with particular reference to the judgement of Keene LJ in *CL (Vietnam) v SSHD* [2008] EWCA Civ 1551 [2009] Imm AR 403, [2009] 1 WLR 273
    b. A reference to *LD (Article 8 - best interests of child) Zimbabwe* was no substitute for having regard to the precise obligations in section 55 BCIA 2009
    c. There had been a failure to comply with the statutory guidance issued under section 55 in that contact should have been made by the Border Agency with the relevant Children's Services' Department.
27. That application was refused by a decision of 20th May 2011, after consideration on the papers by Senior Immigration Judge Gleeson. Having decided that an oral hearing was unnecessary, she went on:

1. The appellant is a citizen of Iran, who appealed against the respondent's decision to refuse him refugee recognition humanitarian protection or leave to remain in the United Kingdom on human rights grounds and to set removal directions to Iran). The appellant is now 18 years old but at the date of decision was a child. His claim was based on family connections with the KDPI, his Kurdish ethnicity, and his Sunni Muslim religion. The appellant had made efforts to locate his family members through the Red Cross but had, not yet heard whether that was successful.
2. The First Tier Tribunal……dismissed the appeal because they were not satisfied that the appellant had lost touch with his family members in Iran, or that the family connection with the KDPI was as claimed, or that his father had been executed by the authorities. They considered that there is no evidence of persecution of the appellant's family members on the basis of their religion or their ethnicity and that the appellant could, if required, internally relocate to Iranian Kurdistan where he would not be at risk The appellant had been in the United Kingdom for only two years. They did not consider that the removal of the appellant would breach the United Kingdoms international under the ECHR, particularly Article 8 (respect for private and family life).
3. The appellant applied to the First Tier Tribunal for permission to appeal to the Upper Tribunal. SIJ McGeachy refused the first application because he considered that the Tribunal were entitled to reach the conclusions they did on the persecution claim, and that as to the Article 8 ECHR/s.55 implications of return, they had given these issues correct and sufficient consideration and that, in reality, the appellant would be 18 just nine days after the first application decision and would not be returning to Iran as a child.
4. The appellant renewed his application to the Upper Tribunal. The proposed grounds of appeal on the second application were erroneously directed principally at the refusal of permission on the first application rather than the Tribunal's determination. Despite the length of the grounds, they are in reality little more than a detailed disagreement with the facts found and the outcome of the appeal.
5. Paragraph 81 of the proposed grounds of appeal asserts, wrongly, that the question of illegal exit, Kurdish ethnicity, Sunni Muslim religion, and return from the United Kingdom as a failed asylum seeker have not been properly considered. They were. The Tribunal reached proper, intelligible and adequate conclusions on the evidence before it and these grounds of appeal do not disclose any arguable error of law therein.
6. Permission to appeal is refused."

28. The application for permission to apply for judicial review was issued on 3rd October 2011. No point is taken on delay. Langstaff J refused permission on paper on 18th November 2011, on the basis that

"The second test applies. There is no important principle or practice at issue. The claim is specific to the claimant's case. Nor is there any compelling reason why it should be heard- I could not be satisfied here that there is a strong, let alone any real, likelihood of success. Nor is there any obvious practical advantage to be gained by the claimant by granting permission, since he would have reached adulthood by the time any challenge is likely to have been resolved in the courts, and the legal underpinning for his claims would largely fall away."

29. Permission was granted after an oral hearing by HH Judge Gore QC, sitting as a deputy High Court Judge, on 16th March 2012.

30. It is plain that SIJ Gleeson based her decision on her conclusion that the FTT had made no arguable errors of law, and that she endorsed SIJ McGeachy's own endorsement of them. Both parties agreed before me that the first main issue to determine with regard to the refusal to grant permission to appeal relate to whether the FTT made errors of law. The two central issues before me were therefore

    a. Whether it is arguable that the decision of the FTT of 10th January 2011 does disclose errors of law
    b. If so, whether the "second appeal test" in *R (Cart) v The Upper Tribunal* [2011] 3 WLR 107, [2011] UKSC 28 is met.

Mr Hunter, for the Home Secretary, also submits that the grant of permission by HH Judge Gore QC should be set aside.

31. I shall therefore consider matters under the following heads

1 **<u>First Issue- Errors of law in FTT decision?</u>**

    a. The case for the Claimant on whether the FTT decision discloses errors of law
    b. The case for the Home Secretary on whether the FTT decision discloses errors of law
    c. Discussion and conclusion on the first issue

2 **<u>Second issue- has the "second appeal test" been met?</u>**

    d. The case for the Claimant
    e. The case for the Home Secretary

f. Discussion and conclusions on the second issue

3 Third issue- should the grant of permission be set aside?

g. The case for the Home Secretary

h. The case for the Claimant

i. Discussion and conclusions on the third issue

1 First Issue- Errors of law in FTT decision?

32. The Claimant argued the following propositions of law

a. As the Claimant was a child, section 55 BCIA 2009 applied. It is of substantive as well as procedural effect- see *AA(unattended children) Afghanistan CG* [2012] UKUT 00016 (IAC) per Owen J and UTJ Jarvis at paragraphs 31 and 33.

b. The effect of section 1 of the Childrens Act 1989 made a child's welfare a "paramount consideration."

c. By reason of the passage of section 55, the UN Convention on the Rights of the Child 1989 had been incorporated into domestic law whereby the interests of the child were a paramount consideration (Article 3).

d. By Article 24 of the Charter of the Fundamental Rights of the European Union, the child's best interests must be a primary consideration in all actions relating to children.

e. The statutory guidance issued by virtue of section 55 ("Every Child Matters- Change for Children") treats the interests of the child as a primary consideration.

f. The best interests of the child must be addressed first. Other interests may outweigh them, but must not be treated as inherently more significant: see Baroness Hale, Lord Hope and Lord Kerr in *ZH (Tanzania) v SSHD* [2011] UKSC 4 [2011] 2 WLR 148 at paragraphs 23-25, 26, 33 (Baroness Hale), 44(Lord Hope) and 46 (Lord Kerr).

