OUTER HOUSE, COURT OF SESSION

[2017] CSOH 117

P138/17

OPINION OF LORD BOYD OF DUNCANSBY

In the petition

(FIRST) SA (AP); (SECOND) SI;

(THIRD) SI; (FOURTH) TI

Petitioners

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioners: Byrne; Drummond Miller LLP
Respondent: Webster; Office of the Solicitor to the Advocate General

6 September 2017

[1] The petitioners are a family who are all nationals of Bangladesh. The first and second petitioners are a mother and father and are the parents of the third and fourth petitioners. The first and second petitioners are failed asylum seekers and had entered the UK unlawfully. Their application for asylum was refused in 2009 and the decision was upheld on appeal. The third petitioner was born on 30 January 2008. The fourth petitioner was born on 16 March 2016. Both the third and fourth petitioners were born in the UK. The third petitioner is a qualifying child for the purposes of section 117D of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) (see below).

[2] The first, second and third petitioners applied to the Secretary of State for leave to remain within the UK. That was refused on 1 June 2015. They appealed to the First-tier Tribunal. The appeal was refused by IJ Handley in a decision promulgated on 24 May 2016. The petitioners sought leave to appeal to the Upper Tribunal. The First-tier Tribunal refused leave on 3 October 2016. They then sought leave to appeal from the Upper Tribunal. That was refused on 11 November 2016. The petitioners seek to reduce that decision.

[3] The focus of this petition is the third petitioner. That was the main issue before the First-tier Tribunal and formed the basis of the application for leave to appeal to the Upper Tribunal. The question for the First-tier Tribunal was whether or not it was reasonable to expect the third petitioner to leave the UK. Evidence that it would not be reasonable was led before the First-tier Tribunal and rejected. The evidence included a report from a child psychologist, Dr Jack Boyle.

The issues

[4] There are three issues.

[5] The first concerns the correct interpretation of section 117B(6) of the 2002 Act.

[6] The second issue relates to the report from Dr Boyle. The First-tier Tribunal did not mention it in terms in their decision letter. The petitioners argue that this was an error and that the First-tier Tribunal was under an obligation to give reasons for not accepting his evidence.

[7] The third relates to the fact that this is a judicial review of an unappealable decision of the Upper Tribunal. The question is whether, having obtained permission to proceed with the petition, the petitioners have met the test in *Eba* v *Advocate General for Scotland* 2012

SC (UKSC) 1 (the *Eba* test) or whether it is still to be addressed as a substantive issue in determining the judicial review.

First issue: The interpretation of section 117B(6)

[8] In its decision the Upper Tribunal noted that the first and second petitioners were failed asylum seekers. It noted:

> "In the light of cases such as EV Phillipines and taking into account the unlawfulness of the family's status which falls to be considered in particular when applying section 117B(6) of the 2002 Act (see *MA (Pakistan) and Others v Upper Tribunal* [2016] EWCA Civ 705 ([2016] 1 WLR 5093)) it is not arguable that the judge erred in his approach to the children's best interests or to Article 8 as a whole. Paragraph [32] of the decision which follows the judge's reference to s117B, clearly shows that the judge considered whether it was reasonable to expect the family to return to Bangladesh."

[9] The petitioners argue that the Upper Tribunal was in error in having regard to the circumstances of the family and the immigration history of the first and second petitioners. They argue that if it is unreasonable to expect the child to leave the UK having regard solely to the position of the child, the parent should be granted leave to remain in the UK with the child. They further submit that the immigration history of the parents is irrelevant and that *MA (Pakistan))* v *Upper Tribunal (Immigration and Asylum Chamber*), a decision of the Court of Appeal, was wrongly decided.

Immigration Rule

[10] Paragraph 276ADE(1) sets out certain requirements which, if satisfied, lead to the applicant being granted leave to remain. The provision is as follows:

> "The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in section S-LTR 1.2 to S-LTR 2.3 and S-LTR.3.1 in Appendix F M; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK."

Nationality, Immigration and Asylum Act 2002

"Section 117A

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts— (a) breaches a person's right to respect for private and family life under article 8 , and (b) as a result would be unlawful under section 6 of the Human Rights Act 1998 .

