Upper Tribunal
(Immigration and Asylum Chamber)

EP (Albania) & Ors (rule 34 decisions; setting aside) [2021] UKUT 00233 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 10-11 June and 29 June 2021

.....

Before

MR JUSTICE SWIFT

UPPER TRIBUNAL JUDGE BLUNDELL

Between

(1) EP (ALBANIA)

(2) MOHAMMED KARIM CHOWDHURY

(3) FMR (IRAQ)

(4) IQ (PALESTINE)

(5) CEE (NIGERIA)

(6) SR (JAMAICA)

(7) TO & BO (NIGERIA)

(8) GS (INDIA)

(9) OLAJIDE JAMES OLATUNDE

(10) RAMANATHAN ANNES

(11) GOLAM KIBREA

(12) RF (GHANA)

(13) RSS (IRAQ)

(14) WAJID HUSSAIN

(15) MORENIKE TOLULOPE ONAYEMI

(16) SS, AS & SS (IRAN)

(17) DANYAL JANNAT

(18) MB (ERITREA)

Applicants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

1. The Upper Tribunal considered applications under rule 43 made consequent on the judgment in R (JCWI) v President of UT (IAC) [2020] EWHC 3103 (Admin) ("the JCWI judgment") which had concluded that guidance set out in a Presidential Guidance Note dated 23 March 2020 on the determination of error of law appeals without a hearing was unlawful.

2. A rule 43 application can be made notwithstanding that an appeal has been retained for remaking in the Upper Tribunal but has not yet been remade. The fact that an application for permission to appeal has been made and/or determined, whether by the Upper Tribunal or the Court of Appeal does not give rise to any jurisdictional bar to a rule 43 application.

3. Subject to any matters arising from the circumstances of a particular case, an Upper Tribunal Judge may determine an application under rule 43 to set aside her own decision without offending the rule against apparent bias.

4. The Upper Tribunal rejected the submission that the consequence of the JCWI judgment was that every rule 34 decision to proceed without a hearing taken following the issue of the Presidential Guidance Note amounted to a procedural irregularity. A decision made under rule 34 to determine an error of law appeal without a hearing would amount to a procedural irregularity for the purposes of rule 43 if the rule 34 decision rested on an error of law. Whether or not a relevant procedural irregularity occurred must depend on scrutiny of each rule 34 decision, and the reasons given for it. The question is whether the decision that it would be fair to determine the appeal in issue without a hearing was wrong in law.

5. The Upper Tribunal gave guidance on matters likely to be relevant or irrelevant to the decision on any rule 43 application made consequent on the JCWI judgment.

6. Where a procedural irregularity is established, it is necessary, pursuant to rule 43, to consider whether the interests of justice require the decision to be set aside. In cases such as the present ones where the conclusion is that the rule 34 decision rested on an error of law, the interests of justice will require that the error of law decision be set aside save where it is beyond argument that the outcome would be the same if the error of law appeal were to be reheard.

Representation :

For the Applicants:

(1) Lawrence Youssefian, instructed by Prime Solicitors

(2) Lawrence Youssefian, instructed by Hubers Law

(3) Rory O'Ryan, instructed by Barnes, Harrild & Dyer Solicitors

(4) Tassadat Hussain, instructed by Halliday Reeves Solicitors

(5) Chowdhury Sultan, instructed by Quintessence Solicitors

(6) Emma Rutherford, instructed by TRP Solicitors

(7) Rajiv Sharva, instructed by A Seelhoff Solicitors

(8) Emma Rutherford, instructed by Cartwright King Solicitors

(9) Pierre Georget, instructed by Perera & Co Solicitors

(10) Frances Allen, instructed by Paul John & Co Solicitors

(11) Chowdhury Sultan, instructed by Wildan Legal Solicitors

(12) Charlotte Kilroy QC and Alasdair Mackenzie, instructed by the Joint Council for the Welfare of Immigrants

(13) Amarjit Seehra, instructed by Barnes, Harrild & Dyer Solicitors

(14) Glen Hodgetts, instructed by Clyde Solicitors (written submissions only)

(15) Charlotte Kilroy QC and Alasdair Mackenzie, instructed by the Joint Council for the Welfare of Immigrants

(16) Lawrence Youssefian, instructed by Simman Solicitors

(17) Alasdair Henderson, instructed by Fadiga & Co Solicitors

(18) Tassadat Hussain, instructed by Fountain Solicitors (Walsall)

For the Respondent: Peter Deller, Senior Presenting Officer

DECISION AND REASONS

A. Introduction

1.
This is the decision of both members of the Tribunal. On 20 November 2020 Mr Justice Fordham handed down his judgment in JCWI v President Upper Tribunal (Immigration and Asylum Chamber) [2020] EWHC 3103 (Admin) ([2021] PTSR 800, "the JCWI case"). The judgment concerned a challenge to the legality of a Presidential Guidance Note dated 23 March 2020 ("the Guidance Note") issued by Mr Justice Lane, President of the Upper Tribunal Immigration and Asylum Chamber ("UTIAC"). The Guidance Note took its lead from a Practice Direction issued by Sir Ernest Ryder, then Senior President of Tribunals, on 19 March 2020 (the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal – "the Practice Direction"). Both the Practice Direction and the Guidance Note were issued in the face of the first wave of the Covid-19 pandemic: on 16 March 2020 the Secretary of State for Health and Social Care had stated in the House of Commons that all unnecessary social contact should cease; on 23 March 2020 the Prime Minister had made a public address instructing the public to stay at home; on 25 March 2020 section 55 of the Coronavirus Act 2020 came into force making provision for court and tribunal hearings to be conducted remotely by video; on 26 March 2020 the Health Protection (Coronavirus, Restrictions) England Regulations 2020 came into force – the Regulations that gave legal force to the Prime Minister's "stay at home" instruction.

2.
Paragraph 4 of the Practice Direction stated:

"Where a Chamber's procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties' ECHR rights and the Chamber's procedure rules about notice and consent."

3.
The Guidance Note was issued "pursuant to the Practice Direction" and was intended to remain in force only so long as the Practice Direction: see paragraph 2. It set out a narrative that explained how appeals to UTIAC from the First-tier Tribunal (Immigration and Asylum Chamber), brought pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") could be decided

without a hearing, using the power at rule 34 of the Tribunal Procedure (Upper Tribunal) Rules ("the Upper Tribunal Rules"). By section 12 of the 2007 Act an appeal lies from the First-tier Tribunal to the Upper Tribunal but only if the decision of the First-tier Tribunal was wrong in law; these appeals are commonly referred to as "error of law" hearings or appeals. If the error of law appeal succeeds, the Upper Tribunal may then either send the matter back to the First-tier Tribunal to be decided again ("remitted hearing") or retain the matter and re-make the original decision itself ("retained hearing"). The Guidance Note said very little about how remitted or retained hearings should be conducted, and nothing that is material for our purposes.

4.
The challenge to the Guidance Note before Fordham J focused on paragraphs 9 to 17 of the Note. (The JCWI case as originally pleaded, also included a challenge to the Practice Direction, but that challenge was dismissed at the permission stage.) Fordham J concluded that paragraphs 9 – 17 of the Guidance Note were unlawful. This conclusion rested on his application of the principle referred to in R(Letts) v Lord Chancellor [2015] 1 WLR 4497. He concluded that the content of the Guidance Note was materially in error on a matter of law in that it conveyed what he termed an "overall paper norm" meaning that it promoted the use of no-hearing determinations as the usual or general way in which error of law appeals should be decided without reference to the provisos at paragraph 4 of the Practice Direction – i.e., the references to the overriding objective (rule 2 of the Upper Tribunal Rules) and fair hearing rights arising at common law or under the ECHR.

5.
The Order made by Fordham J consequent on his judgment in JCWI , declared that paragraphs 9 - 17 of the Guidance Note were unlawful [1] . The Order also recorded an undertaking given by the President to use reasonable endeavours to bring the judgment to the attention of claimants in cases that had been determined without a hearing and in which the Home Secretary had succeeded. That undertaking is, at least in part, the cause of the hearing before us. Following publication of the judgment in the JCWI case, the Upper Tribunal contacted some 285 claimants to bring Fordham J's judgment to their attention. Some 80 applications under rule 43 of the Upper Tribunal Rules have been received by UTIAC from parties who lost appeals that were determined without a hearing. Whilst such applications would ordinarily be considered on the papers, we have heard 18 such applications with the intention both of determining each rule 43 application and deciding various issues common to these applications and which are likely to inform the outcome in other rule 43 applications which, for now, have been stayed.

6.
The applications were initially due to be heard on 10-11 June 2021, at which time social distancing and capacity constraints were in operation in hearing rooms at Field House. For that reason, half of the cases were listed to be heard on 10 June 2021 with the other half listed to be heard on 11 June 2021. The intention was that general submissions on the law would be made by Ms Kilroy QC on 10 June 2021 and that each of the representatives would then have an opportunity to make any additional submissions on the law, followed by the submissions which were specific to their individual cases. Mr Deller, the Senior Home Office Presenting Officer instructed by the Secretary of State for the purposes of these applications was then to respond, and the rule 43 applicants would then have the opportunity to reply. Provision was made for the proceedings to be viewed remotely (via Microsoft Teams) so that any advocate or applicant who could not be physically present in the hearing room could nevertheless see and hear all the submissions made.

7.

In the event, Ms Kilroy's general submissions on the law occupied the whole of 10 June 2021; some (but not all) counsel who had been due to make their submissions on that day were unable to return on the following day; and it was necessary to list a third day (29 June 2021) on which we heard their submissions, Mr Deller's response and any replies. Only one objection was raised (by Mr Sharma for TO & BO) to the procedure followed and we should state – as we did on the final day – that we are satisfied that no applicant has been disadvantaged in any way by the course taken.

8.
Each of the rule 43 applications before us seeks to have set aside the Upper Tribunal's substantive decision on the error of law appeal on the basis that that decision was reached by reason of a procedural irregularity. Rule 43 of the Upper Tribunal Rules permits the Tribunal to set aside its own decision which disposes of proceedings and remake the decision if (a) any of four prescribed conditions concerning procedural irregularity is met, and (b) it is in the interests of justice to set the decision aside. In each of the applications before us the procedural irregularity relied on is the Upper Tribunal's decision under rule 34 to determine the appeal on consideration of written representations alone and without a hearing. Our premise when considering each of these applications is that Fordham J's conclusion that the Guidance Note was unlawful was correct. The Secretary of State did not seek to argue otherwise. One issue for us (both generically and on the facts of each application now before us) has been to determine the significance of that conclusion. Fordham J's judgment in the JCWI case does not go further than the conclusion that part of the Guidance Note was unlawful; none of the appeals in which rule 43 applications have now been made was before Fordham J; and he reached no conclusion in his judgment as to whether in any specific appeal, the decision under rule 34 to proceed without a hearing was lawful.

B. Relevant Provisions

9.
The Guidance Note was directed to the application of rule 34(1) – (2) of the Upper Tribunal Rules, which is as follows:

"34. — Decision with or without a hearing

(1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.

(2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing."

10.
The material part of the Guidance Note, paragraphs 9 to 17, said this (footnotes omitted):

" **Making Certain Appeal Decisions Without A Hearing**

9. Rule 34 gives the UTIAC power to make decisions in appeals without a hearing. Provided it has regard to any view of a party or parties, the UTIAC may do so without the parties' consent. Paragraph 4 of the Practice Direction provides that, during the pandemic, decisions should usually be made in this way.

10. In view of this, a UTIAC judge will examine on the papers, any case where permission has been granted to appeal against a decision of the First-tier Tribunal, and where a hearing has not yet taken place in UTIAC. This will happen, irrespective of whether an adjournment of the hearing has been sought.

11. The judge will consider whether, in all the circumstances known to the judge, his or her provisional view is that it would be appropriate for UTIAC to decide the following questions without a hearing:

(a) whether the making of the First-tier Tribunal's decision involved the making of an error on a point of law; and, if so

(b) whether the First-tier Tribunal's decision should be set aside.

12. Where the judge reaches that provisional view, he or she will give directions to the parties, including a direction to the party who has been given permission to appeal to make further submissions on the error of law and set aside issues; a direction for the other party to file and serve any submissions in response; and (where there is such a response), directions to the appellant to file and serve a reply.

13. The process just described will include a direction to enable the parties, within a stated time, to express their respective views, if any, on whether there should be a hearing to decide the questions in paragraph 11(a) and (b) above, giving reasons for any such views. The judge will have regard to any such views, pursuant to rule 34(2).

14. In formulating the process, the UTIAC is drawing on its expertise since 2010 in making error of law decisions and decisions on whether, in the light of finding an error of law, the First-tier Tribunal's decision should be set aside. It is unusual for the questions in paragraph 11(a) and (b) above to require oral evidence and/or findings of fact by UTIAC; but, if that is the position, the judge may decide a hearing is necessary. The presence of particularly complex or novel/important issues of law may also be such as to necessitate a hearing.

15. The judge can also be expected to have regard to whether a party is unrepresented, in deciding whether a hearing is necessary to decide the questions in paragraph 11(a) and (b). It is important to appreciate that the fact a party is unrepresented will not necessarily lead the judge to conclude a hearing is necessary. On the contrary, a person with no or limited English language ability may find it easier to make their submissions in writing, with the assistance of a relative, friend or other third party, rather than to address the UTIAC orally, through an interpreter, on what are legal issues. Here, as elsewhere, the judge will have regard to all relevant circumstances.

