Upper Tribunal
(Immigration and Asylum Chamber)

TPN (FtT appeals – withdrawal) Vietnam [2017] UKUT 00295 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 14 March 2017	**On 21 July 2017**

Before

THE PRESIDENT, THE HON. MR JUSTICE MCCLOSKEY

Between

TPN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr J Packer, Advocate, of Duncan Lewis & Co Solicitors
For the Respondent: Mr J Jollife, of counsel, instructed by Government Legal Department

(i) The public law character of appeals to the FtT is reflected in the regulatory requirement governing the withdrawal of appeals that any proposed withdrawal of an appeal must contain the reasons for the course mooted and must be judicially scrutinised, per rule 17 of the FtT Rules and rule 17 of the Upper Tribunal Rules.

(ii) Judicial evaluation of both the withdrawal of an appellant's appeal and the withdrawal of the Secretary of State's case or appeal is required.

(iii) Every judicial determination of an appellant's proposal to withdraw an appeal or the Secretary of State's proposal to withdraw requires a brief outline of the reasons for the decision. The purpose of the judicial scrutiny is to ensure that the appeal is being properly and correctly withdrawn.

(iv) Judicial scrutiny will normally result in the mooted withdrawal of the appeal being perfected by transmission of the notice to the parties required by Rule 17(iii). However, this will not occur automatically: for example where the proposed withdrawal lacks coherence or is based on a clear material misunderstanding or misconception.

(v) The outcome of the judicial scrutiny should be briefly reasoned.

(vi) Rule 29 of the FtT Rules is confined to the substantive determination of appeals.

(vii) The power of the FtT to set aside a decision under Rule 32 is exercisable only by the FtT President and the Resident Judges.

(viii) In cases where an unsuccessful appellant has a choice, best practice dictates that an application to set aside the impugned decision of the FtT under Rule 32 be first exhausted in advance of the lodgement of an application for permission to appeal to the Upper Tribunal. Where both species of challenge are lodged simultaneously, it will be sensible to assign them to the same Judge where feasible.

DECISION

Introduction

1. This appeal raises certain questions of some importance relating to the withdrawal of appeals to the First-tier Tribunal ("FtT") and, in particular, the judicial role and responsibility in this process.

The FtT Hearing

2. Before the FtT, counsel representing the Appellant sought to withdraw his client's appeal against the decision of the Respondent, the Secretary of State for the Home Department (the "Secretary of State"), whereby the application for asylum of the Appellant, a national of Vietnam now aged 13 years, was refused. The assembled evidence is sufficiently satisfactory and in its key aspects uncontroversial to enable the following outline of events in the FtT to be formulated:

   (a) As indicated, the Appellant, a minor then aged 13 years, was represented by counsel instructed by the Appellant's solicitors. There was also a representative of the instructing solicitors in attendance. Counsel was centrally involved in the events which unfolded.

(b) The actions of counsel were evidently precipitated by an intervention on the part of the FtT Judge unfavourable in terms to the merits of the appeal. What counsel did was clearly motivated by this.

(c) Counsel then applied to have the appeal withdrawn. No reasons were provided. The FtT Judge sanctioned this course.

(d) Counsel did not have the authority of either the Appellant or any duly authorised agent of the Appellant for this course.

3. The salient aspects of the FtT Judge's conduct of the hearing at first instance are outlined above. To this summary it is necessary to add one further feature of some significance. The outcome of the hearing was not recorded in any order, decision or other document bearing the Judge's name or signed by the Judge. It was, rather, recorded in a HMCTS pro-forma (Form IA55), dated 24 November 2016 (six days post-hearing) and addressed to the Appellant's solicitors. This document contains all the basic, formal details pertaining to the appeal and, under the rubric "Notice", states:

> "*The appellant was represented at the hearing, his Counsel took the view to withdraw perfectly and legitimately, in these circumstances there is nothing for the tribunal to do. Solicitors should take it up with Counsel.*"

This form makes provision for signature by the "Clerk to the First-tier Tribunal". However, it bears no person's signature. As the text reproduced above indicates, the document was completed reactively and retrospectively.

