Upper Tribunal
(Immigration and Asylum Chamber)

Arturas (child's best interests: NI appeals) [2021] UKUT 00237 (IAC)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams **Decision & Reasons Promulgated**

On 30 June 2021

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Before

THE HON. MR JUSTICE LANE, PRESIDENT

MR C M G OCKELTON, VICE PRESIDENT

Between

VAICYS ARTURAS

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellant: Mr E Peters , instructed by Wilson Nesbitt Solicitors

For the respondent: Mr S Walker, Senior Home Office Presenting Officer

(1) Under the laws of England and Wales and the law of Scotland, a failure by the Secretary of State to comply with her duties under section 55(1) or (3) of the Borders, Citizenship and Immigration Act 2009 is highly unlikely to prevent the Tribunal from reaching a lawful decision in a human rights appeal involving a child: AJ (India) v Secretary of State for the Home Departmen t [2011] EWCA Civ 1191; ZG v Secretary of State for the Home Department [2021] CSIH 16.

(2) Under the law of Northern Ireland, the position is different: JG v Upper Tribunal Immigration and Asylum Chamber [2019] NICA 27.

DECISION AND REASONS

1.
The basic question in this case can be succinctly framed: how, if at all, does a breach of the duty in section 55(3) of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") to have regard to

guidance given by the Secretary of State for the purpose of section 55(1), impact upon the determination by the First-tier Tribunal of a n appeal against the refusal of an individual's human rights claim? The brevity of t his question stands in stark contrast to the extent of the analysis needed to produce an answer . Furthermore, as we shall see, that answer may itself depend on the part of the United Kingdom by reference to w hose law the question is posed.

A. PRIMARY LEGISLATION

2.
For our purposes, the relevant provisions of section 55 of the 2009 Act are as follows:-

" **Duty regarding the welfare of children**

(1) The Secretary of State must make arrangements for ensuring that -

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official.

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

…

(6) In this section -

"children" means persons who are under the age of 18;

…"

3.
The present provisions concerning an appeal against the refusal of a human rights claim are as follows:-

" **82 . Right of appeal to the Tribunal**

(1) A person ("P") may appeal to the Tribunal where -

…

(b) the Secretary of State has decided to refuse a human rights claim made by P, or

…

84 . Grounds of appeal

…

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

…

113 Interpretation

(1) In this Part, unless a contrary intention appears—

…

‘human rights claim’ means a claim made by a person that to remove him from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) .

…”

B . THE DECISION OF THE FIRST-TIER TRIBUNAL AND ITS AFTERMATH

4.
The appellant, born in June 2000, is a citizen of Lithuania. In April 2006, he moved from Lithuania to the Republic of Ireland in order to join his mother . She gave birth to a step-brother of the appellant in July 2010. In 2014, the appellant moved to Northern Ireland, along with his mother and step-brother. In December 2015, following a domestic conflict, the appellant was removed from the family home and housed by Social Services.

5.
At the time of his hearing before First-tier Tribunal Judge Grimes in February 2020, the appellant had received some 41 convictions for criminal offences. The appellant told Judge Grimes that he was in a stable relationship with a girlfriend. He said he had re-established good relations with his mother’s husband and enjoyed spending time with his 9 year old step-brother. He also referred to having a baby step-sister.

6.
Much of the decision of Judge Grimes is, understandably, taken up with an analysis of the position of the appellant as a foreign criminal. Having turned specifically to Article 8 of the ECHR, her decision continue d as follows:-

“40. Mr Peters submitted that the strongest aspect to this appeal is the best interests of the appellant’s younger brother. In his submission there is a duty on the Secretary of State to have regard to and act in the best interests of the child. In his skeleton argument he set out extracts from the Home Office guidance entitled “Every Child Matters”. In his submission the Home Office decision-maker in this case failed to mention the guidance and failed to discharge the relevant statutory duty. In his skeleton argument he submitted that failure to have regard to this guidance is a defect of such gravity that this alone is almost always sufficient for a decision to be quashed by way of a judicial review challenge or on appeal. Mr Peters relied on the decisions in **JO and Others (section 55 duty) Nigeria {2014] UKUT 00517 (IAC)** and **JG v the Upper Tribunal, Immigration and Asylum Chamber [2019] NICA 27** .

