JUDICIAL REVIEW OF THE UPPER TRIBUNAL

The legal landscape after *Cart and others v the Upper Tribunal*

Cart, MR and Eba[1]

1. Mr Cart had appealed to the Social Security and Child Support Tribunal against the refusal of the Child Support Agency to revise a variation in the level of child maintenance to be paid to his ex-wife for the support of their children. He was granted permission to appeal to the Upper Tribunal ('UT') on three grounds but refused on a fourth. He applied for judicial review of the decision to refuse permission on the fourth ground.

2. MR, a Pakistani national, had claimed asylum on the basis of his conversion to Christianity. He was found not to be genuine convert. He was refused permission to appeal by both tiers.

3. Ms Eba appealed to the Social Entitlement Chamber of the First-tier Tribunal against the refusal of her claim for disability living allowance. Her appeal was also refused, as were her applications both to the First-tier Tribunal ('FTT') and to the UT for permission to appeal to the UT against that refusal.

The judgments

4. Having provided an illuminating history of the Tribunals structure and how it has evolved, Lady Hale set out the three options that had been put before the Court (para 38):

> "First, we could accept the view of the courts below in *Cart* and *MR* that the new system is such that the scope of judicial review should be restricted to pre-*Anisminic* excess of jurisdiction and the denial of fundamental justice (and possibly other exceptional circumstances such as those identified in *Sinclair Gardens*). Second, we could accept the argument, variously described in the courts below as elegant and attractive, that nothing has changed. Judicial review of refusals of leave to appeal from one tribunal tier to another has always been available and with salutary results for the systems of law in question. Third, we could adopt a course which is somewhere between those two options, and was foreshadowed by Dyson LJ (with the enthusiastic support of

[1] [2011] 3 WLR 107, [2011] UKSC 28 and (in relation to Scotland) *Eba v Advocate General for Scotland* [2011] 3 WLR 149, [2011] UKSC 29

Longmore LJ) in *R (Wiles) v Social Security Commissioner* [2010] EWCA Civ 258 but rejected by the Court of Appeal in *Cart*, namely that judicial review in these cases should be limited to the grounds upon which permission to make a second-tier appeal to the Court of Appeal would be granted.."

5. In rejecting the first approach Lady Hale was keen not to re-introduce something of a historic distinction (para 40):

> "the distinction was given its quietus by the majority in *Anisminic* not least because the word "jurisdiction" has many meanings ranging from the very wide to the very narrow."

6. She weighed up the competing considerations in relation to the need for some form of judicial review whilst analysing the first approach. On the one hand (para 41):

> "…proportionality. There must be a limit to the resources which the legal system can devote to the task of trying to get the decision right in any individual case. There must be a limit to the number of times a party can ask a judge to look at a question."

And on the other (para 43):

> "But that risk is much higher in the specialist tribunal jurisdictions, however expert and high-powered they may be. As a superior court of record, the Upper Tribunal is empowered to set precedent, often in a highly technical and fast moving area of law. The judge in the First-tier Tribunal will follow the precedent set by the Upper Tribunal and refuse permission to appeal because he is confident that the Upper Tribunal will do so too. The Upper Tribunal will refuse permission to appeal because it considers the precedent to be correct. It may seem only a remote possibility that the High Court or Court of Appeal might take a different view….There is therefore a real risk of the Upper Tribunal becoming in reality the final arbiter of the law, which is not what Parliament has provided. Serious questions of law might never be "channelled into the legal system" (as Sedley LJ put it at para 30) because there would be no independent means of spotting them. High Court judges may sit in the Upper Tribunal but they will certainly not be responsible for all the decisions on permission to appeal, nor is it possible for the Upper Tribunal to review its own refusals, even when

satisfied that they are wrong in law."

7. Thus the restrictive ("exceptional") Court of Appeal approach was rejected, on the premise that it was(para 44):

> "too narrow, leaving the possibility that serious errors of law **affecting large numbers of people** will go uncorrected." (emphasis added)

8. In considering the remaining options Lady Hale reminded herself of the basis for statutory reviews (para 47):

> "It is not difficult to dress up an argument as a point of law when in truth it is no more than an attack upon the factual conclusions of the first instance judge. In most tribunal cases, a Claimant will have little to gain by pressing ahead with a well-nigh hopeless case. He may have less money than he otherwise would, but he will not have to leave the country and may make another claim if circumstances change. But in immigration and asylum cases, the Claimant may well have to leave the country if he comes to the end of the road. There is every incentive to make the road as long as possible, to take every possible point, and to make every possible application. This is not a criticism. People who perceive their situation to be desperate are scarcely to be blamed for taking full advantage of the legal claims available to them. But the courts' resources are not unlimited and it is well known that the High Court and Court of Appeal were overwhelmed with judicial review applications in immigration and asylum cases until the introduction of statutory reviews."

9. She highlighted the paradox facing the Courts (para 50):

> "Ironically, therefore, the more troubling the context, the more necessary it has seemed to limit the availability of judicial review."

10. Thus the second-tier appeals criteria were to be adopted[2] (para 56):

> "….Clearly [in the Tribunal structure itself] there should always be the possibility that another judge can look at the case and check for error.

1. Which provides that"no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that:(a) the appeal would raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it."

> That second judge should always be someone with more experience or expertise than the judge who first heard the case (it is to be hoped that the new structure will not perpetuate the possibility, exemplified in *Sinclair Gardens,* that a non-lawyer member might be entrusted with deciding whether a tribunal chaired by a legally qualified tribunal judge had gone wrong in law, but this is left to the good sense of the Senior President rather than enshrined in the legislation). But it is not obvious that there should be a right to any particular number of further checks after that. **The adoption of the second-tier appeal criteria would lead to a further check, outside the tribunal system, but not one which could be expected to succeed in the great majority of cases**." (emphasis added)

11. She indicated that the second-tier appeals criteria (para 57):

> "…is capable of encompassing both the important point of principle affecting large numbers of similar claims and **the compelling reasons presented by the extremity of the consequences for the individual**...." (emphasis added)

12. Lord Phillips had no doubt that if judicial review of the UT was to be permitted, and this was his reluctant conclusion, it was to be restricted on the same basis (para 92):

> "there is, at least until we have experience of how the new tribunal system is working in practice, the need for some overall judicial supervision of the decisions of the **Upper Tribunal,** particularly in relation to refusals of permission to appeal to it, in order to guard against the risk that errors of law of real significance slip through the system."

