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IN THE COURT OF APPEAL IN NORTHERN IRELAND

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Between:

JG

Applicant

and

THE UPPER TRIBUNAL, IMMIGRATION AND ASYLUM CHAMBER

Respondent

_____

Before: Stephens LJ, McCloskey J and Huddleston J

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McCLOSKEY J (delivering the judgment of the court)

Introduction

[1] This is an application for leave to appeal to this Court against a decision of the Upper Tribunal, Immigration and Asylum Chamber ("the UT") refusing the application of the JG, ("the Applicant") for leave to appeal. The background is that the UT had dismissed the Applicant's appeal against a decision of the First – tier Tribunal (the "FtT") dismissing his appeal against the decision of the Secretary of State for the Home Department (the "SSHD") refusing his application, which was that to deport him to his country of origin would infringe his Article 8 ECHR rights and those of his family, in contravention of section 6 of the Human Rights Act 1998.

Immigration and Litigation History

[2] The Applicant's immigration and litigation history have the following salient features:

(i) He is a citizen of China, aged 40 years, who resided unlawfully in the United Kingdom from 2006 to 2010, was lawfully resident from 2010 to 2014 and has been unlawfully resident thereafter.

(ii) Having been convicted of a drugs offence in July 2016, the Applicant became the subject of deportation action on the part of SSHD.

(iii) The Applicant, as he was entitled to do, resisted the proposed deportation by advancing a human rights claim based on Article 8 ECHR.

(iv) The decision underlying these proceedings is that of SSHD dated 11 July 2017 refusing the Applicant's human rights claim.

(v) The public interest in the deportation of foreign national criminals, enshrined in statute, is the central theme of the impugned decision. In a proportionality balancing exercise, the decision maker gave this determinative weight. The evaluative assessment was that this outweighed the private and family life facts and factors advanced by the Applicant.

(vi) The genuine and subsisting nature of the Applicant's marriage with his Chinese spouse was accepted. So too his parental relationship with their two children, now aged 11 and two years respectively. The best interests of the children were purportedly considered, being weighed alongside the aforementioned statutory public interest. While some negative impact on the children flowing from the Applicant's deportation was acknowledged, this was considered to be sufficiently counterbalanced by their continuing life with their mother in the United Kingdom and certain other factors.

(vii) The decision maker considered that the Applicant's relationship with his spouse was formed in circumstances where his immigration status in the United Kingdom was precarious.

(viii) The decision maker was required to apply the test of unduly harsh consequences. He considered that the relocation of the Applicant's spouse to China would not be unduly harsh, reasoning that she is a citizen of China, speaks the language, is familiar with the culture and lifestyle and is likely to have significant ties there.

(ix) The decision maker suggested that the Applicant's deportation to China would give rise to a joint parental decision to be made. The choice would lie between the Applicant returning to China unaccompanied and, alternatively, the entire family transferring there.

(x) The decision maker assessed that the younger child, by reason of her very tender years, could adapt to life in China with her two Chinese national parents. However, it was acknowledged that relocation to China for the older child would be unduly harsh (a necessary legal test to be applied: see *infra).*

(xi) The decision maker also considered, and rejected, the private life dimension of the Applicant's Article 8 claim.

(xii) Ultimately, the test applied by the decision maker was that of whether the Applicant had demonstrated very compelling circumstances sufficient to outweigh the potent statutory public interest favouring his deportation from the UK. The application of this test resulted in the rejection of the Applicant's human rights claim.

(xiii) The Applicant appealed, unsuccessfully, to the FtT. The judge commented, as countless others have done, that the illicit use etc. of drugs is a scourge on society. He described the report of the educational psychologist, relating to the older child, as the centrepiece of the appeal (this was new evidence). He evaluated the report critically, noting in particular the author's failure to engage with certain aspects of the impugned decision letter. The judge describes the case as a difficult one. In dismissing the appeal, he in substance endorsed the approach and reasoning of SSHD.

(xiv) The Applicant secured permission to appeal to the UT. The question for this tribunal was whether the decision of the FtT was vitiated by a material error of law. The UT noted that the judge's reliance on the decision in the case of *MAB (paragraph 399 - "unduly harsh") USA* [2015] UKUT 00435 (IAC) was no longer sustainable, having regard to the supervening decision of the Court of Appeal in *MM (ditto).* The UT assessment was that this diagnosed error was favourable, rather than adverse, to the Applicant.

