Upper Tribunal
(Immigration and Asylum Chamber)

Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **On 19 December 2017**	**Decision & Reasons Promulgated** ……

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CLAUDIUS STEVEN CHARLES
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr P Haywood, Counsel, (Direct Access)

(i) A human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") can be determined only through the provisions of the ECHR; usually Article 8.

(ii) A person whose human rights claim turns on Article 8 will not be able to advance any criticism of the Secretary of State's decision making under the Immigration Acts, including the immigration rules, unless the circumstances engage Article 8(2).

(iii) Following the amendments to ss.82, 85 and 86 of NIAA 2002 by the Immigration Act 2014, it is no longer possible for the Tribunal to allow an appeal on the ground that a

decision is not in accordance with the law. To this extent, Greenwood No. 2 (para 398 considered) [2015] UKUT 00629 (IAC) should no longer be followed.

DECISION AND REASONS

1. The respondent (hereafter claimant) is a citizen of Grenada who was born on 29 April 1960. On 25 June 2013, he was sentenced to 42 months' imprisonment for possession of Class A drugs, with intent to supply. On 2 October 2013 the Secretary of State wrote to the claimant inviting him to make submissions as to why he should not be deported in the light of his criminal history and latest conviction.

2. On 26 November 2014, the Secretary of State signed a deportation order in respect of the claimant. She also issued a certificate, pursuant to section 94B of the Nationality, Immigration and Asylum Act 2002.

3. The claimant commenced judicial review proceedings, which led to the Secretary of State withdrawing the section 94B certificate, granting the claimant an in-country right of appeal, and treating his application for revocation of the deportation order as a human rights claim, which the Secretary of State had rejected.

The first appeal decision

4. The claimant's appeal was heard by First-tier Tribunal Judge P J M Hollingworth at Nottingham in October and December 2015. The claimant's position was that the Secretary of State could not deport the claimant from the United Kingdom pursuant to the Immigration Act 1971. He relied upon section 7 of the 1971 Act which, so far as relevant, provides as follows:-

> **7. Exemption from deportation for certain existing residents**
>
> (1) Notwithstanding anything in section 3(5) or (6) above but subject to the provisions of this section, a Commonwealth citizen or citizen of the Republic of Ireland who was such a citizen at the coming into force of this Act and was then ordinarily resident in the United Kingdom -
>
> (a) …
>
> (b) shall not be liable to deportation under section 3(5) if at the time of the Secretary of State's decision he had for the last five years been ordinarily resident in the United Kingdom and Islands;]
>
> (c) shall not on conviction of an offence be recommended for deportation under section 3(6) if at the time of the conviction he had for the last five years been ordinarily resident in the United Kingdom and Islands.
>
> (2) A person who has at any time become ordinarily resident in the United Kingdom or in any of the Islands shall not be treated for the purposes of this section as

having ceased to be so by reason only of his having remained there in breach of the immigration laws.

…

(5) Nothing in this section shall be taken to exclude the operation of section 3(8) above in relation to an exemption under this section."

5. Section 3(5) of the 1971 Act provides that a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good. Section 3(6) provides that a person who is not a British citizen shall also be liable to deportation if, after attaining the age of 17, he is convicted for an offence punishable with imprisonment and on conviction is recommended for deportation by a court empowered to do so.

6. Section 3(8) provides as follows:-

"(8) When any question arises under this Act whether or not a person is a British citizen, or is entitled to an exemption under this Act, it shall lie on the person asserting it to prove that he is."

7. The 1971 Act came in to force on 1 January 1973. The claimant's case was that he had arrived in the United Kingdom in February 1972. It is common ground that the claimant cannot be deported if the claimant was in the United Kingdom before 1 January 1973. The Secretary of State does not contend that, if the claimant was in the United Kingdom before that date, he may not have been ordinarily resident. She also takes no point as to the application of section 7(1)(b) in the claimant's case. As a result, the sole issue regarding the application of section 7 is whether the claimant was in the United Kingdom before 1 January 1973.

8. Judge P J M Hollingworth heard a great deal of oral evidence from the claimant and his witnesses. The judge, however, eventually decided that the Secretary of State had failed to answer Subject Access Requests made on behalf of the claimant, with a view to securing access to his Home Office files. According to the judge, the Secretary of State had also "failed to gather all the relevant information in the first instance before making the deportation order".

9. As a result, the judge decided to "allow the appeal on the basis that the [Secretary of State] has not acted in accordance with the law in the making of the deportation decision".

Proceedings in the Upper Tribunal

10. In a decision dated 19 July 2016, Upper Tribunal Judge Pitt found a material error of law in Judge P J M Hollingworth's decision. She set that decision aside and remitted the case to be re-decided by the First-tier Tribunal.