(2) In considering the public interest question, the court or tribunal must (in particular) have regard— (a) in all cases, to the considerations listed in section 117B , and (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C .

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under article 8(2) ."

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or
(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies …

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

The definition of qualifying child is in s117D

'qualifying child' means a person who is under the age of 18 and who-

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more."

[11] As noted above the third petitioner is a qualifying child.

MA (Pakistan) and Others v *Upper Tribunal*

[12] The issue is focussed in the submissions to and judgement of the Court of Appeal in England and Wales in *MA (Pakistan) and Others* v *Upper Tribunal* [2016] 1 WLR 5093. The argument for the appellant was that the structure of subsection (6) was such as to render the conduct of the parent relevant only in so far as the applicant must not be liable for deportation. If the parent is not liable to deportation, neither his conduct nor his immigration history is of any further relevance. Thereafter, paragraph (a) focuses on the relationship between the parents and the child: it must be genuine and subsisting. Paragraph (b) concentrates on the effect of removal on the child alone. On this analysis, no assumptions should be made about where the applicant parent or parents will reside. If it is unreasonable to expect the child to leave the UK having regard solely to the position of the child, the applicant parent should be granted leave to remain in the UK with the child; if not, and it is reasonable to expect the child to leave, the application for leave to remain will fail and the applicant parent will be removed with the child.

[13] The Secretary of State argued that this analysis was misconceived and would lead to a much more generous approach to these applications than Parliament could have intended. The focus is not simply on the child but must embrace all aspects of the public interest. In substance the approach envisaged in section 117B(6) is not materially different to that which a court will adopt in any other article 8 exercise. The decision-maker must ask whether,

paying proper regard to the best interests of the child and all other relevant considerations bearing upon the public interest, including the conduct and immigration history of the applicant parent or parents, it is not reasonable to expect the child to leave. The fact that the child has been resident for seven years will be a factor which must be given significant weight in the balancing exercise, but it does not otherwise modify or distort the usual Article 8 proportionality assessment.

[14] Elias LJ giving a judgement with which King LJ and Sir Stephen Richards agreed said:

> "Looking at section 117B(6) free from authority, I would favour the argument of the applicants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section."(paragraph 36).

[15] He continued:

> "37 Ms Giovannetti's analysis has a number of difficulties. First, as she accepts, it means that the only effect of subsection 117B(6) would be to give some additional weight to the fact that the child has been resident in the UK for seven years. (Similarly it would require the court to give additional weight to the fact that a child is a British citizen, although that would need to be done quite irrespective of the section, as the *ZH (Tanzania) case [2011] 2 AC 166* makes clear.) Save for that, the proportionality test is applied as in any other article 8 case. If that is right, section 117B(6) is in my view drafted in an extremely convoluted way to achieve so limited an aim. The objective could have been achieved much more clearly and succinctly.
>
> 38 Second, Ms Giovannetti's construction makes subsection 117B(6) tautologous. In effect it comes down to saying that 'the public interest does not require removal … in circumstances where the application of the proportionality test does not justify removal.' That would seem to be self-evident.
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> 39 Third, in relation to paragraph 276ADE(1) it is plain that paragraphs (v) and (vi) of that rule do not warrant any consideration of the wider public interests than have been specifically identified in paragraph (i). It is not obvious why paragraph (iv) should do so."

[16] Having stated his reservations however he then went on to consider his decision.

> "45 However, the approach I favour is inconsistent with the very recent decision of the Court of Appeal in the *MM (Uganda) case [2016] EWCA Civ 617* where the court came down firmly in favour of the approach urged upon us by Ms Giovannetti, and I do not think that we ought to depart from it. In my judgment, if the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the 'unduly harsh' concept under section 117C(5) , so should it when considering the question of reasonableness under section 117B(6) . I recognise that the provisions in section 117C are directed towards the particular considerations which have to be borne in mind in the case of foreign criminals, and it is true that the court placed some weight on section 117C(2) which states that the more serious the offence, the greater is the interest in deportation of the prisoner. But the critical point is that section 117C(5) is in substance a freestanding provision in the same way as section 117B(6), and even so the court in the MM (Uganda) case held that wider public interest considerations must be taken into account when applying the 'unduly harsh' criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct."