41. I note that in the appellant’s solicitors’ representations of 27 March 2019 references made to section 55 and the interests of the appellant’s stepbrother. However, no evidence was submitted to the Home Office as to the effect of the appellant’s removal upon his brother. In my view it is not enough without more to assert that there will be a negative impact on the appellant’s brother. In any event the Secretary of State did give consideration to the best interests of the appellant’s brother at page 13 of the reasons for refusal letter.

42. As set out above there is little evidence before me as to the child’s opinions or as to the effect upon the child of the appellant’s deportation. The only evidence is that the appellant sometimes picks the child up from school. I n fact, it may be the case that the deportation of the appellant removes a disruptive and negative influence on the child’s life. On the basis of the evidence before m e it is difficult to reach a conclusion on the best interests of the appellant’s brother. Even if it were established that it is in the child’s best interests that the appellant remain in the UK this is not determinative of the proportionality of the interference with the appellant’s family life. ”

7.
At paragraph 48, having weighed all relevant factors, Judge Grimes was satisfied that the deportation of the appellant was proportionate to the respondent’s legitimate aim of maintaining an effective system of immigration control. Accordingly, she dismissed the appeal on human rights grounds.

8.
Permission to appeal was refused by the First-tier Tribunal and by the Upper Tribunal. As he had before Judge G rimes, Mr Peters submitted in the application for permission that the respondent had not complied with her duty under section 55(3) of the 2009 Act to have regard to the relevant guidance; namely, “ Every Child Matters: s tatutory g uidance to the UK Border Agency on m aking a rrangements to s afeguard and promote the welfare of children ” (November 2009) (hereafter “ Every Child Matters ” or “the guidance”) . Attention was drawn to the following passage in the respondent’s decision to make a deportation order in respect of the appellant:-

“Consideration has been given to whether you meet the private life exception to deportation which is set out in paragraph 399A of the Immigration Rules. This exception applies where :

(a) the foreign criminal has been lawfully resident in the UK for most of his life, and

(b) the foreign criminal is socially and culturally integrated in the UK, and

(c) there would be very significant obstacles to the foreign criminal’s integration into the country to which he is proposed to be deported.

All three limbs of the exception must be met in order for the public interest in deportation to be outweighed.

It is not accepted that you have been lawfully resident in the United Kingdom for most of your life. This is because your representations claim that you entered the UK in 2014 , only 5 years ago, when you would have been 12 or 13 years old.

It is not accepted that you are socially and culturally integrated in the United Kingdom. This is because you have chosen to commit 41 offences whilst living here. These actions are not indicative of someone who has integrated socially and culturally in the UK.

It is not accepted that there would be very significant obstacles to your integration into the country to which it is proposed to deport you. This is because you are a young fit and healthy individual who has

been training to be a barber in the UK. It is considered that you could use these skills to help you find employment in Lithuania. Additionally, despite the fact you have no adequate family support in Lithuania because of the health and financial situation of your grandparents, it is considered that they will still be in a position to provide an adequate level of support to you until you are fully integrated into life in Lithuania.

Consideration has been given to the best interests of your step-brother, [Egor] under Section 55 of the Borders Citizenship and Immigration Act 2009. It is considered that Egor's best interests will continue to be served by him being cared for by his mother. There is no evidence to suggest that even if you were removed, the level [of] care a nd support he would receive would be anything other than safe and effective. As stated above, you state in your representations that you were removed from the family home in 2015 and were housed in social services. You were not returned to [your] mother's address until August 2016. In September 2016 she reported you to the police as you were offending despite being on bail. You state you have been looked after by social services since then. You therefore do not reside with your mother or step-brother and there is no indication that you are either depend a nt on them or them on you. It is considered that you could continue to maintain your relationship with your family via modern means of communication and by way of visits o utwith of the United Kingdom."

9.
Mr Peters placed reliance upon the judgment of McCloskey J, giving the judgment of the Court of Appeal in Northern Ireland, in JG v Upper Tribunal, Immigration Asylum Chamber [2019] NICA 27. We shall have occasion to consider that judgment in detail.