g. The checklist in section 1 *Childrens Act 1989* should be applied- as per HH Judge Anthony Thornton QC in *R(Tinizaray) v SSHD* [2011] EWHC 1850 at paragraphs 19-20 and 25;

h. Cogent expert evidence that the child's welfare would be impaired by removal had to be addressed if proper regard is to be had to the need to

safeguard and promote the child's welfare: see *R (TS) v SSHD* [2010] EWHC 2614 (Admin), [2011] Imm AR 164 per Wyn Williams J at paragraphs 46-48.

i. It was incumbent on the FTT as decision maker to address the obligation arising from section 55 BCIA 2009: see *DS (Afghanistan) v SSHD* [2011] EWCA Civ 305, [2011] INLR 389 at paragraphs 71, 76, 82 per Lloyd LJ. In that case the appeal succeeded even though the claimant was likely to be 18 years old by the time it would be reheard at the Tribunal- see Pill LJ at paragraph 14.

j. As a right arising under EU law is in play, the court cannot exercise its discretion to uphold an action taken in breach of it: see Lord Hoffman in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 at 616D-G.

k. The Tribunal was still under a duty to consider reception conditions on the Claimant's return, even if that would occur after he reached the age of 18. If wrongly made, the decision should still be quashed even if he was almost or over 18 : see Keene LJ in *CL (Vietnam) v SSHD* [2008] EWCA Civ 1551 [2009] Imm AR 403, [2009] 1 WLR 1873 at paragraphs 13, 24 and 26, and Schiemann J in *R v Immigration Appeal Tribunal ex parte Iqbal Ali* [1994] Imm AR 295 at 298-9.

l. Article 19(3) of the Reception Directive 2003/9/EC lays down minimum standards for the reception of asylum seekers, and makes the best interests of the child a primary consideration. It is the duty of the UK Government to endeavour to trace the child's family as soon as possible. That is now incorporated in domestic law in Regulation 6 of the *Asylum Seekers (Reception Conditions) Regulations 2005*. It is for the UK Government to make these enquiries, and not to leave it to the child. The Court of Appeal has stressed that a failure to do so was relevant to whether a claim for asylum should be granted: see Pill and Rimer LJJ in *DS (Afghanistan) v SSHD* [2011] EWCA Civ 305, [2011] INLR 389 at 44-48 and 88-89, and *HK (Afghanistan) v SSHD* [2012] EWCA Civ 315 per Elias LJ at 39-40 47 and 51. Reference was also made to an Upper Tribunal decision *AA (unattended children) Afghanistan CG* [2012] UKUT 00016 (IAC) at paragraph 133.

33. The Claimant argued that the treatment of the issue by the FTT was deficient, because

    a. The FTT treated the first (AIT) decision as having decided that he was in contact with his family, when no such conclusion had been reached.

    b. The FTT never sought to assess what the best interests of the Claimant were.

    c. Had they done so, given their findings at paragraphs 67 and 68 of their decision about his intelligence and education, they would have been bound to conclude that his best interests lay in remaining in the United Kingdom. The Tribunal also failed to consider what educational and employment opportunities would exist in Iran.

    d. Given the failure to assess the best interests of the child, or to address the relevant " checklist" in s 1 of the Children's Act 1989, it was unable to make a proper assessment for the purposes of Article 8 ECHR.

    e. It was impermissible of the Tribunal to rely on the fact that he would be 18 years old when returned to Iran.

    f. The failure of the Home Secretary to carry out a proper Regulation 6 exercise to trace the Claimant's family should have been taken account of. The failure to perform the Regulation 6 exercise meant that any assessment under Article 8 would be invalid.

34. The Home Secretary argued that

    a. The FTT had expressly had regard to the interests of the child as a primary consideration.

    b. It was required to treat them as a primary consideration, not as a paramount consideration.

    c. The central issue was whether removal of the Claimant to Iran was contrary to the child's best interests. The Tribunal determined that it was reasonable to expect him to return to Iran. The decision (which included the fact that he was on the cusp of 18) was not arguably wrong, let alone perverse.

    d. There is no obligation to consider the list of factors in s 1 Children Act 1989, and conclusions to the contrary in *R(Tinizaray) v SSHD* [2011]

EWHC 1850 are wrong in law; see Baroness Hale in *ZH(Tanzania) v SSHD* [2011] UKSC 4 [2011] 2 WLR 148 at paragraph 25.

e. It would be unrealistic to treat the Claimant as one would a child of say 13. Further, the FTT had to consider what would have happened if he were returned, which inevitably involved the fact that he would be over 18 at that stage.

f. The fact that a child has not attempted to contact his family can raise an adverse inference: see Elias LJ in *HK(Afghanistan) and others* [2012] EWCA Civ 315 at paragraph 35, and even if there are no family members able to receive him, it does not follow that he cannot be safely returned – see Elias LJ at paragraph 38. A decision maker can still reach a decision even if there has been a breach of Regulation 6 of the *Asylum Seekers (Reception Conditions) Regulations 2005.* (See Elias LJ at 39-47). In any event, this point was never taken before the Tribunal.

g. In any event, Community Law does not require that non-compliance by the state with Article 19(3) (Regulation 6) determines the substantive outcome of an appeal.

h. In any event the findings of the Tribunal were that his family would be there to receive him.

First Issue - Discussion and Conclusions

35. It is sensible to start by noting that what is really in issue between the parties is not whether the asylum or humanitarian protection claims should have been rejected, but whether the Article 8 issues were properly treated. In other words, the issue is whether removal directions could or should have been given.

36. There can be no doubt that the first appeal decision- in August 2009- was gravely deficient in its consideration of the Claimant's Article 8 position. Quite apart from the serious and unexplained error concerning the claimant's age, the Immigration Judge sought to discount as irrelevant the question of what he called the Claimant's "economic advancement". It is correct that the BCIA 2009 was not then in force, but the EU Directives and UN Charter undoubtedly applied, and were to the same effect. But the effect of the first

appeal decision was not to deprive him of the ability to remain in this country, and was not made the subject of challenge. He was granted discretionary leave to remain by the Home Secretary.