16. In deciding whether it is necessary to hold a hearing, the judge can be expected to have regard to paragraph 4 of the Practice Direction and rule 2 of the UT Rules. The fact that the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing to decide the relevant questions. Almost all appeals in the immigration jurisdiction are important to the individuals affected; and to the Secretary of State, in the discharge of her statutory responsibilities. In particular, human rights and protection appeals necessarily involve the prospect of an individual being removed from the United Kingdom.

17. It is important to emphasise the limited scope of the process described in this Part of the Guidance. It is confined to whether the First-tier Tribunal's decision should stand. If the decision reached is that the First-tier Tribunal's decision should be set aside, the UTIAC will then need to determine whether to remit the case to the First-tier Tribunal or re-make the decision. In reaching its determination on that issue, the UTIAC will require the parties' submissions, if it does not already have them. If the outcome is that the appeal should be re-made in the UTIAC, then, again, the parties can expect further directions. In the event that oral evidence needs to be given and findings of fact

made, in order to re-make, the UTIAC is more likely to proceed by way of a hearing; but where some or all of this evidence is uncontroversial, UT rule 15(1)(e), permitting evidence to be given by witness statement, may be of assistance."

Fordham J's criticisms of the Guidance Note were directed to the passage at paragraph 9 and from paragraphs 14 – 16 (see his judgment at paragraphs 4.5 and 4.9 – 4.13).

11.
Paragraphs 10 to 13 of the Guidance Note described a process intended to ensure that the requirement in rule 34(2) was met. As Fordham J noted, these paragraphs in the Guidance Note led each Tribunal to give directions to the parties to make representations before any rule 34 decision was made. At paragraph 4.17 he referred to one such set of directions, and commented as follows:

"4.17 I was shown a template Standard Directions document which falls into that category: it was a document provided to UTIAC Judges after the PGN was issued. It states:

"1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules [fn. The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4)], I have reached the provisional view that it would in this case be appropriate to determine the following questions without a hearing: (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so (b) whether that decision should be set aside. 2. I therefore make the following DIRECTIONS …"

This document is consistent with the message that there was to be an 'overall paper norm'. But I do not accept that this document materially assists the exercise in interpretation of the PGN. It is the PGN which communicates the 'guidance'. These Standard Directions could have been issued alongside guidance which communicated an overall paper norm, or an overall hearing norm, or no overall norm. Ms Kilroy QC, rightly, did not place any real weight on the Standard Directions ."

What this makes clear is that Fordham J did not consider these procedural matters said anything one way or the other as to the merits of the substantive provisions in the Guidance Note. In submissions to us, various of the applicants did maintain that the directions given were material when deciding whether the relevant rule 34 decision had given rise to a procedural irregularity for rule 43 purposes.

12.
As we have already said, the applications before us were advanced primarily under rule 43 of the Upper Tribunal Rules – i.e., as applications to set aside the decisions in error of law appeals determined without a hearing in exercise of the power under rule 34. At the hearing, some of the applicants suggested other provisions in the Rules and in the 2007 Act that might be used to address any error arising from the rule 34 decisions. For the reasons set out below we do not consider that resort to any power other than rule 43 is either necessary or appropriate. That being so, in this part of the judgment we need only to set out the material part of rule 43.

" **43. — Setting aside a decision which disposes of proceedings**

(1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—

(a) the Upper Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are—

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;

(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or

(d) there has been some other procedural irregularity in the proceedings.

(3) Except where paragraph (4) applies, a party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Upper Tribunal so that it is received no later than 1 month after the date on which the Upper Tribunal sent notice of the decision to the party.

(4) In an asylum case or an immigration case, the written application referred to in paragraph (3) must be sent or delivered so that it is received by the Upper Tribunal—

(a) where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application is made, no later than twelve days after the date on which the Upper Tribunal or, as the case may be in an asylum case, the Secretary of State for the Home Department, sent notice of the decision to the party making the application; or

(b) where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application is made, no later than thirty-eight days after the date on which the Upper Tribunal sent notice of the decision to the party making the application.

(5) Where a notice of decision is sent electronically or delivered personally, the time limits in paragraph (4) are ten working days."

13.
Thus, the Tribunal may set aside its own decision if any one of the specific conditions is met and a decision to set aside is in the interests of justice. In the applications before us the relevant condition relied on has been the one at rule 43(1)(d), namely that the rule 34 decision was "some other procedural irregularity" occurring during the error of law appeal.

C. Decision: generic issues

(1) The Tribunal's power to set aside its own decisions

14.
In the course of submissions an issue arose as to whether any limitation within rule 43 might mean that some of the applications before us fell outside the scope of the rule.

15.
The eighteen cases before us had been selected to ensure we could explore any such jurisdictional issues. In cases (1) and (2), the Upper Tribunal had allowed an appeal by the Secretary of State and had remitted the appeals to the First-tier Tribunal. In cases (3) – (6), the Upper Tribunal had allowed an appeal by the Secretary of State and had retained the appeal for remaking. In cases (7) – (11), the Upper Tribunal had dismissed an appeal brought by the applicant and there had been no application

for permission to appeal to the relevant appellate court. In cases (12) – (14), the Upper Tribunal had dismissed appeals brought by the applicant and an application for permission to appeal was pending against that decision. In cases (15) – (16), the applicant's appeals had been dismissed by the Upper Tribunal and applications for permission to appeal to the relevant appellate court had been refused. Amongst these classes of case, there was scope for concern that rule 43 could not apply, whether because the Upper Tribunal was no longer seized of the appeal or because its determination of the appeal was not complete.

16.
In the event, it was largely uncontroversial between the parties that the Upper Tribunal had power to set aside its own decision regardless of the stage the statutory appeal had reached. There can be no dispute that the Upper Tribunal can apply rule 43 to a decision in which it has set aside the decision of the First-tier Tribunal and remitted the appeal to that Tribunal for redetermination. Nor can it be controversial that rule 43 is available when an appeal has been dismissed and there has been either no application for permission to appeal or no decision on such an application. It is in the other classes of case in which it might be said that rule 43 cannot apply.

17.
The first class of applications it was said might fall outside the scope of a rule 43 application were those where the Upper Tribunal had allowed the error of law appeal but decided (as permitted by section 12(2)(b)(ii) of the 2007 Act) to remake the decision itself rather than remit the matter to the First-tier Tribunal for re-determination. This submission rested on case law which had considered the point at which a right of appeal arises from the Upper Tribunal to the Court of Appeal. In Terzaghi v Secretary of State for the Home Department [2019] EWCA Civ 2017, the Court of Appeal considered a submission to the effect that an appeal against the Upper Tribunal's decision on an error of law appeal had been brought out of time because before appealing, the appellant had waited for the Upper Tribunal to complete its further consideration of the case remaking the decision of the First-tier Tribunal. The Court of Appeal rejected this submission. It noted that by reason of section 13(1) of the 2007 Act and article 3(m) of the Appeals (Excluded Decisions) Order 2009, no right of appeal to the Court of Appeal arose in respect of any "procedural, ancillary or preliminary decision…" . It then concluded by reference to earlier case law of the Upper Tribunal, that where following an error or law determination, the Upper Tribunal retained further consideration of the appeal to itself to remake the First-tier Tribunal's decision, the error of law decision was an "intermediate" decision which did not become an appealable decision until the Upper Tribunal had re-made the decision of the First-tier Tribunal and finally disposed of the appeal.

18.
Based on this conclusion, the submission made to us was that where following the error of law decision the Upper Tribunal retained re-making of the First-tier Tribunal's decision to itself, there was no "decision which disposes of proceedings or part of such a decision" that could be the subject of rule 43 application. We do not agree with this submission. At rule 1 of the Upper Tribunal Rules "disposal of proceedings" is defined as including "… unless indicated otherwise, disposing of a part of the proceedings". We see no reason why rule 43 should not be read by reference to this definition. Thus, a rule 43 application can be made in respect of a decision which disposes of part of the proceedings.

19.
One possible reading of the judgment of the Court of Appeal in Terzaghi is that where the Upper Tribunal retains a final decision to itself the proceedings are not complete until the Tribunal has

remade the decision originally taken by the First-tier Tribunal: until that time, to the use the language of rule 43, there is no “decision which disposes of proceedings”. However, even on that premise, reading rule 43 together with the definition at rule 1 permits the power to set aside to be applied to a decision that disposes of part of proceedings. We can see no reason why the error of law decision cannot be regarded as a decision that disposes of part of proceedings. Applying rule 43 in this way will not give rise to any difficulty: the decision to which each rule 43 application is directed is logically and practically distinct from the further decision that the Upper Tribunal is yet to take under section 12(2)(b)(ii). Nor does this approach to rule 43 present procedural or practical difficulty. One consideration that lay behind the Court of Appeal’s reasoning in Terzaghi was that appeal rights should not be balkanised since that risked undue complexity and increased expense and unnecessary appeal proceedings (see the judgment of Dingemans LJ at paragraph 42). The position is not the same in the context of rule 43. This permits a decision to be set aside if (put very generally) it is consequent on significant procedural error. In that context, the reasons for limiting applications until after the final disposal of the whole proceedings is significantly less compelling. Where the Upper Tribunal, following an error of law hearing, retains to itself the decision on the merits of the immigration proceedings, there is sense in treating each decision as a distinct part of the proceedings; permitting the application of rule 43 to each part does not give rise to the potential difficulties that informed the conclusion reached by the Court of Appeal in Terzaghi .

20.
Mr Deller submitted (paragraph 7 of his skeleton argument) that a decision to find an error of law and to retain the appeal in the Upper Tribunal for remaking is an excluded decision which is not ‘susceptible’ to rule 43. It is undoubtedly correct that such a decision is an excluded decision against which an appeal cannot be brought. So much is clear from Terzaghi v SSHD and its endorsement of VOM (Error of law - when appealable) Nigeria [2016] UKUT 410 (IAC). The fact that a decision of that type is an excluded decision also precludes the possibility of it being reviewed under section 10 of the 2007 Act. But the Upper Tribunal’s jurisdiction to set aside a decision under rule 43 is not conferred by section 10 of the 2007 Act. Rule 43 was made in the exercise of specific powers derived from section 22 of the 2007 Act and set out in paragraph 15 of Schedule 5 to the 2007 Act, and the power conferred is available whether or not the decision is an excluded decision which may not be the subject of an appeal or a review.

21.
For these reasons we conclude that rule 43 applications directed to the Upper Tribunal’s error of law decision are available in circumstances where the Upper Tribunal has retained determination of the merits of the immigration proceedings to itself but has not yet completed the retained hearing.

22.
The other class of case where it was thought a rule 43 application might not be possible was where an application for permission to appeal to the Court of Appeal had been made under section 13 of the 2007 Act, either to the Upper Tribunal or where such an application had been made and refused, directly to the Court of Appeal. The premise for this submission was that by the time of the Upper Tribunal’s refusal of permission to appeal or of the application for permission to appeal made to the Court of Appeal, the Upper Tribunal would be functus officio with the consequence that it lacked jurisdiction to entertain a rule 43 application.

23.
We do not consider that either refusal by the Upper Tribunal of an application for permission to appeal under section 13 of the 2007 Act or the filing of an application for permission to appeal with

the Court of Appeal prevents resort to rule 43. Where, as here, the Tribunal's jurisdiction is defined by statute, applying the label functus officio is no more than a conclusion on construction of the relevant statutory provisions that identify the scope and extent of the Tribunal's jurisdiction. For present purposes, the question is whether as a matter of construction, any limits have been placed on the power under rule 43 of the Upper Tribunal Rules for the Upper Tribunal to set aside its decisions, by reference to whether an application for permission to appeal to Court of Appeal has been made.

24.
There is nothing directly on point in the provisions of the 2007 Act. The Upper Tribunal is established by section 3 of the 2007 Act to exercise such functions as are conferred on it under that Act or any other statute. This of course, includes hearing of appeals from the First-tier Tribunal made pursuant to section 11 of the 2007 Act. We cannot see anything in section 11 (or in section 13, which provides for the right of appeal from the Upper Tribunal to the Court of Appeal) that says anything material to the availability of the rule 43 power. As to the Upper Tribunal Rules, Part 7 contains a range of provisions which permit the Tribunal to take further action in respect of its own decisions. There is a power to correct minor errors (rule 42); the rule 43 power to set aside decisions; the power under rule 44 to entertain and determine applications for permission to appeal; the power under rule 46 to review a decision if an application for permission to appeal has been made to the Upper Tribunal in respect of that decision; and finally, rule 48 which permits the Tribunal to treat an application made under any of these powers as an application to exercise any other of the Part 7 powers. Putting rule 43 itself to one side, we see nothing in any of the other rules that tends to limit when a rule 43 application can be made. For example, there is no suggestion that making an application to the Upper Tribunal for permission to appeal to the Court of Appeal excludes the possibility of an application under rule 43. Rule 43 does contain specific time limits within which applications to set aside must be made: see rule 43(3) to (5). However, those time limits apply subject to the Upper Tribunal's power under rule 5(3)(a) to extend time.