13. In rejecting the exceptional circumstances approach Lord Dyson pointed out that (para 110):

> "In practical terms, it is immaterial to the victim of an error of law whether it is a jurisdictional error or should be differently classified. Non-jurisdictional error may be egregious and obvious."

14. In considering that restricted judicial review was appropriate, Lord Dyson noted the various levels of scrutiny that exist within the Tribunals structure (para 123):

> "first when the FTT decides whether or not to review its decision under s 9(1) and (2); second, if the FTT decides not to review its decision, when it decides whether or not to grant permission to appeal to the UT under s 11(4)(a); third, if the FTT refuses permission to appeal, when the UT decides whether or not to grant permission to appeal under s 11(4)(b). The UT initially decides this on the papers. In certain categories of case, there is a right to renew the application at an oral hearing (Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) rr 22(3) and (4); in any event, the UT has the power, if it considers it appropriate to do so, to hold an oral hearing to decide permission (ibid, rr 5(1) and 5(3)(g))."

15. As to the second-tier appeals criteria and the first available limb (para 130):

> "…it is not enough to point to a litigant's private interest in the correction of error in order to obtain permission for a second appeal. Permission will only be given where there is an element of general interest, which justifies the use of the court's scarce resources… It follows that, if the law is clear and well established but arguably has not been properly applied in the particular case, it will be difficult to show that an important point of principle or practice would be raised by an appeal. The position might be different where it is arguable that, although the law is clear, the UT is systematically misapplying it: see, for example, *Cramp v Hastings Borough Council* [2005] EWCA Civ 1005, [2005] 4 All ER 1014n, [2005] HLR 786."

(For further assessment of *Cramp* see below, in that this related (only) to 2 cases and yet was still considered by Lord Dyson in *Cart* to amount to 'systematic misapplication'.)

16. As to the second limb (para 131):

> "Care should be exercised in giving examples of what might be "some other compelling reason", because it will depend on the particular circumstances of the case. But they might include (i) a case where it is strongly arguable that the individual has suffered what Laws LJ referred to at para 99 as "a wholly exceptional collapse of fair procedure" or (ii) **a case where it is strongly arguable that there has been an error of law which has caused truly drastic consequences.**"

(emphasis added)

Eba

17. In *Eba*[3] Lord Hope gave the judgment of the Court and adopted the approach chosen in *Cart*, e.g. see para 48 of his judgment:

> "…Underlying the first of these concepts is the idea that the issue would require to be one of general importance, not one confined to the petitioner's own facts and circumstances. The second would include circumstances where it was clear that the decision was perverse or plainly wrong or where, due to some procedural irregularity, the petitioner had not had a fair hearing at all."

The benchmark or threshold to be met – the Supreme Court view?

18. It is fair to say that the Court did not provide a great deal of guidance on the application of the second-tier appeals criteria[4]. Nonetheless, it is clear from the majority and lead judgment of Lady Hale that she considered that the second limb could be made out due to the "extremity of the consequences for the individual", which chimed with Lord Dyson's view that permission should be granted where it is "strongly arguable that there has been an error of law which has caused truly drastic consequences" – of course that latter view requires the Court to find the error of law, with its averred truly drastic consequences, to be strongly arguable. This is consistent with past and present caselaw as to the need for "very good prospects of success" – as to which see below.

19. Further consideration of the *Cart* judgments, in particular that of Lord Dyson, has led the Court of Appeal to point the need for flexibility in approach, given the need to have regard to "the particular circumstances of the case" (Lord Dyson at para 131)

[3] Note, however, the recent case of *KP and MRK Applicants against THE SECRETARY OF STATE FOR THE HOME DEPARTMENT* [2012] CSIH 38 where the Extra Division of the Inner House of the Court of Session held that r.41.59 is ultra vires. That was relied on by Lord Hope in applying the second appeals test to the Scottish system, e.g. *Eba* at para 47.

[4] Presumably because, as Lord Dyson opined (para 132): "The exceptional nature of the test is well understood. A perusal of the commentary in Civil Procedure (2011) ("The White Book") on CPR 52 r 13(2)(a) and (b) suggests that the application of the second appeals test has not caused difficulty. That also accords with the experience of Lord Clarke. It also accords with mine…"

Past cases - Uphill[5] *and Cramp*[6]

20. *Uphill* warrants further consideration as it is relied on by the Court of Appeal in more recent guidance given on the second-tier appeals criteria. Further it was a judgment (given by Dyson LJ, as the judgment of the Court, with the approval of the then Master of the Rolls and Vice-President of the Court of Appeal). The case itself concerned a claim for damages for negligence. An issue had arisen as to the extension of time that had been granted by the County Court for service of the claim form.

21. The Court considered the relevant questions to be (para 15):

> "(i) whether, and if so in what circumstances, permission to appeal should be given under CPR 52.13(2)(a) where the ground of appeal is that there has been a failure to apply correctly a point of practice or principle which has already been established by a court of higher authority, and (ii) the scope and meaning of the phrase "other compelling reason" in CPR 52.13(2)(b)."

22. As to an important point of principle, the Court emphasised that this was in relation to a *new* point of principle (para 18):

> "it is clear that the reference in CPR 52.13(2)(a) to "an important point of principle or practice" is to an important point of principle or practice that has not yet been established. The distinction must be maintained between (a) establishing and (b) applying an established principle or practice correctly. Where an appeal raises an important point of principle or practice that has not yet been determined, then it satisfies CPR 52.13(2)(a). But where the issue sought to be raised on the proposed appeal concerns the correct application of a principle or practice whose meaning and scope has already been determined by a higher court, then it does not satisfy CPR 52.13(2)(a). We cannot accept the submission of Mr James that the question whether an established point of principle or practice has been properly applied in an individual case itself raises an important point of principle or practice. Were the position to be otherwise, the door would be open to second appeals in all cases which concern the application of an important principle or practice. That is clearly not what was intended."