4. The context in which the aforementioned Form IA55 was completed becomes clear when one identifies what preceded and precipitated it, namely a letter dated 18 November from the Appellant's solicitors to the FtT "for the attention of" the Judge concerned. This states, so far as material:

> "*We write further to the above matter and the full hearing listed today that was withdrawn by Counsel ….*
>
> *We hereby confirm that we were not consulted about this. Counsel withdrew the appeal without our authorisation ……*
>
> *The Appellant had his foster carer, his social worker, the foster carer's senior social worker and another witness all in attendance. …….*
>
> *We submit that for something as important as an asylum and human right's appeal for an unaccompanied minor, aged 13 years old, we would not have withdrawn his appeal in those circumstances.*"

The letter then raises the issue of the decision being set aside under Rule 32 (*infra)* on the basis that this would be in the interests of justice or on the ground of procedural irregularity. The response which this stimulated, in Form IA55, does not address this discrete application and does not

purport to determine it. This is unfortunate, not least because of the clear indications that the response was prepared either by or under the direction of the Judge concerned.

5. I interpose the following at this juncture. Initially Instructed counsel has not had instructions to represent the Appellant since the FtT hearing. Counsel has, however, clearly been most cooperative and, so far as I can determine, candid in his interaction with the Appellant's solicitors. This is deserving of some credit, in a context of professional embarrassment and possible disciplinary action. If and insofar as there is any enquiry into the events summarised in [2] above in another forum, I emphasise two things. First, this summary is based on the evidence available to this tribunal. Second, it does not purport to bind any other court or tribunal and, as a matter of law, does not have this effect in any event.

Appeal to this Tribunal

6. Permission to appeal to this Tribunal was, properly, granted in the following terms:

> *"The grounds requesting permission to appeal to the Upper Tribunal argue that the Judge erred in allowing the withdrawal …*
>
> *It is arguable that the Judge committed or permitted a procedural or other irregularity".*

As a result of the case management steps taken in this forum, the issues have crystallised and, ultimately, clear and focussed arguments, both written and oral, by Mr Packer (on behalf of the Appellant) and Mr Jolliffe (on behalf of the Secretary of State) have been presented. I commend both representatives for the quality of their written and oral advocacy.

The FtT Procedural Rules

7. The following are the salient provisions of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "FtT Procedural Rules"). I begin with the overriding objective which, by no coincidence, sits proudly at the apex of this regulatory regime and requires neither introduction nor reproduction for the purposes of this decision: see Rule 2. Next, I highlight the broad and flexible case management powers enshrined in Rule 4 and the equally wide ranging directions provisions of Rule 5. It is also appropriate to take into account Rule 6(1), which provides:

> *"An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings."*

8. The withdrawal of appeals to the FtT is regulated by certain specially tailored provisions. Rule 17 is the main vehicle:

> *"(i) A party may give notice of the withdrawal of their appeal—*

(a) by providing to the Tribunal a written notice of withdrawal of the appeal; or

(b) orally at a hearing, and in either case must specify the reasons for that withdrawal.

(ii) The Tribunal must (save for good reason) treat an appeal as withdrawn if the respondent notifies the Tribunal and each other party that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn and specifies the reasons for the withdrawal of the decision.

(iii) The Tribunal must notify each party in writing that a withdrawal has taken effect under this rule and that the proceedings are no longer regarded by the Tribunal as pending."

Rule 29 provides:

"*(i) The Tribunal may give a decision orally at a hearing.*

(ii) Subject to rule 13(2) (withholding information likely to cause serious harm), the Tribunal must provide to each party as soon as reasonably practicable after making a decision (other than a decision under Part 4) which disposes of the proceedings —

(a) a notice of decision stating the Tribunal's decision; and
(b) notification of any right of appeal against the decision and the time within which, and the manner in which, such right of appeal may be exercised.

(iii) Where the decision of the Tribunal relates to—

(a) an asylum claim or a humanitarian protection claim, the Tribunal must provide, with the notice of decision in paragraph (2)(a), written reasons for its decision;
(b) any other matter, the Tribunal may provide written reasons for its decision but, if it does not do so, must notify the parties of the right to apply for a written statement of reasons.

(iv) Unless the Tribunal has already provided a written statement of reasons, a party may make a written application to the Tribunal for such statement following a decision which disposes of the proceedings.

(v) An application under paragraph (4) must be received within 28 days of the date on which the Tribunal sent or otherwise provided to the party a notice of decision relating to the decision which disposes of the proceedings."