37. While for my own part I might have considered harsh the rejection of the Claimant's case on his claims for asylum and humanitarian protection, no attempt was made to challenge it in 2009. Further, the Claimant expressly disavowed before me any arguments that the rejection of his asylum claim by the FTT was legally deficient.

38. I also consider that the FTT was entitled to conclude that the Claimant had retained contact with his family. It made clear and unassailable findings of fact to that effect at paragraphs 54, 56, 58 and 61 of the decision.

39. But when it comes to the Article 8 claim, in my judgement, it is strongly arguable that the decision of the FTT also reveals errors of law. I say that for the following reasons.

40. It is clear that the Tribunal accepted that he had established a private life in the United Kingdom. While the judgements in *ZH(Tanzania) v SSHD* [2011] UKSC 4 [2011] 2 WLR 148 were not given until after the FTT hearing, the principles set out there- that the best interests of a child were a primary consideration- were abundantly plain from the EU Directive and from the statutory guidance issued under section 55. As Mr Hunter accepted was one of the most difficult parts of his argument, it is hard to discern any attempt by the FTT to make an assessment of what the Claimant's best interests were, let alone a structured one.

41. I accept that in the case of an adult, what the Tribunal is bound to consider is whether a private life has been established, and then consider whether there are countervailing considerations which outweigh that matter, such as the need to maintain an immigration policy which resists claims for asylum by those who are actually economic migrants. But that is not the approach which must be adopted in the case of an asylum seeker of under 17, and it is not the approach which should have been adopted here. The way in which the test was described by the FTT at paragraph 65 shows that it is strongly arguable that the issue was not approached in accordance with the law. The approach is succinctly stated by Lord Hope in *ZH*(*Tanzania)* at paragraph 54

> "There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration. The proper approach, as was explained in *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568, para 32, is, having taken this as the starting point, to assess whether their best interests are outweighed by the strength of any other considerations."

42. As to what " best interests" comprise, I would refer to the judgement of Baroness Hale in *ZH*(*Tanzania)* at paragraph 29

> "Applying, therefore, the approach in *Wan* to the assessment of proportionality under article 8(2), together with the factors identified in Strasbourg, what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo),* it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away."

43. While Baroness Hale was there addressing an asylum or immigration decision which would have meant that a parent would be removed from the United Kingdom when a child was living here, it provides some useful basic principles no less relevant to the reverse situation. In the case of the Claimant in this case it required consideration of whether he would be better off (in the fully rounded and not merely economic sense) leaving where he had established a private life, with good prospects, in an open society, but separated from his mother and other relations, to go and live in a minority culture (but a substantial one) in a society which was not open, and in which he had not lived since he was about to be 16, but was the culture in which he had been raised. One can see that the arguments would be substantial on both sides. But what is patently not a relevant argument to that issue is whether he had come to the United Kingdom as an economic migrant as opposed to being a genuine asylum seeker. That argument is relevant to the overall decision, but only to the second stage.
44. In my judgement, the application of the proper tests required the Tribunal to approach the matter as follows

a. The FTT must address what his interests were in the fullest sense (which would included those of his current situation and development, and of his future prospects as assessed at the time of the decision), and whether they would be best served by his staying in the UK or being returned. “Best interests” for a 17 year old are not confined to looking no further ahead than the child’s 18th birthday. If one were advising a 17 year old about (say) what educational courses to study, be it to A level or to a technical qualification or otherwise, one would take into account what could happen after the age of 18 in advising on the choices s/he had to make. Of course one matter one will have to address is that after reaching of the age of 18, the child in question may not be able to remain in the UK. I return to that topic below.

b. The FTT’s duty to do so is not reduced or affected by the fact that the child in question is approaching 17. The facts relating to a 17 year old will be different from those relating to a 10 year old, including how much longer childhood will last, but the nature of the duty to assess them, and to treat the interests as primary, is undimmed. It does not of course follow that the result of the assessment will be the same in the two cases.

c. Having addressed the best interests as a starting point, and if they tended to show that he should not be removed from the United Kingdom, the FTT must then consider whether other interests outweighed them.

d. When the FTT makes that second judgement, the weight which applies in the balancing exercise may be affected by the fact that the child has almost attained 18, and will be 18 when returned, but that cannot deprive the best interests of the child of their status as a primary consideration.

45. It is strongly arguable that that approach is not one which was followed by the FTT.

46. It is also strongly arguable that the way in which paragraph 68 is drafted reveals a failure to grapple with the duty incumbent upon it. *LD (Article 8- best interests of child) Zimbabwe* [2010] UKUT 278 (IAC) does not, as the FTT implies, simply say that “ the interests of children require careful

consideration" or that (my italics) " the interests of a child *should* be a primary consideration in immigration cases". What Blake J and SIJ Ward went on to say, consonant with the later Supreme Court decision in *ZH(Tanzania),* is that " A failure to treat them as such will violate Article 8(2) as incorporated directly into domestic law" (paragraph 28). "Should" as used in *LD (Article 8- best interests of child) Zimbabwe* does not imply the use of a discretion, but is effectively instructive. Here it is strongly arguable that the FTT have, at paragraph 68, effectively discounted the force of the best interests issue by referring to the fact that he was nearly 18, and was likely to be an adult when returned to Iran. However the need to consider his best interests remained, albeit that he was approaching his 18th birthday. Once they had been assessed, then countervailing considerations could be considered, and at the time of striking the balance the fact that he was nearly 18 years old would of course have been a factor affecting the weight to be given to his best interests.

47. It is also unfortunate that the FTT was not assisted by any submissions by the advocate for the Home Secretary on the meaning and application of section 55 BCIA 2009

48. I therefore hold that the fact that he was almost 18 is a relevant matter, which must go to the weight to be given to his best interests when considering other considerations, but it cannot be treated as a factor which trumps them in any event. For completeness I should state that I do not accept that the Children Act 1989 provides the relevant checklist. That submission was rejected by Baroness Hale in *ZH*(*Tanzania)* at paragraph 25.