10.
Somewhat problematically, the Upper Tribunal Judge who refused permission to appeal began her decision by stating that "judgments of the Court of Appeal in Northern Ireland are not binding on decisions of the Upper Tribunal (IAC)". They are, of course, binding if and to the extent that the appeal is governed by the law of Northern Ireland. The refusing judge said that the Court of Appeal in England and Wales had held in AJ (Zimbabwe) v SSHD [2016] EWCA Civ 1012 ; [2017] Imm AR 442 that "the best interests of children will only rarely outweigh the state's interests". T he grounds failed to explain what evidence was before the respondent at the date of the respondent's decision. In any event, in the refusing judge's view, Judge Grimes had considered the submission that the respondent's decision was "worthless because she had not considered the best interests of the appellant's brother". Judge Grimes had been unarguably correct to conclude that this submission was misconceived "because the Tribunal has the duty to consider the best interests of children". T here had not, in fact, been any evidence other than oral to show that the claimed siblings actually existed. In any event, the oral evidence was that the appellant helped at home with the baby and sometimes picked up his younger brother from school. There was no evidence of the impact of the appellant's deportation on the younger brother. Given the evidence regarding the periods of time spent by the appellant in care, together with his extensive criminal offending, it was difficult to see how an ongoing relationship with the appellant was in the best interests of his siblings.

11.
The appellant sought judicial review in the Northern Ireland High Court, seeking to quash the Upper Tribunal's refusal of permission to appeal. Amongst the grounds of challenge was that the refusal ignored the respondent's "failure to comply with statutory guidance pursuant to section 55(3) of the Borders, Citizenship and Immigration Act 2009 and to assess the child's best interests without the relevant evidence which the [respondent] had a duty to obtain in compliance with that statutory guidance " .

12.
McAlinden J quashed the refusal of permission, following which a hearing took place before th is Chamber's Vice President of the outstanding application for permission to appeal. In his ex tempore decision , the Vice President referred to the section 55 issue as follows:-

"8. The next question arises from the judge's disinclination to make the findings she was invited to make on the relationship of the five people who the appellant said lived at his house. Those are the people to whom I have already referred: his mother, her husband, her two other children and himself. As the judge said, there is little evidence on that. It is remarkable that there was no evidence at all from the appellant's mother's husband; indeed, I am told by Mr Peters today that it was regarded as "impractical to catch up with him" in order to obtain a witness statement from him, although the appellant regards him as living at home with him. Be that as it may, the position is certainly that the appellant and his younger brother do live together: there is no real doubt about that, I think. I have called him "his younger brother", whatever the relationship precisely is; this is two young boys, if I may so call them, living in the same house with their mother.

9. I regard the failure to reach conclusive findings on the precise relationships between the family members as again irrelevant because the real issue is the extent to which any damage to the brothers' wellbeing by the removal of the appellant should have been noticed by the judge. On this point Mr Peters cites an earlier decision of this Tribunal JO [2014] UKUT 00517 (IAC) decided at a time when there was a right of appeal to the First-tier Tribunal on the grounds that the decision against which the appellant appealed was "not in accordance with the law". That, as is well established over a series of decisions going back well into the 1980s, includes a quasi-judicial review function within the Tribunal system. It was abolished by the modifications brought into the 2002 Act by the Immigration Act 2014. As was said in the refusal of permission, the ground now has to be [that] rights protected by the European Convention on Human Rights and the Human Rights Act 1998 would be disproportionately infringed by the action proposed. That leaves the appellant with the task of establishing what damage there would be to himself or other family members such that it would be disproportionate in this case to remove him.

10. As the judge pointed out, there is no evidence of that. "There is no evidence as to the impact of the appellant's deportation on his younger brothers" was the way she put it. Mr Peters' ground of appeal against that is that on the basis either of JO or of other subsequent authority, there is some ground for saying, in Northern Ireland if not in the rest of the United Kingdom, that the appellant is entitled to remain silent on the impact on other young members of his family in circumstances in which he claims that the Secretary of State has failed to carry out the duty imposed by s 55. That strikes me, I have to say, as an extremely frail argument. But insofar as there may be a difference between the views of the Court of Appeal in Northern Ireland and the rest of the United Kingdom, it is a point on which, although I regard it as having very little prospect of success, I must, I think, grant permission for the matter to be elaborated and investigated by the Tribunal, which of course is a Tribunal for the United Kingdom.