[5] Uphill v BRB (Residuary) Ltd [2005] EWCA Civ 60, [2005] WLR 2070
[6] *Cramp v Hastings Borough Council* [2005] EWCA Civ 1005, [2005] 4 All ER 1014n, [2005] HLR 786

23. In dealing with the second limb the Court emphasised that (para 19):

> "…"Compelling" is a very strong word. It emphasises the truly exceptional nature of the jurisdiction."

24. The following guidance was thus provided (para 24), the Court making it clear (para 23) that it was not exhaustive:

> "(1) A good starting point will almost always be a consideration of the prospects of success. It is unlikely that the court will find that there is a compelling reason to give permission for a second appeal unless it forms the view that the prospects of success are very high. That will usually be a necessary requirement, although as we shall explain, it may not be sufficient to justify the grant of permission to appeal. This necessary condition will be satisfied where it is clear that the judge on the first appeal made a decision which is perverse or otherwise plainly wrong. It may be clear that the decision is wrong because it is inconsistent with authority of a higher court which demonstrates that the decision was plainly wrong. **Subject to what we say at (3) below, anything less than very good prospects of success on an appeal will rarely suffice. In view of the exceptional nature of the jurisdiction conferred by CPR 52.13(2), it is important not to assimilate the criteria for giving permission for a first appeal with those which apply in relation to second appeals.**
>
> (2) Although the necessary condition which we have mentioned at (1) is satisfied, the fact that the prospects of success are very high will not necessarily be sufficient to provide a compelling reason for giving permission to appeal. An examination of all the circumstances of the case may lead the court to conclude that, despite the existence of very good prospects of success, there is no compelling reason for giving permission to appeal. For example, if it is the appellant's fault that the first appeal was dismissed, because he failed to refer to the authority of a higher court which demonstrates that the decision on the first appeal was wrong, the court may conclude that justice does not *require* this court to give the appellant the opportunity to have a second appeal. There is a reason for giving permission to appeal, but it is not compelling, because the appellant contributed to the court's mistake. On the other hand, if the authority of a higher court which shows that the decision on the first appeal was wrong post-dated that decision,

then there might well be a compelling reason for giving permission for a second appeal.

(3) There may be circumstances where there is a compelling reason to grant permission to appeal even where the prospects of success are not very high. The court may be satisfied that there are good grounds for believing that the hearing was tainted by some procedural irregularity so as to render the first appeal **unfair**. Suppose, for example, that the judge did not allow the appellant to present his or her case. In such a situation, the court might conclude that there was a compelling reason to give permission for a second appeal, even though the appellant had no more than a real, as opposed to fanciful, prospect of success. **It would be plainly unjust to deny an appellant a second appeal in such a case, since to do so might, in effect, deny him a right of appeal altogether.**" (bold emphasis added)

25. *Uphill* was subsequently considered in the case of *Cramp* (ante), which itself was cited by Lord Dyson when considering the second-tier appeals criteria in *Cart*. *Cramp* concerned two homelessness cases and it is evident that Brooke LJ was influenced by the witness statement evidence adduced as to the amount of public money that might be wasted if the incorrect approach adopted by the two judges below were to continue (para 66). Of note is the fact that although these appeals concerned 'merely' two cases which, in the view of the Court of Appeal, "evidence[d] a worrying tendency in judges at that level to overlook [the correct approach in law]" (para 68), this was sufficient, in the view of the Court, to surmount the important point of principle threshold.

26. As stated above, *Cramp* was expressly approved by Lord Dyson and so provides some scope for arguing that the first limb has been met through misapplication of an already established principle; e.g. where practitioners can point to another case in which this has happened, or join with another appeal on the same issue/point.

PR (Sri Lanka)[7] *and JD (Congo)*[8]

27. Both of these cases were presided over by a senior panel of (different) Court of Appeal judges – the Master of the Rolls sat on both cases. It is perhaps of some relevance that in both cases, the guidance was aimed at appeals from the UT to the Court of Appeal – where the second-tier appeals criteria now apply in relation to an appeal from the UT to the Court of Appeal. That said, given

[7] *PR (Sri Lanka) v Secretary of State for the Home Department* [2012] 1 WLR 73, [2011] EWCA Civ 988

[8] JD (Congo) & Ors v Secretary of State for the Home Department & Anor [2012] EWCA Civ 327

that the same criteria must be met in an application for judicial review of the UT's refusal of permission to appeal to it, it is unsurprising that that Judges have relied heavily on the *PR* guidance since its promulgation. Furthermore, in *JD* the Court referred expressly to claims before the Administrative Court (para 32).

28. In *PR (Sri Lanka)*, Carnwath LJ (giving the judgment of the Court) commented that (para 35):

> "Judicial guidance in the leading case of *Uphill* emphasised the narrowness of the exception. The prospects of success should normally be "very high", or (as it was put in *Cart* para 131) the case should be one which "cries out" for consideration by the court. The exception might apply where the first decision was "perverse or otherwise plainly wrong", for example because inconsistent with authority of a higher court. Alternatively a procedural failure in the Upper Tribunal might make it "plainly unjust" to refuse a party a further appeal, since that might, in effect, "deny him a right of appeal altogether". In *Cart* Lord Dyson, following Laws LJ, characterised such a case as involving "a wholly exceptional collapse of fair procedure" (para 131). Similarly, Lord Hope in *Eba* referred to cases where it was "clear that the decision was perverse or plainly wrong" or where, "due to some procedural irregularity, the petitioner had not had a fair hearing at all"."

29. As to the relevance of the potential "extreme consequences" for the applicant, this was dealt with shortly (para 36):

> "It is true that Lady Hale and Lord Dyson in *Cart* acknowledged the possible relevance of the extreme consequences for the individual. **However, as we read the judgments as a whole, such matters were not seen as constituting a free-standing test**. In other words "compelling" means *legally* compelling, rather than compelling, perhaps, from a political or emotional point of view, although such considerations may exceptionally add weight to the legal arguments."