11. As Upper Tribunal Judge Pitt found, Judge P J M Hollingworth, although seized with what she described as an Article 8 appeal, failed to address any of the five "Razgar

questions" (R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27 at paragraph 17). These are:-

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

12. At paragraph 16, Upper Tribunal Judge Pitt said as follows:-

> "16. The appeal was allowed as the First-tier Tribunal purported to exercise a jurisdiction no longer open to it, finding that the respondent acted unlawfully in failing to obtain proper information on when the appellant came to the UK before making a deportation order and in failing to provide that information when formally requested to do so by the appellant and the Tribunal. There was no statutory jurisdiction for allowing an appeal on that basis and in doing so the First-tier Tribunal fell into legal error."

Decision on the remitted appeal

13. The remitted appeal was heard by First-tier Tribunal Judge Malone on 22 November 2016. He allowed the claimant's appeal. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 2 June 2017.

14. First-tier Tribunal Judge Malone heard evidence from the claimant and the claimant's two daughters, Stacey and Anne Marie. The judge also heard oral evidence from the mother of Stacey and Anne Marie, the claimant's elder brother and the claimant's sister.

15. At paragraph 14 of his decision, Judge Malone said that the claimant -

> "resists deportation on two grounds: first, that his deportation would be unlawful by reason of s.7 of the 1971 Act; and, secondly, that his deportation would be unlawful as it would unlawfully infringe his qualified protected right to enjoy family and/or private life in the United Kingdom."

16. The judge's analysis of the evidence and conclusions thereon are to be found at paragraphs 17 to 38 of the decision. Having heard the oral evidence of the claimant

and his witnesses, he found them all to be "honest and reliable. My assessment of their oral evidence is particularly important in this case".

17. At paragraph 18, the judge recorded the Secretary of State's concession that if the claimant came to the United Kingdom before 1 January 1973 and had been ordinarily resident since that time, whether lawfully or as an overstayer, then by reason of section 7 of the 1971 Act the claimant was "exempt from deportation".

18. In his deportation questionnaire, the claimant said that he came to the United Kingdom in January or March 1970, when he would have been 9 years old. In his witness statement and oral evidence, however, he said that he came to the United Kingdom in 1972 when he was 12 years old.

19. At paragraphs 21 and 22, the judge dealt with written material emanating from, respectively, a GP Surgery and the Ilford Chest Clinic. The medical notes from the GP Surgery recorded that the claimant had first attended there on 14 October 1974. The judge observed that these notes "do not conflict with the [claimant's] claim that he came to the United Kingdom in 1972".

20. At paragraph 22, the judge considered the letter from the Ilford Chest Clinic. This was dated 2 July 1975. It was addressed to the claimant's GP. The letter stated that the claimant "came to England eighteen months ago".

21. The judge considered that this statement "does not conflict with the [claimant's] claim". The judge said that the expression "eighteen months ago" was "inexact. I am unable to come to a conclusion as to how inexact it might be. I do not know on what evidence that statement came to be made. Its author did not give evidence".

22. Beginning at paragraph 24, the judge examined in detail the oral evidence. The appellant's elder brother had told the judge that he arrived in the United Kingdom when he was 14 years old and had travelled to this country with the claimant. There was nothing more that he could say other than he knew he was 14 when he arrived with the claimant. The witness had attended Senior School in Ilford shortly after arrival and the claimant went to the Junior School.

23. The claimant's sister said that she had been 8 years old when her brothers (one of whom was the claimant) arrived in the United Kingdom. It had been a memorable occasion for her. The brothers had joined her in the United Kingdom. She was certain that she was 8 years old when the claimant and his brother had arrived. She had been born in December 1963.

24. The judge considered it probable that the claimant and his brother arrived in the summer "of whatever year it was they arrived in, enabling them to start a new school year in September or October" (paragraph 26).

25. At paragraph 28, the judge noted that he also had a letter from another brother of the claimant, now residing in Canada, who stated that he believed the claimant had come to the United Kingdom in 1972/1973.

26. The remaining findings of the judge need to be set out in full:-

"29. Ms. Crittenden said, of the evidence of the Appellant, Mr. Charles and Ms. Charles, that "they would say that wouldn't they"; ie that the Appellant had first come here in 1972. I find that an unjustified submission. At no stage was it put to any of those three witnesses that they were lying or indeed that they were mistaken. As I have said above, I found both Mr. and Ms. Charles to be impressive witnesses. They gave their evidence with, what I perceived to be, candour. Ms Crittenden asked Ms. Charles no questions at all as to when the Appellant came to the United Kingdom. She must therefore be taken to have accepted her evidence.

30. The Appellant's claim is fortified, I find considerably, by two further matters. The Appellant, by his current solicitors, has striven to obtain school records from Loxford School. As I understand it, due to the fact that the school has moved premises, it has no records going back beyond 15 years. In a telephone conversation between a member of staff at the school and someone at the Appellant's solicitors, it was stated that enquiries had been made of the senior staff at the school to see if anyone was there as at 1972. The most senior member of staff still present only started teaching in the 1980's.