25.
Drawing all this together, we do not consider there is any jurisdictional cut-off point, beyond which a rule 43 application may not be made. There is a requirement to make any rule 43 application within the time permitted by rule 43(3) – (5); but that time limit can be extended if the Upper Tribunal considers it appropriate. Thus while there may be a practical restriction on how long after a decision an application under rule 43 might successfully be raised (because good cause would always be needed before any extension of time would be granted), there is no relevant jurisdictional cut-off point; an application under rule 43 can be made even if an application for permission to appeal to the Court of Appeal has been made to the Upper Tribunal, and even if that application for permission to appeal has been determined. Nor, if the application for permission to appeal is refused by the Upper Tribunal, is there any jurisdictional bar to a rule 43 application if the rule 43 applicant then applies directly to the Court of Appeal for permission to appeal. If such an application for permission to appeal has been made, a subsequent rule 43 application might encounter difficulties, for example on grounds of lateness, or perhaps even on the ground that pursuing a rule 43 application in parallel with the application to the Court of Appeal might be some form of abuse of process. But the success or failure of any such objection to a rule 43 application would depend on the circumstances in which the application had been made, not any jurisdictional barrier.

26.
In these circumstances, we are satisfied that we can determine each of the rule 43 applications before us on its merits. That being so, we need not say much about the other provisions to which we were

referred as possible bases to reconsider the rule 34 decision if a rule 43 application was not available. We were referred to section 10 and section 22 of the 2007 Act, and to paragraph 15 of Schedule 5 to the Act. None of these provisions provides any basis for entertaining complaints about Tribunal decisions based on procedural error that goes beyond the scope of rule 43.

27.
Section 22 is the general enabling power that includes power to make procedural rules for proceedings in the Upper Tribunal. We cannot see that resort to it, per se , would assist to plug any gap left by the Rules, as made. Section 22 is an enabling provision; litigants gain nothing from its simple existence, only from the product once it has been used. Schedule 5 to the 2007 Act contains various more closely formulated powers to make rules for specific purposes; paragraph 15 is the specific power that lies behind rule 43. Here too, there is nothing to which litigants might have resort save to the extent that the power has been exercised. Section 10 of the 2007 Act contains the Upper Tribunal's power to review its own decisions. It is a provision that is then shaped by rules 46 and 45 of the Upper Tribunal Rules. We do not consider that direct resort to section 10 could provide any basis for the Upper Tribunal to entertain an application to set aside a decision on grounds of procedural error or failure that fell beyond the range of rule 43.

28.
Lastly on this matter, we were referred to section 25 of the 2007 Act. Headed "Supplementary powers of the Upper Tribunal" , section 25 states that in respect of matters specified at section 25(2) the Upper Tribunal "… has in England and Wales … the same powers, rights privileges and authority as the High Court" . The specified matters are: (a) attendance and examination of witnesses; (b) the production and inspection of documents; and (c) all other matters incidental to the Upper Tribunal's functions. Reliance was placed on (c). Had we concluded that any of the rule 43 applications before us fell outside the scope of rule 43, we doubt that section 25(2)(c) would have helped. We accept that rule 43 identifies one of the functions of the Upper Tribunal. However, we doubt that an application to set aside that for one reason or another falls outside the scope of rule 43, may properly be regarded as a matter "incidental" to the Tribunal's exercise of its rule 43 function.

29.
In this context, incidental is not synonymous with something that is a "near miss" to any of the Upper Tribunal's express functions; rather, it is something sufficiently closely connected to the exercise of an express function, which the Tribunal does for the purpose of exercising that express function. In support of the submission made by reference to section 25 we were referred to the judgments of the Court of Appeal in Forcelux Limited v Binnie [2010] HLR 20, and R(Singh) v Secretary of State for the Home Department [2019] EWCA Civ 1014. In the former case, the Court of Appeal considered the power of the County Court to make a possession order at a hearing where the tenant was not present. When making the order, at a hearing that took place pursuant to the provisions of CPR 55.8, the District Judge had relied on the power at CPR 39.3 to proceed with a trial in the absence of a party. The Court of Appeal decided that a hearing under CPR 55.8 was not a trial for the purposes of CPR 39.3: see per Warren J at paragraph 36 to paragraph 49. The court concluded that the District Judge's decision to go ahead in the absence of the defendant had been permissible as a step taken "for the purpose of managing the case and furthering the overriding objective" as permitted by CPR 3.1(2)(m): see per Warren J at paragraph 56.

30.
The submission made to us was to the effect that by reason of section 25(2)(c) of the 2007 Act, the power at CPR 3.1(2)(m) or a power equivalent to it is available to the Upper Tribunal. We do not

consider this submission accurately captures the meaning and effect of section 25(2)(c). Section 25(2)(c) is undoubtedly broadly framed. However, it does not simply give the Upper Tribunal all the powers etc. of the High Court. Rather it permits such power to the Upper Tribunal only to the extent that resort to it is necessary to do something incidental to any one or more of the Upper Tribunal's own functions. Thus, in this instance, the issue is whether determining an application that would otherwise fall outside the scope of rule 43 can be a matter incidental to the rule 43 function. For the reasons we have already given, we do not think that it can.

31.
The other case cited – Singh – is entirely consistent with this conclusion. In Singh the questions concerned the procedures available to the Upper Tribunal under Part 4 of the Upper Tribunal Rules for the purposes of deciding applications for judicial review. The specific issue was whether the Upper Tribunal had the power to set aside a decision granting permission to apply for judicial review which had been taken at a hearing held pursuant to rule 30 on the ground that one of the parties had not attended the hearing. The Rules made no provision one way or the other. (Rule 43 has no application to judicial review claims before the Upper Tribunal.) The Court of Appeal noted that had the application for judicial review been in the High Court a relevant power to set aside would have been available under CPR 23.11(2). It then concluded that by reason of section 25(2)(c) of the 2007 Act, the Upper Tribunal should be regarded as having the same power because it was a power incidental to the Tribunal's function of determining applications for judicial review. That application of section 25(2)(c) was, with respect, both entirely orthodox and some way distant from the section 25 submission made to us in these applications.

(2) Rule 34 Decisions and rule 43 "procedural irregularity"

32.
Rule 34(1) of the Upper Tribunal Rules permits the Upper Tribunal to "make any decision without a hearing" . Before reaching any such decision the Upper Tribunal "must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter and the form of any such hearing" (rule 34(2)). The first question for us is whether, if a decision under rule 34 to proceed without a hearing is wrongly taken, that decision is capable of being the subject of a rule 43 application. Putting the matter in the language of rule 43, can a decision under rule 34 to proceed without a hearing be a "procedural irregularity"? We consider that such a decision is capable of giving rise to a relevant procedural irregularity for rule 43 purposes, but only if the rule 34 decision was in error of law in the sense contemplated in SH(Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284 (i.e., that the consequence of the decision to proceed without a hearing was unlawful as a breach of the requirement to act fairly when determining the error of law appeal).

33.
We accept that no similar requirement will attach when the rule 43 application is made based on any of the conditions at rule 43(2)(a) to (c). Where those provisions are relied on, the rule 43 Tribunal need only be satisfied that the relevant factual condition is met, and when it is so satisfied it moves to consider whether setting the decision aside for that reason is in the interests of justice. The same approach will also apply on an application made in reliance on rule 43(2)(d) if the irregularity claimed is a factual irregularity. The difference of approach so far as concerns the cases before us, is that the irregularity alleged is that the Tribunal's rule 34 decision was wrong in law (whether because of the Guidance Note or otherwise). Thus, the issue for us in these applications is whether the rule 34 decision rested on some error of legal principle or was one that no Tribunal properly directing itself

on the law could have reached. However, if any of the applicants before us succeeds in demonstrating the rule 34 decision rested on an error of law it is likely to follow directly that it will be in the interests of justice for the rule 34 decision to be set aside. The scope for argument over what the interests of justice require will be much more limited in these applications than, for example, in applications where the initial condition is one of the factual matters listed at any of rule 43(2)(a) – (c). As we see it, the only scenario in which it might not be in the interests of justice to set aside a rule 34 decision that rested on an error of law would be where for some reason or other, it is beyond argument that were the error of law appeal to be reheard the outcome would be the same.

34.
We do not accept the submission – made by reference to authorities including General Medical Council v Spackman [1943] AC 627 and R(Pathan) v Secretary of State for the Home Department [2020] UKSC 41; [2020] 1 WLR 4506 – that the decision must be set aside if there is a procedural irregularity. Rule 43 requires that it must also be in the interests of justice to set the decision aside and those interests are plainly not served by ordering a hearing when the outcome of that hearing would be a certainty. Nothing said in Pathan or any other authority causes us to doubt the correctness of that statement, expressed in John v Rees [1970] Ch 345 and applied in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.

35.
These matters set the approach we shall apply when considering the rule 43 applications before us when they are directed only to the rule 34 decision itself.

36.
There is one further point to make at this stage. A rule 34 decision to decide an error of law appeal without a hearing will not necessarily be a self-contained event. Any decision that an appeal can be determined without a hearing will usually entail directions setting out the steps to be taken in place of the hearing. For example, in each of the applications before us the Tribunal gave directions on the submissions to be filed and then reached its decision taking those submissions into account together with the pleadings already served pursuant to rules 23 to 25 of the Upper Tribunal Rules. Any Tribunal that embarks on a no-hearing determination will need to keep under review whether the directions it has given for the purposes of reaching its determination on the appeal continue to work fairly or whether events require additional steps to be taken to ensure the fairness of the no-hearing determination. Where necessary, the Tribunal must be prepared to act, by way of further directions or otherwise, to ensure a fair process is followed. For example, where one party has raised a point in its written submissions that the other party has not had the opportunity to address and ought as a matter of fairness to have that chance. A failure to give further appropriate directions could itself amount to a “procedural irregularity” for the purposes of rule 43 if the failure went to the fairness of the proceedings.

37.
However, the subsequent event must be one that goes to the fairness of the proceedings. Such errors are distinguishable from one submission made by all advocates for the applicants in the rule 43 applications before us. That submission was to the effect that, looking at the reasons given by the Tribunal for its decision on the error of law appeal (not its decision on the rule 34 issue), there were points that could have been made had there been an oral hearing, which either might or would have meant that the error of law appeal would have been decided differently. Although the outcome of every rule 43 application must depend on its own circumstances, submissions on these lines are unlikely to succeed. This type of submission depends both on speculation and hindsight. The starting

point is the Tribunal's written reasons; the next step is the submission that if the rule 43 applicant (the losing party in the error of law appeal) had realised that a point relied on by the Tribunal would or might be significant (or more significant than anticipated when the skeleton argument was drafted), there was something the applicant could have said on that point, had there been a hearing, which might or would have meant that the error of law appeal would have been decided differently.

38.
We do not consider that a submission along these lines is likely to make good the existence of any procedural irregularity. Whenever a hearing takes place, it is always possible that, in the ebb and flow of the hearing, some point (either not in the skeleton argument at all or, if in the skeleton, not set out prominently) might be made that turns out to be decisive. That is in the nature of a hearing. This point is one that is relevant to the rule 34 decision itself. It will be well-known to any judge who has ever conducted a hearing; and will weigh in the balance against a decision that there should be a no-hearing determination. However, simply being able, after the event, to point to a matter that might have been said, does not of itself point to procedural irregularity for the purposes of a rule 43 application. Whether or not a rule 34 decision amounts to a rule 43 procedural irregularity depends on whether the decision to proceed without a hearing rested on legal error. The submission that starts from the premise that the Tribunal's decision on the appeal should have been different (for example because a matter was overlooked), will not of itself demonstrate that the rule 34 decision was wrong, save for the situation where the difference in outcome is the consequence of procedural error in the course of the no-hearing determination which goes to the fairness of the proceedings. Put another way, an argument that an error of law decision made without a hearing was wrong might form the basis for an appeal, but of itself will say little that is likely to be relevant to whether there was procedural irregularity. The benchmark for a legally permissible rule 34 decision is not that the subsequent decision on the error of law appeal is free from substantive error. It is both speculative and contrary to common experience to contend that a decision on an error of law appeal that follows a hearing will always be error-free. Where applying rule 43 the Tribunal should be astute to ensure that any decision in favour of an applicant rests on genuine procedural irregularity, not simply on its scrutiny of the merits of the decision on the error of law appeal (which if undertaken at all will properly fall within the scope of a review pursuant to rule 45).

(3) The Secretary of State's submission

39.
The Secretary of State's submission as to when the Tribunal should exercise its power to set aside substantive decisions reached following a rule 34 no-hearing determination was set out at paragraphs 5 to 6 of her Skeleton Argument (emphasis in the original):

"5. The Secretary of State considers that the Tribunal would only not exercise that power [to set the decision aside] if the parties are wholly content with the outcome of the rule 34 decision or, exceptionally, if it is clear that a different decision would not have been reached if there had there been an oral hearing. The Secretary of State considers that the latter would be highly unusual given that it would lead to satellite litigation and would be contrary to finality of litigation and the overriding objective.

6. The Secretary of State raises no point about acquiescence by the lack of objection, either explicit or by silence, as the terms of the Administrative Court's decision make it clear that facing an appellant with the presumption that there not be an oral hearing was an unlawful and unnecessary step contrary to the rule of common law fairness and to the overriding objective".

40.
At the outset of the hearing, we informed the parties that the legal basis for this submission was not clear to us. We invited any party wishing to support these submissions to make further submissions accordingly.

41.
Ms Kilroy objected to that course. She submitted that the Secretary of State had effectively conceded that each of the decisions should be set aside. However, there was no such acceptance on the part of the Secretary of State; there was no consent order under rule 39 of the Upper Tribunal Rules. Ms Kilroy also submitted that these were adversarial proceedings and that it was not for the Upper Tribunal to disagree with the stance adopted in the Secretary of State's skeleton argument. We cannot accept that submission either. Proceedings before UTIAC are adversarial but it must be for the Tribunal to decide for itself whether or not to set aside a decision already made by it in an appeal.