Submissions

[17] Mr Byrne adopted the submissions made for the appellant in *MA (Pakistan)* and urged me to adopt the analysis, but not the conclusion, of Elias LJ's judgement. He pointed specifically to the terms of IR 276ADE, which he said was a stand-alone rule dealing only with the child's private life and there was no mention of family. There was no mention of the parents within the rule. He argued that this reinforced Elias LJ's analysis.

[18] Mr Webster preferred the conclusion, rather than the analysis, of Elias LJ's judgement. He also pointed out that this argument had not been made at the First-tier Tribunal or to the Upper Tribunal in the grounds of appeal. Mr Byrne countered that *MA (Pakistan)* had not been decided before the application for leave to appeal had been to the First-tier Tribunal, though it was available before the application to the Upper Tribunal. However he argued that it was the Upper Tribunal that raised the issue in their decision and the petitioner was entitled to submit that it had been wrongly decided.

Decision on first issue

[19] I do not think the fact that the argument was not made to the Upper Tribunal can be held against the petitioner in this case. The ground of appeal is cast as a failure by the First-tier Tribunal judge to give any indication of his views on the best interests of the children either on their own or as part of the family. It further submits that he has not made an assessment of whether it is reasonable to expect the child to leave the UK in terms of section 116B and attacks the reasonableness of the decision. These are different points to the one argued in the petition, albeit that it concerns the best interests of the child and the assessment made under section 116B. Nevertheless it is the Upper Tribunal that founds on the decision in *MA (Pakistan)* in refusing leave to appeal. In those circumstances it seems to me to be not unreasonable for the petitioner to submit that the basis of the decision is legally flawed.

[20] I am not persuaded that the decision of the Court of Appeal in *MA (Pakistan)* is incorrect despite the reservations of Elias LJ. In reaching their decision the Court followed the analysis of the same Court in *MM (Uganda) and Another* v *Secretary of State for the Home Department* [2016] EWCA Civ 617, concerned with s. 117C(5), 2002 Act. The construction was affirmed in *IT (Jamaica)* v *Secretary of State for the Home Department* [2017] 1 WLR 240, at paragraph 51 (Arden LJ).

[21] The approach urged on me by Mr Byrne treats the child as if she lives a life isolated from her family. That was the view taken by McCloskey J, in *PD (Sri Lanka)* v *Secretary of State for the Home Department* [2016] Imm AR 797, paragraphs 21 to 25. A similar approach can be found in the judgement of Lewison LJ in *EV (Philippines)* v *Secretary of State for the Home Department [2014] EWCA Civ 874* at para 58.

[22] In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, "Why would the child be expected to leave the United Kingdom?" In a case such as this there can only be one answer: "because the parents have no right to remain in the UK". To approach the question in any other way strips away the context in which the assessment of reasonableness is being made. In the course of submissions I understood Mr Byrne to concede that in assessing the prospects for the child in Bangladesh one had to assume that she would be with her parents. The reason why she would be with her parents is because their immigration history means that they have no right to remain in the UK.

[23] While I acknowledge the reservations of Elias LJ in *MA (Pakistan)*, excising out section 117B(6) from the other subsections of section 117B appears to fly in the face of the direction in section 117B that these public interest considerations apply in all cases. If Parliament had wanted the assessment of whether it was reasonable to expect the child to leave the UK to stand alone then it could have said so. Nor am I persuaded that section 117B(6) is necessarily tautologous. But even if it is it would not be the first time that Parliament has enacted provisions that might be said to be self-evident.

[24] Nor do I consider that there is any merit in Mr Byrne's reliance on the terms of IR 276ADE(1). Two points may be made. The first is that in assessing whether it would be reasonable to expect the child to leave the UK under 276ADE(1)(iv) one still has to ask the question as to why the child would be expected to leave the UK in the first place. The answer is the same as an assessment under section 117B(6). Secondly, unless the child is an orphan or in some other way estranged from her parents a child's private life will inevitably be bound up with family.