31. The other matter is that, since the Appellant's current solicitors have taken on his case, they have made numerous efforts, on the Appellant's behalf, to obtain evidence from the Home Office. On 16 February 2015, a Subject Access Request was made on the Appellant's behalf for his file. A similar request was made for Mr. Charles' file. Further follow-up letters were sent in May 2015, August 2015 and October 2015. The Respondent failed to respond to the request within the 40 days statutory deadline or at all. On 29 October 2015, the Appellant's solicitors submitted a complaint to the Information Commissioner regarding the delay in obtaining information from the Home Office. Recently, the request has been answered to the effect that Mr. Charles' files have been lost and producing three or four documents relating to the Appellant, none of which had any evidential value.

32. The fact that the Appellant had authorised vigorous approaches to be made both to his old school – it was not disputed he attended there – and to the Home Office is strong evidence of his bona fides on this matter. Had he fabricated his date of entry, his enthusiasm for approaching institutions that might have been able to produce evidence of when he was first in the United Kingdom would, I suspect, have been minimal.

33. As I say, the efforts of the Appellant authorised to be made to ascertain corroboration of his claim as to when he arrived here goes to his bona fides. All the oral evidence I had was to the effect that the Appellant came to the United Kingdom in 1972. I emphasise it was not put to any of the witnesses that they were lying. The only document inconsistent with the Appellant being in the United Kingdom in 1972 was the letter from Ilford Chest Clinic. However, I treat that document with caution. I know little of its provenance and I have no idea how the author came to use the phrase he did to identify the inexact date the Appellant entered the United Kingdom. I do not know on what material the statement was based.

34. The standard of proof the Appellant has to demonstrate is that of "on the balance of probabilities". It is not "beyond reasonable doubt". I am satisfied he has taken all possible steps to obtain corroborative evidence of his claimed date of

entry. It is unfortunate that the Home Office has been unable to produce any material evidence relating to either Mr. Charles or the Appellant. The fact that the Appellant's old school has not kept records does not render his claim weaker. It is a neutral factor. As I have said above, I find the fact that he has energetically approached his old school goes to demonstrating his bona fides.

35. After careful consideration, and taking into account all the evidence available to me, I have come to the conclusion that the Appellant has demonstrated, on the balance of probabilities, that he and his older brother Radix Charles came to the United Kingdom in 1972, probably in the summer of that year. I find, to the same standard, that he entered the United Kingdom on a British Colonies passport. It was not suggested that the Appellant has not been ordinarily resident in the United Kingdom for the last five years. I find that he has been ordinarily resident in the United Kingdom since 1972. He has never left this country.

36. I therefore find that the Appellant is exempt from deportation by reason of s.7 of the 1971 Act. The Respondent's decision under appeal refusing to revoke the deportation order she has made in respect of the Appellant and the decision to make a deportation order in the first place are therefore unlawful. In the result, this appeal must be allowed.

37. Bearing in mind my finding on the first issue is in favour of the Appellant, I do not intend to embark on a lengthy and complex analysis of the position of the Appellant, his claimed partner and his two daughters (the elder of whom has achieved majority) under Article 8 of the 1950 Convention. There is no point in my doing so. Were I to have done so, I would have had to have found that the Respondent's decision is not in accordance with the law, when going through the steps set out in Razgar 2004 UKHL 27.

38. This appeal is allowed as the Respondent's decision is unlawful. As the decision was properly to be viewed as one of her "own motion", it is not a situation where a lawful decision remains to be made by her (see Greenwood (No. 2) (para. 398 considered) 2015 UKUT 629 (IAC)."

The Secretary of State's grounds of appeal

27. The Secretary of State's grounds of appeal had this to say about the First-tier Tribunal Judge's paragraph 36:-

> "2. The FTT allowed the appeal as "otherwise not in accordance with the law", however this was not a ground of appeal open to the [claimant]. This appeal fell to be considered under the appeal provisions of the 2014 Immigration Act, the relevant decision of the SSHD being taken on 21st May 2015, therefore falling outside the transitional provisions of the Act. Therefore the only grounds available to the appellant were whether his deportation would be unlawful under s.6 of the Human Rights Act (as per s.15(4) Immigration Act 2014). Therefore the FTTJ materially erred in finding that the decision was otherwise not in accordance with the law; there was no such outcome available."

28. The remainder of the grounds took issue with Judge Malone's findings of fact. It was submitted that the letter from the Ilford Chest Clinic of 2 July 1975 had been

misconstrued, in that the expression "eighteen months" which the judge had regarded as "inexact" was not of that character. The grounds submitted that the statement in the letter that the claimant had come to the United Kingdom "eighteen months ago" had

> "obviously been a result of a consultation between the [claimant] and the chest clinic. There was no reason to doubt the evidence from the records obtained and in disregarding this evidence and failing to give adequate reasons for doing so the FTT erred materially in law."