(xv) The last, and latest, of the decisions underpinning these proceedings is that of the UT refusing leave to appeal to this court. Permission was refused on the basis that the grounds resolved to a mere disagreement with the decision of the UT, no material error of law had been committed by the UT in the proportionality balancing exercise and, finally, the UT had not erred in its approach to the application by the FtT of an incorrect test.

[3] Disappointingly, the court has been deprived of the opportunity to consider at least three material pieces of evidence. In SSHD's decision letter of 11 July 2017 there are references to the Applicant's application for further leave to remain and supporting evidence dated 28 May 2014, further representations (evidently in writing) dated 18 August 2016 and a further application for leave to remain submitted on 2 June 2017. The reality that foreign nationals are frequently unable to provide the court or tribunal with material of this kind, typically because they did not retain copies or no longer have the same legal representation (this case). This has been frequently recognised. There have also been repeated exhortations on the part of the Judicial Review Court that there is an onus on SSHD, hardly a burdensome one, to proactively provide the materials to its legal representatives and the court. Regrettably, over six months after the initiation of these proceedings this elementary step has not been taken. This is incompatible with SSHD's duties of candour to and cooperation with the court and is unacceptable.

[4] The court will, of course, decline to speculate about the contents of the unavailable evidence.

The Family Unit

[5] The family unit has at all times been the cornerstone of the Applicant's case which, as noted above, has been founded squarely on Article 8 ECHR. At the time of the impugned decision the two children of the family were aged nine years and one month respectively. They are now aged 11 and 2½ years. The Applicant's spouse is aged 33 years. She has settled status in the United Kingdom, having been granted indefinite leave to remain in 2010. They were married in Northern Ireland on 24 July 2006. Each of the children is, by law, a British citizen. Their mother has resided in the United Kingdom for approximately half of her life. The children know no other country, culture or language.

[6] Since initiating his appeal to the FtT the Applicant's case has been built substantially around the older of the two children: the father/son relationship, the boy's life situation and circumstances and the predicted impact of future permutations on him. While the Applicant's case has developed this emphasis, we remind ourselves that by well-established principle it is incumbent on the court to consider the right to family life enjoyed by all members of the unit.

[7] The emphasis just noted is reflected in the preparation and presentation of a psychological report relating to the older child at the stage of the FtT proceedings. This report, comprised by an Educational Psychologist and dated 30 October 2017, is couched in balanced terms. It has the following two noteworthy features:

(a) The boy's mental health was considered to be deteriorating, in a context of prolonged separation from his father who had been imprisoned from, it would appear, around mid-2016. Symptoms included low mood, anxiety, fears of further separation, social isolation, self-stigma and withdrawal. The author predicted a deterioration of these symptoms in the event of the Applicant returning to China alone. The Applicant was considered to be the "primary attachment figure" in his son's life.

(b) The boy's best interests would be served by remaining in the United Kingdom and being reared there by both parents.

This Appeal

[8] In the exercise of the court's case management powers, the parties were informed at the outset that there would be no fragmenting of the Applicant's challenge: the court would determine the issue of granting leave to appeal and, if appropriate, the resolution of the substantive appeal, at a single, composite hearing. This, properly, was unopposed,

[9] There are, in substance, two grounds of appeal. Each entails an asserted error of law on the part of the FtT and the UT, traceable to the impugned decision of SSHD. We shall examine each in turn.

The First Ground of Appeal

[10] The first ground challenges the way in which the two successive tribunals applied the "unduly harsh" test. This had to be applied firstly to the Applicant's spouse by virtue of paragraph 399(b) of the Immigration Rules. This provision enshrines one of the so-called "exceptions" to deportation. It provides, in substance and so far as material, that deportation can be avoided where it is demonstrated that the "foreign criminal" has a genuine and subsisting relationship with a partner who is in the United Kingdom and is a British citizen or settled in the United Kingdom and –

> "… it would be unduly harsh for that partner to remain in the UK without the person who is to be deported."