11. I therefore give permission only on the grounds set out in paragraphs 26, 27, 28, 29 and 30 of Mr Peters' grounds of appeal, as follows:

"26. Finally, the judge did not attach any weight to the failure on the part of the Home Office decision makers to discharge (or even consider) statutory duty under s 55(3) of the Borders, Citizenship and Immigration Act 2009 (to have regard to any guidance given to Secretary of State). The relevant guidance in the 2009 UKBA document 'Every Child Matters'.

27. In JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC) " cursory, casual or superficial " engagement with the guidance was said " not to be in accordance with the specific duty imposed by section 55(3) or the overwhelming duty to have regard to the need to safeguard and promote the welfare of any children involved in or affected by the relevant factual matrix " - (para 12)

28. At para 42 the Judge accepts that "there is little evidence before [her] as to the child's opinions or as to the effect upon the child of the appellant's deportation."

29. However the judge fails to acknowledge that this lack of evidence is a result of the non-compliance of the Home Office caseworkers with the SSHD's guidance. Such non-compliance amounts to grave breach of statutory duty under s 55(3) and is sufficient – without more – to undermine the Home Office decision.

30. JO is a solid authority behind the proposition that failure on the part of the FtT to consider whether the Secretary of State had complied with the statutory duty imposed by section 55 – namely to have regard to the statutory guidance – "is the fundamental error of law infecting the FtT's decision." – (paras 16-17).""

C. GUIDANCE AND CASE LAW

13.
At paragraph 3 above, we have set out the current relevant statutory provisions regarding an appeal against the refusal by the respondent of a human rights claim. These provisions stand in strong contrast to the previous regime. U ntil its wholesale amendment by the Immigration Act 2014, section 82 of the 2002 Act enabled a person to appeal to the First-tier Tribunal against "an immigration decision", which was defined by section 82(2). Amongst the refusals, variations, revocations and other decisions set out in section 82(2) were certain kinds of removal decision. Section 84(1) set out seven grounds upon which an appeal against an immigration decision could be brought. Amongst them was:-

"(e) t hat the decision is otherwise not in accordance with the law; … "

14.
Section 84(1)(e) provided a "catch - all" for such decisions, alongside the particular forms of unlawful decisions described in section 84(1)(a) to (d). As established in Abdi v SSHD [1995] EWCA Civ 27, t he ground in section 84(1)(e) conferred upon the First-tier Tribunal (and its predecessor) a public law power of review , whereby an appeal against a decision which was not in accordance with the law fell to be allowed, with the result that th e respondent had then to make a fresh, lawful decision.

(i) "Every Child Matters"

15.
Before considering the case law, it is necessary to examine the statutory guidance in " Every Child Matters ". A s will be seen , some of the ensuing cases appear , with respect, to misconstrue or at least gloss over what the guidance actually says.

16.
Paragraph 5 describes the guidance as setting out "the key arrangements for safeguarding and promoting the welfare of children". The guidance is said to be modelled on that which supports section 11 of the Children Act 2004. Part 1 of the guidance is intended to make clear how the work of (what was then) the UK Border Agency fits into the wider arrangements, although not all of Part 1 is

said to be “directly relevant to” the UKBA. Part 2 sets out how the general arrangements apply specifically to the UKBA. Paragraph 6 reads as follows:-

“ 6. This guidance is issued under section 55 (3) and 55 (5) which requires any person exercising immigration, asylum, nationality and customs functions to have regard to the guidance given to them for the purpose by the Secretary of State. **This means they must take this guidance into account and, if they decide to depart from it, have clear reasons for doing so.** ” (original emphasis)

17.
Paragraph 1.2 explains that, since the UKBA operates across the United Kingdom, it was considered necessary to place the duty to safeguard and promote the welfare of children, as it concerns the UKBA, in an A ct dealing directly with the UKBA ’s work; namely, the Borders, Citizenship and Immigration Act 2009. Paragraph 1.3 provides that the section 55 duty “ does not give the UK Border Agency any new functions, nor does it over-ride its existing functions ”. Rather, it requires the UKBA to “carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children”.