Finally, it is necessary to consider the provisions concerning the setting aside of a decision which disposes of proceedings. These are contained in Rule 32, which provides:

> *(i) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—*
>
> *(a) the Tribunal considers that it is in the interests of justice to do so; and*
> *(b) one or more of the conditions in paragraph (2) are satisfied.*
>
> *(ii) The conditions are—*
>
> *(a) a document relating to the proceedings was not provided to, or was not received at an appropriate time by, a party or a party's representative;*
> *(b) a document relating to the proceedings was not provided to the Tribunal at an appropriate time;*
> *(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or*
> *(d) there has been some other procedural irregularity in the proceedings.*
>
> *(iii) An application for a decision or part of a decision, to be set aside under paragraph (1) must be made—*
>
> *(a) if the appellant is outside the United Kingdom, within 28 days; or*
> *(b) in any other case, within 14 days,*
> *of the date on which the party was sent the notice of decision."*

9. While the FtT Procedural Rules contain nothing further of significance, I would mention also in this context paragraph [15] of Presidential Guidance Note No. 1 of 2014 which, under the rubric of "Withdrawal by the Appellant", states:

> *"Where an appellant seeks to withdraw an appeal in terms of rule 17, provided the Tribunal is satisfied that the appellant is doing so freely and understands the consequences of the withdrawal, the Tribunal will be satisfied that the appeal is withdrawn. Where an appellant is legally represented and the request to withdraw is made by the representative, the Tribunal will assume that the representative has explained the consequences of the action to the appellant and that this is the intention of the appellant*."

As I shall explain *infra*, I consider this statement to faithfully reflect the correct construction of Rule 17 and its discernible underlying intention.

10. At this juncture I draw attention to certain provisions of Presidential Guidance Note No1 of 2014, an instrument of the President of the FtT. This coincided with the new FtT procedural rules, which became operative on 20 October 2014. Under the rubric of "Withdrawals", paragraph 15 states:

> "*Where an appellant seeks to withdraw an appeal in terms of rule 17, provided the Tribunal is satisfied that the appellant is doing so freely and understands the consequences of the withdrawal, the Tribunal will be satisfied that the appeal is withdrawn. Where an appellant is legally represented and the request to withdraw is made by the representative, the Tribunal will assume that the representative has explained the consequences of the action to the appellant and that this is the intention of the appellant.*"

This passage is directed exclusively to withdrawals by the <u>appellant</u>.

11. Paragraphs 16 – 20 of the Presidential Guidance Note are concerned with the separate, though related, topic of withdrawal by the respondent of the decision challenged by the extant appeal. Notably, and correctly, the procedural rights of the appellant are explicitly recognised by paragraph 17:

> "*Where the respondent withdraws the decision no later than 21 days prior to the hearing (28 days for out of country appeals), a notice will be sent to the appellant asking if there is good reason why the appeal should not be treated as withdrawn. If a response is received, or the time for replying expires without a response, then a Judge will be asked to decide if the appeal should be treated as withdrawn. If there is insufficient time to consult the appellant prior to the hearing, then the question of whether the appeal will be treated as withdrawn will be considered at the hearing.*"

Paragraphs 16 and 18 – 20 summarise carefully and accurately, with little elaboration, the explicit requirements of the constituent elements of Rule 17.

12. The framework of this appeal is completed by certain provisions of the Bar Standards Board ("BSB") Code of Conduct and its Solicitors Regulatory Authority ("SRA") cousin. I consider it appropriate to draw attention to these since their form part of the broader context in which the FtT Procedural Rules were devised. They may, therefore, provide some guidance in the exercise of construing the material provisions of the Rules which, in turn, will involve ascertaining the intention underlying some of their provisions. Thus some illumination may be obtainable from this source.

13. The attributes of integrity, competence, honesty and independence coarse through the veins of both the BSB Code and its solicitor's counterpart (*infra*). From the perspective of this appeal the BSB Code contains the following material provisions:

> **<u>The Core Duties</u>**

"You must observe your duty to the Court in the administration of justice ……..

You must act in the best interests of each client.

You must act with honesty and integrity …

You must provide a competent standard of work and service to each client. "

These are four of the ten core duties.

14. Part C of the BSB Code comprises "*The Conduct Rules*". The first of these rules is:

"The Court is able to rely on information provided to it by those conducting litigation and by advocates who appear before it."

The 2nd and 3rd rules are, respectively:

"The proper administration of justice is served ….

The interests of clients are protected to the extent compatible with outcomes C1 and C2 and the Core duties."

The 7th rule is framed thus:

"The proper administration of justice, access to justice and the best interests of clients are served."

15. There is a discrete section prescribing specific duties owed to the client. These include the following:

"Clients receive a competent standard of work and service …..

Client's bests interests are protected and promoted by those acting for them ….

Care is taken to ensure that the interests of vulnerable clients are taken into account and their needs are met."

[Client duties numbers 10, 11 and 14.]