[11] SSHD concluded that the requirements of this rule were not satisfied, for two reasons. First, because the relationship between the spouses was developed at a time when the Applicant was in the United Kingdom unlawfully and had an immigration status which was precarious. Each of these factors counted against the Applicant. Pausing, this assessment is plainly unassailable and the contrary was not argued on the Applicant's behalf. Second, the decision maker considered that it would not be unduly harsh for the mother to remain in the United Kingdom in the event of the Applicant's deportation. The reasoning was that she is settled in the United Kingdom, cares for their two children there, could lawfully seek employment and would be entitled to receive appropriate public benefits and services.

[12] The decision maker separately applied the "unduly harsh" test to the two children, in somewhat cryptic terms:

> "It is not accepted that it would be unduly harsh for any of your children to remain in the UK even though you are to be deported. This is because your children are currently being cared for by their mother …… there is no reason to indicate that your wife would be unable to continue to provide suitable care for your children in your absence."

Noting the Applicant's claim that he was the sole provider for the family, the decision maker then made reference to bank statements showing that his wife was in receipt of Child Tax Credits and other Social Security Agency payments. (In passing the Applicant could not, of course, have been an earner from mid-2016 when his sentence of imprisonment began: it seems likely that he was not released until around the end of 2017).

[13] Although neither SSHD nor the FtT specifically addressed the applicable provisions of primary legislation, each showed some awareness thereof. In very brief compass, the relevant provisions are those contained in Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act") and the issue to be determined was whether under Section 117C(v) the Applicant had –

> "… a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of [his] deportation on the partner or child would be unduly harsh."

The Applicant's spouse satisfied the definition of "qualifying partner" and each of the children was a "qualifying child". Furthermore, the genuine and subsisting nature of his relationship with all three was not disputed. Thus, the "unduly harsh" question was the only hurdle – a substantial one – to be overcome. If he had overcome this hurdle one of the statutory exceptions to deportation would have been established.

[14] *In MK (Section 55 – Tribunal Options) Sierra Leone* [2015] UKUT 00223 (IAC) the Upper Tribunal examined the meaning of "unduly harsh" at [46]:

> "45. By way of self-direction, we are mindful that '*unduly harsh*' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb '*unduly*' raises an already elevated standard still higher."

[15] In *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 the Supreme Court described this as "authoritative guidance", at [27] (and noted also the earlier passage at [23]). *KO (Nigeria)* was the culmination of a series of decisions of the Upper Tribunal and the Court of Appeal in which differing approaches had been adopted. In addition to approving the MK guidance on the meaning of "unduly harsh", the Supreme Court confirmed the correctness of the Upper Tribunal's determination of the Section 117C(v) issue, which entailed declining to import an additional public interest factor. In short, the Upper Tribunal had construed this statutory provision correctly. The effect of *KO (Nigeria*) was, further, to confirm the like approach of the Upper Tribunal in another reported case, *MAB* (*ante*) together with *BM and others (Returnees – criminal and non-criminal) DRCCG* [2015] UKUT 293 (IAC), at [109]-[110], while disapproving of the contrary decision of the Court of Appeal in *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA 617.

[16] At both tiers the Tribunal decisions underlying the present application pre-dated *KO (Nigeria).* Strictly each Tribunal was bound by *MM (Uganda)* at the time of their respective decisions. The FtT made no reference to this decision. However, properly analysed, this entailed no error of law as the approach which it applied to the "unduly harsh" test was consonant with what was ultimately approved by the Supreme Court. Thus, retrospectively analysed, the FtT committed no error in its reliance on MAB.

[17] On appeal, the UT observed that this was "*… more likely to have led [the FtT] to allow the appeal than to dismiss it*". We agree. The Upper Tribunal's construction of Section 117C of the 2002 Act in the other cases noted, ultimately endorsed by the Supreme Court, had the effect of erecting a lower hurdle than that established by the later Court of Appeal decision in *MM (Uganda)* which the Supreme Court ultimately reversed. Thus, the Applicant was the beneficiary of the application of a more benign test which subsequently proved to be the correct one. This analysis impels inexorably to the conclusion that neither the FtT nor the UT fell into error on the "unduly harsh" issue. We would add that while this issue featured in the Applicant's grounds of appeal and the skeleton argument of Mr Erik Peters (of counsel) it was not pressed at the hearing.