29. The grounds also submitted that the evidence from the chest clinic contradicted the evidence of the claimant and his siblings, with the result that their evidence "should have been treated with caution by the FTT". The judge had also erred in disregarding the submissions of the Secretary of State's Presenting Officer that the evidence of the siblings "was likely to be in the [claimant's] favour".

30. The grounds further contended that the judge had erred in considering the issue of the Subject Access Request at all: "The request simply had nothing to do with the appellate proceedings". The burden was said to be on the claimant to show that, on the balance of probabilities, he was exempt from deportation by virtue of section 7.

31. As for the judge's alternative finding that, had he gone on to consider Article 8, he would have found that the decision was not in accordance with the law, when going through the "Razgar" steps, the Secretary of State submitted that this was wrong. Since the claimant had not, according to the Secretary of State, shown himself to be exempt, the judge should have considered whether the claimant met the requirements of paragraph 399 or 399A of the Immigration Rules.

Discussion

32. It is convenient to begin discussion with the challenge made by the Secretary of State to the First-tier Tribunal Judge's findings of fact on the issue of when the claimant arrived in the United Kingdom. We agree with Mr Haywood, for the claimant, that the judge's findings on this issue disclosed no legal error.

33. It is trite law that an appellate court or tribunal will not lightly interfere with the findings of a judicial fact-finder, who has had the benefit of hearing and seeing the parties and witnesses give evidence. The Secretary of State's attempt to undermine the significance of the judge's findings on the oral evidence depends upon the letter of 2 July 1975 from the Ilford Chest Clinic. The Secretary of State contends that the expression "he came to England eighteen months ago" is not "inexact". However, on any sensible reading of the letter, the writer was not asserting, in terms, that the claimant arrived in the United Kingdom on 2 January 1974. The judge was, therefore, entitled to regard the expression as "inexact" and entitled to say that he was unable to conclude how inexact the expression might be.

34. We agree with Mr Haywood that, contrary to the Secretary of State's assertion in her grounds, it is certainly not obvious that the statement in the letter had been made as

a result of the consultation between the claimant and the person writing the letter. In any event, one can easily envisage scenarios in which, for whatever reason, the writer of the letter may have misunderstood what was said in this regard. The writer was, after all, not materially concerned with precisely when the claimant had arrived in the United Kingdom.

35. The First-tier Tribunal Judge was entitled to place weight on the persons who had given him oral evidence. There is nothing remotely perverse in his findings in this regard. The judge was called upon to consider all the evidence, both oral and written, in the round. On any reading of his decision, that is precisely what the judge did.

36. There is no merit in the Secretary of State's criticism of what the judge had to say regarding the Subject Access Request or, for that matter, the claimant's attempt to obtain school records. The judge was entitled to conclude that a person who had made vigorous attempts to obtain official documentation (which may have supported his case or, alternatively, undermined it) had indicated "his bona fides on this matter" (paragraph 32).

37. There is, for these reasons, no valid criticism of Judge Malone's conclusion that the claimant had shown, on the balance of probabilities, that he arrived in the United Kingdom before 1 January 1973 and that the exemption in section 7 of the 1971 Act accordingly applied in his case.

38. How, then, should the judge have given effect to that finding? As we have seen, at paragraph 36 he did so by allowing the appeal on the basis that section 7 of the 1971 Act exempted the claimant from deportation, with the result that "the decision to make a deportation order in the first place" was unlawful, as was the refusal to revoke the deportation order.

39. In fact, however, as the judge had earlier recorded in his decision, the Secretary of State's decision of 21 May 2015, against which the claimant had appealed, was a decision to refuse a human rights claim.

40. Judge Malone referred, at paragraph 38 of his decision, to the Upper Tribunal's decision in Greenwood (No. 2) (para. 398 considered) [2015] UKUT 00629 (IAC). That decision contained guidance on a number of matters. For present purposes, we are concerned with what the Upper Tribunal had to say about the ability or otherwise of the First-tier Tribunal to "remit" a matter to the Secretary of State, under the appellate regime as it is currently stands, following the changes made by the Immigration Act 2014.