42.
Having now considered the matter more fully our view remains that the submission at paragraph 5 of the Secretary of State's skeleton argument is wrong. The premise of the submission is that the Tribunal must, in exercise of its rule 43 power set aside any rule 34 decision to determine an appeal without a hearing unless both: (a) at the time the rule 34 decision was made; and (b) after the event (i.e., in light of the decision on the error of law appeal), both parties agree that the rule 34 decision was correct. This premise does not fit with rule 34, as made. The rule requires the Tribunal to have regard to (and by inference to seek out) the views of the parties. But the rule does not give the parties a veto either at the time the rule 34 power is exercised or later when the Tribunal's substantive decision on the error of law appeal is known.

43.
Even though paragraph 6 of the Secretary of State's written submission claims to be based on conclusions reached by Fordham J in his judgment in the JCWI case, we are unable to find any part of that judgment that corresponds to this proposition. In our view the submission confuses two distinct matters. Although Fordham J concluded that the Guidance Note was unlawful because it established an "overall paper norm" , that conclusion says nothing necessarily determinative of whether a party may consent to a no-hearing determination, or whether if a party either consented or did not object to the Tribunal's proposal that an error of law appeal be determined without a hearing, that consent or lack of objection is relevant to a rule 43 application to set aside the error of law decision. In this regard we note that Fordham J went out of his way to emphasise that the directions given by Tribunals seeking representations from the parties for the purposes of deciding whether to apply rule 34 were not themselves objectionable: see per Fordham J at paragraph 4.17.

44.
All this being so, we do not accept the Secretary of State's submission provides a proper basis on which the rule 43 applications before us can be decided.

(4) The significance of the Guidance Note, per se

45.
Does it necessarily follow from the existence of the Guidance Note that any decision to determine an error of law appeal without a hearing made between 23 March 2020 (when the Guidance Note was issued) and 20 November 2020 (when Fordham J's judgment was handed down) rested on an error of law?

46.
This question is not answered by Fordham J's judgment in the JCWI case. His judgment focused on the objective meaning of paragraphs 9 to 16 of the Guidance Note, and in particular, paragraphs 14 to 16 of that document. He concluded that the Guidance Note established "an overall paper norm" which promoted determination of error of law appeals without a hearing as "usual" and determination of them at a hearing as "exceptional" . The Guidance Note was legally objectional on the Letts principle because it gave advice that was wrong in law and which would tend to encourage unlawful decisions. What was wrong with the Guidance Note was that it did not make sufficiently clear that any decision to determine an error of law appeal without a hearing had to be consistent with principles of fairness. See generally, per Fordham J at paragraphs 2.13, 2.5, and 7.11. In this regard the distinction Fordham J drew between the (unlawful) Guidance Note and the (lawful) Practice Direction is telling. At paragraph 3.7 of his judgment Fordham J said this.

"3.7 … What the [Senior President of Tribunals] did in [the Practice Direction] was to promote paper determination, during the pandemic, wherever it is consistent with the overriding objective, the Human Rights Act 1998 (ECHR rights), basic requirements of common law procedural fairness, the natural justice principle, the open justice principle and the principle of legality. That course promoted the use of a power to decide cases on papers, but only where it was fair to do so. It meant no unfair paper determinations. That was promoting the e ff ective and ongoing operation of the machinery of justice, during an international pandemic, using resources in a proportionate way. It was fully consistent with the statutory duties applicable to the SPT when exercising statutory functions, including the function of making a practice direction. The SPT was communicating a change in practice (a new, contingent norm) in the exercise of an originating function (para 2.4(1) above), not a descriptive one (para 2.4(2) above).

47.
All this helps to identify Fordham J's reasons for concluding the Guidance Note was unlawful. His conclusion, based only on the principle stated in Letts, did not require consideration of whether in any case the existence of the Guidance Note had led to an unlawful exercise of the rule 34 power. Thus, his judgment did not attempt to scrutinise the decision taken in any individual error of law appeal. The conclusion that Fordham J did reach does not prescribe the further conclusion that every exercise of the rule 34 power in favour of a no-hearing determination was unlawful.

48.
This point is underlined by the status of the Guidance Note under the provisions of the 2007 Act. The Act draws a clear distinction between the Practice Directions which may be made either by the Senior President of Tribunals (ordinarily requiring the approval of the Lord Chancellor) or a Chamber President (ordinarily with the approval of both the Senior President of Tribunals and the Lord Chancellor), and guidance such as that in the Guidance Note. The Guidance Note was issued by Lane J in exercise of the power under paragraph 7 of Schedule 4 to the 2007 Act given to Chamber Presidents "… to make arrangements for the issuing of guidance on changes in the law and practise as they relate to the functions allocated to the chamber" . Guidance issued in exercise of this power is no more than that. Chamber Presidents have the power to issue guidance; but when guidance is issued there is no corresponding obligation on Tribunal judges that attaches to it. The judges are not required to follow the guidance; there is nothing in the 2007 Act even requiring regard to be had to such guidance. In law, guidance issued in exercise of the power under paragraph 7 of Schedule 4 has no express status. This is not to detract from a practical reality that guidance issued by a Chamber President will come to the attention of the judges in that chamber, and no doubt will be carefully

considered. But that practice is grounded only in judicial comity. It does not support the conclusion that the existence of the Guidance Note, per se , requires the conclusion that rule 34 decisions were taken unlawfully. Instead, each decision must be assessed on its own terms.

49.
A final point that is said to be relevant to the significance of the simple existence of the Guidance Note, is that after the Guidance Note was issued the proportion of error of law appeals determined without a hearing increased dramatically (see Fordham J in JCWI at paragraphs 4.21 to 4.23). We do not accept this necessarily says anything as to whether any specific decision taken pursuant to rule 34 was lawful or unlawful. That question will not be accurately answered by generalisation, only by consideration of each decision.

(5) The significance of reference (or lack of reference) to the Guidance Note or other matters.

50.
Various submissions were made by the applicants on the significance attaching to reference or lack of reference to specific documents. The point most often made was that if a Tribunal judge's reasons in support of a conclusion to determine an error or law appeal without a hearing referred to the Guidance Note, the judge must be assumed to have followed the Guidance Note, applied Fordham J's "overall paper norm" , failed to attach weight or sufficient weight to general considerations of fairness, and have decided unlawfully to determine the error of law appeal on the basis of written representations rather than at a hearing. Related submissions were made by reference to whether the reasons for one or other decision did or did not make express reference to the Practice Direction, or the overriding objective, or leading authority on the common law duty to act fairly, or some or all the "key themes from the common law principles" listed by Fordham J at Part 6 of his judgment in the JCWI case. (A specific variant of this latter submission was made in the application made by SR (Jamaica) (HU/8693/2017), which could also be applied to all other applications; we address this below at paragraph 83.)

51.
We reject the logic that lies behind these submissions: they either prove too little or prove too much. Determining the legality of a decision under rule 34 to decide an error of law appeal without a hearing requires overall assessment of the reasons given, not an exercise in the nature of playing bingo. Simple reference to the Guidance Note cannot invalidate a rule 34 decision. The error in the Guidance Note identified by Fordham J was that it failed to communicate what he referred to as the proviso to paragraph 4 of the Practice Direction: i.e., the need to consider the overriding objective (rule 2 of the Upper Tribunal Rules) and fairness at common law and under ECHR. Reference to the Guidance Note does not prove such matters have been left out of account. The reasons must be considered in the round. Conversely, reasons for a rule 34 decision that do not refer to the Guidance Note are not, by reason of that alone, impregnable. Any such conclusion would be blinkered to the obvious. Even if in a particular appeal a particular judge does not mention the Guidance Note, it would be entirely unrealistic to assume this meant that judge was unaware of the Guidance Note.

52.
The same general point applies to the submission that a rule 34 decision is wrong in law if the judge has not, each in turn, listed and addressed all the "key themes" set out at Part 6 of Fordham J's judgment in JCWI . As we understand that part of his judgment it was not intended as being some form of rule 34 checklist. Rather it was part of the judge's explanation of why an "overall paper norm" was unlawful on application of the principles stated in Letts . A lawful decision in exercise of rule 34

to determine an error of law appeal without a hearing does not depend on rote consideration of the generic merits of using hearings to decide appeals. Instead, the focus needs to be on whether the appeal in hand can be fairly determined without a hearing.

53.
For these reasons, and for the purposes of the rule 34 applications before us, we do not consider that particular significance attaches in the abstract either to the presence or the absence of reference to the Guidance Note. We reach the same conclusion on an allied submission: that given the existence of the Guidance Note and given also that Upper Tribunal judges must plainly have been aware of it, a rule 34 decision will be unlawful unless the reasons for it expressly disavow the contents of the Guidance Note. Given the status of the Guidance Note (there was no obligation to apply it) and given the principle of judicial independence, the suggestion that disavowal might be required is artificial.

(6) The significance of directions given by the Tribunal: pre-judgment of the rule 34 decision.

54.
Paragraphs 11 – 13 of the Guidance Note set out steps that could be taken to decide whether to determine an error of law appeal without a hearing. First , the Note stated the judge should form a provisional view on whether a no-hearing determination might be appropriate. Second , if the provisional view was that it might, the judge should give directions to the parties. Paragraphs 12 and 13 read as follows:

“12. Where the judge reaches that provisional view, he or she will give directions to the parties, including a direction to the party who has been given permission to appeal to make further submissions on the error of law and set aside issues; a direction for the other party to file and serve any submissions in response; and (where there is such a response), directions to the appellant to file and serve a reply.

“13. The process just described will include a direction to enable the parties, within a stated time, to express their respective views, if any, on whether there should be a hearing to decide the questions in paragraph 11(a) and (b) above, giving reasons for any such views. The judge will have regard to any such views, pursuant to rule 34(2).”

These paragraphs ensured that any decision to determine an error of law appeal without a hearing met the requirement at rule 34(2) to have regard to the views of the parties.

55.
In all the applications before us the Tribunal adopted the procedure sketched in the Guidance Note. By way of example, Judge Kekic gave the following directions on 9 June 2020 in the appeal of FMR (Iraq) (PA/09206/2019) (underlining and bold type as in the original)

“1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of COVID-19, and the overriding objective expressed in the Procedure Rules, I have reached the provisional view that it would in this case be appropriate to determine the following questions without a hearing:

(a) Whether the making of the First-tier Tribunal’s decision involved the making of an error of law, and, if so

(b) Whether that decision should be set aside.

2. I therefore make the following DIRECTIONS:

(i) The party who sought permission to appeal must submit further submissions in support of the assertion of an error of law, and on the question whether the First-tier Tribunal's decision should be set aside if error of law is to be found to be filed and served on all other parties no later than **14 days after this notice is sent out** (the date of sending is on the covering letter or covering email);

(ii) Any other party must file and serve submissions in response, no later than **21 one days after this notice is sent out** ;

(iii) If submissions are made in accordance with paragraph (ii) above the party who sought permission to appeal must file and serve a reply no later than **28 days after this notice is sent out** .

(iv) All submissions that rely on any document not previously provided to all parties in electronic form must be accompanied by electronic copies of any such document.

3. Any party **who considers that despite the forgoing directions a hearing is necessary** to consider the question set out in paragraph 1 (or either of them) above must submit reasons for that view no later than **21 days after this notice is sent out** and they will be taken into account by the Tribunal. The directions in paragraph 2 above must be complied with in every case.

4. If this Tribunal decides to set aside the decision of the First-tier Tribunal for error of law, further directions will accompany the notice of that decision …"

56.
One overarching submission made to us was that the existence in all cases of directions to this effect, following the course plotted at paragraphs 11 – 13 of the Guidance Note, was proof that the relevant judge had applied the Guidance Note including the part of it described by Fordham J as the "overall paper norm" and thereby erred in law when applying rule 34.

57.
We do not accept this submission. As we have already noted, this was not a submission that found favour with Fordham J: see his judgment in JCWI at paragraph 4.17. No decision to apply rule 34 could be taken without some form of direction to explain what would happen in the event of a no-hearing determination. We can see no problem arising from the practice of making and communicating the provisional view on the application of rule 34. Any consideration of whether to proceed under that rule must start somewhere. A Tribunal does not need to wait until one or the other of the parties suggests the course of action; it can initiate the process itself. From these premises, there is nothing in the directions that requires the conclusion that the subsequent decision in favour of no-hearing determination was unlawful. The request for the parties' views (paragraph 3) stems from the requirement at rule 34(2). The direction for written submissions on the error of law appeal is necessary so that the parties can comment on the suggestion that the appeal should be determined without a hearing: that response needed to be informed by the arrangements that the Tribunal purposed to adopt in place of a hearing.

58.
Nor do we think any significance attaches to the fact that the directions provided that the submissions on the error of law appeal should be filed at the same time as any submission in response to the provisional decision on the use of rule 34. The applicants submit that the fact that the directions at paragraphs 2 and 3 operated in parallel rather than sequentially showed that the provisional rule 34 decision was not provisional at all but was final. We disagree. Rather, the directions assume that before taking the final rule 34 decision the Tribunal judge should have the benefit of considering the

submissions on the error of law appeal together with representations on the provisional rule 34 decision and in that way will be better-placed to decide whether a no-hearing determination of the error of law appeal would be fair. This assumption is reflected in each of the decisions before us that is the subject of a rule 43 application. In each the reasons for the rule 34 decision and for the determination of the error of law appeal are part of a single determination.