18.
Paragraph 1.4 refers to the definition of safeguarding and promoting the welfare of children, as found in the guidance to section 11 of the 2004 Act. It means protecting children from maltreatment; preventing impairment of children’s health or development; ensuring that children grow up in circumstances consistent with the provision of safe and effective care; and undertaking that role so as to enable those children “to have optimum life chances and to enter adulthood successfully”.

19.
Paragraph 1.6 describes each agency as having different contributions to make towards safeguarding and promoting the welfare of children, depending on the functions for which the agency in question has responsibility. The UKBA’s main contribution is to identify and act on their concerns about the welfare of children with whom they come into contact.

20.
In similar vein, paragraph 1.13 states that the way in which agencies work with or have contact with individual children and their families will differ , depending on the functions of each agency. Paragraph 1.14 describes the key features of an effective system as ensuring that children and young people are listened to and what they have to say is taken seriously and acted on; and that:-

“• Where possible the wishes and feelings of the particular child are obtained and taken into account when deciding on action to be undertaken in relation to him or her. Communication is according to his or her preferred communication method or language;

…”

21.
Paragraph 1.15 introduces the principles, set out in paragraph 1.16, that underpin work with children and their families to safeguard and promote the welfare of children. The principles “are relevant to varying degrees depending on the functions and level of involvement of the particular agency and the individual practitioner concerned. **The UK Border Agency should seek to reflect them as appropriate** ” (original emphasis).

22.
Among the principles in paragraph 1.16 are that work with children and famil ies should be:-

“• child centred

…

• supporting the achievement of the best possible outcomes for children and improving their well-being;

• holistic in approach

…

• designed to identify and provide the services required, and monitor the impact their provision has on a child’s developmental progress ;

…

• informed by evidence.”

23.
At paragraph 1.17(b), detail is given about the involvement of children and families:-

“ b. In order to appreciate the child’s needs and how they make sense of their circumstances it is important to listen and take account of their wishes and feelings. It is also important to develop a co-operative constructive working relationship with parents or caregivers so that they recognise that they are being respected and are being kept informed. Where there is respect and honesty in relating to parents they are likely to feel more confident about providing vital information about their child, themselves and their circumstances. ”

24.
Part 2 of Every Child Matters is entitled “The Role of the UK Border Agency in Relation to Safeguarding and Promoting the Welfare of Children”. Paragraph 2.1 describes the nature of the UKBA and its primary duties, which are “to maintain a secure border, to detect and prevent border tax fraud, smuggling and immigration crime, and to ensure controlled, fair immigration that protects the public and that contributes to economic growth and benefits the country”.

25.
Paragraphs 2.4 and 2.5 read as follows:-

“2.4 The UK Border Agency’s main contributions to safeguarding and promoting the welfare of children include:

• Ensuring good treatment and good interactions with children throughout the immigration and customs process.

• Applying laws and policies that prevent the exploitation of children throughout and following facilitated illegal entry and trafficking.

• Detecting at the border any material linked to child exploitation through pornography.

2.5. Other parts of the UK Border Agency’s contribution include:

• Exercising vigilance when dealing with children with whom staff come into contact and identifying children who may be at risk of harm.

• Making timely and appropriate referrals to agencies that provide ongoing care and support to children. ”

26.
Paragraphs 2.7 and 2.8 read as follows:-

“2.7 The UK Border Agency must also act according to the following principles:

• Every child matters even if they are someone subject to immigration control.

• In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children.

• Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.

• **Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree. In instances where parents and carers are present they will have primary responsibility for the children’s concerns .**
(Our emphas i s)

• Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience.

2.8 When speaking to a child or dealing with a case involving their welfare, staff must be sensitive to each child’s needs. Staff must respond to them in a way that communicates respect, taking into account their needs, and their responsibilities to safeguard and promote their welfare. ”

27.
Under the heading “Work with Individual Children” paragraph 2.18 provides:-

“2.18 This guidance cannot cover all the different situations in which the UK Border Agency comes in to contact with children. Staff need to be ready to use their judgement in how to apply the duty in particular situations and to refer to the detailed operational guidance which applies to their specific area of work. In general, staff should seek to be as responsive as they reasonably can be to the needs of the children with whom they deal, whilst still carrying out their core functions .”