[25] I should also record that Mr Byrne placed some reliance on the evolution of the 7 year policy in respect of children. That is detailed in his note of argument. I have not thought it necessary to deal with that matter as it is now historic, the policy having been withdrawn in December 2008; *MA (Pakistan)* para 34.

Second issue: Dr Boyle's report

[26] Dr Jack Boyle is a child psychologist who was commissioned by the first and second petitioners to give a report on whether or not it would be reasonable to expect the third petitioner to return to a country of which she has no knowledge or experience and where it would be difficult for her to continue her education given her limited understanding and knowledge of Bengali. He did not give evidence but his report was submitted to the First-tier Tribunal.

[27] In the grounds of appeal to the Upper Tribunal the petitioners complained that the First-tier Tribunal had not made any reference to the report or made any findings in respect of it. The Upper Tribunal's decision on this point is as follows:

> "Although Dr Boyle's report is not mentioned expressly in the context of the impact on, in particular the third appellant, it is clear that at [26] and [27] of the decision the judge was addressing that evidence. The judge was not bound to accept the conclusions of the psychologist who, in any event accepted that the third appellant could speak some Bengali and that the minor appellants would receive an education in Bangladesh albeit possibly not to the same standard as in the UK."

Submissions

[28] The petition attacks the Upper Tribunal's decision on the basis that the First-tier Tribunal failed to have regard to the report. The note of argument submits, "In the context of an expert report whose expertise was not in question, the Court must give reasons why it is to be rejected: *English* v *Emery Reimbold and Strick* [2002] 1 WLR 2409 at 6 and 7."

Mr Byrne pointed to the parts of the report which suggested that a movement from an advanced liberal culture to a poorer culture would be extremely difficult for children, that the third petitioner would experience gender issues and, initially at least experience, what he described as a form of exile. Mr Webster on the other hand said that the issues had been addressed in the First-tier Tribunal decision. It was not necessary for the First-tier Tribunal to mention every report or piece of evidence so long as they were engaged with the issues. It was not as if the First-tier Tribunal had had to resolve a conflict between opposing experts.

Decision on issue 2

[29] In my opinion the Upper Tribunal were entitled to conclude that the issues had been addressed in paragraphs 26 and 27 of the decision. The First-tier Tribunal judge made reference to having taken into account all of the documents, albeit there is no specific reference to Dr Boyle's report. The decision letter makes reference to the third petitioner's schooling, the fact that she is settled in the UK, that she speaks English and is taught in English at school. It also records that she does speak some Bengali and Urdu and that this knowledge with support from her parents will assist her. There is specific reference to children moving to countries where there is different educational provision and different social and cultural norms. The First-tier Tribunal judge is of the opinion that the third petitioner has not reached the critical stage of her personal and educational development. There is no conflict of evidence between experts which might require specific reference to the opposing opinions and resolution of the issues.

[30] Mr Byrne relied on the case of *English* v *Emery Reimbold and Strick* in the Court of Appeal. It combined three cases in which it was alleged the judge at first instance had failed to give adequate reasons. In the first two there was a conflict of expert evidence where the

judge concluded that the evidence of one expert was to be preferred without giving reasons. The court found that although the decisions were open to criticism it was possible to understand the decision and the appeals were refused.

[31] In this case it is perfectly possible to ascertain the reasons for the decision and there was no requirement in law for the First-tier Tribunal to make specific reference to Dr Boyle's report.

Third issue: The *Eba* point

[32] Since I have not found any error of law it is not necessary for me to address the question of whether the *Eba* test applies. However detailed submissions were made on both sides of the bar and it is right that I should deal with them.

Permission Stage

[33] Section 27B of the Court of Session Act 1988 (the 1988 Act), as amended, and so far as relevant, is in the following terms:

> "(1) No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed.
>
> (2) Subject to subsection (3), the Court may grant permission under subsection (1) for an application to proceed only if it is satisfied that—
>
> (a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and
>
> (b) the application has a real prospect of success.
>
> (3) Where the application relates to a relevant Upper Tribunal decision, the Court may grant permission under subsection (1) for the application to proceed only if it is satisfied that—

(a) the applicant can demonstrate a sufficient interest in the subject matter of the application,

(b) the application has a real prospect of success, and

(c) either—

(i) the application would raise an important point of principle or practice, or

(ii) there is some other compelling reason for allowing the application to proceed.