The second ground of appeal: Section 55

[18] The second ground of appeal is based on Section 55 of the Borders, Citizenship and Immigration Act 2009 ("2009 Act"). Section 55 provides:

> "**55 Duty regarding the welfare of children**
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;

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

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

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

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

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

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

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

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

(6) In this section—

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

"customs function", "designated customs official" and

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

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

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

Section 55 has generated a fairly substantial cohort of jurisprudence. At the apex are two decisions of the Supreme Court, *ZH (Tanzania)* [2011] UKSC 4 and *Zoumbas v Secretary of State for the Home Department* [2012] 1 WLR 3690.

[19] The Upper Tribunal (Immigration and Asylum Chamber) has been at pains in its jurisprudence to emphasise that within Section 55 there are two quite separate, though intra-related, duties, namely (i) a duty to have regard to the need to safeguard and promote the welfare of children in the United Kingdom ("the section 55(1) duty") and (ii) a duty to have regard to the statutory guidance produced by SSHD ("the section 55(3) duty"). This was considered extensively in *JO and others (Section 55 Duty) Nigeria* [2014] UKUT 00517 (IAC) at [10]-[14]. See also MK at [16] and [32]. More recently, SSHD's failure to perform the freestanding duty enshrined in Section 55(3) has formed the basis of several orders of the Northern Ireland High Court quashing the decision under challenge. These are, in particular (and inexhaustively), *Re TL's Application [2017] NIQB 137, Re ED's Application [2018] NIQB* 19, *Re OR's Application* [2018] NIQB 27 *Re EFE's Application* [2018] NIQB 89.

[20] In the latter case, the court observed at [10] that the subsection (3) duty –

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

The court added at [12], that compliance with Section 55(3) -

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

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

The judgment continues at [21]:

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

This theme was also considered by the court in *EFE* at [14]:

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

We are satisfied that the High Court was not purporting to suggest that these are the only possible tools of analysis, or tests, to be applied in cases where a breach of the section 55 (3) duty is demonstrated.

[22] It is timely to add the following. Section 55 of the 2009 Act has been in operation for approximately 10 years. It features frequently in both statutory appeals and judicial reviews. During its ten year existence, in the course of which as President of UTIAC I spent four consecutive years dealing only with immigration and asylum appeals and judicial reviews, I have not experienced a single case in

which the decision maker has purported to give effect to the Section 55(3) duty. Furthermore, this was the experience of multiple judicial colleagues. There appears to be a Home Office policy of simply ignoring this solemn statutory obligation. I have made orders in countless cases allowing either appeals or judicial reviews on the basis of SSHD's contravention of Section 55(3). None of these orders has been challenged on appeal.

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

[24] Every breach of the Section 55(3) duty exposes the child concerned to the real risk that his or her best interests will simply be disregarded. Absent a conscious and conscientious assessment of the child's best interests by the decision maker, those interests are likely to be ignored in the decision making process. The scales will not have been properly prepared. The child's entitlement is to have its best interests balanced with the other facts and factors in play, in particular the public interest engaged by the immigration function being performed: most frequently the public interest in maintaining firm immigration control, stemming from the ancient right of states to control their borders, and the public interest in deporting the certain foreign offenders. Every member of this vulnerable societal cohort is exposed to the risk of being denied this entitlement where the section 55(3) duty is breached. This is not diluted by any counter-balance or remedial mechanism.

[25] Furthermore, every breach of the Section 55(3) duty defies the will of Parliament. Such breaches are exposed only where resort is had to the court or tribunal. It is well-known that legal challenges do <u>not</u> occur in large numbers of cases for a variety of reasons - mostly human, financial and prosaic in nature. The result is that large numbers of children are being denied the protection which Parliament deemed necessary for them.

[26] The present case is typical of its kind. It is abundantly clear that no attempt was made by SSHD's decision maker to comply with the Section 55(3) duty. The contrary, sensibly, was not suggested. Mr Peters characterised this failing "fatal", contending that his client must succeed in consequence. On behalf of SSHD Mr Michael Egan (of counsel) countered by highlighting the following passage in *KO (Nigeria)* at [15] (per Lord Carnwath):

> "I start with the expectation that the purpose is to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute. I also start from the presumption, in the absence of clear language to the contrary, that the provisions are intended to be consistent with the general principles relating to the 'best interests' of children, including the principle that 'a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent' …"

Secondly, Mr Egan drew attention to the "wherever possible" qualification in the statutory guidance. Thirdly, he submitted that there is now available a detailed expert report relating to the older child. Finally, Mr Egan submitted that the failure under scrutiny has no material consequences.