28.
At paragraph 2.19, examples are given of where the UKBA must take action, upon encountering a child. Where there is doubt on arrival about who is caring for the child, staff must seek evidence that the particular named adult is caring for the child with the parent’s consent. Special care must be taken when dealing with unaccompanied asylum seeking children, for instance by checking with them that they understand the process when making or resolving their asylum claim. Families who have no right to be in the United Kingdom “must be encouraged to leave voluntarily and detention should be used only as a last resort and for the shortest possible time”, family detention arrangements respecting as fully as possible the principle that the primary responsibility for a child during any period of detention still rests with the parents.

29.
Paragraph 2.22 reads as follows:-

“2.22 The UK Border Agency must always make a referral to a statutory agency responsible for child protection or child welfare such as the police, the Health Service, or the Children’s Department of a Local Authority in the following circumstances:

• When a potential indicator of harm (the most comprehensive such list is found in Working Together to Safeguard Children who have been Trafficked and their application is wider than trafficking cases alone) has been identified.

• When a child appears to have no adult to care for them and the Local Authority has not been notified.

• When the child appears to be cared for by a person who is not a close relative (i.e. where a private fostering arrangement has been identified). The Children Act 1989 (Part IX, section 66) defines privately fostered children. All professionals and agencies that work with children must establish the relationship that exists between any child and those who care for him or her. If that relationship appears to be a private fostering relationship — or if the relationship cannot be established — a referral to the relevant Local Authority must be made. ”

30.
It is worthwhile at this point to make the following observations about Every Child Matters . The respondent’s border officials have, as their primary duties, the maintenance of the United Kingdom’s system of immigration controls. The nature of the duties of those officials is such that the main contribution they can make to the principles enshrined in the guidance is “to identify and act on their concerns about the welfare of children with whom they come into contact” , as a result of the discharge of their immigration functions. In that regard, the main situations in which the guidance is relevant will be whe re the immigration officials first encounter a child who has arrived in the United Kingdom, whether with or without those who contend that they have responsibility for that child; and when arrangements are underway for the removal of the child from the United Kingdom.

31.
The principle in paragraph 2.7 that children should be consulted and their wishes and feelings taken into account is qualified by the words “wherever practicable”. Importantly, “ W here parents and carers are present they will have primary responsibility for the children’s concerns”. There is nothing in the guidance which states that immigration officials have an obligation to obtain (or even to consider obtaining) expert evidence, such as psychological reports or reports from social workers, concerning what may, or may not, be in the child’s best interests, irrespective of the child’s own wishes and feelings.

32.
W e can now turn to the case law concerning section 55 of the 2009 Act.

(ii) Case law

33.
The leading authority on section 55 continues to be ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 ; [2011] Imm AR 395 . In her judgment, Lady Hale described the “overarching issue in this case” as being “the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents from this country”. She traced the growing emphasis placed by the European Court of Human Rights on the interests of children, in the context of removal decisions, identifying the connection with general principles of

international law; in particular, Article 3(1) of the United Nations Convention on the Rights of the Child:-

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

34.
Lady Hale’s judgment proceeded as follows:-

“ 23. This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".

24. Miss Carss-Frisk acknowledges that this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2). Both the Secretary of State and the tribunal will therefore have to address this in their decisions. ”

35.
At paragraph 25, Lady Hale noted that it was clear from the recent jurisprudence that the Strasbourg Court would expect national authorities to apply a rticle 3(1) and threat the best interests of a child as “a primary consideration”, which, she emphasised, was not the same as “the primary consideration”, still less “the paramount consideration”.

36.
Drawing on the UNHCR Guidelines on determining the best interests of the child (May 2008), Lady Hale emphasised the distinction to be drawn between decisions “which directly affect the child’s upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents would live”. Even in the latter case, however, the best interests of the child must be a primary consideration. In this regard, Lady Hale cited with approval the judgment of the Federal Court of Australia in Wan v Minister for Immigration and Multi-Cultural Affairs [2001] FCA 568. She then said:-

“Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first” .
(paragraph 26)

37.

