Challenges to decisions of the Upper Tribunal

by Nathalie Lieven QC

Introduction

1. I intend to focus on the issue of what approach the Court of Appeal will take to decisions of the Upper Tribunal, and in particular the "deference", "margin of appreciation" or "appropriate weight" that will be accorded to decisions of the Upper Tribunal. The question of what deference should be given to decisions of the Upper Tribunal ("the Tribunal") can be a vexed one. It is a specialist tribunal, but does not always act as the specialist determiner of fact, this role instead being filled in many instances by the First Tier Tribunal ("the FTT"). The relationship between the role of the UT and the FTT (in its many guises) can itself cause considerable problems around which is the more specialist/expert and how the CA should approach their respective roles.

2. As a generality, where the UT is acting in its specialist capacity, it can expect the Court of Appeal to give some deference to its decision making. In this regard, at least, the oft-quoted approach of Baroness Hale in ***AH (Sudan) v Secretary of State for the Home Department*** [2008] 1 AC 678, at §30, is the starting point:

> ... This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see ***Cooke v Secretary of State for Social Security*** [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such

> misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. ...

3. Deference can thus arise in relation to interpreting the law and applying the law, as well as in determining facts. Matters of judgement, determinations of proportionality, and determinations focused upon on a particular specialist issue, can all give rise to questions as to what degree of deference should be accorded to the Tribunal's findings. Given the unified Tribunal system, these matters can also apply in a range of areas.

4. I intend to focus on four main themes: interpreting the law, applying the law, determining facts (including in specialised areas), and proportionality assessments. I will also touch briefly on the implications of the second-tier appeals test.

Interpreting the law

5. The case of ***Cooke***, referred to by Baroness Hale in ***AH (Sudan)***, involved an appeal against the decision of a Deputy Social Security Commissioner, which in turn was an appeal from the Disability Appeal Tribunal. The Disability Appeal Tribunal had determined that there had been a change in the appellant's circumstances, namely a reduction in mobility and care needs, which justified a review of the appellant's disability living allowance. The Deputy Social Security Commissioner upheld this first instance finding.

6. On appeal to the Court of Appeal, Lady Justice Hale considered the question of how the Court of Appeal should approach the question of granting permission to appeal from a determination of the Social Security Commissioners. Her approach foreshadowed the later statement made in ***AH (Sudan)***. Her discussion as to the specialist knowledge of social security law held by the Commissioners emphasises that deference can also extend to the interpretation of the law.

7. After noting that social security law is highly specialised area which is rarely encountered by most lawyers in practice, Hale LJ went on to emphasise that the Commissioners not only have particular knowledge of the relevant law, but that they will also (at §16):

> ... know how that particular issue fits in the broader picture of social security principles as a whole. They will be less likely to introduce distortion into those principles. They may be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life.

8. Deference in relation to the interpretation of the law has as its touchstone the expertise of (now) the Tribunal, due effectively to its ability to understand the broader picture. For these reasons, Hale LJ went on to conclude that a "robust attitude" to the prospect of success criterion was needed. Consideration as to the prospects of obtaining permission to appeal now also has to have regard, when it applies, to the second-tier appeals test in s. 13(6) of the Tribunals, Courts and Enforcement Act 2007 (see below).

9. Similar comments were made by the Court of Appeal in the case of ***Secretary of State for Defence v Duncan & McWilliams*** [2009] EWCA Civ 1043. When interpreting a highly complex scheme of compensation for armed forces personnel, Carnwath LJ emphasised the need to respect both the expertise of a specialist tribunal *and* its understanding of its own legislative scheme. As he observed at §120, such a tribunal is ideally suited to make legal judgments about a scheme and also to point out weaknesses in such schemes to enable future improvements. It is however interesting to note that the Court of Appeal did in fact send the cases back to the FTT, certainly outside the field of immigration whatever the "deference" in practice the Court of Appeal will consider the facts and have in mind its own views.

10. Notwithstanding the comments of the Court of Appeal, matters of statutory interpretation do often reduce to simply ascribing meaning to the words of a particular provision. If a reviewing Court is able to determine the purpose of a

statutory scheme, or at least glean this purpose from the findings of the Tribunal, it will in many instances in practice be as well placed to determine matters of interpretation as the Tribunal. Social security cases such as ***Cooke***, which do involve consideration of the wider social policy behind that part of the benefit regime may in reality be somewhat unusual in that the specialist tribunal, now the UT (AAC) formerly the Social Security Commissioners really do have a specialist knowledge of the policy and practical application of the statutory scheme. It will most often be in the following areas that matters of "deference" may more readily make a difference.