30. The Court added (para 37):

> "…The point of principle or practice should be not merely important, but one which calls for attention by the higher courts, specifically the Court of Appeal, rather than left to be determined within the specialist tribunal system."

31. Prominent in the Court's mind when considering (and seemingly dismissing the relevance of) potential extreme consequences was the fact that some applicants will have failed to establish any such risk at two levels (para 41):

> "…Certainly, if his fear is well-founded, the consequences could be drastic, if he is removed. But the proceedings in the First and Upper Tiers of the Tribunal (from which permission for a second appeal is sought) have established by proper judicial process, put in place by Parliament, that his fear is not well-founded. The question is not, therefore, whether the nature of the asserted claim would, if its factual basis were established, risk drastic consequences, but whether there is a compelling reason why the issue on which the claimant has failed twice should be subjected to a third judicial process."

Plainly that guidance could only apply to a case where the Upper Tribunal had granted permission to appeal to it and thereafter considered the A's appeal, i.e. thereby subjecting his case to two levels of scrutiny. In the circumstances, such guidance is not necessarily applicable to a judicial review of the UT's refusal to grant permission to appeal to it from the FTT – there will not have been two levels of scrutiny in the manner described by the Court in *PR (Sri Lanka)*.

32. Indeed the Court later stated that where there has, in truth, only been one level of scrutiny, a more flexible approach was required (para 53):

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

33. In *JD (Congo)*, it is notable that the Court underlined Lord Dyson's reference in *Cart* (at para 131) to the need to have regard to "the particular circumstances of the case".

34. Sullivan LJ, giving the judgment of the Court, expressly noted the context in which the Court had recently given guidance in *PR (Sri Lanka)*, namely where the Appellant had failed twice in the Tribunal system. The Court therefore proposed to consider how the second appeals test should apply where (para 3):

> "[i] the appellant has succeeded before the FTT but failed in the UT following a successful appeal by the Secretary of State? [or ii] the appellant has "failed twice in the tribunals system", but the FTT's adverse decision was set aside because it contained a material error of law, and the UT has re-made the decision and dismissed the appeal?"

35. So, the Court was considering not only cases where the party had succeeded once but then ultimately failed, but also cases where the party had failed before the FTT, had that decision set aside by the UT, which then proceeded to re-make the decision and dismiss the party's appeal; e.g. see facts of the cases (para 4).

36. The following issues were to be considered, therefore (para 6):

> "In JD and WN, the application of and weight to be given to the second appeals test where the applicant was successful in the FTT but the UTIAC reversed the decision.
>
> In ES, the same issue but in circumstances in which the FTT dismissed the appeal, an error of law was found in that decision which was set aside and the matter was heard de novo in the UTIAC.
>
> In MR the question of whether, in either of the above circumstances the UTIAC, once it has found a material error of law and decides to set aside the FTT's decision, should proceed to hear the appeal or should remit the matter to the FTT so that the second appeals test does not apply to the next onward appeal.
>
> In WN the relevance of the fact that an Immigration Judge sat in the UTIAC in the light of the judgment in *PR (Sri Lanka*) [2011] EWCA Civ 988 is also argued."

37. It is of note that the Appellants sought to challenge part of *PR (Sri Lanka)* (para 9 of Sullivan LJ's judgment):

> "As a fall back position, the applicants and the PLP submitted that if something more was needed for there to be a "compelling reason" to grant permission to appeal, then in those cases falling within (a) and (b) (above) [this appears to relate to the two scenarios to be considered by the Court of Appeal in these particular cases], **a strongly arguable case that the UT had erred, when combined with the severity of the consequences for the appellant could amount to a compelling**

reason. Insofar as paragraph 36 of *PR* (see below, paragraph 24) decided that the severity of the consequences for the appellant was not, or was only exceptionally, a relevant factor when considering whether there were "compelling reasons", it was in conflict with the judgments of the Supreme Court in *R (Cart) v Upper Tribunal (Public Law Project and another intervening)* [2011] 3 WLR 107, [2011] UKSC 28 ("*Cart*"), and was wrongly decided." (bold emphasis and underlining added)

38. Having considered the authorities cited to the Court, Sullivan LJ remarked that (para 16):

> "it seems to us that these authorities do not support either of the two extreme positions: that the fact that the UT has reversed a decision of the FTT, or has re-made the decision for itself having set aside the FTT's decision is:
>
> i) of itself a "compelling reason" to grant permission to appeal if there is a ground of appeal which has a real prospect of success; or
> ii) of no relevance when deciding whether there is a "compelling reason" to grant permission to appeal."

39. The latter could not be correct as (para 18):

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

40. Having cited the relevant parts of the judgments of Lady Hale and Lord Dyson, in relation to the potential *consequences* for the Appellant (as to which see above), the Court stated that (para 22):

> "…it is important not to lose sight of Lord Dyson's warning that "Care should be exercised in giving examples of what might be 'some other compelling reason' because it will depend on the particular circumstances of the case". **Undue emphasis should not be laid on the need for the consequences to be "truly drastic"**. Lord Dyson

was expressly giving two, non exhaustive, examples. However, the second of his examples makes it clear that very adverse consequences for an applicant (or per Baroness Hale, the "extremity of consequences for the individual") are capable, **in combination** with a strong argument that there has been an error of law, of amounting to "some other compelling reason."" (emphasis added)

41. This important analysis, which amounted to consideration of the *Cart* judgments and how those provided guidance on the *application* of the second-tier appeals criteria, cannot be said to have been restricted to the type of case with which the Court of Appeal was there dealing – despite the opinion of Wyn Williams J to the contrary in *Patel & Ors*[9].

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

[9] Patel & Ors v Upper Tribunal (Immigration & Asylum Chamber) & Ors [2012] EWHC 1416 (Admin) (30 May 2012)[9]

for there to be a "strongly arguable" error of law as a synthesis of those earlier authorities."

In other words, the Court of Appeal considered that the reference in *Cart* to an averred error of law being "strongly arguable" must have encapsulated the reference in *Uphill* to a case where prospects of success were not high.