(6) In this section, *"a relevant Upper Tribunal decision"* means—

(b) a decision of the Upper Tribunal in an appeal from the First-tier Tribunal under section 11 of the Tribunals, Courts and Enforcement Act 2007."

[34] The decision under review in this case is a "relevant Upper Tribunal decision". Accordingly the petitioners required to satisfy section 27B(3).

[35] The petition addresses this point and avers that it raises an important point of principle which has a real prospect of success. Answers were lodged before the permission stage. The answers contended that the petition did not have a real prospect of success. There are two relevant pleas in law in the following terms:

"1. The petition not presenting a real prospect of success, permission to proceed should be refused.

4. The petitioner not raising an important point of principle or practice or other compelling reason to admit the supervisory jurisdiction, the orders sought should be refused."

[36] On 12 April 2017 the Lord Ordinary pronounced an interlocutor in the following terms:

"The Lord Ordinary, having considered the petition and answers thereto, being satisfied that the petitioner demonstrates a sufficient interest in the subject matter of the petition and that the petition has a real prospect of success; grants permission for the petition to proceed;" etc.

As can be seen the interlocutor does not specifically deal with section 27B(3). It may be noted that the style interlocutor for permission in a judicial review of an unappealable decision of the Upper Tribunal includes a specific reference to being satisfied that the petition either raised an important point of principle or practice, or there is some other compelling reason for allowing the petition to proceed. Nor did the interlocutor repel the respondent's plea in law to the effect that the petition did not raise such a question.

Submissions

[37] Mr Byrne submitted that since the Court has granted permission, it follows that the Court was satisfied the petition would raise an important point of practice or principle. This Court should apply the presumption of regularity to the Court's interlocutor, *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium* and conclude the steps in the 1988 Act have been fulfilled. Holding over the *Eba* question to a first substantive hearing is contrary to principle: it would inject uncertainty into the procedure and delay settling the *Eba* question. It would break *Eba* into two questions: whether the *Eba* point *might* be met and whether it was met. That would undermine the Court's desired function to determine the *Eba* question at an early stage. There would be no filter. That is not the intention or purpose of the Practice Direction 2 of 2013. The test is to be determined decisively at an early point. It is a filter through which petitions must first pass: *SA (Nigeria)* v *Secretary of State* 2014 SC 1 per Lord Carloway LJC at [41]-[44]. Furthermore, the respondent's approach is contrary to the Courts' practice, see the following examples: *MA* v *Secretary of State for the Home Department* [2014] CSIH 111; *Daha Essa* v *Upper Tribunal* [2012] EWCA Civ 1718; *Q on the application of Hareef* v *Secretary of State for the Home Department* [2016] EWHC 873 (admin). The approach is in line with the test for appeal to the Court of Appeal or the Court of

Session from the decision of the Upper Tribunal; s. 13(6) Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) and Rule of Court 41.57. There is no good reason to apply a different approach to a judicial review.

[38] For the respondent Mr Webster pointed to the fact that the interlocutor granting permission was silent on the issue on whether the *Eba* test was met and the plea in law had not been repelled. If it had been the respondent would have required to reclaim.

[39] He emphasised that *Eba* was about the scope of judicial review. It was wrong to see the test as merely procedural. Section 27B(3) is about the granting of permission. The petitioner must still satisfy the court that any error of law relied upon raises an important point of principle or practice or other compelling reason to admit the supervisory jurisdiction. Section 27B(3)(c), properly construed imposes only a threshold question, *viz.* whether there is an arguable important point of principle or practice or other compelling reason. That is clear from the language of the statute and the statutory context. Section 27B(3)(c) does not require the Court at the stage of permission to determine that there *is* an important point of principle or practice; or that there *is* a compelling reason. Rather, the question to be answered is whether the application "*would raise*" an important point (sub-para.(c)(i)) and whether there is a compelling reason "*for allowing the application to proceed*". The language is not determinative. It is consistent with the permission test in s. 27B(3) as only a threshold test to further procedure. As the determination of whether the application demonstrates a real prospect of success is a low threshold, not determinative of the application itself (*MIAB* v *Secretary of State for the Home Department* [2016] SC 871, Lord President (Carloway) at para 66; *Fei* v *Secretary of State for the Home Department* [2016] CSOH 28, Lord Boyd of Duncansby at 17), so should the other branches of s. 27B(3)(c) be construed. Determining and permitting an application to proceed is to be distinguished