49. I also reject the argument for the claimant that Mr Hurrell's evidence required additional express consideration and reasoning from the FTT. It considered his evidence, and was entitled to deal with its conclusions on the issue he addressed without referring to his evidence specifically. I regard *R(TS) v SSHD* [2010] EWHC 2614 (Admin), [2011] Imm AR 164 as a decision which sets out no additional principle on the giving of reasons by a Tribunal.

50. So far as the question of the *Reception Regulations* is concerned, they read as follows :

> "Tracing family members of unaccompanied minors
> 6.—(1) So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the members of the minor's family as soon as possible after the minor makes his claim for asylum.
> (2) In cases where there may be a threat to the life or integrity of the minor or the minor's close family, the Secretary of State shall take care to ensure that the collection, processing and circulation of information concerning the minor or his close family is undertaken on a confidential basis so as not to jeopardise his or their safety.
> (3) For the purposes of this regulation—
> (a) an unaccompanied minor means a person below the age of eighteen who arrives in the United Kingdom unaccompanied by an adult responsible for him whether by law or custom and makes a claim for asylum;
> (b) a person shall be an unaccompanied minor until he is taken into the care of such an adult or until he reaches the age of 18 whichever is the earlier;
> (c) an unaccompanied minor also includes a minor who is left unaccompanied after he arrives in or enters the United Kingdom but before he makes his claim for asylum."

51. As far as one could tell, no steps whatever had been taken by the Home Secretary pursuant to that duty. It is perhaps ironic that one of the reasons for the FTT disbelieving the Claimant's case was that he had contacted the Red Cross to perform that exercise, albeit late in the day. I note also that the advocate for the Home Secretary never addressed this issue in his case to the FTT. However I note also that this point was not taken before the Tribunal, or in the applications for permission to appeal.
52. However, despite the failures to address this issue, both by the Home Secretary and by the Tribunal, the fact is that the Tribunal made specific and in my view unchallengeable findings that the Claimant was in touch with his family. That being so, while the failures are regrettable, I would be unwilling to consider quashing the decision on this ground.
53. It follows that were this to be a judicial review of the FTT decision, in which the Second Issue was not raised, I would have concluded that it was strongly arguable that there had been a failure to apply the " best interests test" as required by section 55 *BCIA 2009* and as set out in *ZH(Tanzania) v SSHD* [2011] UKSC 4 [2011] 2 WLR 148.
54. However it does not follow that the decision would be quashed. Although it follows from the above that it is strongly arguable that Senior Immigration

Judge McGeachy's reliance on the imminence of the 18th birthday, and his failure to address the effect of *ZH(Tanzania) v SSHD* [2011] UKSC 4 [2011] 2 WLR 148 (which had been decided by the date of his decision) was erroneous in law (and therefore that Senior Immigration Judge Gleeson's endorsement of it was similarly open to challenge) it does not follow that the decision must be quashed. When and if the merits were reheard by the Upper Tribunal, or remitted to the FTT, it would be bound to address the facts as they stand at the date of that rehearing, albeit one before a differently constituted Tribunal. At that time, section 55 of BCIA 2009 would no longer be relevant, and the *ZH(Tanzania) v SSHD* [2011] UKSC 4 [2011] 2 WLR 148 test would no longer apply. At most, what the Claimant could argue are any additional reasons under Article 8 showing that he now had a more firmly settled private life in the United Kingdom. Given the passage of time, they may be stronger than they were in January 2011, but one cannot say how much. If this had been a case of judicial review unaffected by the " second appeal" test, the issue of whether to grant relief would have been a finely balanced one.

55. Further, the fact that the Claimant had established a private life within the meaning of Article 8 (assuming that he had done so) does not mean that his claim for asylum, or for humanitarian protection, would or should have been permitted. At most, the assertion of Article 8 rights would prevent his removal. But once he reached the age of 18, his best interests would no longer be a primary consideration. It follows that, even if he had succeeded in his Article 8 claim before the Tribunal, it by no means follows that he would have been able to resist removal once he had attained his majority.

2 Second issue- has the "second appeal test" been met?

56. The Claimant argued that
    a. The " Second Appeal " test, found in CPR 52.13 , and *The Appeals from the Upper Tribunal to the Court of Appeal Order 2008* and applied to challenges of the kind in issue here by *R (Cart) v the Upper Tribunal and others* [2011] UKSC 28 [2011] 3 WLR 107 permits the grant of relief if either (a) the claim raises an important point of

principle, or (b) there is some other compelling reason why it should be heard.

b. The second appeal test does not prevent an appeal if a set of proceedings disclosed that a tribunal was systematically acting in breach of an established principle of law: see *Cramp v Hastings BC* [2005] EWCA Civ 1005 [2005] 4 All ER 1014 per Brooke LJ at paragraphs 65-68

c. The second criterion (compelling reason) can include compelling reasons presented by the extremity of the consequences for the individual- see Baroness Hale in *Cart* at paragraph 57, and Lord Neuberger MR, Maurice Kay and Sullivan LJJ in *JD (Congo) and others v SSHD* [2012] EWCA Civ 327 at 18, 22 and 23, which was decided after, and in the light of, *PR (Sri Lanka) v* SSHD [2011] EWCA Civ 998 [2012] 1 WLR 73.

d. The fact that EU rights are engaged is significant. If there is a breach of a fundamental right, that affects the issue of whether there is a compelling reason: see Lord Dyson in *Cart* at paragraph 112.

e. The evidence shows serious failures to apply the s 55 BCIA 2009 duty, and the failure to trace the Claimant's relatives.

f. Compelling reasons have therefore been shown.