43. The reference in *PR (Sri Lanka)* to the need for something to be "legally compelling" was approved, albeit in the following (clarificatory) terms (para 26):

> "…the Court was emphasising the fact that, in the absence of a strongly arguable *error of law* on the part of the UT, extreme consequences for the individual could not, of themselves, amount to a free-standing "compelling reason." The Court noted that Baroness Hale and Lord Dyson had "acknowledged the possible relevance of the extreme consequences for the individual." **It did not suggest that such consequences were irrelevant to the consideration of whether there was a "compelling reason", it merely stated, in our view correctly, that absent a sufficiently serious legal basis for challenging the UT's decision, extreme consequences would not suffice**." (emphasis added)

44. As to the latter comment (para 27):

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

significance of the consequences of a decision in the immigration and asylum field merely because legal errors in that field are often capable of having dire consequences for appellants." (emphasis added)

45. Again that guidance plainly was not restricted to the specific facts or issues presented by the cases before the Court. The following guidance was so restricted, however (paras 28 & 29).

> "28. What is the position when the UT, having set aside the FTT's decision to dismiss the applicant's appeal on the ground that it contains a material error of law, exercises its discretion under section 12(2)(b)(ii) of the 2007 Act to re-make the decision, and dismiss the appeal? The second-tier appeals test applies to the UT's decision, but as the Court said in *PR:*
>
> > "We accept, however, that both the *Uphill* case [2005] 1 WLR 2070 and the *Cart* case [2011] 3 WLR 107 were directly concerned with true second appeals. A slightly less demanding standard may be appropriate where there has been only one level of judicial consideration. As Brooke LJ recognised in the *Cramp* case [2005] 4 All ER 1014, there is room for some flexibility having regard to the "provenance of the appeal" This might therefore in some cases be a factor in the overall evaluation of a "compelling" reason."
>
> 29. This is not authority for the proposition advanced by the applicants and PLP that the mere fact that the UT has set aside the FTT's decision and re-made the decision is a compelling reason to grant permission to appeal provided the challenge to the lawfulness of the UT's decision has a real prospect of success. Such an approach would substitute the ordinary test for granting permission to appeal for the second-tier appeals test in circumstances where the 2007 Act and the 2008 Order provide that the latter shall apply. Equally, paragraph 53 of *PR* does not support the Respondent's position: that if the UT decides that it is not necessary to remit the case to the FTT, it is of no consequence for present purposes that the UT will be making its decision *de novo*.

46. The extent to which the UT has set aside and remade the decision will be relevant (paras 30 & 31):

> "30. If the Court is bound to have regard to the particular circumstances of the case (see Lord Dyson at paragraph 131 of *Cart*), the reason why the FTT's decision was set aside is capable of being a

> relevant factor when deciding whether there has been, in substance, only one level of judicial consideration. We emphasise the words "in substance". As a matter of form, if it has re-made the decision the UT will always have set aside the FTT's decision on the basis of an error of law (see section 12(2) of the 2007 Act, paragraph 33 below), but errors of law are many and various and may range from a discrete failure to consider a particular piece of evidence (eg the medical report in *PR*), to a decision that is so replete with error that the UT will have had to start again from scratch.
>
> 31. The extent to which it was possible to preserve the findings of fact of the FTT will be relevant. If the FTT has rejected an appellant's case, but in doing so has failed to consider a particular piece of evidence, or has failed to give adequate reasons for reaching a particular conclusion adverse to the appellant, and on re-making the decision the UT reaches the same conclusion having considered the evidence that was omitted from the FTT's consideration, or if the UT gives more detailed, and adequate reasons for reaching precisely the same conclusion as the FTT, we can see no reason for applying a less demanding standard. In such cases there will, in substance, have been two levels of judicial consideration and the appellant will have failed twice in the tribunal system. In other cases the UT may have reversed the FTT's decision upon the basis of a wholly new legal point which was not argued before the FTT, in respect of which there will have been only one level of judicial consideration."

47. Those who have failed twice face a high hurdle (para 32):

> "These are illustrations of the flexibility that is inherent in the second limb of the second-tier appeals test. In those cases where an asylum seeker has "failed twice in the tribunal system" because the UT has either agreed with the FTT on appeal, or has refused permission to appeal against the FTT's decision upon the basis that it contains no arguable error of law, it is likely to be much more difficult to persuade this Court on an application for permission to appeal, or the Administrative Court on an application for permission to apply for judicial review, that the legal basis for challenging the UT's decision is sufficiently strong and the consequences for the applicant are so extreme as to amount to a compelling reason for giving permission to appeal, or to apply for judicial review, respectively."

48. Finally, note the Court's assessment of the case of *ES* (para 44):

> "…The FTT's decision was set aside in its entirety by the UT on the ground that it contained a number of errors of law. Against this background, there is a strong argument that the UT did not correctly apply the Country Guidance, and that a failure to apply this particular guidance will have drastic consequences for the individual on return."

Summary of principles

49. The principles articulated by the higher Courts thus far may be summarised as follows:

    I. In arguing that the case raises an important point of principle it will be necessary to show that a *new* principle is in issue (*Uphill* para 24); although an important point of principle may well be engaged where applicants can point to the "systematic" (at least two – see *Cramp*) misapplication of the already established principle (*Cart* para 130)
    II. Where there is a strongly arguable error of law, the "extreme" consequences for the applicant are relevant in determining whether there is some other compelling reason (JD para 26);
    III. When arguing some other compelling, very high prospects of success are generally required (*Uphill* para 24(1)), although the prospects of success might not need to be as high in light of the nature of the argument, e.g. where there has been some procedural irregularity which prevented the A from receiving a fair hearing at first instance (*Uphill* para 24(3) and *JD* para 23) or, indeed, the extreme consequences for the individual (*JD* para 27).
    IV. When all is said and done the Court is bound to have regard to the particular circumstances of the case (*Cart* para 131 and *JD* paras 22 and 23).

Cases since Cart and PR (Sri Lanka)…

English cases

50. In the recent, albeit unsuccessful, case of *Essa v Upper Tribunal (Immigration & Asylum Chamber) & Anor* [2012] EWHC 1533 (Admin) (01 June 2012), Lang J confirmed that (para 3):

> "It was common ground before me that, once a Claimant had satisfied the court at permission stage that the second appeal test had been satisfied, he was not required to go on to satisfy the court hearing the substantive judicial review that the second appeals test applied, in

order to obtain substantive relief."