41. Under the heading "Remittal by the FTT to the Secretary of State" the Upper Tribunal held as follows:-

> "20. We have highlighted in [3] above the first of the two orders of the FtT, namely "remittal" to the Secretary of State. Fundamentally, wherein reposes the power to remit? The operative statutory provision in this context is section 86 of the 2002 Act, as amended by the Asylum and Immigration (Treatment of Claimants) Act 2004, per paragraph 18 of Schedule 2, effective from 04 April 2005, and the

Immigration, Asylum and Nationality Act 2006, per paragraph 4 of Schedule 1, effective from 31 August 2006. Its predecessors were paragraph 21 of Schedule 4 to the Immigration and Asylum Act 1999 and section 19 of the Immigration Act 1971. Prior to its most recent amendment, section 86 provided:

> "*(1) This section applies on an appeal under section 82(1), 83 or 83A.*
>
> *(2) The Tribunal must determine –*
>
> *(a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and*
>
> *(b any matter which section 85 requires it to consider.*
>
> *(3) The Tribunal must allow the appeal in so far as it thinks that –*
> *(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or*
>
> *(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.*
>
> *(4) For the purposes of subsection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision.*
>
> *(5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal.*
>
> *(6) Refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes of subsection (3)(b).*

In its amended form, section 86 now provides:

> "*(1) This section applies to an appeal under section 82(1).*
>
> *(2) The Tribunal must determine –*
>
> *(a) any matter raised as a ground of appeal, and*
>
> *(b) any matter which section 85 requires it to consider*"

Section 85, under the rubric "*Matters to be considered*", provides:

> "*(1) An appeal under section 82(1) against a decision shall be treated by [the Tribunal] as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).*
>
> *(2) If an appellant under section 82(1) makes a statement under section 120 the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.*
>
> *(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.*

(4) On an appeal under section 82(1), 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

(5) But in relation to an appeal under section 82(1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10 –

(a) subsection (4) shall not apply, and

(b) the Tribunal may consider only the circumstances appertaining at the time of the decision to refuse."

21. We consider it clear that prior to the most recent amendment of section 86, the FtT, in determining statutory appeals, had two main choices viz to allow or dismiss the appeal. A third and fourth option were also available. The third option was to allow an appeal and, simultaneously, to make directions in order to give effect to its decision, per section 87 of the 2002 Act as amended. However, this has been repealed by paragraph 37 of Schedule 9 to the Immigration Act 2014, effective from 20 October 2014. Thus [17] of Greenwood (Automatic Deportation: Order of Events) [2014] UKUT 00342 (IAC), which predated this statutory development, must be read with this adjustment. The fourth possible outcome of an appeal to the FtT, as Greenwood noted, was the following. If the effect of the Tribunal's decision was to conclude that the decision of the Secretary of State under appeal was unlawful and the Tribunal did not substitute another decision:

(a) if the decision of the Secretary of State involved a determination of an application made by the litigant, a lawful decision remains to be made by the Secretary of State – and it is preferable that the FtT say so clearly;

(b) alternatively, if the challenge in the appeal was to an "own motion" decision of the Secretary of State, it would be a matter for the Secretary of State to decide whether a further decision should be made in the wake of the FtT's decision.

This is, in effect, a declaratory decision.

22. As noted above, in the seemingly interminable merry-go-round of legislative activity, section 86 has undergone a significant recent amendment. This is linked to the wholesale reduction in statutory rights of appeal effected by the amendments introduced by the Immigration Act 2014, operative from 20 October 2014. In this context, the exercise of juxtaposing the new section 82 with its predecessor is enlightening. This reduction in appealable decisions is accompanied by a significant pruning of the permitted grounds of appeal, which are enshrined in section 84. By section 85, the FtT is obliged to consider certain matters. By this route one arrives at section 86, which bears the cross heading "Determination of Appeal".

23. In notable contrast with its predecessor, the new section 86 does not reproduce the two basic options of allowing or dismissing the appeal. In this respect, the drafting is both surprising and infelicitous. However, applying elementary dogma, it is the function of every appellate tribunal and court to resolve appeals,

normally by allowing or dismissing them, unless directed otherwise by statute. I consider that any reconfiguration of this basic model would, given the legislative history, require clear and elaborative new provisions. There are none. The new statutory language is "*determine*". I conclude that this encompasses the two basic options of either allowing or dismissing an appeal. The third option – noted in [21] above – of allowing an appeal with directions has clearly been extinguished by the repeal of section 87 of the 2002 Act. I consider, however, that the fourth option noted above, with its two dimensions, continues to apply. This has been a feature of UTIAC jurisprudence for some years and, in the new legislation, Parliament has not taken the opportunity to interfere.

24. The effect of this analysis is that the answer to the question posed in [20] above is uncompromising: the FtT has no power to remit a case to the Secretary of State for any purpose. The principle which underpins this conclusion is that the FtT is a creature of statute and its powers are exclusively statutory in consequence. Any course which the statute does not, expressly or by implication, permit is forbidden. In this respect, the FtT is to be contrasted with the High Court which, by tradition of some longevity, is acknowledged to possess an inherent jurisdiction. The FtT cannot lay claim to possession of comparable powers.