57. The case for the Home Secretary was as follows:

a. The test in *Cart* is a stringent one- see *PR (Sri Lanka) v* SSHD [2011]Civ 998 [2012] 1 WLR 73. For the tests to be passed, the case must be one which "cries out" for consideration by the Court of Appeal, and where the prospects of success are very high- see Carnwath LJ at paragraph 35. "Compelling" means legally compelling rather than compelling from a political or emotional point if view; ibidem paragraph 36.

b. Reference was also made to Dyson LJ's observations on the meaning of the word " compelling" in *Uphill v BRB (Residuary) Limited* [2005] EWCA Civ 60 [2005] 1 WLR 2070 at paragraphs 19 and 24.

c. In a case such as this one, where the Upper Tribunal has refused permission to appeal on the basis that it contains no arguable error of

law, it will be much more difficult to persuade the Court that there is a compelling reason: see *JD*(*Congo)* at paragraph 32.

d. When the Claimant's case is measured against the tests , it cannot said to be compelling

    i. He was almost 18 at the time of the hearing
    ii. On the Tribunal's findings, he would not suffer persecution on his return
    iii. On the Tribunal's findings he would be able to make contact with his family.

Second issue - Discussion and Conclusions

58. This case does not relate to the discussion of an important point of practice or principle. The principle in issue here was firmly established by the Supreme Court in *ZH (Tanzania)*. The issue is whether the FTT's arguable failure to apply it properly, and the Upper Tribunal's endorsement of that failure, makes the case a "compelling" one for requiring the Upper Tribunal to grant permission to appeal. I take as the most recent judicial guidance the decision of the Supreme Court in *Cart* as applied in *JD(Congo).* The very restrictive approach of the Court of Appeal in *PR(Sri Lanka)* was moderated in the differently constituted court (presided over by the Master of the Rolls) in *JD(Congo)* . The judgement of the court in the latter at paragraphs 11 to 32 sets out the relevant approach

"*The test - discussion*

11 The background to the adoption of the second-tier appeals test and its application to appeals from the UT is set out in detail in the Court's judgment in *PR*. With two exceptions – *Azimi v Newham London Borough Council* (2001) 33 HLR 51 ("*Azimi*") and *esure Insurance Ltd v Direct Line Insurance Plc* [2009] Bus LR 438, [2008] EWCA Civ 842 ("*esure*") all of the authorities to which we were referred were cited to, or considered by, the Court in *PR*. The authorities do not show any settled pattern for present purposes

(Sullivan LJ then set out the series of authorities at paragraphs 11 to 15)

16 Pausing there, it seems to us that these authorities do not support either of the two extreme positions: that the fact that the UT has reversed a decision of the FTT, or has re-made the decision for itself having set aside the FTT's decision is:

i) of itself a "compelling reason" to grant permission to appeal if there is a ground of appeal which has a real prospect of success; or

ii) of no relevance when deciding whether there is a "compelling reason" to grant permission to appeal.

17 The former effectively ousts the second-tier appeal test altogether in such cases and replaces it with the ordinary test for granting permission to appeal. That would be contrary to the statutory scheme which provides that the second-tier test shall apply to such cases, so that a real prospect of success will not be a sufficient justification for granting permission to appeal.

18 The latter ignores the flexibility inherent in the statutory language – which requires the Court to decide whether a particular reason is "compelling" – and the indications (and they are no more than indications) in the authorities that the provenance of the appeal (*Cramp)*, the consequences for the applicant for permission (*Re B*), and the fact that the second appeal is the first occasion that the applicant has had to correct the error (*esure*), may all be relevant factors when the Court decides whether there is a compelling reason to grant permission to appeal.

19 We have dealt briefly with these authorities because the second-tier appeal test was considered, albeit in the context of applications for permission to apply for judicial review of refusals by the UT of permission to appeal from decisions of the FTT, in *Cart.* The Supreme Court considered three possible approaches: exceptional circumstances, the *status quo ante* and the second-tier appeals test: see Baroness Hale at paragraph 38. When deciding which option to adopt the Supreme Court had, necessarily, to consider the ambit of each of the options: in what circumstances, and subject to what constraints, would they permit a challenge to a refusal of permission to appeal?

20 When deciding that the second-tier appeal option should be adopted Lord Dyson said in paragraph 131 of his judgment:

> "131 Thirdly, the second limb of the test ("some other compelling reason") would enable the court to examine an arguable error of law in a decision of the FTT which may not raise an important point of principle or practice, but which cries out for consideration by the court if the UT refuses to do so. Care should be exercised in giving examples of what might be "some other compelling reason", because it will depend on the particular circumstances of the case. But they might include (i) a case where it is strongly arguable that the individual has suffered what Laws LJ referred to at para. 99 as "a wholly exceptional collapse of fair procedure" or (ii) a case where it is strongly arguable that there has been an error of law which has caused truly drastic consequences."

21 To similar effect, Baroness Hale said in paragraph 57 of her judgment:

> "57 For all those reasons, together with those given by Lord Dyson JSC (in the case) and Lord Hope of Craighead DPSC (in the *Eba* case [2011] 3 WLR 149), the adoption of the second-tier appeals criteria would be a rational and proportionate restriction upon the availability of judicial review of the refusal

> by the Upper Tribunal of permission to appeal to itself. It would recognise that the new and in many ways enhanced tribunal structure deserves a more restrained approach to judicial review than has previously been the case, while ensuring that important errors can still be corrected. It is a test which the courts are now very used to applying. It is capable of encompassing both the important point of principle affecting large numbers of similar claims and the compelling reasons presented by the extremity of the consequences for the individual."

22 We accept Mr. Beloff's submission on behalf of PLP that it is important not to lose sight of Lord Dyson's warning that "Care should be exercised in giving examples of what might be 'some other compelling reason' because it will depend on the particular circumstances of the case". Undue emphasis should not be laid on the need for the consequences to be "truly drastic". Lord Dyson was expressly giving two, non exhaustive, examples. However, the second of his examples makes it clear that very adverse consequences for an applicant (or per Baroness Hale, the "extremity of consequences for the individual") are capable, in combination with a strong argument that there has been an error of law, of amounting to "some other compelling reason."