from determining and granting an application. Not only are the tests distinct (permission *cf*. grant), they serve different concepts. The permission test is for letting applications proceed. Granting an application for review of an unappealable decision of the Upper Tribunal requires, at common law, for the application to fall within the scope of the supervisory jurisdiction as it exists in respect of such a decision; *Eba* at paragraphs 47-49; *SA* at para 35.

[40] The relevancy of the application at common law is a distinct concept from the issue of permission to proceed and may require inquiry into the facts. A petitioner may present an arguable case raising a compelling reason based on the facts as pled, but those facts may be disputed. As pled, the second appeals criteria may be considered to be sustainable on those averments taken *pro veritate* (and thus justifying permission to proceed); but on inquiry as to fact, the averments may not be sustained, such as to denude the case of a compelling reason as a matter of relevancy at common law. Mr Webster gave as an example a case where on the face of it there had been a complete failure of due process. On enquiry while there had been a failure in procedure it was not of the quality contended for by the petitioner. Accordingly, a decision granting permission is indeed without prejudice to the distinct question of whether the application falls within the scope of the jurisdiction. This construction is consistent with the test for permission in the statute being a uniform, *in limine* standard, against which all applications are to be judged, rather than an assessment of the substantive argument based on the particular grounds of challenge in any case. The assessment of such an *in limine* standard sits consonantly with a process requiring rapid decision making (*MIAB* at [66].; *SA* at [43]). Were it otherwise, it would also mean that in assessing the application at the substantive hearing the court would be applying a different and less stringent test than was applied at the permission hearing; a result that would be all the more surprising given that the reasoning of the Supreme Court in *Eba* and *R(Cart)* v

Upper Tribunal [2012] 1 AC 663 was that a case which might have succeeded on conventional public law grounds would not meet the *Eba*/*Cart* test. See *R (Cart)* at paragraph 55, 56, 100 and *Eba* at paragraph 47. Were it to be held that at the permission stage a case meets the *Eba*/*Cart* threshold, there would be little point in holding a substantive hearing, other than to consider what order, if any, ought to be granted.

Discussion

[41] I do not consider that the failure in the interlocutor to specifically deal with section 27B(3) of the 1988 Act is in any way material. In the first place it would have been obvious to the Lord Ordinary from the petition and answers that in order to grant permission to proceed she needed to be satisfied that the test in section 27B(3) required to be met. One has to assume that in granting permission she addressed that question.

[42] So far as the plea in law is concerned it is often the case that respondents who wish to participate in the permission stage of the process will lodge answers which include a plea in law to the effect that the petition does not present a real prospect of success and accordingly permission to proceed should be refused. In granting or refusing permission it is not the practice, and in my opinion it is not required, to either sustain or repel the plea in law. In this case where the review is against an unappealable decision of the Upper Tribunal there is a further plea in law addressed to whether the *Eba* test is met. It says, reading short, that the petition not raising an important point of principle or practice or other compelling reason, the orders sought should not be pronounced. It does not say that permission should not be granted. If the respondent's position is correct that the *Eba* test is part of substantive law then, in considering whether the orders should be granted the Lord Ordinary would address

this plea. However if it is a procedural step then I do not consider it necessary to deal with it at the permission stage.

[43] I asked Mr Webster about the position in England and Wales. He very helpfully produced a number of judgements. As I will come on to show somewhat surprisingly there has been little discussion of the point in the English courts. Nor has there been a consistent approach by Government departments. In *R(Essa)* v *Upper Tribunal (Immigration and Asylum Chamber)* [2012] EWHC 1533 (QB) it was common ground between the parties that once a claimant had satisfied the second appeals test at permission stage he was not required to satisfy the court hearing the substantive case that the test was met in order to obtain the order sought.