[27] As to Mr Egan's first submission, the riposte must be that Section 55(3) did not feature in *KO (Nigeria)* at any of the three judicial decision making levels. It had no bearing on the central issue, which was one of statutory construction, as [6] of the judgment of Lord Carnwath makes clear.

[28] Turning to Mr Egan's second submission, the relevant passage in the statutory guidance is in these terms:

> "In order to safeguard and promote the welfare of individual children, the following should be taken into account, in addition to the relevant section of Part II of this guidance. The key features of an effective system are:
>
> …"

There follows a seven point list, one of whose components is in the following terms:

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

The "where possible" qualification does not arise on the facts of this case for two reasons. First, any suggestion that communication with the older child, whether direct or otherwise, would not have been feasible has no evidential foundation. No contrary case was advanced on behalf of SSHD. Second, since the decision maker

clearly ignored the statutory guidance outright, no consideration whatsoever was given to this discrete passage.

[29] Mr Egan's third and fourth submissions can be taken together. They confront a difficulty of his client's own making. We have highlighted at [3] above the substantial gaps in the evidential matrix before the court. As the content of this evidence is unknown, the court can make no assumptions about whether it grappled, adequately or at all, with the older child's best interests. Furthermore, there is no indication in the decision letter of how the decision maker engaged with this evidence. It is simply mentioned but not addressed. Additionally, there is at least a substantial possibility that any previous consideration of this child's best interests would have been in breach of the section 55(3) duty.

[30] Any temptation to underplay the importance of the two duties enshrined in Section 55 of the 2009 Act must be resisted. As the present case illustrates graphically, the decision making in cases of this kind has profound and long term consequences for the lives of children. In theory, in a given case a breach of Section 55(3) might be of no material moment, for example a mere technical or inconsequential or trivial breach. However, when one examines the detailed checklist in the statutory guidance it seems likely that such cases, if they arise at all, will be rare. The necessity of making an assessment of the best interests of every potentially affected child present in the United Kingdom is a necessary pre-requisite to performing the section 55(1) duty namely to have regard to the need to safeguard and promote those interests. Section 55(3) equips the decision maker with the means with which to make the requisite assessment by stipulating the obligatory step of having regard to the statutory guidance. The latter, in turn provides a range of tools to be employed in appropriate cases.

[31] Some reflection on the passage in *EFE* at [14], reproduced at [21] above, is appropriate. There the court postulated two possible tests to be applied in cases of a demonstrated breach of section 55(3), namely (a) whether the duty had been in substance discharged and (b) whether the failure to discharge the duty was of no material consequence. We do not consider that the court was purporting to suggest that these are the only possible tests to be applied. In [30] above we have elaborated on the second of these tests.

[32] As regards the first of the *EFE* tests, it is difficult, in the abstract, to conceive of a case where the very specific duty under section 55 (3) could be shown to have been discharged in substance. However, since this issue does not arise in the present case, we prefer to say to say nothing more about it.

[33] We have elaborated on the second of the EFE tests in [27] above. It will be noted that in *ED,* at [21], the court expressed itself in different terms, posing the question of whether there is a sustainable and realistic possibility that observance of the section 55(3) duty might have yielded a different decision: see [21] above. This test is freestanding of the *EFE* tests. It demonstrates that there is no single, universal

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

[34] There is another consideration to be addressed in cases involving a breach of the section 55(3) duty. While judicial review proceedings differ sharply from their private law counterpart, there is nonetheless a burden of proof in play. The applicant must establish his/her case to the civil standard of the balance of probabilities: see for example *R v Inland Revenue Commissioners, ex parte Rossminster [*1980] AC 592 at 1026H, per Lord Scarman. We draw attention to this for the purpose of making clear that in cases of this kind, the applicant must establish a breach of section 55(3) to this standard. Experience shows that in many cases a breach of section 55(3) is – very properly – conceded on behalf of SSHD.