(However it is understood that a recent permission application in Manchester was granted on the basis that it was arguable that the second appeals test had been met.)

51. Practitioners may also find useful the guidance issued by Blake J (the President of the UT of the Immigration and Asylum Chamber) in relation to permission to appeal applications, set out at para 16 of Lang J's judgment.

52. In another recent case, *Patel & Ors, R (on the application of) v Upper Tribunal (Immigration & Asylum Chamber) & Ors* [2012] EWHC 1416 (Admin) (30 May 2012), Wyn Williams J did not find that *JD (Congo*) had changed matters (para 17):

> "…Mr Knafler QC is correct when he submits that the Court of Appeal in JD (Congo) was considering the second-tier appeals test. However, it was doing so in a particular context, namely in relation to appeals from the Upper Tribunal to the Court of Appeal. Further, its primary concern was to determine how the second-tier appeals test should be applied in cases where the Appellant had succeeded before the First Tier Tribunal but failed in the Upper Tribunal following a successful appeal by the Secretary of State. In that particular context it may be that the Court of Appeal would be prepared to adopt an approach which was slightly more flexible than that suggested in PR (Sri Lanka). Obviously, that is a matter for the Court of Appeal. However, I do not read JD (Congo) as changing, in any way, the principles formulated in Cart itself and the elucidation of the "other compelling reason" test in PR (Sri Lanka)."

53. That, with respect, fails to take into account the wide-ranging guidance given by the Court of Appeal, which was concerned, in any case, with more than Wyn Willams J thought. Indeed the *JD (Congo)* judgment expressly referred to judicial review in the Administrative Court – seemingly in contrast to the Court in *PR (Sri Lanka)*.

54. In another English case permission for judicial review was granted in a social security case by Wilkie J in *Kuteh v Upper Tribunal Administrative Appeals Chamber* [2011] EWHC 2061 (Admin) (08 July 2011), although that preceded *PR* and *JD*. There had been a failure by the FTT to deal with evidence in that case: an additional late witness statement. That was described by the Claimant as a "serious procedural defect". The Claimant sought to place this in the category of case described by Dyson LJ in *Uphill,* whereby a serious

procedural irregularity might mean that the prospects of success need not be very high. Wilkie J agreed and granted permission – although he declined to grant permission for his judgment to be relied on by others.

Scottish cases

55. In *WO, Petitioner* [2012] CSOH 88 (24 May 2012), J Beckett QC dismissed the application for judicial review. WO had claimed asylum with her children as dependants. The application for permission to the UT, and subsequent application for judicial review, considered the FTT's treatment of Article 8 viz. the children and their best interests.

56. The petitioner argued that there was some other compelling reason in her case, namely the welfare of the children (para 16). This arose from a comment by the Court in *PR (Sri Lanka*) (para 10), where it had noted that the Court of Appeal had in the family context[10] left open "(because [it was] not argued)" the question whether the fact that a decision related to the welfare or future upbringing of a child might itself give rise to a compelling reason.

57. Having found no material error of law in terms of the treatment of the children's best interests (paras 41 & 42), the Court expressed the following (consequently, *obiter* view):

> "I reject Mr Forrest's contention that **in any case** where the best interests of children may be affected there is necessarily a "compelling reason". That was not decided in *GB* [the Re B case as it is also known] in a case in which the best interests of the child in question would have been the paramount consideration. Where the best interests of a child must be given primary, as opposed to paramount, consideration, and where it is recognised that they can be outweighed by countervailing public interest considerations, it is difficult to envisage that the **mere fact** that children may be affected by an immigration decision offers a compelling reason to allow judicial review of a decision of the Upper Tribunal where it would otherwise be excluded.

58. As to the link between extreme consequences and compelling circumstances, the Court added (para 45):

> "…Reading paragraphs 35 and 36 of *PR* together, it appears to me that the court was saying that even extreme consequences for an individual will not **of themselves** amount to a compelling reason."

[10] *Re B (A Child) (Residence: Second Appeal)* [2009] 2 FLR 632

When read carefully, and with the appropriate emphasis, that indication is consistent with the guidance given by the higher Courts, e.g. in *JD (Congo)*.

59. In an earlier case, *OLUWASEGUN OLALEKAN OKE, Petitioner* [2012] CSOH 50. Lord Glennie granted the petition and reduced the UT's refusal to grant permission to appeal. This case concerned a points-based appeal. The issue on appeal had been a narrow one, it being conceded by the SSHD that if the petitioner was entitled to the points claimed in respect of his earnings from self-employment, then he would have achieved the requisite points.

60. As regards *PR (Sri Lanka*) Lord Glennie noted the context in which that guidance had been given, and how that could be contrasted with the context in which the Court of Session (and, one would venture, the High Court) had to consider a challenge to the UT (para 10):

> "…[*PR*] provides important guidance, though it is important to emphasise, as the Court of Appeal itself emphasised, that the context is all-important. The views expressed on the issue by the Supreme Court in ***Cart*** and *Eba*, though highly persuasive, could not be determinative of the approach to be taken by the Court of Appeal in the context of deciding whether or not to grant permission to appeal from the UT. **For the same reason, the views expressed by the Court of Appeal in that context, though again highly persuasive, cannot be determinative of the approach to be adopted by the Court of Session on the question of judicial review of a decision by the UT to refuse permission to appeal to itself.** One point made by the Court of Appeal, for example, in para.37, is that in considering whether an important point of principle or practice arises, it should be one which "calls for attention by the higher courts, specifically the Court of Appeal, rather than left to be determined within the specialist tribunal system". When the court is considering whether to grant judicial review of a decision by the UT to refuse permission to appeal to itself, the question must surely be whether the point of principle or practice is sufficiently important to require determination at the least within the tribunal system, regardless of whether or not it is sufficiently important to call for attention by the Court of Appeal or the Court of Session." (emphasis added)