59.
Overall, therefore we do not accept the overarching submission that the directions demonstrate that the Tribunal either reached an unlawful rule 34 decision or proposed to reach a rule 34 decision that would be unlawful.

60.
In addition, further submissions were advanced. One was to the effect that these directions were inconsistent with the requirement at rule 34(2) to have regard to the views expressed by the parties before any decision to go ahead with a no-hearing determination. This submission rested on two matters. First , the way in which paragraph 3 of the directions was formulated; it was contended this gave the impression of pre-judgment or at the least that there was a presumption in favour of a no-hearing determination and a requirement to rebut it. The second concerned the direction at paragraph 2 to file submissions on the error of law appeal. It was submitted that the timing of these directions (working in parallel with the direction seeking the parties' views on a no-hearing determination) showed that so far as concerned the rule 34 decision, the die had been cast. This submission is a variation on the overarching submission we have just considered. The reasons we have given on that submission apply here too. In addition, it is important to consider the effect of the directions, objectively. They state that the Tribunal judge has formed "a provisional view". There is no reason not to take those words at face value; any suspicion that the provisional view was in fact the final decision would be entirely without foundation.

61.
The other submission was directed to the timetable at paragraph 2 of the directions and was to the effect that this was too compressed and put an unreasonable burden on the parties. We do not regard this as a point of any substance. The timetable is not unreasonable of itself; the time given for each step reflects an approach commonly adopted. If that timetable was not achievable in a particular case, for whatever reason, it was open to any party to apply to vary the directions and explain the reasons why variation was necessary. It is certainly not unreasonable to expect litigants (in particular, legally represented litigants like all the applicants before us) to participate in this sort of case management process: this is no less than is expected and required by rule 2(4) of the Upper Tribunal Rules.

(7) Consent; failure to comply with the direction permitting submission in opposition to the provisional view.

62.
Rule 34(2) requires the Tribunal to have regard to the views of the parties before deciding to make any decision without a hearing. We consider that where parties consent to a no-hearing determination, that will ordinarily provide strong support for the conclusion that the decision to proceed without a hearing was lawful. Although the rule 34 decision is for the Tribunal not for the parties, the parties to an error of law appeal will usually be well-placed to assess whether and if so, why a determination without a hearing would or might be unfair. Each party will know the nature of its own case; each party will be able to assess from its own perspective the relative advantages and disadvantages of a no-hearing determination. In the circumstances of the appeals which have resulted

in the applications that we are now considering we have in mind both that the possibility of no-hearing determinations arose only in the respect of the error of law appeal (and would not apply to any subsequent redetermination of the appeal, whether retained by the Upper Tribunal or remitted to the First-tier Tribunal), and also that as of March 2020 parties to any error of law appeal faced, in consequence of the pandemic, a choice between an earlier no-hearing determination of that appeal, or a later, delayed hearing (either remote or in person). Either of these considerations might have been significant to the parties when deciding whether to consent to a no-hearing determination of the error of law appeal. Each reflects a different aspect of the rule 2(1) overriding objective, for example that cases should be dealt with proportionately and that so far as possible delay should be avoided. Either can provide an explanation of why consent was given. We draw attention to these matters only for the purpose of explaining that the fact that a party might consent to a no-hearing determination would not, of itself, be out of the ordinary.

63.
The applicants submitted that for the purpose of deciding whether a procedural irregularity has occurred, little or no weight should be attached to a party's consent to a no-hearing determination because of the context provided by the Guidance Note. The submission was that no genuine consent could be given when the Guidance Note so clearly pointed in favour of no-hearing determinations. We do not agree with this submission. All applicants before us were legally represented at the relevant time. Those legal representatives must have realised (or if they did not, they ought to have realised) that the directions issued by the Tribunal genuinely sought their views and the views of their clients on whether there should be a no-hearing determination.

64.
Another scenario to consider is that in which a party did not take the opportunity to make representations provided by paragraph 3 of the Directions. Paragraph 3 permitted each party to make submissions on the provisional rule 34 decision but did not require "a nil return". Therefore, all other matters being equal, it would be open to the Tribunal when taking the rule 34 decision to assume that no response under paragraph 3 of the Directions was tacit consent to a no-hearing determination, the party concerned having considered the pros and cons of that course of action in the context of its own appeal. That inference would be particularly strong where the parties had filed submissions in response to paragraph 2 of the Directions on the merits of the error of law appeal. It is of course possible that there might be good reason why no submissions were filed in response to direction 3: for example, if the Directions had not been received. But absent such circumstances, we do not think it is consistent with rule 2(4) of the Upper Tribunal Rules (the parties' duty to cooperate with the Tribunal and help the Tribunal to further the overriding objective) to assert that a failure to file submissions in response to direction 3 should be regarded as irrelevant.

(8) Appearance of bias

65.
Two submissions were made in this regard. The first concerned whether an appearance of bias would arise if the same Tribunal judge took both the provisional view on the application of rule 34 (and issued directions as set out above), and the final view that there should be a no-hearing determination. This was what happened in one of the cases before us as a rule 43 application. We do not consider this scenario to be problematic. Two linked questions are relevant: are there any matters which could be identified giving rise to an appearance of bias; if there are such matters, would they, considered alone or together, cause a fair-minded and informed observer to conclude there was a real possibility or danger of bias? The scenario in which the same Tribunal judge both forms the

provisional view on the application of rule 34 and then takes the final decision on the application of that rule does not give rise to any appearance of bias. The expression of a provisional view and then a final view on the application of rule 34 is part of regular case management. It is neither unusual for one judge to have responsibility for successive case management decisions, nor is it unusual in the course of case management for a judge to propose steps of her own motion and then, in light of representations made by the parties, decide whether those steps should be taken. In the premises, any fair-minded and informed observer would recognise this scenario as an ordinary part of judicial case management.

66.
The other scenario arises in the case of Annes (HU/11949/2019). One of us (Judge Blundell), took the rule 34 decision and the decision on the error of law appeal. Is it objectionable that Judge Blundell is one of the judges now hearing the rule 43 application in that appeal? By reference to the standard of the fair-minded and informed observer we do not consider it is. Various provisions in Part 7 of the Upper Tribunal Rules (the part that includes rule 43) provide for the Upper Tribunal to revisit its own decisions. The Rules do not specify whether any such exercise (whether it be review under rule 45, an application to set aside pursuant to rule 43, or otherwise) be taken by the same Upper Tribunal judge or a different judge. We suspect that practice will vary in this regard and will take account of judicial deployment. In many situations the judge who has heard the error or law appeal will be well-placed to determine any post-hearing application. For example, this will be so in the case of many rule 43 applications where the application arises out of some issue of fact going to the conduct of the proceedings. The present situation is a little different in that the submission is that it is the judge's rule 34 decision that is the procedural irregularity giving rise to the rule 43 application, and that application requires the judge to revisit his own decision. Whether or not this is significant in terms of giving rise to a real possibility of danger or bias will depend on context. At the level of principle, we do not consider there is a problem; it is not uncommon for judges to have to revisit their decisions for one or other purpose (the most common example being when considering applications for permission to appeal). Undertaking such exercises objectively and candidly is part and parcel of the judicial function. This would be recognised by any fair-minded and informed observer. We accept, however, that matters arising from a particular context may suggest a different conclusion in a particular case. To this extent, each such situation must be considered on its own terms.

(9) Final observations on generic matters

67.
Our overall conclusion is that there is no single, one size fits all, answer to the rule 43 applications made consequent on Fordham J's judgment in the JCWI case. We do not accept the submission that the judgment in JCWI requires all error of law appeals determined without a hearing after the Guidance Note was issued in March 2020 be set aside. This is not to negate Fordham J's judgment, rather it recognises the scope of the issue before him. The JCWI judgment only concerned the legality of the Guidance Note when assessed against the Letts principle i.e., whether the Note contained a statement that was wrong in law or permitted or encouraged unlawful acts. On application of that principle, the JCWI judgment concluded that the Guidance Note was unlawful to the extent that it did not include or refer to the proviso to paragraph 4 of the Practice Direction that any decision in favour of no-hearing determination had to be in accordance with the overriding objective and fairness rights.

68.
The JCWI litigation did not concern the "what happened next?" question. It did not address the merits of any rule 34 decision taken after the Guidance Note was published. It is not possible to conclude

that simply because the Guidance Note had been issued and simply because the Administrative Court concluded that the note as formulated did not comply with the Letts principle, it must follow that every subsequent rule 34 decision was unlawful. That would overlook that each subsequent decision was in exercise of a judicial function and the product of consideration by a judge of the Upper Tribunal, well-used to conducting error of law hearings on a regular (if not daily) basis and exercising their functions in accordance with the overriding objective and well-known principles of fairness.

69.
Moreover, each rule 34 decision is a reasoned decision. The merits of the rule 43 applications must be determined on consideration of the reasons given in each case. If those reasons whether expressly or by inference point to a conclusion reached without consideration of the principles that make up the overriding objective, or without consideration of whether determination of the error of law appeal without a hearing would be consistent with the principles of fairness, or a conclusion reached on application of an "overall paper norm" , then the rule 34 decision should be set aside because it proceeded on incorrect premises. As we have said already, the conclusion reached on any subsequent rule 43 application is unlikely to depend simply on whether in the case in hand, certain matters are or are not expressly mentioned (for example the Guidance Note itself). The reasons must be considered in the round to see what inferences and what conclusions may properly be drawn. It was submitted that this approach was at odds with conclusions stated at paragraphs 4.19 – 4.20 of the judgment in JCWI . We do not agree. The point considered by Fordham J at that point in his judgment was (and can only have been) a generic one: was the Guidance Note not Letts unlawful (i.e., not guidance that permitted or encouraged unlawful acts) because of the way it would necessarily be understood and applied by Tribunal judges? Fordham J answered that question in the negative but could only address the matter at the generic or in-principle level. By contrast, the rule 43 applications require us to consider and assess the legality of each rule 34 decision, on its own terms.

D. Decisions on the rule 43 applications before us

Applying the rule 43(3) time limit; applications for an extension of time

70.
Rule 43(3) requires that any application to set aside a decision must be received by the Tribunal "no later than one month after the date on which the Upper Tribunal sent notice of the decision to the party" . By rule 5(3), case management powers permit the Tribunal to extend time for complying with any rule. The overwhelming majority of rule 43 applications received by the Tribunal following Fordham J's judgment in the JCWI case were received later than one month following notice of error of law decisions. Fordham J's judgment was handed down on 20 November 2020. The Order made recorded the President's undertaking to take such steps as were necessary to bring the judgment to the attention of all individuals who had lost error of law appeals on or after 23 March 2020. We have been told that a so-called "JCWI pack" containing Fordham J's judgment and order was sent to all relevant parties on 4 December 2020. A further copy, also containing an information note from the JCWI was sent on 11 December 2020. These packs were sent by email to represented parties and by post to those without representation. Most of the parties before us refer to having received the pack at some time in the first half of December. Each of the applicants before us was legally represented at the material time and the packs were sent to those representatives. Given the need on receipt of the JCWI packs for the legal representatives to seek and obtain instructions on whether to make any further application to the Tribunal, and given also the Christmas and New Year period and the disruption at that time caused by the second COVID-19 lockdown, we accept, without need for specific explanation, that an extension of time should be granted in respect of any application received by the

Tribunal by or before Monday 18 January 2021. Where applications presently before us were received after that date we will consider whether to grant an extension of time on the facts of the case in hand.

(1) EP(Albania) (HU/18412/2019)

71.
This rule 43 application was made by letter of 16 December 2020 and was further particularised on 22 March 2021. EP was the respondent to the error of law appeal. The Upper Tribunal allowed the Secretary of State's appeal, set aside the decision of the First-tier Tribunal and remitted the matter to the First-tier Tribunal for redetermination.

72.
The rule 34 decision was taken following directions in the standard form given on 26 June 2020 and sent to the parties in July 2020. EP did not file representations on the rule 34 issue or on the merits of the error of law appeal. Mr Ayodele Modupe, the solicitor acting for EP, has made a statement explaining that it was only 11 June 2021 that he became aware of the directions that had been sent by the Tribunal in July 2020. The statement explains that he found the email in the deleted items file. He says that in July 2020 his offices were closed because of the pandemic. However, the firm was receiving an unprecedented amount of email. At that time the firm did not have email addresses for each fee-earner. Rather there was a single email address and a shared inbox. Mr Modupe says that he can only assume that the email was received in July 2020 but deleted in error. He did not see the email at that time (he only saw it in June 2021); the email was not marked for his attention and had no title save for the case number.

73.
We have considered whether these facts disclose any procedural irregularity falling within any of the categories at rule 43(2)(a) to (d). We do not think they do. The directions were sent by the Tribunal and were received by EP's representatives but were then misfiled in error and not acted on.