At paragraph 29, Lady Hale held that the “best interests of the child” … “broadly means the well-being of the child”. Having examined the relevance of the child’s nationality, Lady Hale stated at paragraph 33 that “in making the proportionality assessment under a rticle 8, the best interests of the child must be a primary consideration. This means they must be considered first”.

38.
The concluding paragraphs 34 to 37 of Lady Hale’s judgment are headed “Consulting the Children”. Although they are not invoked by courts and tribunals as frequently as the passages we have just referenced, for reason s that will become plain they possess significance in this and other cases, where the focus is on the effect of an alleged failure by the respondent to comply with the duty in section 55(3) of the 2009 Act. Accordingly, the paragraphs merit citation in full:-

“34. A cknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child's own views. Article 12 of UNCRC provides:

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

35. There are circumstances in which separate representation of a child in legal proceedings about her future is essential: in this country, this is so when a child is to be permanently removed from her family in her own best interests. There are other circumstances in which it may be desirable, as in some disputes between parents about a child's residence or contact. In most cases, however, it will be possible to obtain the necessary information about the child's welfare and views in other ways. As I said in EM (Lebanon) v Secretary of State for the Home Department [2008] UKHL 64 , [2009] 1 AC 1198 , at para 49:

"Separate consideration and separate representation are, however, two different things. Questions may have to be asked about the situation of other family members, especially children, and about their views. It cannot be assumed that the interests of all the family members are identical. In particular, a child is not to be held responsible for the moral failures of either of his parents. Sometimes, further information may be required. If the Child and Family Court Advisory and Support Service or, more probably, the local children's services authority can be persuaded to help in difficult cases, then so much the better. But in most immigration situations, unlike many ordinary abduction cases, the interests of different family members are unlikely to be in conflict with one another. Separate legal (or other) representation will rarely be called for."

36. The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. We have been told about a pilot scheme in the Midlands known as the Early Legal Advice Project (ELAP). This is designed to improve the quality of the initial decision, because the legal representative can assist the "caseowner" in establishing all the facts of the claim before a decision is made. Thus cases including those involving children will be offered an appointment with a legal representative, who has had time to collect evidence before the interview. The Secretary of State tells us that the pilot is limited to asylum claims and does not apply to pure

article 8 claims. However, the two will often go hand in hand. The point, however, is that it is one way of enabling the right questions to be asked and answered at the right time.

37. In this case, the mother's representatives did obtain a letter from the children's school and a report from a youth worker in the Refugee and Migrant Forum of East London (Ramfel), which runs a Children's Participation Forum and other activities in which the children had taken part. But the immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents' this should not be taken for granted in every case. As the Committee on the Rights of the Child said, in General Comment No 12 (2009) on the Right of the Child to be Heard, at para 36:

"in many cases . . . there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative."

Children can sometimes surprise one. ”

39.
Lord Brown and Lord Mance agreed with Lady Hale, as did Lord Hope, who added some observations of his own. So too did Lord Kerr.

40.
In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 ; [2014] Imm AR 479 , Lord Hodge, at paragraph 10, paraphrased the legal principles deriving from ZH (Tanzania), H v Lord Advocate [2012] SC (UKSC) 308 and H (H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338 as follows:-

“ (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;

(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent. ”

41.
We now come to the cases where section 55 has been considered in the wake of the Supreme Court's judgments. In Tinizaray v Secretary of State for the Home Department [2011] EWHC 1850 (Admin) HHJ Anthony Thornton QC quashed decisions to grant indefinite leave to remain on the basis that the decisions about the family were not properly informed about what might be the best interests of the first applicant's 9 year old daughter , Angeles . At par a graph 24, the Judge said this:-

" 24. As the guidance makes clear, it is not sufficient for the decision-maker to rely solely on information volunteered by a child's parent, particularly if it is clear that that information is either incomplete or potentially slanted. In such cases, further information must be sought by the decision-maker including, in appropriate cases, interviews of the applicant and separate interviews of the child, questionnaires and seeking or soliciting the views, assessments and reports of other agencies such as local authority social services, CAFCAS or local children's welfare groups. "

42.
At paragraph 25, he held that it was "difficult to see how [Angeles's] views could be objectively and fairly obtained without someone other than [her mother] speaking to her and exploring with her in depth her feelings, attitudes and preferences ". It was also difficult to see how the decision-maker could proceed "without first commissioning, or seeking from [the mother] an appropriate assessment or report from that third party source".