23 While the test is a stringent one it is sufficiently flexible to take account of the "particular circumstances of the case." It seems to us that those circumstances could include the fact that an appellant has succeeded before the FTT and failed before the UT, or the fact that the FTT's adverse decision has been set aside, and the decision has been re-made by the UT. Where they apply, those circumstances do not, of themselves, amount to "some other compelling reason", but they are capable of being a relevant factor when the court is considering whether there is such a reason. In *Uphill v BRB (Residuary) Ltd* [2005] 1 WLR 2070 Dyson LJ (as he then was) said that "anything less than very good prospects of success will rarely suffice" for the purposes of the second-tier appeals test. However, he recognised that there "may be circumstances where there is a compelling reason to grant permission to appeal even where the prospects of success are not high": see the passages from *Uphill* cited in paragraph 8 of *PR.* Dyson LJ did not refer to the kind of circumstances with which we are concerned in these applications. That is not surprising, the Court in *Uphill* was not considering a case where the applicant for permission to appeal had succeeded at first instance but had failed at the first level of appeal. The defendant had failed before both the District Judge and the County Court Judge. Since Lord Dyson referred to *Uphill* and other authorities in his review of the earlier cases in *Cart,* it is appropriate to take his reference to the need for there to be a "strongly arguable" error of law as a synthesis of those earlier authorities.

24 Where does that leave paragraph 36 of *PR?* In paragraph 36 Carnwath LJ said:

> "36. It is true that Baroness Hale and Lord Dyson JJSC in the *Cart* case acknowledged the possible relevance of the extreme consequences for the individual. However, as we read the judgments as a whole, such matters were not seen as

> constituting a free-standing test. In other words "compelling" means *legally* compelling, rather than compelling, perhaps, from a political or emotional point of view, although such considerations may exceptionally add weight to the legal arguments."

25 The applicants and PLP submitted that if this passage meant that the consequences for the individual were not relevant, or might only exceptionally be relevant, when the court was considering whether there was "some other compelling reason", it was in conflict with the passages in *Cart* (above), and wrong. Although Mr. Blundell submitted that paragraph 36 was consistent with *Cart*, he was only reluctantly prepared to concede that, in cases such as these with which we are concerned, a strongly arguable error of law on the part of the UT when coupled with truly drastic consequences for the individual "might" amount to a compelling reason for granting permission to appeal.

26 In our view paragraph 36 of *PR* is consistent with *Cart*, indeed it would be surprising if it was not. As we read the judgment in *PR*, the Court was emphasising the fact that, in the absence of a strongly arguable *error of law* on the part of the UT, extreme consequences for the individual could not, of themselves, amount to a free-standing "compelling reason." The Court noted that Baroness Hale and Lord Dyson had "acknowledged the possible relevance of the extreme consequences for the individual." It did not suggest that such consequences were irrelevant to the consideration of whether there was a "compelling reason", it merely stated, in our view correctly, that absent a sufficiently serious legal basis for challenging the UT's decision, extreme consequences would not suffice.

27 We have deliberately used the phrase "sufficiently serious legal basis for challenging the UT's decision" because the threshold for a second appeal must be higher than that for an ordinary appeal – real prospect of success. How much higher, how strongly arguable the legal grounds for the challenge must be, will depend upon the particular circumstances of the individual case and, for the reasons set out above, those will include the extremity of the consequences of the UT's allegedly erroneous decision for the individual seeking permission to appeal from that decision. It may well be the case that many applicants in immigration and asylum cases will be able to point to the "truly dire consequences" of an erroneous decision. As Mr. Husain pointed out, a decision to remove an asylum applicant from the United Kingdom's jurisdiction to the place where he claims to fear persecution will be irreversible. Just as there is no case for applying a different test to applications for permission to appeal from the Immigration and Asylum Chamber of the UT (see Lord Dyson at paragraph 125 of *Cart*), so also there is no reason to minimise the significance of the consequences of a decision in the immigration and asylum field merely because legal errors in that field are often capable of having dire consequences for appellants.

28 What is the position when the UT, having set aside the FTT's decision to dismiss the applicant's appeal on the ground that it contains a material error of law, exercises its discretion under section 12(2)(b)(ii) of the 2007 Act to re-make the decision, and dismiss the appeal? The second-tier appeals test applies to the UT's decision, but as the Court said in *PR:*

> "We accept, however, that both the *Uphill* case [2005] 1 WLR 2070 and the *Cart* case [2011] 3 WLR 107 were directly concerned with true second appeals. A slightly less demanding standard may be appropriate where there has been only one level of judicial consideration. As Brooke LJ recognised in the *Cramp* case [2005] 4 All ER 1014, there is room for some flexibility having regard to the "provenance of the appeal" This might therefore in some cases be a factor in the overall evaluation of a "compelling" reason."

29 This is not authority for the proposition advanced by the applicants and PLP that the mere fact that the UT has set aside the FTT's decision and re-made the decision is a compelling reason to grant permission to appeal provided the challenge to the lawfulness of the UT's decision has a real prospect of success. Such an approach would substitute the ordinary test for granting permission to appeal for the second-tier appeals test in circumstances where the 2007 Act and the 2008 Order provide that the latter shall apply. Equally, paragraph 53 of *PR* does not support the Respondent's position: that if the UT decides that it is not necessary to remit the case to the FTT, it is of no consequence for present purposes that the UT will be making its decision *de novo.*

30 If the Court is bound to have regard to the particular circumstances of the case (see Lord Dyson at paragraph 131 of *Cart*), the reason why the FTT's decision was set aside is capable of being a relevant factor when deciding whether there has been, in substance, only one level of judicial consideration. We emphasise the words "in substance". As a matter of form, if it has re-made the decision the UT will always have set aside the FTT's decision on the basis of an error of law (see section 12(2) of the 2007 Act, paragraph 33 below), but errors of law are many and various and may range from a discrete failure to consider a particular piece of evidence (e.g. the medical report in *PR*), to a decision that is so replete with error that the UT will have had to start again from scratch.