[44] In *R(HS)* v *Upper Tribunal (Immigration and Asylum Chamber)* [2012] EWHC 3126 (Admin) both parties initially accepted that the second appeals test required to be addressed in the substantive hearing notwithstanding the grant of permission. However the judgement in *Essa* became available just after the initial hearing and Charles J gave both parties an opportunity to make further oral and written submissions. Both parties changed their position to accepting that once the second appeals test had been dealt with at permission stage it could not be raised again at the substantive hearing. Charles J went on to analyse the arguments and accepted the position as set out by the parties in their revised submissions.

[45] In *Khatoon* v *The Entrance Clearance Officer, Islamabad* [2013] EWHC 972 (Admin) both parties were given an opportunity to address the court as to whether *R(HS)* was correctly decided. Both parties intimated that they did not wish to make any submissions about Charles J's decision in *R(HS)* accepting that the second appeals test need only be addressed at the permission stage. *R(HS)* was followed by Leggatt J in *R(Ground Rents (Regisport) Ltd)*

v *The Upper Tribunal (Administrative Appeals Chamber)* [2013] EWHC 2638 (Admin) and, with some hesitation by Blair J in *Thangarasa* v *Upper Tribunal (Immigration and Asylum Chamber*) [2013] EWHC 3415 (Admin).

[46] Matters took a different turn however in *R(Nicholas)* v *Upper Tribunal (Administrative Appeals Chamber)* [2013] EWCA Civ 799. In that case Mr James Eadie QC appeared for the Secretary of State for Work and Pensions and submitted that the concession made by the Secretary of State for the Home Department in *R(HS)* (and other cases) was wrong. The Court however did not deal with the argument disposing of the case on other grounds.

[47] It appears that there have been no other cases on this point in England and Wales. Accordingly the position in that jurisdiction is the one set out by Charles J in *R(HS).*

[48] So far as the position of the respondent in this jurisdiction is concerned in *B Petitioner* 2013 SLT 990 the argument presented to the court for the Secretary of State was that the issue of whether the *Eba* test was met was one to be dealt with as a preliminary issue, preferably at the procedural hearing but if not at a preliminary hearing set down for that purpose.

[49] In *Cart* the Supreme Court considered the options for the judicial review of unappealable decisions of the Upper Tribunal. These options are set out in the judgement of Lady Hale at paragraphs 37 to 56. Having considered the options the court adopted what is known as the second appeals test now formulated in section 27B(3) of the 1988 Act. It is in the same terms as is found in section 13(6) of the 2007 Act. In taking that approach the court consciously adopted a mechanism which acts as a filter for cases coming before it either as appeals from decisions of the Upper Tribunal under the 2007 Act or as judicial reviews against unappealable decisions of the same body. The court considered that this was a rational and proportionate restriction on the availability of judicial review against such

decisions. As Lady Hale noted it is a test which the courts are now very used to applying; para 57. That this was seen as a question of permission is clear not only from the judgement of Lady Hale but also Lord Phillips of Worth Matravers at paragraphs 93 and 94, Lord Brown of Eaton-under-Heywood at para 100, Lord Clark of Stone-cum-Ebony at para 103 and Lord Dyson at paragraphs 128 to 133.

[50] In *Eba* the Supreme Court determined that it should follow the same approach in Scotland as had been adopted for England and Wales in *Cart*. Lord Hope of Craighead pointed out that the limitation on the scope for second appeals in section 13(6) of the 2007 Act had been reproduced in the Rules of Court. He added that it would not be consistent with that limitation for the court to allow a wider opportunity for the decisions of the Upper Tribunal to refuse leave to appeal to itself to be reconsidered by way of judicial review; para 47. In other words he sought a consistent approach as between appeals from decisions of the Upper Tribunal under the 2007 Act and judicial reviews of unappealable decisions of the Upper Tribunal.

[51] If there was any doubt in the matter as to how the second appeals test was to be applied it is put to rest by Lord Hope's discussion of possible mechanisms in para 49. He invited the Court of Session to give further guidance as to how the second appeals test might be applied in practice. He saw the test as a filter to be applied at the earliest possible stage in the process; para 49(b). Further evidence comes from his endorsement of Lady Smith's approach in *EY* v *Secretary of State* 2011 SC 388 (paras 12 to 14) where she declined first orders because she was not satisfied that an arguable case had been made out.