61. Lord Glennie indicated that, in terms of approach (para 11):

> "…if the court grants a petition for judicial review and reduces the decision of the UT refusing permission to appeal to itself, the decision on the question of whether to grant permission to appeal will have to be re-taken by a judge of the UT; and, if leave is then granted, it is, in the first instance at least, for the UT, not for the court, to decide upon the merits of the appeal. On the hearing of the petition for judicial review, therefore, the court should be reluctant to express any firm views on these matters and thereby trespass on the merits of the application for leave to appeal or on the merits of the appeal, both of which are areas reserved for the UT. However, the test for the grant of judicial review, as explained by the Supreme Court in ***Cart*** and *Eba* under reference to *Uphill*, and in *PR (Sri Lanka)*, in many cases requires the court, if it grants the petition, to form a view of the merits, and thereby invites it to pronounce on those very areas which are within the exclusive preserve of the UT. A potential conflict is, to my mind, inherent in the test. In such circumstances, the court has no option but to express a view on the merits where the test requires it to do so; but, so it seems to me, the UT must be free (and duty bound) to form its own view when the matter comes back to it for decision."

This analysis thus revealed Lord Glennie's concern on the one hand that even if successful before the Court of Session, a petitioner would still (appropriately in his view) have to persuade the UT that permission to appeal to it should be granted; and yet on the other, the Court of Session would necessarily be required to form a view as to the merits of the petitioner's proposed appeal to the UT, thereby 'trespassing' on the UT assessment. That it would have to do, however, although ultimately the decision on permission to appeal would be for the UT.

62. In the present case the earnings of the petitioner had been rejected by the SSHD through reliance on published guidance not contained within the Immigration Rules (para 17). The appeal itself had been dealt with on the papers. Lord Glennie observed that the Judge had raised additional points against the petitioner, which had not been raised by the SSHD, such that he had not had the chance to respond to them (para 18).

63. The subsequent application for permission to appeal relied on the case *Pankina* v *Secretary of State for the Home Department* [2011] QB 376. The petitioner contended that the Judge had treated the Secretary of State's Policy Guidance as to the documentation required to be produced by the applicant as though it were a legal requirement, and in doing so had erred in law. Secondly, he complained that the Judge had found accounts to be neither reliable nor credible, when the reliability or credibility of those accounts had not been put

in issue by the SSHD. Third, the Judge had failed to deal with much of the evidence put forward by the petitioner, including but not limited to his invoices and bank statements, each invoice corresponding to entries in the bank statements and thereby showing the source of the receipts shown in the bank statements. His application for permission to appeal concluded by saying that, in accordance with *Pankina*, the Policy Guidance was not the law and did not have to be followed; and that therefore the whole findings of the Immigration Judge, being related to the Policy Guidance, were irrelevant and immaterial to the substance of the appeal.

64. The shortly expressed reasons of the FTT in refusing permission to appeal were unimpressive (para 23):

> "…It might be thought that those reasons rather miss the point. First, the petitioner's argument was not that *Pankina* decided that the Policy Guidance was "irrelevant and immaterial". His point was that it should not have been treated as though it was part of the law which had to be followed to the letter. Secondly, to say that the IJ gave detailed reasons for finding that the evidence in relation to the appellant's self-employed earnings was not satisfactory is somewhat stretching the reasons given by the Immigration Judge. He did not consider the other evidence apart from the Hafeez & Co accounts. As to these accounts he decided that they were unreliable and incredible on points which, as the petitioner pointed out in his application for permission to appeal, had not been raised by the Secretary of State."

65. The refusal by the UT was also inadequate (para 26):

> "…It can be seen at once that the consideration given to the application for permission to appeal by the Senior Immigration Judge failed to address the key issues raised by the Petitioner. The challenge to the FTT's discounting of the SKI accounts (raised in the *Pankina* argument) is not answered by the fact that the Immigration Judge had concerns about the reliability of the Hafeez accounts [that was a separate point to the *Pankina* issue]. Nor does the Senior Immigration Judge even mention the fact that the application for permission to appeal complained that the Immigration Judge had not had regard to any of the other evidence."

66. Lord Glennie found that that an issue of law had been raised (para 50):

> "In the present case, I am of the view that that is clearly satisfied, since

> the strict insistence on certain documents which resulted in the exclusion from consideration of the SKI audit and various other documents was arguably, and I need go no further than that at this stage, contrary to the guidance given by the Court of Appeal in *Pankina*. Because the decision of the FTT was on a point of law, and the point of law was arguable, permission to appeal to the UT should have been granted by the FTT, which failing by the UT."

67. That was not sufficient to reduce (i.e. quash) the refusal of permission to appeal (para 51):

> "It by no means follows that every wrong decision refusing permission to appeal should be reduced: see ***Cart*** and *Eba*. On the first part of the test, the decision should only be reduced if the proposed appeal raises an important point of principle or practice. To decide this question, the court hearing the petition for judicial review clearly has to form a view both as to the importance of the point and its likely outcome, since however important the point of principle or practice might be there would be little point in permission to appeal being granted if the answer was obvious and the appeal was bound to fail. However, at the same time, this court must be wary of trespassing on the role of the UT, to which the decision on any appeal is entrusted, or on the role of the Court of Session on appeal from the UT (if permission to appeal is granted). Any view formed as to the merits should at this stage be provisional only. I should therefore limit my observations on this part of the test to the following."

68. He went on to find that an important point of principle had been made out (para 52), with reference to the *Pankina* argument and its varied treatment from the Courts thus far (para 54):

> "…Of course, not every point of principle or practice on which there is a divergence of view will justify the reduction of the refusal of permission to appeal on a petition for judicial review. The point must be an important one. I have found that it is. It must also be a sufficiently arguable point to justify this court interfering with the refusal of permission to appeal. For reasons which appear from my discussion of the cases, I am of the opinion that the petitioner's case is seriously arguable…"

69. As to the second limb he observed (para 56):

> "…Extreme consequences for the individual are not generally to be

> regarded as sufficient as a free-standing ground for holding that there is "some other compelling reason": see *PR (Sri Lanka)* v *Secretary of State for the Home Department* at para.36. **Nonetheless, they are not irrelevant, since the assessment of whether there is some other compelling reason has to have regard, so it seems to me, to the whole picture, and a combination of events, each one of which may not be sufficient in itself, may add up to a state of affairs where it can properly be said that there has been a result which is not just wrong but perverse, or where (to use the language in *Cart*) there has been a wholesale breakdown of fair procedure, so that it can be said (per Lord Hope in *Eba*) that in reality the applicant has not had a fair hearing at all.**" (emphasis added)

That bears close resemblance to the observations of the Court of Appeal in *JD (Congo)*: namely that it is the particular circumstances of the case, and how they add up or combine, which ultimately determines whether the high threshold is met. There is no warrant for leaving anything out of consideration, not least extreme consequences.