31 The extent to which it was possible to preserve the findings of fact of the FTT will be relevant. If the FTT has rejected an appellant's case, but in doing so has failed to consider a particular piece of evidence, or has failed to give adequate reasons for reaching a particular conclusion adverse to the appellant, and on re-making the decision the UT reaches the same conclusion having considered the evidence that was omitted from the FTT's consideration, or if the UT gives more detailed, and adequate reasons for reaching precisely the same conclusion as the FTT, we can see no reason for applying a less demanding standard. In such cases there will, in substance, have been two levels of judicial consideration and the appellant will have failed twice in the tribunal system. In other cases the UT may have reversed the FTT's decision upon the basis of a wholly new legal point which was not argued before the FTT, in respect of which there will have been only one level of judicial consideration.

32 These are illustrations of the flexibility that is inherent in the second limb of the second-tier appeals test. In those cases where an asylum seeker has "failed twice in the tribunal system" because the UT has either agreed with the FTT on appeal, or has refused permission to appeal against the FTT's decision upon the basis that it contains no arguable error of law, it is likely to be much more difficult to persuade this Court on an application

> for permission to appeal, or the Administrative Court on an application for permission to apply for judicial review, that the legal basis for challenging the UT's decision is sufficiently strong and the consequences for the applicant are so extreme as to amount to a compelling reason for giving permission to appeal, or to apply for judicial review, respectively."

59. I have therefore considered whether in the circumstances of this case "*the legal basis for challenging the UT's decision is sufficiently strong and the consequences for the applicant are so extreme as to amount to a compelling reason*" as per *JD(Congo)* paragraph 32. If the decision of the FTT had been issued when he was 16, and the consequences would thus have been removal of the Claimant to Iran while a child, and still some way off reaching his majority, I would have concluded that it was strongly arguable that the effects of its legally erroneous treatment of his case were so serious for him that the test would have been met. But, given the fact that he has been found to be in contact with his family, and that at the time of the hearing he was then approaching his 18th birthday, and will now, should the matter be heard again, be unable to argue that his best interests are a primary consideration, I do not consider that the effects upon him would be extreme in the sense used in *JD (Congo)*. It follows also that I do not consider that this is a "compelling" case where I would be justified in quashing the decision of the Upper Tribunal to refuse permission to appeal.
60. While I am mindful of the decisions in *CL (Vietnam) v SSHD* [2008] EWCA Civ 1551 [2009] Imm AR 403, [2009] 1 WLR 1873 *R v Immigration Appeal Tribunal ex parte Iqbal Ali* [1994] Imm AR 295 at 298-9 about how one deals with cases where the child has now passed the age of 18, neither related to the issues arising under the second appeal test, where the issue is not just whether the decision was arguably unlawful (and if it was not the claim must fail *in limine*) but whether the " compelling" test is met, which requires more than a demonstration that it was unlawful.
61. It follows that the second appeal test is not passed, and that for that reason this application must fail.
62. After I had circulated my judgement in draft, Mr Draycott drew my attention to the judgement in *SS(Sri Lanka) -v- Secretary of State for the Home Department* [2012] EWCA Civ 945. In that case the Court of Appeal was very

critical of the way in which an Immigration Judge had dealt with medical issues. It also considered that a Tribunal's failure to apply the section 55 test on the best interests of the child, could amount to a compelling reason under the second *Cart* test. But as Mr Hunter submits, it is not authority for the position that it must do so.

63. I do not consider that that authority should cause me to reach a different conclusion.

<u>3 Third issue- should the grant of permission be set aside ?</u>

64. Mr Hunter contended that the grant of permission by Judge Gore QC should be set aside, on the basis that he ought to have refused permission to apply for judicial review on the basis that the *Cart* test was not met. He contends that while CPR 54.13 expressly prevents the making of an application to set aside permission to seek judicial review, there is an inherent jurisdiction to enable it to be done: see *R (Webb) v Bristol City Council* [2001] EWHC Admin 696, *R (Enfield BC) v Sec of State for Health* [2009] EWHC Admin 743. He submitted that the power was not limited to cases of fraud or mistake or where there had been some procedural irregularity.

65. Mr Draycott resisted that, arguing that the remedy was confined to cases of fraud or mistake, or exceptionally cases where there had been inadvertent oversight of a seemingly conclusive statutory provision or legal authority, and referring to Davis J (as he then was) in *R(Wilkinson) v Chief Constable of W Yorkshire* [2002] EWHC 2352 Admin at paragraphs 41-3. He also referred to *R (Davey) v Aylesbury Vale DC* [2007] EWCA 1166 [2008] 1 WLR 878 on the purposes of a permission hearing.

66. Mr Draycott pointed out also that no issue of fraud or mistake can be argued, nor of procedural irregularity. Judge Gore QC heard argument in the usual way, and ruled that there was an arguable case.

Issue 3- discussion and conclusions

67. I consider that the Home Secretary's argument on this point has little merit. While the second appeal test (as per *Cart)* is relevant at all stages of proceedings, the question at the permission stage was whether the claimant has shown that it was realistically arguable that it was case falling within the *Cart*

criteria. It is worth citing the words of Sedley LJ in the *R (Davey) v Aylesbury Vale DC* case at paragraphs 1-12.

"The purpose of the permission hearing

11 It may be helpful first to recall what Lord Diplock said in the *National Federation of the Self-Employed* case [1982] AC 617, 643-4:

> "…. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. …"
>
> In the same vein, Lord Woolf in his 1989 Hamlyn Lectures, *Protection of the Public – a New Challenge*, noted that the Justice All Souls Review had argued for the abolition of the leave requirement but said (p.21):
>
> > "In practice the requirement, far from being an impediment to the individual litigant, can even be to his advantage since it enables a litigant expeditiously and cheaply to obtain the view of a High Court judge on the merits of his application."