74.
Turning to the rule 34 determination itself, the reasons given by the Judge (Upper Tribunal Judge Lane) are brief. This is not surprising given that neither party had made representations in response to the Tribunal's provisional view. The decision makes no express reference to the Guidance Note, the Practice Direction, the overriding objective, or any case law concerning the requirements of fairness either at common law or under the ECHR. Nevertheless, we are satisfied that the conclusion on rule 34 was not the result of any error in principle. It is clear from paragraph 2 of the decision that the Judge recognised that a no-hearing determination was a significant departure from usual practice. He made no assumption of any "overall paper norm" . He also, quite properly, considered the nature of the issues in the appeal. He regarded the First-tier Tribunal decision as "so deeply flawed by legal error that it cannot stand" and took that into account when deciding that the appeal could properly be decided without a hearing. We consider this was a conclusion he was entitled to reach. There is nothing in this decision that is inconsistent with application rule 34 in accordance with the overriding objective and the requirement of fairness. There was no procedural irregularity which engages rule 43(2)(d).

75.
Had we reached the contrary conclusion on the decision to proceed without a hearing, we would nevertheless have declined to set aside the decision. To do so would not be in the interests of justice. The decision of the First-tier Tribunal was described by Upper Tribunal Judge Lane as "so deeply flawed by legal error that it cannot stand". We agree; there is no possibility that a different result

might be reached if the appeal were considered at a hearing. The judge in the First-tier Tribunal concluded that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 applied, but that provision clearly did not apply on the facts of this case because the applicant is not a parent. The judge further concluded that paragraph 276ADE(1)(iv) of the Immigration Rules applied, but that provision did not apply either; the applicant had not (and still has not) been in the United Kingdom for seven years.

76.
There were also factual irregularities in the reasoning which suggest the decision was directed to a different case. At paragraph 23 of her decision, the judge referred to the applicant's wife, but he is unmarried. At paragraph 24, she stated that she was allowing appeals brought by "the first, second and fourth appellants" but there was only one appellant before her.

77.
Mr Youssefian, for EP, acknowledged these points but submitted that the first five pages of the seven-page decision contained a lawful disposal of the appeal and that what followed was merely a "bad cut and paste job" which did not undermine the analysis which preceded it. We cannot agree. The decision is to be read as a whole and it is quite clear that the Judge's article 8 ECHR analysis cannot stand given the errors described above. If the Judge had in mind that the applicant was able to succeed on article 8 grounds by reference to determinative provisions of the 2002 Act or the Immigration Rules, her approach was so badly flawed that no Upper Tribunal Judge, properly directing herself to the law and the facts, could conclude that the decision of the First-tier Tribunal should stand. The interests of justice are not served by this applicant having a further opportunity to defend an indefensible decision. This rule 43 application is refused.

(2) Mohammed Karim Chowdhury (HU/11561/2019)

78.
This rule 43 application was received on 15 January 2021, and an extension of time for the application was granted by the Tribunal on 26 January 2021.

79.
This appeal was allowed by the First-tier Tribunal and the Secretary of State was granted permission to appeal. The Upper Tribunal gave directions on 23 June 2020. Mr Chowdhury's representatives filed written submissions in response on 16 July 2020. Those submissions set out detailed reasons objecting to a no-hearing determination. The Tribunal decided to proceed under rule 34 and set out its reasons at paragraphs 10 – 15 of its decision. Looking at those reasons in isolation we would have concluded against setting aside the rule 34 decision. The Judge did have regard to the overriding objective; he considered whether a no-hearing determination could take place by reference to the nature of the issues in the appeal and the parties' respective positions on them: see the decision at paragraphs 14 – 15. Read as a whole, the decision shows the Judge neither assumed nor applied an "overall paper norm" .

80.
However, during the submissions on this application it became apparent that a different procedural irregularity had occurred. The Tribunal's reasons at paragraphs 24 and 25, the primary basis on which the Tribunal concluded that the First-tier Tribunal's decision should be set aside, rest on a point that did not form part of the Secretary of State's Grounds of Appeal or her further written submission made in response to the Tribunal's Directions. The point was therefore not one that Mr Chowdhury's representatives had the opportunity to address. We say nothing about the merits of the

conclusion at paragraphs 24 to 25 of the Upper Tribunal's decision. Suffice it to say that before relying on those matters the Tribunal should, as a matter of fairness, have given further directions to permit the parties the opportunity to address the matter. As stated above at paragraph 36, if a Tribunal decides in favour of a no-hearing determination hearing and gives directions to that end, it must keep those directions under review to ensure they remain sufficient for the purposes of a fair determination of the appeal. In this instance, the failure to do this resulted in a procedural irregularity: the appeal was decided based on a submission which had been neither advanced by the appellant nor addressed by the respondent. In the premises, it is in the interests of justice to set aside the decision dated 14 September 2020 on the error of law appeal.

(3) FMR (Iraq) (PA/09206/2019)

81.
FMR was the respondent to the error of law appeal. The Tribunal gave directions on 9 June 2020. His written submissions (dated 16 June 2020) responded to the Secretary of State's grounds of appeal. The final paragraph of those submissions (paragraph 39) requested an oral hearing but provided no observations in support of that request. The failure to give reasons amounted to a failure to comply with paragraph 3 of the Tribunal's directions. No explanation has been given for that failure.

82.
Judge Kekic's decision on the rule 34 issue and the error of law appeal was promulgated on 15 September 2020. The reasons for the rule 34 decision are at paragraphs 6 – 9 of the decision. It appears that in reaching her conclusion to determine the appeal without a hearing, Judge Kekic overlooked the request for a hearing at paragraph 39 of FMR's submissions. At paragraph 9 of her decision she said that neither party had raised objection to the matter being decided without a hearing. (Strictly speaking, it could be said this is correct. FMR had not stated any reasoned objection; but he had requested a hearing.) However, we do not consider this error to be a matter of substance. The judge did not make her rule 34 decision simply because the parties had not objected. We are satisfied by the reasons at paragraph 8 and 9 of the decision that the judge had the requirements of fairness well in mind.

83.
The submission made to us was that because the reasons refer to the Guidance Note that made it inevitable that the overriding objective was not applied and that the Judge did fall into error. We disagree. Looking at the reasons in the round, the Judge did not apply an "overall paper norm" ; there was no presumption in favour of a no-hearing determination. The Judge considered the requirements of fairness taking account of the nature of the issues in the appeal. Her reasons show no error of principle, and the conclusion she reached was a conclusion open to her.

84.
The further submission made by counsel for FMR was that the Judge had been wrong to conclude (at paragraph 28 of the decision) that at the remitted hearing there was no article 3 ECHR issue that would need to be decided. We consider that submission may well be correct. However, it is not a matter that demonstrates any procedural error on the part of the Tribunal. Whether or not the article 3 issue would remain to be determined at the remitted hearing was a matter canvassed in the written submissions (see FMR's written submissions dated 16 June 2020 paragraph 29). As we have explained above at paragraph 38, whether the Tribunal determined the error of law appeal correctly is not a benchmark for existence of procedural irregularity.

85.

For all these reasons, this rule 43 application is refused.

(4) IQ (Palestine) (PA/4768/2019)

86.
In this case too, the Secretary of State was the appellant in the error of law proceedings. The Tribunal gave directions on 7 May 2020 in the form we have set out above at paragraph 55. The Secretary of State responded, late, on 5 June 2020 stating only that she intended to rely on the matters set out in her Notice of Appeal. IQ did not respond to the request for submissions on the rule 34 issue. The submission to us was that IQ "received a clear view that a provisional view had been taken" . That was entirely correct; the directions stated the Tribunal's provisional view. But that was no reason not to comply with direction 3 if there was an objection to be made. It was also submitted that the directions put IQ under pressure of time. If that was why the submissions invited by direction 3 could not be made the proper course would have been to request an extension of time.

87.
The reasons for the rule 34 decision are at paragraphs 3 – 9 of the Tribunal's decision promulgated on 28 July 2020. The conclusion was reached by reference to consideration of the overriding objective and the assessment that a no-hearing determination of the issues in the appeal would not prejudice the parties: see the decision at paragraph 9. We do not consider this conclusion rested on any incorrect legal premise or any incorrect application of the relevant legal principles.

88.
The submission made to us was that the reasons did not refer to the judgment of the Supreme Court in R(Osborn) v Parole Board [2014] AC 1115 (an authority which considered the Parole Board's practice of taking decisions on whether to release tariff-expired life sentence prisoners without a hearing), and that the Tribunal's decision could have "benefitted from oral advocacy" . We do not consider either of these matters carries weight. The Parole Board function scrutinised by the Supreme Court in Osborn is very different to the function of the Upper Tribunal when determining error of law appeals. Failure to refer to the Osborn judgment, of itself, says little as to whether a Tribunal has directed itself properly when taking a rule 34 decision. The submission that the Upper Tribunal may have been assisted by oral advocacy is directed to the Tribunal's reasons on the article 3 ECHR issue in the appeal: see paragraphs 27 – 31. We do not consider there is anything inherently wrong with the Tribunal's reasoning on this issue. It addresses matters that had been canvassed in the pleadings. The submission to the effect that had there been a hearing something might have been said on behalf of IQ that might have influenced the Tribunal is speculative and more importantly does not point to the existence of procedural irregularity.

89.
The one specific point advanced was that at paragraph 69 of its decision the First-tier Tribunal recorded that, in her decision letter, the Secretary of State had not sought to advance any internal relocation argument. That is correct. The decision letter did not rely on the possibility of internal relocation, only the conclusion that on the facts IQ was not at risk of article 3 ill-treatment. The submission is to the effect that, at paragraphs 24 to 25 of its decision, the Upper Tribunal appears to have allowed the Secretary of State to submit that the First-tier Tribunal had erred in failing to consider the possibility that IQ should relocate. This, it is submitted, was wrong. We tend to agree. However, these matters do not reveal procedural irregularity. Notwithstanding the reasons in the decision letter, the internal relocation issue was part of the Secretary of State's Grounds of Appeal (Notice of Appeal, Ground 1, second paragraph); it was therefore a matter of which IQ was on notice,

and which he did have the opportunity to address in his submissions on the error of law appeal. In any event, this point – that any attempt now by the Secretary of State to rely on internal relocation is inconsistent with her decision letter – is one that IQ will be at liberty to raise when the Upper Tribunal comes to remake the decision on the appeal on its merits (this having been retained by the Upper Tribunal and not remitted to the First-tier Tribunal).

90.
For these reasons the rule 43 application in this case is refused.

(5) CEE (Nigeria) (DA/00715/2018)

91.
CEE was the respondent to the error of law appeal, having succeeded in his appeal before the First-tier Tribunal. Directions were issued on 15 July 2020. Both parties filed submissions; each agreed expressly with the Upper Tribunal's proposal to determine the error of law appeal without a hearing. The Tribunal promulgated its decision on 2 November 2020.

92.
The Judge noted at paragraph 6 of her decision that the parties had agreed to the error of law issue being determined on the papers. She observed correctly that she was required by rule 34 to have regard to their views. She considered the overriding objective, the Practice Direction and the Guidance Note and she assessed whether fairness demanded that there should be a hearing in order to determine the error of law appeal. She concluded that it did not.

93.
Before us, it was submitted for CEE that consent that the error of law appeal be determined without a hearing was not determinative. We agree it was not determinative but, for the reasons we have set out above, it was highly relevant. The Judge did not treat the consent as determinative. She had regard to all material considerations, and she was entitled to proceed without a hearing, for the reasons she gave. Her decision to do so disclosed no procedural irregularity – there was no breach of the obligation to act fairly. The application under rule 43 is refused.

(6) SR (Jamaica) (HU/8693/2017)

94.
The Secretary of State was the appellant in these proceedings. Judge O'Connor gave directions which were sent to the parties on 26 May 2020. Written submissions were filed on behalf of SR on 4 June 2020, and supplementary written submissions were filed on 16 June 2020. SR did not object to the proposal that the error of law appeal should be determined without a hearing.

95.
The submissions made in support of the rule 43 application were to the effect: (a) that lack of objection to a no-hearing determination is not conclusive because the requirement to act fairly gives rise to an obligation that error of law appeals must be decided at hearings; (b) that there is no requirement on a rule 43 application to demonstrate its specific prejudice; and (c) in any event, in this case the Tribunal would have benefited from oral argument at a hearing.

96.
We do not accept the first of these submissions (that appeals must be decided at hearings). Put very shortly, the submission proves too much. If correct it would negate the existence of rule 34. There has been no challenge to the legality of rule 34, and it was no part of Fordham J's conclusions in the JCWI

case that rule 34 was unlawful. Applicants (SR and others) have submitted that the application of rule 34 is not limited to decisions taken by UTIAC (it applies to all chambers of the Upper Tribunal) and even within UTIAC's jurisdiction it does not apply only to decisions on error of law appeals (it applies to any decision which the Tribunal may take, whether interlocutory or final). It follows from this, so the submission goes, that by reason of the "Key Themes from the Common Law Principles" listed at Part 6 of Fordham J's judgment, an error of law appeal in UTIAC cannot be determined other than at a hearing – effectively disapplying rule 34 from this class of appeal. We can see no reason in principle which singles out error of law appeals in UTIAC as a class of decision that is in principle unsuited to the application of rule 34.

97.
The point on prejudice (the second submission) has also been addressed already. We accept that if the Tribunal misapplies rule 34 by reaching a conclusion without regard to relevant legal principle or by reaching a conclusion unsupportable in the circumstance of the case at hand, that would be a procedural irregularity that would require an error of law decision to be set aside, save where a convincing "no difference" submission could be made. However, on the facts of this case, this point leads nowhere. The rule 34 decision was contained in the decision of Judge Keith, promulgated on 16 July 2020. The material passage in the decision is at paragraph 16.