25. This analysis is consistent with the limited jurisprudence bearing on this subject. In Haddad [2000] INLR 117, the IAT decided that the adjudicator had no power to remit to the Secretary of State an unconsidered and undetermined claim but should, rather, determine such claim as primary decision maker. The Court of Appeal espoused the same approach in R (Zaier) v Secretary of State for the Home Department [2003] EWCA Civ 937. The FtT is also constituted primary decision maker in cases where new claims are raised by the appellant in response to a so-called "one stop" notice in accordance with sections 85(2) and 120 of the 2002 Act: see AS (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1076. Similarly, in circumstances where the Secretary of State has not made a decision on whether the appellant has a Community law right to remain in the United Kingdom or in respect of the best interests of an affected child, the FtT must make the primary decision: see VM (Zambia) v Secretary of State for the Home Department [2009] EWCA Civ 521 and DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305."

42. Although the Tribunal in Greenwood (No. 2) helpfully set out sections 85 and 86 of the 2002 Act, as amended by the 2014 Act, it is important to set out the provisions dealing with a right of appeal in respect of the refusal of the human rights claim.

43. So far as relevant for present purposes, section 82 (Right of appeal to the Tribunal) provides as follows:-

> "(1) A person ("P") may appeal to the Tribunal where –
>
> …
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P,
>
> … ."

44. So far as relevant, section 84 (Grounds of appeal) provides:-

"(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998."

45. We find we must take issue with the last part of paragraph 23 of Greenwood (No. 2). The former ability of the Tribunal to conclude that a decision of the Secretary of State was unlawful, with the result that a lawful decision remained to be made by her, depended upon the fact that under the version of section 86 of the 2002 Act as it was, prior to its amendment by the 2014 Act, the Tribunal was required to allow an appeal insofar as it thought that a decision against which the appeal was brought or was treated as being brought was not in accordance with the law (including immigration rules). That requirement has been removed from the legislation. In this regard, therefore, Parliament has most definitely "taken the opportunity to interfere".

46. The correct approach to adopt in a human rights appeal under section 82(1)(b) is as follows. As section 84(2) makes clear, and as is reflected in the present notice of decision, served in compliance with the Immigration (Notices) Regulations 2003, the decision being appealed is the decision to refuse the claimant's human rights claim. Section 84(2) provides that the only ground upon which that decision can be challenged is that "the decision is unlawful under section 6 of the Human Rights Act 1998". Section 6(1) of the 1998 Act provides that it "is unlawful for a public authority to act in a way which is incompatible with the Convention rights".

47. The definition of "human rights claim" in section 113(1) of the 2002 Act involves the making of a claim by a person that to remove him or her from or to require him or her to leave the United Kingdom would be unlawful under section 6.

48. The task, therefore, for the Tribunal, in a human rights appeal is to decide whether such removal or requirement would violate any of the provisions of the ECHR. In many such cases, including the present, the issue is whether the hypothetical removal or requirement to leave would be contrary to Article 8 (private and family life).

49. In such a paradigm human rights appeal, therefore, we do not consider that paragraph 21 of the decision in Greenwood No 2, including its sub-paragraphs (a) and (b), has any purchase. If the decision to refuse the human rights claim would violate section 6 of the 1998 Act, the Tribunal must so find. In such a paradigm case, we see no purpose in the Tribunal making any statement to the effect that "a lawful decision remains to be made by the Secretary of State". It would certainly be wrong to conclude that, having allowed the appeal, the appellant's human rights claim remains outstanding, in the sense that the Secretary of State must make a fresh decision on that claim. The actual position will be that the Secretary of State, faced with the allowing of the appeal by the Tribunal, will decide whether and, if so, what leave to enter or remain she should give to the appellant. Any deportation decision or decision under section 10 of the 1999 Act that the Secretary of State may have made in respect of the appellant will fall away. Again, we see no need for the Tribunal to make any express statement to that effect.

50. What we have just said applies in the paradigm case where there is no discrete reason why any planned removal by the Secretary of State would be unlawful. In

other words, but for the Tribunal's finding that removal would constitute a disproportionate interference with Article 8 rights, the Secretary of State would have had the power to remove.

51. In the present case, as we have seen, that was not the position. Judge Malone found as a fact that the claimant was more likely than not that to have arrived in the United Kingdom before 1 January 1973. Accordingly, the claimant was entitled to the benefit afforded by section 7 of the 1971 Act and was thus exempt from deportation.

52. The appeal before the judge was, however, a human rights appeal. As we have seen, the sole ground of challenge to the decision to refuse the human rights claim is that the refusal is unlawful under section 6 of the 1998 Act.

53. In the circumstances, Judge Malone was, we find, wrong in law to purport to allow the appeal on the freestanding basis that the decisions to make the deportation order, and to refuse to revoke it, were in each case unlawful. To repeat, neither of those decisions was the decision under appeal. The judge was therefore compelled to treat the section 7 issue as going to the determination of the sole ground of appeal; namely, whether refusal of the claim would violate the United Kingdom's obligations under the ECHR, by reference to Article 8.