Applying the law

11. ***AH (Sudan)*** itself is an example of where significant deference was given to the Tribunal (then the AIT) in its application of the law. This case followed the determination by the House of Lords of the case of ***Januzi v Secretary of State for the Home Department*** [2006] 2 AC 426. Both cases dealt with the issue of the availability of internal relocation, an issue which must necessarily involve consideration of the applicant's facts but also factual judgements about the country in question. Indeed the three respondents in ***AH (Sudan)*** were also parties to the appeal in ***Januzi*** who had, following this case, had their appeals remitted to the AIT for further reconsideration. Their appeals had been dismissed on reconsideration but were then allowed by the Court of Appeal.

12. The Court of Appeal found that the AIT had made two errors in its application of the test set down as to internal relocation laid down in ***Januzi***.[1] These were, first, that the AIT had wrongly assimilated the test of whether relocation would be reasonable with the requirement that a person should not be treated in a way that would infringe Article 3 of the ECHR, i.e. it had applied too high a test. The second error was that the AIT wrongly compared the conditions in the country as a whole and the place of

[1] The test is simply stated: the decision maker must take account of all relevant circumstances pertaining to the claimant and his country of origin and must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so; per Lord Bingham in ***Januzi*** at §21.

intended relocation, and not between the conditions in the place of habitual residence and the intended safe haven.

13. In overturning the Court of Appeal's judgment, Lord Bingham accepted that the Tribunal had been less plain that it should have been about how it was addressing the issues in contention. However, he concluded that the effect of the Court of Appeal's ruling was to attribute to the AIT what would have been "an egregious and inexplicable error" which was not likely to have been made by an experienced and well-qualified Tribunal. These comments were echoed by Baroness Hale in the quote extracted above at §2.

14. In ***MA (Somalia)***, the Supreme Court was concerned with the issue of return to Somalia, in the particular and extremely difficult context of whether the appellant had lied about the extent of his connections with Somalia. The finding of the Tribunal was that the appellant had lied, and that it was not possible to conclusively determine whether the appellant had close connections with powerful actors in Mogadishu (which would take him outside the then determined risk categories for Somalia). The Tribunal had directed itself properly as to the correct test to apply, as set out in ***GM Eritrea v Secretary of State for the Home Department*** [2008] EWCA Civ 833, but the Court of Appeal found that the Tribunal had not gone on to properly apply that test. It found that the Tribunal's conclusion was simply that the appellant had lied, which fails to apply the test in ***GM*** which requires consideration first of whether there is some other evidence casting light on the appellant's particular situation.

15. On appeal to the Supreme Court, the Tribunal's determination was reinstated. Having cited the above quote from ***AH (Sudan)*** the Court's joint judgment goes on to say (underlining added):

> 44 ... The role of the court is to correct errors of law. Examples of such errors include misinterpreting the ECHR (or in a refugee case, the Refugee Convention or the Qualification Directive); misdirecting themselves by propounding the wrong test on some legal question such as the burden or standard of proof; procedural impropriety such as a breach of the rules of natural justice; and the familiar errors of omitting a

> relevant factor or taking into account an irrelevant factor or reaching a conclusion on the facts which is irrational.
> 45 But the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account.
> 46 We turn to the first of the Court of Appeal's criticisms. In our view, the court was wrong to interpret paras 109 and 121 of the determination as if the AIT were saying that they were dismissing the appeal because MA's account was incredible. In the light of the clear and impeccable self-direction set out only a few paragraphs earlier (at para 105), and having regard to the need for restraint to which we have referred, the court should surely have been very slow to reach the conclusion that it did. It should only have interpreted these paragraphs in the way that it did if there was no doubt that this is what they meant. It is often easy enough to find some ambiguity or obscurity in a judgment or determination, particularly in a field as difficult and complex as immigration, where the facts may be difficult to unravel and the law difficult to apply. If, as occurred in this case, a tribunal articulates a self-direction and does so correctly, the reviewing court should be slow to find that it has failed to apply the direction in accordance with its terms. All the more so where the effect of the failure to apply the direction is that the tribunal will be found to have done precisely the opposite of what it said it was going to do. The striking feature of the present case is that the Court of Appeal was of the view that at para 109, the AIT failed to apply the direction that they had set for themselves only four paragraphs earlier.