Conduct rule 15 provides:

"Your duty to act in the best interests of each client, to provide a competent standard of work and service to each client and to keep the affairs of each client confidential includes the following obligations:

(1) You must promote fearlessly and by all proper and lawful means the client's best interests.

(2) You must do so without regard to your own interests or to any consequences to you …"

Conduct rule 17 prescribes "*a duty to consider whether the client's best interests are served by different legal representation and, if so, to advise the client to that effect*".

16. As regards solicitors, there are certain material provisions in the Solicitors Regulation Authority "Mandatory Principles", namely:

    (i) To uphold the rule of law and the proper administration of justice
    (ii) To act with integrity
    (iii) To not allow your independence to be compromised
    (iv) To act in the best interests of each client
    (v) To provide a proper standard of service to your clients.

    The two professional codes of conduct and ethics are not framed in identical terms. However, I consider their substance, thrust and overarching aims to be materially indistinguishable.

Consideration and Conclusions

17. In order determine the issues raised in this appeal it is necessary to construe certain provisions of the FtT procedural rules. No special principles fall to be applied in this exercise. Three overarching principles, each of them orthodox, are, in my estimation, engaged. First, it is necessary to ascertain the intention of the agency which made the Rules, namely the Tribunal Procedure Committee ("TPC"), a specialist body which draws on the expertise of, *inter alios*, judges hailing from various corners of the world of tribunals. Second, it will normally be appropriate to ascribe to the words of any rule their ordinary and natural meaning. Third, regard should be had to the full context, as I have highlighted in [10] above.

18. Rule 17 of the FtT Procedural Rules establishes two mechanisms for withdrawing an appeal, namely the provision of a written notice of withdrawal or oral withdrawal at a hearing. I consider that the rule makers clearly had two distinct scenarios in contemplation, namely withdrawal in advance of a hearing, in writing and withdrawal on the day of hearing. In both instances, the central stipulation in rule 17 is uncompromising. The reasons for the withdrawal "*must*" be specified. This is expressed as a mandatory requirement, subject to no exceptions.

19. This mandatory requirement points up and reflects some of the hallmarks of tribunal litigation. Proceedings in tribunals involve the determination of the respective legal rights and obligations of the citizen and the State. The administration of justice in tribunals has, by long established tradition and culture, been designed to provide swift, uncomplicated and inexpensive adjudication. Litigants sometimes have no legal advice or representation and, on occasion, have representatives who may not necessarily be appropriately skilled or experienced in the relevant field of law. Furthermore, tribunal litigation, particularly in the discrete field of immigration and asylum, does not lend itself to the consensual resolution mechanisms of mediation or other forms of conciliation. Finally, at the first tier level, the appellant is always the citizen.

20. I consider that the TPC would have been alert to the various features of Tribunal proceedings highlighted above in devising Rule 17. The Committee was, presumptively, operating in the real world of tribunal proceedings. In my judgement many of the factors highlighted explain why the TPC considered judicial oversight and decision necessary in the matter of withdrawing appeals. Furthermore the TPC, in my view, clearly had in contemplation the need for judicial evaluation of the question of whether the Secretary of State's withdrawal of the underlying decision should not operate to preclude judicial adjudication of for example an important issue of legal principle, statutory construction or practice and procedure. Fundamentally, I consider that rule 17 envisages and requires active and properly informed judicial involvement and decision making.

21. I develop this analysis as follows. The phrase "*the Tribunal*" is employed several times in the Rule 17 regime. Indeed – unsurprisingly – it appears repeatedly throughout the FtT Procedural Rules. It is undefined. In some contexts, "*the Tribunal*" denotes the administrative organisation of this judicialised entity. In others, it plainly denotes a judge of the Tribunal. Rule 17 provides a convenient illustration of this important distinction. The requirement to provide to the Tribunal a written notice – enshrined in Rule 17(1)(a) – clearly entails the provision of the document required to the Tribunal's administration in the ordinary case. Similarly, the duty imposed on "*the Tribunal*" to provide the notification required by Rule 17(3) clearly envisages an act on the part of the Tribunal's administration. However, I consider that in all other material respects the words "*the Tribunal*" in Rule 17, denote a judge of the FtT.

22. I elaborate on the above analysis in my outline of what Rule 17 means and requires, most conveniently formulated in tabular form:

    (i) An appeal can only be withdrawn by, or on behalf of, the appellant.

    (ii) The requirement to provide the tribunal with the reasons in support of a proposed withdrawal clearly envisages that there will be judicial consideration.