[52] The guidance as to how the test was to be applied was given by the Second Division in *SA*. Lord Carloway LJC giving the decision of the court noted that the guidance that was required was to how the test should be applied in practice (para 42). The court's role should

be seen as a gatekeeping or sifting one. "Before the petition progresses the court should be able, quickly and without difficulty, to identify from the averments the point or reason advanced." (para 43).

[53] It should be emphasised that nowhere in *Cart, Eba* or *SA,* or anywhere else so far as I can make out, is it suggested that having passed through the second appeals test the court should revisit the issue at the substantive stage. Mr Webster's approach appears to be that this is a *lacuna* which now needs to be addressed. But I am not persuaded that the courts apparent silence on this issue should be taken as leaving the door open to a consideration of the second appeals test at the later stage.

[54] I use the phrase "apparent silence" deliberately because it seems to me that in seeking to apply the same test as that found in s 13(6) of the 2007 Act the court in *Eba* was quite deliberately determining that the test was to be applied in the same manner. That is quite apparent from Lord Hope's judgement at para 47. That being the case there is no room for argument that the second appeals test should be revisited at the substantive hearing.

[55] Nor am I persuaded that having passed through the second appeals test the issue has been decided and there is nothing more to discuss other than the form of order. If that were so appeals from tribunals would be disposed of in a similar and summary manner. The point is well illustrated by the approach I might have taken to this petition at permission stage; I would have been inclined to grant permission on the first ground. I can see that standing Elias LJ's discomfort with the decision he felt obliged to reach in *MA (Pakistan)* there was an argument as to whether the courts in Scotland should follow that decision. I would have been satisfied that it had a real prospect of success. And I may well have been persuaded that it raised an important point of principle. On examination however I have

not been persuaded by the petitioner's arguments. The granting of permission did not predetermine the issue, contrary to Mr Webster's submissions.

[56] The strongest argument for the respondent was the scenario painted by Mr Webster based on Lord Dyson's examples of what might constitute "some other compelling reason". He suggested that they might include a case where it was strongly arguable that the individual had suffered a wholly exceptional collapse in fair procedure or a case where it was strongly arguable that there had been an error of law which had caused truly drastic consequences; *Cart* para 131.

[57] Mr Webster suggested that a petitioner might aver facts which would persuade a judge to grant permission on the basis of some other compelling reason as outlined above. It may well be that on inquiry the facts are not established, or the judge is not persuaded that the high threshold of the Eba test has been reached. So while there may have been a failure in procedure it could not be characterised as a wholly exceptional collapse in fair procedure. Or, while there had been an error of law the consequences were not truly drastic.

[58] It is right to acknowledge that such situations could arise. However, if the permission stage is to operate as envisaged by the Supreme Court in *Cart* and *Eba* and by this court in *SA*, it will be exceptionally rare. In the first place it is a prerequisite that both the First-tier Tribunal and the Upper Tribunal would have refused leave to appeal. That would mean, taking as an example Lord Dyson's first case, that both the First-tier Tribunal and Upper Tribunal had failed to spot that it was strongly arguable that there had been a wholly exceptional collapse in fair procedure.

[59] Accepting that such a situation could arise, I see no difficulty in principle in allowing the ordinary rules of judicial review to apply at the substantive stage. That is wholly consistent with the purpose of second appeals rule – to act as a gateway to the court. Part of

the rationale of the test is the need to ensure an efficient use of judicial resources. The permission stage acts as a filter limiting the number of such cases that come before the courts. Inevitably it may mean that some cases get through which might otherwise have failed at the permission stage had the full facts been known. In my opinion that is simply part of the price for operating a permission stage.

[60] I also agree with Mr Byrne that having the second appeals test applied twice, once at the permission stage and again at the substantive stage, introduces an element of uncertainty and contributes to delay and expense. That seems to me to run counter to the need to ensure certainty in the process and expedition in the procedure.

Disposal

[61] I shall sustain the fifth plea in law for the respondents, repel the petitioners' pleas in law and refuse the petition. I shall reserve the question of expenses.