"I have considered the matter a fresh and endorse the Upper Tribunal Judge O'Connor's view that the determination of the error of law and whether the FtT's decision should be set aside can be resolved without a hearing. The reason for this is that the scope of the issues is clearly outlined, limited to whether the FtT had correctly applied and adequately explained the application of Section 117 of the 2002 Act, with defined grounds of appeal and a response from the claimant. There is no suggestion that there are further submissions which could only be made at a hearing, which had not been addressed in the appeal. I therefore conclude that it is in accordance with of the overriding objective that I reach a decision on the error of law and whether the FtT's decision should be set aside, on the papers".

98.
There is no error in that approach. The Judge considered the specific issues in the appeal and recognised the significance of the overriding objective. There is no basis on which to infer or conclude that he applied any presumption in favour of a no-hearing determination, or that his rule 34 decision rested on any other error of principle.

99.
The third submission for SR is directed to the Tribunal's conclusion on Grounds of Appeal 3 – 5. The submission is to the effect that considering the Tribunal's reasons there were further points that could have been made and might have been said at a hearing which would have caused the Tribunal to decide these grounds of appeal differently. We do not agree that this submission – even assuming that it is good at the level of principle – identifies the existence of any procedural irregularity on the facts of this case.

100.
As to the merits of the point at the level of principle, see above at paragraphs 37 – 38. The advantages of determining cases at hearings are well-known to all experienced judges and advocates. The ebb and flow at a hearing will sometimes bring points to the fore that might have otherwise been overlooked or undervalued. However, to decide in favour or a no-hearing determination, a Tribunal judge does not need to be satisfied that would be the best way of taking the decision concerned; only

that it would be a fair way of taking that decision. In assessing fairness, any judge will have the advantages that hearings can bring well in mind (for example for those listed at Part 6 of Fordham J's judgment in JCWI) but those matters may not be determinative in every case.

101.
On the facts of SR's' case the arguments on each side on Grounds 3 – 5 were properly addressed in the written submissions. It is apparent that the Tribunal properly understood the submissions made and reached its decision taking them into account. There was no procedural irregularity affecting the rule 34 decision.

102.
For these reasons, this rule 43 application is refused.

(7) TO & BO (Nigeria) (HU/04826/2019 & HU/04831/2019)

103.
The applicants' human rights appeals were dismissed by the First-tier Tribunal, and they secured permission to appeal to the Upper Tribunal. Directions were given by Judge Reeds on 10 June 2020. The Secretary of State did not object to the error of law appeal being decided on the papers (see written submissions dated 16 June 2020). The applicants' solicitors made additional submissions on 30 June 2020; the covering email stated that the applicants were "content for the matter to now be considered on the papers".

104.
The Judge considered whether to proceed without a hearing: see paragraph 8 of her decision. She noted what had been stated by both parties. She noted (correctly) that the issues in the appeal were limited. She decided to determine the appeal without a hearing stating that 'no unfairness arises from doing so'. The reasoning in respect of rule 34 is certainly compressed but that is to be seen in context. The applicants (who were legally represented) had expressly consented to a no-hearing determination. The Judge was entitled to treat that view as militating strongly in favour of a conclusion that it was fair to proceed without a hearing.

105.
In support of the application to set aside the Judge's decision, the applicants' solicitor filed a statement for the purposes of the rule 43 application in which he states that consent to paper consideration had only been given because the sponsor "could not afford a procedural challenge" (of the sort made in the JCWI litigation). But this is not to the point. All that needed to be done in response to the Tribunal's directions was to set out the reasons why the provisional view that the appeal could be fairly determined without a hearing, was wrong. Further, we do not accept the submission made by Mr Sharma that the consent which was given was not given freely or in full knowledge of the fact that Judge Reeds' directions made provision for an oral hearing to be requested. As we have explained above, the directions given cannot fairly be seen as any form of pre-determination of the application of rule 34; they set out a view that was provisional and invited the parties' representations in response.

106.
Mr Sharma's remaining submissions went to the merits of the Upper Tribunal's decision and are irrelevant to the question of whether the decision was marred by procedural irregularity. The mere existence of the Guidance Note did not render the rule 34 decision wrong.

107.
This application under rule 43 is refused.

(8) GS(India) (HU/4735/2019)

108.
GS made submissions in response to the Tribunal's provisional view that the error of law appeal could be determined without a hearing. GS's preference was for a remote hearing, either by phone or video (see submissions dated 15 April 2020 at paragraph 3). GS's submissions pointed out that a determination based only on written submissions would remove the possibility of interaction between the advocates and the Tribunal; it would not provide as good a way of deciding the error of law appeal.

109.
These matters were directly addressed by the Tribunal at paragraphs 10 – 11 of its decision. The Tribunal was satisfied that the issues in the appeal could be fairly determined on the basis of written submissions; see in particular at paragraph 11. It is also clear from paragraph 10 of the decision that the Tribunal took account of both the requirements of fairness at common law and the principles that underlay the overriding objective.

110.
The submissions made to us focused on generic issues (the advantages of hearings generally) and pointed to certain matters in the Tribunal's decision which it is said were examples of factual inaccuracy. We do not agree that these matters warrant setting aside the Tribunal's error of law decision. We have already addressed the generic issues. The matters said to be factually inaccurate are not material and, as we have explained already, simply being able to point to respects in which the Tribunal was in error will not, in the overwhelming majority of instances, make good the submission that the no-hearing determination was unfair. This rule 43 application is therefore refused.

(9) Olajide James Olatunde (HU/10003/2019)

111.
The applicant's appeal against the Secretary of State's refusal of his human rights claim was dismissed by the First-tier Tribunal. Directions in the appeal were given by Judge Frances on 12 August 2020. The submissions made in response to the directions included a request for an oral hearing of the error of law appeal (see the submissions at section E of the written submissions).

112.
The Tribunal's decision was promulgated on 30 November 2020, after Fordham J's judgment in the JCWI case. The decision on rule 34 is at paragraphs 2 to 4 of the decision. The Judge noted the objections raised by the applicant but concluded the appeal could be determined fairly without a hearing. Full written submissions had been lodged which failed to identify any respect in which oral argument would be 'helpful or necessary'. The Judge's reasons take account of the Practice Direction, the JCWI judgment ("including the benefits of an oral hearing and requirements of procedural fairness"), and the overriding objective.

113.
The submission in support of the rule 43 application was that notwithstanding her consideration of Fordham J's judgment in the JCWI case, the Judge had applied the "overall paper norm". There is no sustainable basis for that submission. It is clear from the Judge's decision that the Judge applied rule

34 having regard to the shortcomings of the Guidance Note identified in Fordham J's judgment. Her decision was that it was in accordance with the overriding objective to determine the appeal without a hearing. There is no error of law in the decision to proceed as she did. That decision was certainly not tainted – as Mr Georget sought to submit – by the provisional view expressed by Judge Frances. We have already explained our reasons for rejecting the submission that the provisional view stated in the directions amounted to some form of pre-determination.

114.
Mr Georget also submitted that the Judge's decision to proceed without the hearing had deprived the applicant of an opportunity to make the submission that there was unlikely to be any cogent public interest in requiring him to leave the United Kingdom because an application for entry clearance (as the spouse of a settled person) would inevitably succeed. The difficulty with that submission is that it overlooks the content of the grounds of appeal, the grant of permission to appeal and the additional submissions made by counsel. There is not a glimmer of any such argument (or any of the relevant authorities) in those documents. We therefore reject Mr Georget's submission that the Upper Tribunal's decision to proceed without a hearing somehow deprived the applicant of an argument which would otherwise have been available. That argument had never been identified in this case before Mr Georget settled his skeleton argument on 27 May 2021. It is not possible to demonstrate any form of procedural irregularity by developing an argument which was altogether missed by those with conduct of the matter at an earlier stage.

115.
In the circumstances, we do not find that there was any procedural irregularity in the Tribunal's decision and the application to set the decision aside is refused.

(10) Ramanathan Annes (HU/11949/2019)

116.
The applicant was the appellant in the error of law appeal. Judge Kamara issued directions on 30 April 2020 which included the provisional view that the error of law appeal could properly be determined without a hearing. Responses to those directions were filed by both parties. The applicant's response relied on the grounds of appeal and stated that there were no further submissions to make. There was no response to the suggestion that the appeal should be determined without a hearing.

117.
One of us (Judge Blundell) was the judge who determined the error of law appeal and took the rule 34 decision. He noted there had been no response to Judge Kamara's provisional view on the application of rule 34. He referred to the provisions of rule 34 and to the fact that the lack of response to the directions objecting to determination of the appeal without a hearing was relevant but not determinative. He considered the overriding objective and what had been said in R(Osborn) v Parole Board [2014] 1 AC 1115. He noted that there were no live issues of fact. His conclusion was that it was fair and just to determine the appeal without a hearing. The reasons in support of his substantive decision on the appeal were set out in four comparatively short paragraphs, which began with an observation that the grounds of appeal were misconceived.

118.
Ms Allen, for the applicant, sought the removal of this case from the cohort of test cases because Judge Blundell is one of the judges hearing these rule 43 applications. We see no proper reason to remove the case from the cohort so that it might be considered by a judge other than Judge Blundell. We have set out the generic position above – at paragraph 66. There is nothing in the specific

circumstances of this case which displaces those general considerations. There is nothing that might lead any informed and fair-minded observer to conclude that there was any risk of bias in the determination of the rule 43 application.

119.
Ms Allen next submitted that the lack of reference in the rule 34 decision to the Guidance Note placed the Tribunal and the advocates in an invidious position because it was not possible to know whether Judge Blundell was aware of the Guidance Note when he considered the appeal. There is nothing in this point. As explained above, we have approached all the rule 43 applications before us on the assumption that all UTIAC judges were aware of the Guidance Note.

120.
Ms Allen's further submissions relied on generic arguments (a) that the simple existence of the Guidance Note rendered the rule 34 decision unlawful; and (b) that the lack of objection to the provisional decision to determine the appeal without a hearing could not be determinative. We do not agree with the former submission, for the reasons we have already set out. The latter submission is correct, but does not, in this case, mean either the rule 34 decision was wrong or the decision on the error of law appeal must be set aside (see Judge Blundell's reasons at paragraphs 13 – 15).

121.
Ms Allen next submitted that the First-tier Tribunal had failed to engage with the possible application of section 117B of the 2002 Act to the facts of this case. This does not assist the rule 43 application because the point was not raised either in the grounds of appeal to the Upper Tribunal or even in the written submissions made in response to the Tribunal's directions. As such, the fact that the Upper Tribunal did not deal with this point does not indicate the existence of any procedural irregularity. The submission that, had there been a hearing, the point might have been raised is no more than speculation. Finally, Ms Allen made submissions by reference to the substantive merits of the Tribunal's decision to dismiss the error of law appeal. However, if there is any substance to these matters, they are points for an appeal, not for an application under rule 43.

122.
Overall, the reasons for the rule 34 decision in this case do not disclose any error of principle (the relevant principles were demonstrably borne in mind), or any conclusion that was in error of law. In the premises, the rule 43 application in this appeal is refused.

(11) Golam Kibrea (HU/17892/2019)

123.
The applicant was the appellant in the error of law appeal. On 30 June 2020 Judge Gill issued directions in the form we have set out above, stating her provisional view that the appeal could be determined under rule 34 without a hearing, and seeking the parties' representations on that view, and on the substantive merits of the appeal. The Secretary of State agreed with Judge Gill's provisional view on the application of rule 34. The written submissions settled by leading counsel for the applicant said nothing on the application of rule 34 but addressed the substantive merits of the error of law appeal.

124.
The main point taken for the hearing of the rule 43 application is that the Judge was improperly influenced by the Guidance Note such that the rule 34 decision was wrong and the decision on the error of law appeal was vitiated by procedural irregularity. That is not borne out by consideration of

the reasons at paragraphs 4 to 8 of the Judge's decision which give no indication that he was influenced by an "overall paper norm". He observed that the parties had agreed that the error of law consideration could properly be undertaken without a hearing. He considered the overriding objective and the care and effort which had been taken in the preparation of the written submissions. He concluded that it was appropriate to proceed under rule 34. The Judge clearly had in mind the relevant considerations, even if he did not set out every principle and every authority. His conclusion that this was a case in which the error of law appeal could be determined without a hearing does not rest on any error of principle or error of law.

125.
There are various arguments in the applicant's skeleton argument on the merits of the decision on the error of law appeal. If any of these has merit, it is a matter for an appeal, not for an application under rule 43.

(12) RF (Ghana) (HU/13583/2019)

126.
The applicant's appeal to the First-tier Tribunal rested on an article 8 ECHR ground. Judge Buckwell dismissed the appeal, concluding that the applicant did not have a genuine and subsisting relationship with his son, who was two years old at the time. Permission to appeal was granted by the Upper Tribunal (Upper Tribunal Judge Gill). Directions were given on the same date in the form we have set out above.

127.
The submissions in response to Judge Gill's directions were silent on the question of whether the error of law appeal should be determined without a hearing. There was a request that "where an error of law is found in the First-tier Tribunal's decision, the decision be set aside and re-made in the Upper Tribunal". In deciding under rule 34 to proceed without a hearing, the Judge noted the absence of objection to Judge Gill's provisional view. She also referred to the judgment in Osborn v Parole Board , the Practice Direction, the Guidance Note and the overriding objective. She concluded that the parties had been able to participate fully and that it was fair and just to determine the appeal without a hearing.