54. At this point, it is necessary to focus on the wording of Article 8:-

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

55. As can be seen from paragraph 11 above, the so-called "Razgar questions" of Lord Bingham at paragraph 17 of the opinions of the House of Lords in [2004] UKHL 27 are designed to enable judicial fact-finders to navigate the wording of Article 8(1) and where appropriate Article 8(2), to the extent that the facts of the case so require.

56. Questions (1) and (2), if each answered positively, take the judicial fact-finder into the realm of Article 8(2). Questions (3) to (5) engage sequentially with the requirements of that part of the Article.

57. In the present case, as Judge Malone in effect found at paragraph 37 – and as is in any event manifest – the claimant enjoyed the protection of Article 8. The issue, therefore, was whether the Secretary of State could demonstrate that a positive answer fell to be given to each of Razgar questions (3) to (5).

58. So far as concerns the requirement addressed in question (3), that the interference be "in accordance with the law", both Strasbourg and domestic authority suggests that the question is whether the proposed interference (here, deportation) has a proper basis in domestic law, including whether that law is accessible to the person

concerned and foreseeable as to its effects (see eg AB v Her Majesty's Advocate [2017] UKSC 25, paragraph 25). In the present case, the law of deportation under the 1971 Act, read with the UK Borders Act 2007 in the case of foreign criminals, satisfies these requirements.

59. The issue, therefore, is what effect Judge Malone's finding on the application of section 7 of the 1971 Act had on question (5); that is to say, on whether the interference would be proportionate. As the judge found, the proper application of the law on deportation meant that the claimant was entitled to rely upon the statutory exemption in section 7. Since, on the facts found, any hypothetical attempt by the Secretary of State to deport the claimant would be unlawful, that hypothetical action on the part of the Secretary of State would, quite obviously, represent a disproportionate interference with the Article 8 rights of the claimant.

60. Accordingly, although we disagree with the conclusion in paragraph 37 of the judge's decision, that Razgar question (3) would have been answered in the negative, neither that finding nor, more particularly, the finding at paragraph 36 constituted a material error of law. This is for the simple reason that the appeal would be bound to be allowed on the basis that the answer to Razgar question (5) is: no.

61. We are fortified in our approach by the recent judgment of the Court of Appeal in Ahsan and Others v Secretary of State for the Home Department [2017] EWCA Civ 2009. In that case, the Court of Appeal held that, provided certain conditions were satisfied (as to which, see paragraph 116 of the judgment), a human rights appeal brought in the United Kingdom would normally entitle the Upper Tribunal to refuse permission to apply for judicial review in a TOEIC case, where the Secretary of State had decided that a person used deception in seeking (whether successfully or not) leave to remain in the United Kingdom, as a result of having a proxy sit a TOEIC test of proficiency in written and spoken English.

62. In so concluding, the Court was faced with the submission from Mr Malik and Mr Biggs, counsel on behalf of two of the appellants, that a human rights appeal was different from an appeal against a decision to remove under section 10 of the Immigration and Asylum Act 1999 (as it was before amendment by the 2014 Act):-

> "112. Mr Malik and Mr Biggs took a more radical position. They focused on the fact that any in-country appeal under the post-October 2014 regime afforded by following Ms Giovannetti's route would, necessarily, not be an appeal against the section 10 decision itself but only against the refusal of the human rights claim, which is a different decision. Such an appeal could not be an adequate alternative remedy to the quashing of the section 10 notice by way of judicial review. There were two strands to their submissions in this regard.
>
> 113. First, Mr Biggs in particular submitted that persons against whom a finding of deception was made by the Secretary of State were entitled as a matter of justice to a judicial decision about whether that finding was justified, both because of its effect on their reputations and because of its specific consequences for future applications for leave to enter: see paras. 20-21 above. A human rights appeal would not necessarily achieve that outcome. It is true that if (a) the tribunal accepted that the appellant's human rights were engaged by their proposed

removal and (b) the only justification advanced for the removal were that they had used deception, then that issue would have to be determined. But one or other of those conditions might be absent. As to (a), not every person against whom a decision based on deception is made may have established a significant private or family life in this country. As to (b), the proposed removal might be justified on other grounds (as in fact the Secretary of State was arguing in Mr Ahsan's case – see para. 150 below)."

63. At paragraph 116, the Court set out the conditions which needed to be satisfied, if a human rights appeal could, as a general matter, be said to be a suitable alternative remedy to judicial review. The first of the conditions was:-

> "(A) It must be clear that on such an appeal the FtT will determine whether the appellant used deception as alleged in the section 10 notice."