16. So where there is a clear direction as to the correct legal principles, the reviewing court has to be satisfied that there is *no doubt* that the direction has not been followed. Any such assessment is necessarily fact sensitive, but more than at least ambiguity or obscurity is needed to be satisfied that the Tribunal has gone wrong.

Determining facts

17. In many ways, the pre-eminent area of deference arises in the context of determining facts. As a matter of general legal principle, a finding of fact by a lower court or tribunal is interfered with only rarely in any event. But there are any number of examples involving the different areas of the Tribunal's now unified jurisdiction where particular emphasis is placed upon the specialist expertise of the Tribunal's various chambers.

18. Where, for example, the Tribunal's expertise relates specifically to the expert evidence provided to it, questions of deference will be particularly germane. This was the point

made by Waller LJ in ***H v East Sussex County Council*** [2009] EWCA Civ 249, in an appeal that originated in the Special Educational Needs and Disability Tribunal ("SENDIST").[2] In that case the SENDIST was called upon to determine an appeal against a decision to place the appellant in a day, as opposed to a residential, special school. Expert evidence was provided by both parties.

19. The criticism that was made was that the SENDIST had not set out its reasons for rejecting the educational need evidence provided in support of the appellant. Deference in this instance involved the Court of Appeal being prepared to find that the SENDIST had properly taken into account the expert evidence notwithstanding that it had not set out its reasons for rejecting this evidence in express detail. It was a question of reading the determination in the round.

20. This principle was applied in a similar context by the Upper Tribunal (Administrative Appeals Chamber) in an appeal against a decision of the FTT in the matter of ***FC v Suffolk County Council*** [2010] UKUT 368 (AAC). The FTT had maintained the nomination of the school which the appellant was to attend, and had also in its determination ordered a number of amendments to the Special Educational Provision in respect of the appellant. This latter matter was criticised on the basis that the amendments were not first notified to the appellant.

21. HHJ Pearl rejected this submission. He found that they went to the very matters of expertise which the FTT was particularly tasked with resolving, and which it had done so in light of its reasoned review of the expert evidence that it had been provided. HHJ Pearl concluded that (at §32):

> The Upper Tribunal... should provide the [FTT] with a 'margin of appreciation' given that what is being challenged is the rejection of expert evidence providing opinion evidence on the very point which that expert tribunal has to decide...

[2] At the time, appeals from this Tribunal were to the High Court on a point of law. The Special Educational Needs and Disability Tribunal now sits in the Health, Education and Social Care (HESC) Chamber of the First-Tier Tribunal. Appeals against the panel's decisions now go to the Upper Tribunal instead of to the High Court.

22. Questions of judgment are also of particular relevance when considering deference to Tribunal determinations. Such judgments can extend even to such matters as whether "Pringles [are] 'similar to potato crisps and made from the potato'". This was the matter that fell to be determined by the VAT and Duties Tribunal[3] in ***The Commissioners for Her Majesty's Revenue & Customs v Procter & Gamble*** [2009] EWCA Civ 407 in the context of assessing whether Pringles should be zero rated for VAT purposes.[4]

23. When this matter reached the Court of Appeal, Mummery LJ emphasised the deference that was required to be given to the VAT Tribunal in light of the dicta in ***AH (Sudan)***. As to the Tribunal's judgment of this issue, he said (at §19):

> ... It was not incumbent on the Tribunal in making its multifactorial assessment not only to identify each and every aspect of similarity and dissimilarity (as this Tribunal so meticulously did) but to go on and spell out item by item how each was weighed as if it were using a real scientist's balance. In the end it was a matter of overall impression. All that is required is that "the judgment must enable the appellate court to understand why the judge reached his decision" (per Lord Phillips MR in ***English v Emery*** [2002] EWCA Civ 605, [2002] 1 WLR 2409 at 19])...

24. These words were echoed by Toulson LJ, who said (at §60):

> Where a Tribunal has taken into account all relevant factors, and has not been influenced by impermissible factors, a court will only exceptionally entertain a challenge based on the Tribunal's evaluation of those factors for the reasons given by Baroness Hale in ***AH***. The challenger would have to show that the decision was perverse, and in this case there is simply no foundation for such a challenge. The Tribunal was not obliged to accord a separate grading for each factor. It was entitled, as it did, to look at the matter in the round.