12 We have been shown in the course of argument the transcript of a permission application in the Administrative Court [2007] EWHC 2352 (Admin) in the course of which Burton J expressed a preference for the maximum amount of material on a contest at the permission stage. While there may be cases in which it is necessary or helpful to explore issues in depth at this stage, such cases must be quite exceptional. The proper place for a full exploration of evidence and argument is at the hearing of a claim which has been shown at the permission stage to be arguable."

68. It follows that provided HH Judge Gore QC considered that the case was realistically arguable that the case could be out forward as an appropriate one for relief under the *Cart* test (and no-one suggested to me that he did not) , he was quite entitled to grant permission. This is not like the *Enfield* or *Bristol* cases, where permission had been granted without the Defendant Authority having had its arguments considered at the stage of the consideration of permission on the papers, which is when permission had been given in each of those cases. I would refer also to the words of Davis J in *R(Wilkinson) v Chief Constable of W Yorkshire* [2002] EWHC 2352 Admin at paragraph 43, which while as far as I am aware appearing in an unreported judgement , encapsulate what seems to me to be the proper approach:

> "The court has always had power to recall and reopen orders and decisions in cases of fraud and mistake, and recent decisions confirm that the courts can, albeit exceptionally, recall orders, even when they have been drawn up, for further argument. Inadvertent oversight of a seemingly conclusive statutory provision or legal authority, for example, might be such a case. If such circumstances do arise, I would venture to suggest that the correct procedure normally would be to apply to the judge who made the original order granting permission, with a view to inviting him to recall his original decision and order. I would also add that, even where permission has been granted in an alternative remedy case, the alternative remedy argument may possibly, albeit perhaps exceptionally, and provided the circumstances are appropriate, still be available to be deployed at a substantive hearing on any discussion as to the appropriateness of relief, if any, to be granted."

69. I consider that this is not one of those exceptional cases, and that it would be wrong in principle to set aside the grant of permission.

Overall summary and conclusion

70. It follows that while I find that the decision of the Upper Tribunal refusing permission was based upon an endorsement of an FTT decision, and subsequent review, which, it is strongly arguable, revealed errors of law, I do not consider that the criteria for quashing that Upper Tribunal decision have been met.
71. It follows that this claim is dismissed.

Applications by Claimant for permission to appeal and by Defendant for costs

72. I invited representations on these issues when I circulated my draft judgement. In a lengthy written argument, supported by ample citation of authorities (some of which had not been argued before me), Mr Draycott has asked for permission to appeal on three grounds
    a. The failure by the Home Secretary to perform her duty under Article 19(3) and Regulation 6 required that leave to appeal against the FTT's decision should have been granted, in line with *DS(Afghanistan) -v- Secretary of State for Home Department* [2011] INLR 389 CA and [40-43], [45-46] of *HK(Afghanistan) and others -v- Secretary of State for the Home Department* [2012] EWCA Civ 315.

b. Further the breach of European directives involved required that I should have granted the relief claimed.

c. I was wrong to treat the *Children Act* checklist as irrelevant, and wrong to distinguish *R(TS) -v- SSHD* [2011] Imm AR 164 Admin.

d. I was wrong to hold that the second *Cart* " second appeal" test was not passed. If there was an arguable breach of section 55, and of the Directives, I should have upheld the claim.

73. Mr Hunter contends that this case failed the "second appeals " test, and that there is no arguable case that it did not. If permission is granted, it should be by the Court of Appeal.

74. I am persuaded by some, but by no means all, of Mr Draycott's argument. I consider that his second and fourth points just pass the relevant test for the grant of permission. Permission to appeal is therefore granted.

75. As to costs, the Claimant has the benefit of being funded by the Legal Services Commission.

76. Mr Hunter seeks the Home Secretary's costs, arguing that whilst it may be that costs are likely, in practical terms, to be a merely academic issue, in principle the Interested Party is entitled to an order that the Claimant pay its costs having successfully defended the claim on the same basis that such an order would be made in other cases: *Knight v Lambeth London Borough Council* [1995] CLY 3969, CA. He argues that, given the claimant's circumstances, the court should order that the order for costs is not to be enforceable without leave of the Court (or the Court of Appeal). He contends further that, given that it is unlikely ever to be enforced, the amount of costs need not be assessed at this stage

77. Mr Draycott contends that there should be no order. He refers to the claimant's funding by the LSC and his impecunious circumstances, and contends, pursuant to regulation 9(2) of the Community Legal Service (Costs) Regulations 2000 (SI 2000/441), that the Claimant is not required to make any payment of costs to the Defendant. He contends that that is the normal order in respect of funded individuals as recognised by Lord Hope at [20] of *R(Edwards and another) -v- Environment Agency and others* (No.2) (2011) 1 WLR 79 SC and Wall LJ at [58] of *Re W (a child) D and DW -v- Portsmouth Hospital NHS Trust* [2006] 5 Costs LR 742 CA.

78. He also contends that if there is an award of costs, it should be for a maximum of 60% of her costs, on the basis that the Interested Party had not been wholly successful.

79. I accept Mr Hunter's submission about whether there should be an order for costs. The arguments about setting aside took a very short time. The case turned on whether the circumstances were " compelling" and the Claimant and his advisers have known throughout that winning on other points was not enough unless they met that test. I therefore refuse to reduce it to any lower percentage than 100%.

80. If the Claimant is impecunious, that will be a matter explored by the Costs Judge. The order of the court is therefore

1. The claim is dismissed.
2 The full costs of the claim which have been incurred by the Interested Party are to be determined by a Costs Judge or District Judge
3. The Claimant, having the benefit of public funding, shall pay that amount of such costs which are determined by the Costs Judge or District Judge as reasonable for him to pay pursuant to s.11 of the Access to Justice Act 1999, directions in respect of which determination stand adjourned generally to be restored at the written request of the Interested Party.
4. There be a detailed assessment of the costs of the claimant which are payable out of the Community Legal Service Fund.
5. Permission is granted to the claimant to appeal to the Court of Appeal.