64. The court explained the ambit of condition (A) as follows:-

> "117. As for (A), if in a case of this kind permission were given to apply for judicial review of the section 10 decision, the applicant would obtain a judicial determination of whether he or she did or did not cheat in their TOEIC test, since that is a matter of precedent fact on which the lawfulness of the decision depends. I regard the right to such a determination as a matter of real value because of the potentially grave other consequences of an official finding of that character, as identified at paras. 20-21 above, even where (untypically) it is not, or no longer, central to any removal decision. However an appellant would *prima facie* also obtain such a determination in a human rights appeal. The tribunal would of course have to decide the deception issue for itself rather than simply review the Secretary of State's finding on rationality grounds, and the appeal would to that extent be an appropriate alternative. But if there is any risk that the appeal will be determined on a basis which does not require such a determination, e.g. for the reasons suggested by Mr Biggs at para. 113 above, that will not be the case.
>
> 118. I should say, for the avoidance of doubt, that the reasoning in the previous paragraph does not mean that in every case where a finding of deception is made the subject of that finding is entitled to a judicial determination of the truth of the allegation. Whether it does so will depend on the legal context in which the question arises, including whether it is material to a human rights claim. That there are cases where only a rationality review is available is illustrated by *Giri* (see para. 43 above). Ms Giovannetti was asked by the Court whether an appellant was entitled to pursue a challenge to a deception finding in its own right, irrespective of its impact on the question of leave to remain or potential removal. She said that in principle they would be, but she submitted, relying on *Giri*, that such a challenge could only be on *Wednesbury* grounds.
>
> 119. I turn to condition (B). Mr Biggs must be right that where the FTT on a human rights appeal finds that the appellant did not cheat, that will not formally lead to the reversal of the section 10 decision: that is a different and prior decision which will not as such be the subject of the appeal. In contrast, a successful judicial review challenge would lead to the section 10 decision being quashed. But I would not regard that difference as necessarily conclusive. This is an area where we should be concerned with substance rather than form. I would regard the crucial question as being whether the fact that the section 10 decision remained

> formally in place – so that leave to remain was still formally "invalidated" (see section 10 (8)) – would leave an appellant worse off as a matter of substance than if the decision had been quashed. Unfortunately this aspect was not explored in the oral submissions as fully as it might have been, no doubt as a result of the late emergence of the human rights claim issue; and the guidance I can give must be rather tentative."

65. For present purposes, two points emerged from the judgment in Ahsan. First, the Court recognised that a human rights appeal can provide a suitable forum for the adjudication of a factual matter (there, deception) which, if decided in favour of the appellant, will necessitate the finding that an appellant's Article 8 rights would be violated by hypothetical removal.

66. So far as this first point is concerned, there is plainly a parallel with the present case. Here, the judicial determination of the section 7 issue informed the outcome of the human rights appeal, via the application of the Razgar questions.

67. Secondly, at paragraph 117, the Court acknowledged the point made by Mr Biggs, as recorded at its paragraph 113(a), which was that if Article 8(1) is not engaged – in other words, if a negative answer is given to either of Razgar questions (1) and (2) – then a human rights appeal will not provide a judicial determination of what may be an important aspect of a person's complaint against a decision of the Secretary of State, such as whether that person had employed deception in his or her dealings with the Secretary of State.

68. That conclusion must, with respect, be correct. The basic limitation of a human rights appeal is that it can be determined only through the provisions of the ECHR; usually Article 8. A person whose human rights claim turns on Article 8 will not be able to advance any criticism of the Secretary of State's decision-making under the Immigration Acts, including the immigration rules, unless that person's circumstances are such as to engage Article 8(2).

69. Although section 85 of the 2002 Act makes provision for certain matters to be considered on an appeal under section 82(1)(b), we do not see how section 85 can expand the scope of a human rights appeal of the kind with which we are concerned, so as to require the separate judicial adjudication – outside section 6 of the 1998 Act – of matters such as whether the claimant had or had not, breached the immigration rules. On the contrary, the wording of section 85(1) makes it clear that the appeal can include only "an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1)", which is limited to refusal of a protection claim or of a human rights claim and revocation of protection status. Likewise, section 85(2), which concerns section 120 statements, is tied to the grounds of appeal under section 84.

70. Section 85(4) permits the Tribunal to consider "any matter which it thinks is relevant to the substance of the decision". In a human rights appeal, therefore, a matter will be relevant if and only if it goes to the question of whether the decision is unlawful under section 6 of the 1998 Act.

71. In our view, therefore, Ahsan underscores the concern we have with paragraphs 21 and 23 of Greenwood (No. 2). Insofar as those paragraphs suggest that judicial fact-finders can treat human rights appeals as vehicles for deciding freestanding challenges to decisions of the Secretary of State under the Immigration Acts, they are not to be followed.

Decision

72. The decision of the First-tier Tribunal does not contain a material error of law. We decline to set that decision aside.

73. The Secretary of State's appeal is, accordingly, dismissed.

Signed

Date: 1 February 2018

The Hon. Mr Justice Lane
President