25. So deference extends in this regard to respecting the judgments made by the Tribunal and in so doing enabling the Tribunal to consider matters in the round, without the Tribunal having to set out its precise views on each matter it has taken into account.

[3] The VAT and Duties Tribunal now forms part of the Tax Chamber of the First-tier Tribunal. The onward appeal from the First-tier Tribunal (Tax) is to the Upper Tribunal (Tax and Chancery).

[4] Apparently, the ingredients for Pringles include potato flour, which makes up some 40% of this product. Crisps have a maximum potato percentage in the 70s. At the material time, crisps and "similar products made from the potato" were not zero-rated for VAT purposes under Schedule 8, Group 1 of the VAT Act 1994.

This too echoes the detailed discussion of Etherton LJ (with whom Wilson and Longmore LLJ agreed) in the case of ***CSC Media Group Ltd v Video Performance Limited*** [2011] EWCA Civ 650 at §§13 - 19, which involved an appeal from the Copyright Tribunal.[5]

26. In the immigration context, we have already seen the deference that is given to the Tribunal when applying the law to the facts. Findings of fact and judgments made in relation to Country Guidance determinations are another area in which the appellate courts can be reluctant to intervene. As is set out in the Practice Direction for the Immigration and Asylum Chambers of the Tribunal and FTT (§12.2), Country Guidance determinations are "treated as an authoritative finding on the Country Guidance issue identified in the determination, based upon the evidence before the members of the Tribunal… that determine the appeal." So while deference may be given to the making of such decisions, it is also important that they are right since they affect the determination of all subsequent cases with similar claims.

27. In relation to the approach to existing Country Guidance determinations, the Court of Appeal in ***R (Madan) v Secretary of State for the Home Department*** [2007] 1 WLR 2891 said that (at §12):

> Country guidance cases have a special status, failure to attend properly to them being recognised by this court as an error of law even though country guidance cases deal only with fact: see ***R (Iran) v Secretary of State for the Home Department*** [2005] Imm AR 535, para 27. They have that special status because they are produced by a specialist court, after what at least should be a review of all of the available material. And that in particular involves a judicial input from a background of experience, not least experience in assessing evidence about country conditions, that is not available to such judges as sit in the Administrative Court and in this court. A judge hearing a judicial review application will therefore wish to tread carefully before finding that a country guidance case is unreliable just on the basis of one or two subsequent reports.

28. The sentiment expressed in the last sentence, above, extends to the care needed when considering whether there is any error in a determination of the Tribunal that

[5] The Copyright Tribunal is not part of the unified Tribunals, though the Government announced in 2010 that it intended to bring it within the unified system.

one or two subsequent reports do not render an existing Country Guidance determination unsound. The need to take such care was confirmed by the Court of Appeal in ***LW (China) v Secretary of State for the Home Department*** [2012] EWCA Civ 519. The Court of Appeal's decision touched in this regard on the need for the Tribunal to take an overall view of objective country material that it reviews: see §32.

29. A significant problem arises however, for the Court of Appeal, where there is disagreement on the facts between two tribunals both of which could be described as "specialist". This arose in the immigration context in ***AP(Trinidad) v Secretary of State for Home Department*** 2011 EWCA Civ 551. Carnwath LJ referred to ***AH*** and ***MA*** and said;

46 By the same token, Baroness Hale's comments cannot in my view be applied to the appellate role of the Upper Tribunal. To do so would be to negate the purpose for which the Upper Tribunal has been established, which is to provide specialist guidance on issues of law arising in the First-tier. (see Leggatt: Tribunals for Users para 6.9ff; White Paper Transforming Public Services Cm 6243 para 7.14ff; see also my discussion of the potential role of the Upper Tribunal in Tribunal Justice – a New Start [2009] PL 48). The original comments in the Court of Appeal in Cooke v Secretary of State related to a proposed appeal from the Social Security Commissioners, who exercised a specialist appellate jurisdiction. The Chambers structure in the Upper Tribunal is designed to ensure that the equivalent specialist expertise is available for each category of its work.