    (iii) If reasons are not provided, proper judicial consideration and oversight are not possible.

    (iv) The combined effect of the notice provisions in Rule 17(i), the requirement of judicial oversight in Rule 17(ii) and the notice to be given in accordance with Rule 17(iii) is that the notice given by the appellant is the first step in the Rule 17 withdrawal process.

    (v) The best guidance available to the FtT judge in performing this function is what is contained in the Presidential Guidance Note (*supra*): the judge must be satisfied that the appellant is withdrawing the appeal freely and understands the consequences of withdrawal. This will not be so if, for example, it lacks coherence or is based on a material misunderstanding or misconception.

(vi) In practice, enhanced judicial vigilance is likely to be required in cases where the appellant is unrepresented.

(vii) The reasons must be such as to persuade the FtT Judge that the course proposed is appropriate.

(viii) In determining whether withdrawal is appropriate, the Judge will take into account (inexhaustively) that Tribunal proceedings do not partake of the essential characteristics of private law *inter-partes* litigation, with the result that withdrawal requires, in effect, judicial adjudication.

(ix) Fundamentally, the FtT Judge must be satisfied that there is good reason for the withdrawal.

(x) There is no obligation on the FtT Judge to approve the proposed withdrawal. Quite the reverse: Rule 17 plainly contemplates that a proposal to withdraw may be refused.

(xi) Fundamentally, where the withdrawal of an appeal is proposed, this takes the form of an application to the tribunal requiring a judicial decision.

23. The exercise of juxtaposing Rule 17(i) and (ii) is instructive. Their phraseology is not identical. However, I consider that, in substance, they are indistinguishable. In both cases notice must be given, the notice must incorporate reasons, judicial scrutiny is then applied and the appropriate outcome follows. Withdrawal of the appeal is neither automatic nor preordained. I consider that in both cases the main purpose of judicial scrutiny is to protect the appellant. It has the further purpose of enabling detection of any misuse of the process of the Tribunal. Each of these purposes furthers the public interest.

24. The above analysis is fortified by the free standing provision in Rule 17(2) which is directed to the scenario where the Secretary of State decides to withdraw the decision under appeal. A decision of this kind is not binding on the FtT. Rather, it too requires judicial oversight and decision. This will entail scrutinising the reasons given for the withdrawal of the underlying decision and the evaluation of whether there is "*good reason*" not to permit the withdrawal of the appeal.

25. Thus every withdrawal of an appeal under Rule 17 requires a judicial decision. I can finding nothing in either the language of the Rule or the ascertainable underlying intention pointing to any other persuasive analysis or construction. The next question which I address is whether Rule 29 of the FtT Procedural Rules applies to a judicial decision under Rule 17. Rule 29 requires that a formal notice of decision must be provided. Where (as in the present case) an asylum claim or humanitarian protection claim is involved, this notice must incorporate or annex "*written reasons for its decision*" – per Rule 29(3)(a). In all other cases,

the FtT must either provide written reasons or notify the parties of their right to apply for same – per Rule 29(3)(b).

26. Notably, Rule 17 contains no reference to Rule 29, while Rule 29 contains no reference to Rule 17. The analysis that Rule 29 is directed to the substantive determination of appeals is readily made. In my judgment, the contemplation of the TPC was that Rule 17 would operate as a discrete, free standing regime. This analysis is fortified by the significant contrast between Rule 17(3) and Rule 29(3) and (6). Thus the question ultimately becomes: what does Rule 17(3) require? Given my conclusion that the "notification" mandated by Rule 17(3) must be the product of judicial consideration and decision, it is impossible to escape the further conclusion that the notice to be given under Rule 17(3) must be composed, signed and dated by the Judge concerned. Second, having regard to the common law principles rehearsed *in extenso* in MK (Duty to Give Reasons) Pakistan [2013] UKUT 641 (IAC) I consider that the judicially composed notice of decision under Rule 17(3) must contain an outline of why the decision has been made. The TPC, in my estimation, cannot have contemplated a bare, perfunctory, conclusionary pro-forma.

27. What, in principle, will this require of the Judge? Context being everything, one immediately contrasts a decision of this *genre* with the substantive determination of an appeal. The key to answering this rhetorical question lies mainly, in the requirement enshrined in Rule 17(1)(b) that the "*reasons*" for the proposed withdrawal be provided by the moving party. I consider that, in all cases, the notice required by Rule 17(3) should explain why the FtT has decided that the reasons put forward are sufficient and satisfactory – or, as the case may be, are not. In the typical case nothing elaborate or unduly burdensome will be required of the Judge. Precisely the same analysis applies to a Notice of Decision under Rule 17(3) belonging to the Rule 17(2) scenario viz withdrawal by the Secretary of State of the underlying decision.