70. Thus (para 57):

> "…the court must be careful not to let words of description become a kind of mantra, laying down a precise and restrictive test which would exclude almost every situation. The concept of a wholesale breakdown of fair procedure or a situation where in reality it can be said that the applicant has not had a fair hearing at all is intended to be descriptive of a state of affairs the details of which will vary from case to case. Ultimately the court will have to form a view on the totality of the evidence rather than engage in a box ticking exercise to see whether some particular facet is or is not present."

71. It was also significant that the petitioner had been deprived of an opportunity to answer the new points raised by the FTT (para 63):

> "…What is clear, however, is that in this respect the petitioner did not get a fair hearing before the FTT. I regard what happened as such a fundamental collapse of fair procedure that it would be right on this ground alone to reduce the refusal of the UT to grant permission to appeal."

72. In *MK, Petitioner* [2012] CSOH 29 (21 February 2012), Lord Stewart made the following observation as to a country guidance gap providing a potential basis for a successful challenge (para 33):

> "It seems to me that an arguable point about the scope of a CG case amounts, potentially, to an *Eba*-proof question of law for the reason that it is likely to involve "an important point of principle or practice". There is also the still - I think - unresolved question whether "risk to life" of the kind that can arise with Immigration Acts decisions constitutes "some other compelling reason" for allowing review."

That last comment does not, however, take account of the guidance given in *PR (Sri Lanka)* and also preceded *JD (Congo*).

73. The petitioner's arguments were worthy of record (paras 34 and 35):

> "[34] In this context, Mr Caskie makes a suggestion - which I have not evaluated but judge worthy of recording - that when Parliament restricted the category of tribunal decisions appealable to the Court of Session in terms of the Tribunals, Courts and Enforcement Act 2007 s. 13, Parliament did not have in view "life and death" decisions, as Mr Caskie calls them, for the reason that the proposed tribunal jurisdiction did not then extend to immigration matters. The Immigration and Asylum Chambers of the unified tribunal system, replacing the Asylum and Immigration Tribunal, did not come into being until 15 February 2010 when the Transfer of Functions of the Asylum and Immigration Tribunal Order SI 2010/21 took effect.
>
> [35] Has the Supreme Court really confronted the issue of the scope for reviewing "life or death" decisions? *Eba* was about a claim for disability living allowance and the English case of ***Cart*** was about liability for child maintenance [*R* ***(Cart)*** v ***Upper Tribunal*** *(SC(E))* [2011] 3 WLR 107]. The English immigration case selected for hearing along with *Eba* and ***Cart*** was *MR (Pakistan)*. MR was a Pakistani visa-overstayer who applied for asylum on the basis of his claimed conversion, I think while over-staying, to Christianity. His application was rejected by UKBA and on appeal to the First-tier Tribunal. In refusing permission to appeal to the **Upper Tribunal,** Ouseley J said: "... crucial to the decision was the finding that the applicant was not a genuine convert to Christianity." The question of risk on return, "how a genuine convert would be treated", did not arise [*R* ***(Cart)*** v ***Upper Tribunal;*** *R (MR (Pakistan)) (SC(E))* [2011] 3 WLR 107 at §§ 5, 59]."

74. These interesting arguments were not answered, however, given the absence of any error of law. They are likely to face great difficulty, however, given that the judgments from the Supreme Court in *Cart* and thereafter the Court of Appeal have expressly addressed the life and limb element of asylum cases.

Procedure

75. Practitioners will, it seems, be required to have regard to the guidance given by Ouseley J in *R (on the application of Khan & others) v Secretary of State for the Home Department & another* [2011] EWHC 2763 (Admin) (6 October 2011) (paras 6 to 8):

> "6. The grounds, when lodged, should address the issues to which **Cart** and PR (Sri Lanka) give rise succinctly and in a focused manner. By nature, an important point of principle or practice has to be capable of being expressed very shortly, with supporting references so far as necessary, to demonstrate that that issue is a correct formulation of an issue which does arise in practice in the case. The "other compelling reason" with a high prospect of success should equally be capable of succinct summary. That applies to the initiation of proceedings. Indeed, the existence of such points ought to be apparent from the grounds for permission to appeal to the FTT from its decision, and the renewed application to the Upper Tier. It is difficult to see how, in a case in which it is said such a point arises, the point has not been raised in such terms in the application to the Upper Tier anyway.
>
> 7. That application should be supported by the minimal documentation required to make it good: the immigration judge decision, the two decisions of the Tribunal (that is the FTT and the Upper Tier refusing permission) and the grounds of appeal placed before them. I make the latter point because it is, as is the case in one of the cases here, sometimes necessary to see the point that was raised to understand fairly what it is that the SIJ is saying about it. Further documentation may be required, but real thought has to be given as to whether the court has to be burdened with it in order for the point raised properly to be understood. There were 333 pages in one of the cases before me. There is no reason for that to be so at all.
>
> 8. If a case is dealt with orally, the parties can expect, before any rule changes are made, that the oral side will be short. The Supreme Court envisaged that there will be a single paper procedure. That requires a rule change. The Supreme Court was aware of the potential

for the abuse of this process by those seeking to delay the effectiveness of a decision. The claimants who bring such proceedings must recognise the importance of those strictures, make sure that the points they want to make are made clearly and succinctly on paper, and cannot expect on a renewal application that they will be able to elaborate at any length. Likewise, if a claim is refused on paper and for so long as oral renewal is available, claimants must consider properly whether there truly is a case for renewal…"

Vijay Jagadesham
Garden Court North Chambers
July 2012