47 However, this should not be confused with the more general principles which apply to any appellate court or tribunal, derived from cases such as English v Emery Reimbold & Strick [2002] 1 WLR 2409 . In R(Iran) v Secretary of State [2005] EWCA Civ 982 , Brooke LJ cited that case in the relation to the role of the former Immigration Appeal Tribunal, and said:
"(the judgment) reveals the anxiety of an appellate court not to overturn a judgment at first instance unless it really cannot understand the original judge's thought processes when he/she was making material findings." (para 15)

*That general statement is identical in effect to the approach advocated by Sir John Dyson in the passage referred to earlier in this judgment. [*in ***MA***]

The same type of issue arose in ***SB v Independent Safeguarding Authority***, referred to below, where both the Independent Safeguarding Authority and the UT, which in that jurisdiction sits with expert assessors, could validly describe themselves as specialist bodies, and where they reached diametrically different views.

Determining proportionality

30. The position of the courts as determiners of proportionality has been the subject of a number of senior judicial pronouncements.[6] In ***Huang v Secretary of State for the Home Department*** [2007] UKHL 11, the House of Lords confirmed that the task of an appellate immigration authority , at whatever level, is to decide for itself whether the challenged decision is unlawful as incompatible with a Convention right (i.e. a right under the European Convention of Human Rights). In so doing, the appellate authority does not itself give deference to the (in this instance) Home Secretary's assessment, but must accord it appropriate weight having regard to the responsibility of the decision maker for a given subject matter and with access to special sources of knowledge and advice (see §§11 and 16).

31. But what of the question of what if any deference should be given to an assessment of proportionality undertaken by the Tribunal? In this instance, there will be a proportionality assessment undertaken by the initial decision-maker, as well as the fresh assessment undertaken by the FTT (or the Tribunal on appeal from the FTT if the Tribunal finds and error of law in the FTT's determination and re-determines the appeal). If the fresh proportionality assessment is undertaken by the FTT, an onward appeal to the Tribunal is on a point of law only: s. 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). The position is the same with appeals from the Tribunal to the Court of Appeal: s. 13(1).

32. As set out further below, the effect of these provisions and the role of the Tribunal generally constrains the manner in which the senior appellate courts will deal with decisions of the Tribunal. Such courts will only rarely undertake the proportionality assessment themselves, and will constrain their enquiry into the Tribunal's decision to being whether there is an error of law.

[6] In the context of judicial review, see also ***R (Aguilar Quila) v Secretary of State for the Home Department*** [2012] 1 AC 621, per Lord Wilson at §46, ***Belfast City Council v Miss Behavin' Ltd*** [2007] 1 WLR 1420, and ***R (SB) v Governors of Denbigh High School*** [2007] 1 AC 100, per Lord Bingham at §30.

33. In the context of determining proportionality, Lord Bingham in ***EB (Kosovo) v Secretary of State for the Home Department*** [2009] 1 AC 1159 described this exercise as being a matter of judgment which involves the weighing of various factors which in general requires a "careful and informed evaluation of the facts of the particular case" which is incompatible with "hard-edged or bright-line rule[s]" (at §12). These comments were adopted by Hooper LJ in ***PE (Peru) v Secretary of State for the Home Department*** [2011] EWCA Civ 274, who consequently preferred the view that a proportionality assessment is a matter of judgment which can permit of two permissible options (albeit that there will be cases where there will be only one permissible option).

34. ***PE*** was in the Court's view an example of a case where the proportionality assessment could have been answered differently but where the actual assessment made was without legal error. This was a deportation case. PE had been convicted of possessing a class A drug with intent to supply, for which he had been sentenced to a 30 month term of imprisonment. PE had, however, developed significant private and family life: he had been in the UK since the age of 13 and his removal was found to result in his separation from his fiancé, a British national. The Tribunal stated that it found its decision difficult, and Hooper LJ expressed considerable sympathy for the appellant, but the decision to deport was maintained. The Tribunal's judgment, and the FTT's proportionality assessment, was left untouched by the Court of Appeal.