[35] Evaluating the evidence as a whole, and mindful of the significant *lacunae* highlighted above, it is impossible to be confident that a satisfactory assessment of the older child's best interests was made by SSHD's decision maker. The section 55(3) duty to have regard to the statutory guidance raises the possibility of a range of further enquiries and actions outlined in such guidance including taking steps to ensure that the child's views are ascertained and fully taken into account. This court cannot discount the possibility that consideration of the statutory guidance would have prompted certain actions on the part of the decision maker giving rise to a fuller and more thorough assessment of the older child's best interests, as a prerequisite to discharging the related statutory obligation to have regard to the need to safeguard and promote those interests. Realistically, this could have resulted in a different outcome for the Applicant and, in consequence the child concerned. Nor can this court be satisfied that the psychologist's report, belatedly commissioned, is comprehensive in its assessment of the best interests of the child concerned. In short, the stakes are at a high level for this pre – teenage boy. The undisputed breach of the section 55(3) duty in this case cannot be dismissed as merely technical, trivial or inconsequential. A material breach of this duty has been demonstrated to our satisfaction.

Conclusion and Order

[36] Giving effect to the foregoing analysis, the court's conclusion is that a material breach of Section 55(3) of the 2009 Act has been established. Mindful of the heavily reduced statutory grounds of appeal surviving the reforms introduced by the Immigration Act 2104, reflected in the substantially amended section 82(1) of the Nationality, Immigration and Asylum Act 2002, we consider that this gives rise to a

breach of the Article 8 ECHR rights of the Appellant and the other family members concerned. The violation of the section 55(3) duty engages, and contravenes, the procedural dimension of Article 8, elaborated in decisions such as *R (MK) v Secretary of State for the Home Department* [2016] UKUT 231 (IAC) at [27] especially, in contravention of section 6 of the Human Rights Act 1998. From this it follows that leave to appeal is granted and the substantive appeal succeeds.

[37] The court has given consideration to what the consequence of its overarching conclusion should be. This issue was considered by the Upper Tribunal in MK (Sierra Leone) (*ante*) at [26] – [39]. The approach of the Upper Tribunal in these passages was considered by the Court of Appeal subsequently, without disapproval: see especially *R (on the application of MA (Pakistan) & Others) v Upper Tribunal (Immigration and Asylum Chamber) & Another* [2016] ECWA Civ 705 at [59] (per Elias LJ). The feasibility of the court or tribunal concerned, in the wake of a demonstrated breach of the section 55(3) duty, actually pursuing any of the enquiries or steps specified in SSHD's statutory guidance appears to this court to be largely theoretical. Steps could of course be taken to ensure that the affected child's/children's views are considered via separate representation, reception of new evidence and a further hearing. But this course would inevitably generate much litigation delay and increased expense. Furthermore, why this burden should fall on the court or tribunal rather than the primary decision maker, SSHD, is unclear. It is far from surprising that these considerations did not feature in the earlier English Court of Appeal decisions preceding, and considered in, *MA (Pakistan)* – and indeed in *MA (Pakistan)* itself - given that the section 55(3) duty was not in play.

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

[39] While we consider that the preferable course would be for this court to make an order remitting the case to SSHD, thereby requiring a fresh decision making process and ensuing decision this, regrettably, is not an available course. Under section 14 of the Tribunals, Courts and Enforcement Act 2007, our options are to exercise our discretion to set aside the decision of the UT and, if we do so, to re-make the decision or to remit to either the UT or the FtT. This may be considered unsatisfactory given that SSHD is the primary decision maker and the agency best equipped to have regard to the section 55 guidance, which is nothing if not intensely prosaic in its nature and operation. Furthermore, SSHD has not yet discharged the section 55(3) duty in this case. However, by statute remittal by this court to SSHD is not possible.

[40] Having considered the statutory alternatives, we have determined to make the following order:

(i) Leave to appeal is granted.
(ii) The substantive appeal succeeds.
(iii) The order of the UT is set aside.
(iv) We remit the case to the FtT, to be differently constituted.

[41] We have opted to remit to the FtT, rather than the UT, given the distinctive functions of these two tribunals. We would add this observation. Previously in a certain class of appeals the tribunal opted to make a final order the effect whereof is to require SSHD to consider the case afresh and make a new decision. This arose in cases where the tribunal found that the decision under challenge was "not in accordance with the law" (the previous statutory formulation of one of the permitted grounds of appeal): see for example *AG (Kosovo) v Secretary of State for the Home Department* [2008] Imm. A. R. 19 and *Patel v Secretary of State for the Home Department* [2011] UKUT 00211(IAC). If this course is, as a matter of jurisdiction, available then whether to adopt it will be a matter for the FtT and, in the event of a further appeal ensuing, the UT. Having received no argument on the issue we venture no further.