28. I apply my construction of Rule 17 to the factual matrix of this appeal in the following way. I do not accept that bare pro-forma notice to the Appellant and his legal representatives in the form which was sent in this case was compliant with either the letter or the spirit of the FtT Procedural Rules. The reason for that is that neither discloses any proper judicial consideration or any proper judicial act or judicial decision. Added to this the elementary requirement of a judicial signature has not been observed. The decision of the FtT is unsustainable in law on this ground alone. It suffers from the further, free standing infirmity that, in contravention of Rule 17, no reasons for the proposed withdrawal of the appeal were provided. It must be set aside in consequence.

29. The broader point of practice raised by this appeal is whether an appeal to the Upper Tribunal in this kind of context is appropriate. I am satisfied that it is. What occurred at first instance was in breach of the express and implied requirements of the Rules to the extent that the decision of the First-tier Tribunal is unsustainable in law. That per se renders it vulnerable to challenge on appeal to the Upper Tribunal. The related point of practice raised is whether one has a choice between appealing to the Upper

Tribunal and applying to the First-tier Tribunal for an order setting aside the decision under Rule 32. My decision on that issue is as follows.

30. In this context it is necessary to be alert to the Practice Statement of the Senior President of Tribunals dated 13 November 2014. This, in recognition of the important consequences flowing from a set aside decision under Rule 32, confines this power to the FtT President and the various Resident Judges. From this it follows that individual Judges throughout the regions must be alert to refer cases to the Resident Judge where appropriate. It is worth emphasising that Rules 32 – 36 must be considered in unison. Rule 36, a paradigm illustration of a sensible procedural provision in the world of Tribunal litigation, is of particular importance. It is also appropriate to highlight the distinction between the setting aside discretionary power contained in Rule 32 and the separate, self-contained discretionary review power contained in Rules 34 and 35. It is probably uncontroversial to suggest that a heightened alertness to the setting aside and review powers of the FtT will reduce the number of grants of permission to appeal to the Upper Tribunal.

31. Rule 32, which is rooted in section 9 of the Tribunals, Courts and Enforcement Act 2007, provides an alternative to an appeal in certain prescribed circumstances. That option is available if and only if the conditions enshrined in Rule 32 [2] are satisfied. These conditions are rehearsed in disjunctive terms. In the case of the present kind I accept Mr Jollife's submission that Rule 32(2)(d) namely "some other procedural irregularity in the proceedings" is engaged. However, the breadth and elasticity of Rule 32(1)(a) ("*the Tribunal considers that it is in the interests of justice to do so*") must be acknowledged. It seems to me that this provision is also engaged in the context of this appeal.

32. A right of appeal to the Upper Tribunal is conferred by statute. It is correctly characterised as a right to apply for permission to appeal to the second instance level: see VOM [2016] UKUT 410 (IAC). Any curtailment or limitation on the exercise of that right must be evident in the statutory language provided. There is no curtailment or limitation, express or to be implied, in section 11 of the 2007 statute (*supra*) to the effect that an appellant must exhaust the Rule 32 option before pursuing an appeal to the Upper Tribunal.

33. It follows that in a context such as the present an appellant has a choice. Best practice dictates that the Rule 32 avenue should be pursued first, principally it is a quicker and cheaper mechanism. However, a failure to observe best practice does not deprive the Appellant of their statutory right of seeking to pursue an appeal to the Upper Tribunal asserting an arguable error of law in the decision in question. That threshold will be judicially determined, as in every case, by an application for permission to appeal. In cases of doubt representatives may wish to adopt the cautious course of making an in-time application for permission to appeal to the Upper Tribunal whilst simultaneously applying to the FtT to set aside its decision under Rule 32 within the time limit specified. The former application should make clear that adjudication thereon will not be required if the latter application is determined in a manner suitable to the

Appellant. The appropriate choreography will be for the FtT to determine the Rule 32 application first. At a practical level, the assignment of both applications to the same Judge would make much sense.

DECISION

34. I conclude that the breaches of the express and implied requirements of Rule 17 identified above constitute material errors of law. The decision of the FtT is set aside in consequence. I remit the appeal to a different constitution of the FtT for rehearing.

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

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Edward McCloskey.

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

Date: 05 June 2017