35. Lord Justice Sedley, in a concurring judgment, set out his views as to the Tribunal's assessment of proportionality and the Court's role in reviewing this assessment within an error of law rubric. He said as follows (underlining added):

> 27 I agree, with the same reluctance as Hooper LJ, that this appeal has to be dismissed. The decision of the tribunal is properly structured, is balanced in its appraisal of the facts, omits nothing relevant, adopts a legally correct approach, and comes to a conclusion which, while others equally well qualified might well not have come to it, is tenable.
> 28 I gave Ms Phelan permission to appeal, nevertheless, so that she could develop the argument that Strasbourg jurisprudence had rendered the ascertainment of proportionality, if not a question of law, then a question of judgment which a reviewing

> or appellate court was as well placed as the initial tribunal to take. I do not think she has been able in the event to make this argument good. The reason why the Court of Human Rights, in cases such as ***Uner*** and ***Maslov*** 1638/03 [2007] ECHR 224 (22 March 2007), makes its own appraisal of proportionality is that it possesses the unique status of a court both of first instance and of last resort. It may be anomalous that, despite the underlying legislative policy of patriating the Convention rights, the superior courts of the United Kingdom lack the same power of reappraising merits as the Strasbourg court, but without doubt they do lack it.
> 29 A near relation of merits review, close scrutiny, has been considered in this appeal; but while close scrutiny may permit intervention in, for instance, the fact-finding process, its bearing on the ultimate judgment of proportionality is hard to discern. To use it as a licence for too-ready findings of perversity, which is generally all that is left at that stage, would be subversive of legal certainty.

36. It bears reiterating that Sedley LJ's comments relate to the role of the appellate courts when there has been a re-assessment of proportionality by the Tribunal (or the FTT, as the case may be) of the initial assessment undertaken by the primary decision-maker, as required by ***Huang***. It is in this context that a proportionality assessment, having been undertaken by the Tribunal or the FTT, and being reviewable only on the basis of there being an error of law, will be able to withstand scrutiny notwithstanding that an appellate Court may disagree with the outcome.[7]

37. This is not to say that proportionality assessments cannot be overturned. As acknowledged in ***PE***, whether it is proportionate to interfere with a person's rights may permit of only one answer. If the answer provided by the Tribunal is wrong, then plainly it will be subject to being quashed.

38. Regard must also be given to the particular context in which the Upper Tribunal is called upon to consider matters of proportionality. In ***Independent Safeguarding Authority v SB and Royal College of Nursing*** [2012] EWCA Civ 977. The regime under the Safeguarding Vulnerable Adults Act 2006, is of an independent body the ISA making the first decision as to whether to bar an individual, and an appeal lying to the Upper Tribunal. The Act expressly states that the appeal lies to the UT only on an error

[7] See also ***ED (Ghana) v Secretary of State for the Home Department*** [2012] EWCA Civ 39, where Hooper LJ affirmed the relatively narrow basis of review of Tribunal decisions, and in particular decisions turning on assessments of proportionality.

of law or material error of fact, and not on whether the decision was "appropriate". The difficulty in the case arose because a finding on proportionality could itself give rise to an error of law. The ISA is itself a specialist body which is "particularly equipped to make safeguarding decisions" (per Maurice Kay LJ at §22). It was itself for this reason entitled – not to deference, but – to have its decision to maintain inclusion of SB on the list given appropriate weight. The UT itself sits with experts in the field, and the ISA decided SB should be barred, and the UT held that the ISA had erred in law because it had reached a disproportionate decision. The Court found that the Tribunal erred in not according the ISA's assessment appropriate weight. One interesting aspect of the case is that the ISA does not hear oral evidence, whereas the UT does, but appropriate weight still had to be given to the ISA's decision.

39. One can also see a shifting context within the area of immigration deportation. Previously, weight was accorded to the Secretary of State's view that it was in the public interest to deport a foreign offender, in line with a number of authorities such as ***N (Kenya)*** [2004] EWCA Civ 1094. With the advent of the automatic deportation regime under the UK Borders Act 2007, there has been a shift.[8] Parliament has decreed where the public interest lies (deportation is presumed upon imprisonment of 12 months or more, subject to the statutory exemptions applying, such as breach of Convention rights).

40. As was said in ***Secretary of State for the Home Department v Gurung*** [2012] EWCA Civ 62 (at §§11-12; underlining added):

> 11... This means that, while the public interest in deportation has already been established by legislation, <u>its content and extent in the particular case have to be separately evaluated</u>, initially by the Home Secretary and thereafter if necessary by the tribunal, if the proportionality of deportation comes into question.
> 12 The tribunal should accordingly entertain both sides' submissions on the public interest, along with such elements as the nature and gravity of the offence; but the fact that one estimation of the public interest (or of any other element) is the Home Secretary's, whether leaning towards or against deportation in the particular case, commands no additional weight.

[8] Albeit that the position remains the same under the deportation provisions of the Immigration Act 1971.