128.
It was submitted on behalf of the applicant that the Judge's decision to determine the appeal without a hearing was marred by procedural irregularity and unfairness. To the extent the contentions relied on are generic, we have considered those submissions above. We have already explained why neither the existence of the Guidance Note per se , nor simple reference to it in a decision suffices to establish procedural irregularity that engages rule 43.

129.
It was also submitted that the Judge had failed to engage in a "case-specific" analysis of the propriety of proceeding without a hearing. We do not agree. The Judge plainly had well in mind that the case concerned the best interests of the applicant's son, since she made reference to that in paragraph 8 of her decision; in this respect she clearly had the importance of the proceedings to the applicant well in mind. It was also submitted that the Judge failed to appreciate the complexity of the case and that this level of complexity militated in favour of determination of the appeal at a hearing. We do not agree that the case was complex or, as Ms Kilroy submitted that it was an appeal "crying out" for an oral hearing. As the Judge's analysis shows, the case essentially involved an assessment of the First-tier

Tribunal’s conclusion that the applicant did not have a genuine and subsisting relationship with his son, and a consideration of the application to adduce further evidence said to bear on that question.

130.
The submissions next criticised the Judge’s reliance (for the purposes of the rule 34 decision) on the need to avoid delay in the determination of the error of law appeal. We do not accept that criticism. Avoidance of delay in UTIAC proceedings (so far as compatible with proper consideration of the issues) is recognised at rule 2(1)(e) of the Upper Tribunal Rules, as one facet of the overriding objective. The Judge was entitled to place weight on this matter.

131.
Submissions were also made on the substantive merits of the decision on the error of law appeal. In particular, the submission was made that certain issues had been missed, or misunderstood, or examined with insufficient scrutiny. These points do not begin to bear on whether the Judge’s decision to determine the appeal without a hearing gave rise to any procedural irregularity in the disposal of the error of law appeal.

132.
In the premises, none of the matters relied on in support of the rule 43 application demonstrates that the rule 34 decision was wrong, or that any other procedural irregularity affected the error of law appeal. The rule 43 application is therefore refused.

(13) RSS (Iraq) (PA/11981/2019)

133.
In the course of submissions on this application it became apparent that there had been a significant procedural irregularity in the course of the no-hearing determination of the error of law appeal.

134.
The First-tier Tribunal hearing took place in February 2020. The case was argued and decided on the basis of the Iraq country guidance then in force. RSS’s Grounds of Appeal were formulated on the same premise, as was the Secretary of State’s response and the written submissions of the parties (made pursuant to directions given by the Upper Tribunal on 29 July 2020). However, the Upper Tribunal’s determination of the error of law appeal (decision promulgated on 12 October 2020) was reasoned by reference to information in a Country Policy and Information Note published by the Secretary of State on 30 June 2020. The parties had not been given the opportunity to address the contents of this document. The parties should have had that opportunity; the Tribunal should have given further directions for that purpose. This rule 43 application is granted, and the Tribunal’s decision of 12 October 2020 is set aside.

(14) Wajid Hussain (HU/01731/2019)

135.
We heard no oral submissions in support of Mr Hussain’s application to set aside the Upper Tribunal’s decision on the error of law appeal. A skeleton argument, settled by Mr Hodgetts of counsel, had been filed in compliance with directions, but the applicant’s solicitors wrote in advance of the hearing stating that he would not be represented at the hearing.

136.
The applicant’s appeal was dismissed on human rights grounds by the First-tier Tribunal, which concluded that although he had not cheated in an English language test, his removal from the United

Kingdom would not be in breach of his article 8 rights. Permission to appeal was granted by the First-tier Tribunal.

137.
The Tribunal gave directions proposing that the error of law appeal be determined without a hearing. The applicant filed written submissions in compliance with those directions and requested that the appeal be determined at a remote hearing, submitting that an oral hearing of the appeal would be fairer, that a remote hearing was feasible, and that a paper determination was not consistent with the highest standards of fairness, which were to be observed given that the outcome of the appeal would affect the applicant's relationship with his wife (a British national). The remainder of the submissions concerned the merits of the error of law appeal, in particular the adequacy of the First-tier Tribunal's conclusion that there were no insurmountable obstacles to continuation of family life in Pakistan.

138.
The Judge decided to determine the appeal without a hearing. The reasons for that conclusion are set out in the decision, which was promulgated on 8 October 2020, which also dismissed the error of law appeal on its merits. In deciding to proceed under rule 34, the Judge noted the reasons relied on in support of the contention that the appeal should be determined at a hearing. At paragraph 4 of his reasons, the Judge explained that for the purpose of his rule 34 decision he had taken account of the overriding objective and had regard to the narrow focus of the grounds of appeal and to the full written submissions which had been made. He considered it appropriate "in light of the covid-19 pandemic" to determine the error of law appeal without a hearing.

139.
The applicant's criticisms of the rule 34 decision are based in substance on the general points made orally and in writing by leading counsel in RF and Onayemi . We have considered those points in some detail above and have rejected them. In this case we are satisfied the Judge took account of the overriding objective and the nature of the case before him. He reached a reasoned decision that it was appropriate in all the circumstances to proceed without a hearing. This application under rule 43 is accordingly refused.

(15) Morenike Tolulope Onayemi (HU/13731/2019)

140.
The applicant was the appellant in the error of law proceedings. Directions were given by Judge Mandalia on 2 July 2020. Written submissions consequent on those directions were filed on 10 July 2020, directed to the merits of the appeal; nothing was said about the provisional view that the appeal should be determined without a hearing.

141.
In her decision dismissing the appeal, the Upper Tribunal Judge referred to the absence of objection to a paper determination and continued as follows:

"In circumstances where no objections were made to the issues being determined without a hearing and where the appellant has made written submissions and nothing further is needed from the respondent; it is in the interests of justice to proceed to determine the error of law issues on the papers in light of the written submission available and the full appeal file."

It was submitted to us that this represented inadequate consideration of whether to determine the appeal without a hearing. Counsel highlighted the existence of the Guidance Note and the comparative brevity of the Judge's reasons for the rule 34 decision.

142.
Considering the nature of the issues before her and the absence of any objection to the provisional view expressed by Judge Mandalia, we do not consider that anything more was required. The applicant had professional representation and detailed written submissions had been settled by counsel. We accept that the absence of submissions in response to the provisional view to determine the appeal without a hearing was not determinative; the judge was still required to consider whether it was fair to proceed to determine the error of law appeal without a hearing. However, her reference to the interests of justice at the end of paragraph 2 of her decision shows that she had the correct considerations in mind. We see nothing in error in her decision to proceed without a hearing.

143.
Extensive submissions were made orally and in writing about the merits of the applicant's article 8 ECHR case (rejected by the First-tier Tribunal) and the Upper Tribunal's resolution of the substantive issues in the appeal. It was submitted there were various issues which had not received the scrutiny they deserved or were points that should have been clarified by the Secretary of State. We do not consider these points establish any procedural irregularity in the Tribunal's consideration of the appeal. If it is to be submitted that the Upper Tribunal failed to provide adequate reasons for its conclusions or that it failed to take material matters into account, that is an argument for an appeal.

144.
For these reasons, we decline to set aside the Tribunal's decision of 30 August 2020.

(16) SS(Iran) (PA/06833/2019) ; AS(Iran) (PA/06105/2019) ; and S(Iran) (PA/06106/2019)

145.
In this appeal the applicants made written submissions in opposition to the provisional view that rule 34 should be applied (written submissions dated 14 May 2020 at paragraphs 4 – 13). The applicants emphasised the well-established and well-known advantages of oral hearings. The submissions identified that one issue in the appeal concerned a challenge to the First-tier Tribunal's approach to assessing the applicants' credibility and contended this was a "nuanced" matter that needed exposition at a hearing. They suggested that a hearing could take place by phone or by video.

146.
These points were carefully considered by the Tribunal: see the decision at paragraphs 3 – 8. At paragraph 8, Upper Tribunal Judge Macleman concluded as follows:

"I accept that oral arguments are sometimes "game-changing". However, fair resolution of issues such as the present on written materials is common in this and in other jurisdictions, and well within professional and judicial competence, in asylum as well as other cases. The appellants' citations are not good authority for never deciding error of law without an oral hearing, a course available to the Tribunal within its rules. Contrary to their submission, the facts which the appellants sought to establish, and their supporting evidence, are not complex. The claim is straight forward. The evidence has been led. Parties have had ample opportunity to explain their positions on it. The appellants have done so at length and in detail. I find no feature of this case such that it cannot now fairly be resolved without an oral hearing".

147.
In submissions to us, this paragraph was criticised as failing to refer to the importance of the case to the applicants, failing to refer to the careful scrutiny that determination of the appeal would require, and failing to refer to the overriding objective. We do not consider there is force in any of these points. Although there is no express reference to the overriding objective, paragraph 8 of the decision explains the Judge's conclusion by referring to the substance of the overriding objective. Judge Macleman does make express reference to the paragraphs in the applicants' submissions which refer to the importance of the outcome of the appeal and the need for careful consideration of the issues in it. We do not consider it material that these matters are not themselves written-in to the decision. It is important to consider written reasons fairly, and in-the-round, and not to nit-pick one's way through them.

148.
Overall, our conclusion is that in this case the rule 43 decision was taken by reference to relevant principle; the specific features raised in the appeal were carefully considered from the perspective of whether a decision taken on the basis of written representations would be fair; and no presumption in favour of a no-hearing determination, no "overall paper norm" was applied. We have also carefully considered the Tribunal's treatment of the issues in this appeal. This does not reveal any procedural irregularity. For these reasons, this rule 43 application is refused.

(17) Danyal Jannat (PA/1481/2017)

149.
The Tribunal gave directions in this appeal on 30 April 2020 both parties consented to a no-hearing determination. The written submissions for Mr Jannat dated 12 May 2020 included the following:

"2. … The Appellant is content for the appeal to be dealt with on the papers, given the current COVID-19 situation, and does no (sic) request a hearing …"

150.
The submission made to us was that this agreement was "reluctant" and only given because the alternative was a delayed decision; that paragraph 3 of the Directions suggested that the provisional decision on the application of rule 34 was final, not provisional; and that oral argument at a hearing may have assisted the Tribunal. The latter two submissions are essentially generic. We have addressed them in Section C of this judgment. There is nothing in the circumstances of this case which gives any significance to either of them. We reject the first submission on the nature of the consent given. At the material time Mr Jannat was represented by solicitors and counsel. The written submission on this point was clear and unconditional. The gloss that Mr Jannat's representatives (the same as instructed by him in May 2020) now seek to put on the matter is opportunistic. This rule 43 application is therefore refused.

(18) MB (Eritrea) (PA/05994/2019)

151.
The Tribunal gave directions in this appeal on 7 April 2020. The Secretary of State (the respondent to the appeal) consented to a no-hearing determination. MB's representatives filed written submissions in support of his error of law appeal under cover of a letter dated 5 May 2020. The covering letter included the following:

“It is contended that any re hearing of the Appellant’s case be it as a resumed hearing before the Upper Tribunal or before the FTT, it is requested that such a hearing be dealt with by way of an oral hearing. It is contended that on such resumed hearing the Upper Tribunal or the FTT will be invited to make findings on issues of credibility which we respectively contend will require oral evidence from the Appellant.”

The effect of this was noted by the judge at paragraph 7 of his decision. There was an issue before us as to whether this amounted to any form of consent or agreement that the error of law appeal could be determined on the basis of the Tribunal’s directions for written submissions. It was also submitted that the Tribunal’s decision had failed to address some parts of the grounds of appeal.

152.
We do not consider there is any substance to the latter point. The Tribunal identified the Grounds of Appeal at paragraph 18 of the decision, and then addressed each in turn. As to the former submission, we consider, in context, the passage in the 5 May 2020 letter set out above is consent to a no-hearing determination. It is notable that the letter distinguishes between the decision on the error of law appeal and the decision on any subsequent retained or remitted hearing by reference to the nature of the issues at each stage respectively. By inference, this recognises that the issues in the error of law appeal could be fairly determined on the basis of written submissions. As we have pointed out in the previous section of this judgment, a conclusion that the issues raised in an error of law appeal could be fairly addressed in this way is not at all surprising. As we have also said above, in the context of any specific error of law appeal, the parties to the appeal are well-placed to assess what fairness requires. All this being so, the Tribunal was entitled to attach significant weight to the view set out in the 5 May 2020 letter.

153.
Apart from this it is fair to observe that the Tribunal’s reasons for its rule 34 decision are brief. Nevertheless, it is apparent from paragraph 5 of the decision that the Tribunal did not approach the matter on any basis of presumption in favour of a no-hearing determination; the significance of the common law duty of fairness was well-recognised. This rule 43 application is therefore refused.

E. Disposal

154.
For the reasons above the rule 43 applications in Mohammed Chowdhury (HU/11561/2019), and RSS (Iraq) (PA/11981/2019) are granted. In these cases, the error of law decisions of the Tribunal are set aside, and the error of law appeals will need to be reheard. The remaining rule 43 applications are refused.

155. In the cases in which applications for permission to appeal to the Court of Appeal remain pending, separate decisions will be issued on those applications in due course.

Mr Justice Swift

Sitting as a Judge of the Upper Tribunal

(Immigration and Asylum Chamber)

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[1] A declaration to this effect was at paragraph 2 of Fordham J’s Order. Strictly speaking, it was probably unnecessary for the declaration to apply to paragraph 17 of the Guidance Note as that

paragraph said nothing as to the conduct of error of law hearings. However, nothing material turns on this point.