41. Accordingly, if, for example, the Tribunal were to direct itself in an automatic deportation case that weight should be given to the Secretary of State's view of the public interest, it would itself fall into error and its decision would be susceptible to be set aside.[9]

42. Where the appellate Courts do consider that the Tribunal has erred in its approach to proportionality, it has been recently stated in the Court of Appeal that the normal course will be for the Court to remit the matter for redetermination to the Tribunal: ***Secretary of State for the Home Department v Treebhowan*** [2012] EWCA Civ 1054, at §§21 and 30(e). The rationale is that the fact sensitive nature of any proportionality assessment will generally render it appropriate for that assessment to be undertaken by the specialist Tribunal and not by the Court of Appeal.

43. Plainly there can be no fixed rule about this, however. In ***Miss Behavin*** for example, albeit in a case that did not start in the Tribunal, the House of Lords expressly stated that the Court (i.e. the High Court in Belfast) would determine the proportionality assessment for itself, the Council having failed to expressly do so: see §§ 27 per Lord Roger and 37 per Baroness Hale. This was specifically in the context of the Council not having done the job itself. In the Tribunal context, ***Chikwamba v Secretary of State for the Home Department*** [2008] UKHL 40 is an example of where the Supreme Court undertook the proportionality exercise. This is arguably explained as being an exception, based on the Court's assessment in that case that there was only one proper answer to the proportionality assessment.

Second-tier appeals

[9] The recent changes to the Immigration Rules which purport to lay down hard edged or bright line rules as to the determination of proportionality in the deportation context are beyond the scope of this talk. The Tribunal did, however, fire a warning shot to the effect that these changes would be viewed by the Tribunal as being unlawful in ***Sanade and others (British children – Zambrano – Dereci)*** [2012] UKUT 00048 (IAC). It remains to be seen how this will be approached now that the new Rules are in force.

44. Mention must finally be made of the second-tier appeals test, which provides a statutory mechanism that results in effective deference to the Tribunal's decisions. Where there has been an appeal to the FTT and an onward appeal to the Tribunal, permission to appeal the Tribunal's decision may be granted by the Court of Appeal only if the so called second-tier appeals test set down in s. 13(6) of the 2007 Act is met, namely:

> (a) that the proposed appeal would raise some important point of principle or practice, or
> (b) that there is some other compelling reason for the relevant appellate court to hear the appeal.

45. As to the application of this test, the latest judicial word comes from ***JD (Congo) v Secretary of State for the Home Department*** [2012] EWCA Civ 327, in which PLP intervened. The issue that arose in that case was how the second-tier appeal test should be applied where the appellant had succeeded before the FTT but lost before the Tribunal. If the mischief to which the second-tier appeal test is aimed is to limit second appeals by appellants, was this reconcilable for example with the situation where the appellant had succeeded at first instance and so was not then making a second appeal him or herself?

46. The Court of Appeal rejected the Secretary of State's submission that the test was to be applied in the same manner regardless of whether an appellant had succeeded before the FTT. Having considered the judgment of the Supreme Court in ***Cart v Upper Tribunal (Public Law Project and another intervening)*** [2011] UKSC 28[10], the Court said (at §§22-23):

> 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

[10] ***Cart*** is of course relevant to applications to seek judicial review of a decision by the Tribunal to refuse permission to appeal a determination of the FTT. In such contexts, the Administrative Court is required to adopt the second-tier appeals test when determining whether permission to apply for judicial review should be granted.

> consequences to be "truly drastic". … 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***.[11] 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.

47. Accordingly, again in relation to the question of deference, albeit in the current context in the guise of the second-tier appeals test, context is highly important. Where the matters in ***JD (Congo)*** are in issue, they can be a relevant factor in the Court of Appeal's assessment of whether to grant permission to appeal. So too will all of the other matters discussed above.

Conclusion

48. It follows from the above, unsurprisingly, that the specialised nature of the Tribunal structure lends itself to more informed and potentially therefore better quality decision making. Saying that, the Tribunal can and sometimes does simply just get the law wrong. As in any court, context and the factual matrix are critical to whether the CA will intervene Where questions of deference arise, however, the opportunity to review the Tribunal's (or the FTT's) decisions are more limited. Getting it right the first

[11] ***PR (Sri Lanka) v Secretary of State for the Home Department*** [2012] 1 WLR 73.

time, and ensuring that appropriate resources are applied to first instance decisions, accordingly assumes higher importance.

15 October 2012