43.
Tinizaray was considered by the Court of Appeal in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550 ; [2013] Imm AR 1106 . SS was an appeal against the decision of the decision of the Upper Tribunal to dismiss an appeal against deportation, where it was asserted that deportation would breach the A rticle 8 rights of the proposed deportee and his child. Beginning at paragraph 33, Laws LJ said this :-

" 33. A principal focus of Mr Mahmood's argument, consistent with the grant of permission by Elias LJ, was the need for a proper "evaluation, discovery or ascertainment of the best interests of the child". The means of achieving this necessity was, he submitted, through the imperatives of s.55 of the 2009 Act and in particular the guidance – "Every Child Matters – Change for Children" – issued in November 2009 under s.55(3). It will be recalled that HHJ Thornton referred to this document in Tinizaray . Much of the guidance is, with great respect, cast in relatively general terms. Mr Mahmood referred in particular to paragraphs 1.16 and 2.7. The former contains a list of prescriptions for "work with children and families" which, among other things, should be "child centred" and "holistic in approach". The latter sets out principles which the UKBA should follow. The first of these is "Every child matters even if they (sic) are someone subject to immigration control". The second , citing the UNCRC and reflecting the decision in ZH , states that "the best interests of the child will be a primary consideration".

34. The concrete proposition which I think Mr Mahmood draws from the guidance, and some of the learning, is that in determining an Article 8 claim where a child's rights are affected, the child's best interests must be properly gone into: that is to say they must be treated as a primary consideration, and the court or tribunal must be armed – if necessary by its own initiative – with the facts required for a careful examination of those interests, and where in truth they lie. Mr Mahmood submits that was not done in this case.

35. While in very general terms I would not quarrel with this proposition (though I consider that the circumstances in which the tribunal should exercise an inquisitorial function on its own initiative will

be extremely rare), its practical bite must plainly depend on the nature of the case in hand. It is necessary to consider the deportation of foreign criminals as a particular class of case; and, of course, the circumstances of this case itself. ”

44.
Agreeing with Laws LJ, Mann J added the following :-

“62. In this appeal counsel for the appellant placed considerable emphasis on the need for the Tribunal to satisfy itself as to the interests of the child in such a way as suggested an inquisitorial procedure. I agree with Laws LJ that the circumstances in which the Tribunal will require further inquiries to be made, or evidence to be obtained, are likely to be extremely rare. In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision-maker by the individual concerned. The decision-maker would then make such additional inquiries as might appear to him or her to be appropriate. The scope for the Tribunal to require, much less indulge in, further inquiries of its own seems to me to be extremely limited, almost to the extent that I find it hard to imagine when, or how, it could do so. ”

45.
Both Tinizaray and SS (Nigeria) fell for consideration in AN (Afghanistan) and Others v Secretary of State for the Home Department [2013] EWCA Civ 1189. Underhill LJ held that the judge concerned had misunderstood that the child’s educational opportunities would be “far poorer if she were returned to Afghanistan than if she remained in the UK” . Underhill LJ doubted “whether further detailed findings about the kind of education that she might have hoped to pursue here or about what was available in Afghanistan would have contributed much to the overall assessment”, which the judge had to make. Underhill LJ continued:-

“ 21. It is at this stage of the argument that Mr Kadri invokes Tinizaray . That was a case in which a mother and daughter had entered the UK illegally from Ecuador in 2001; the daughter had herself given birth to a daughter shortly afterwards. They had not come to the attention of the authorities until 2008. At that point they applied for indefinite leave to remain and were refused. The Judge quashed the Secretary of State's decision on the basis that she had not had, and had not sought to acquire, sufficient information about the child in order properly to discharge her duty under section 55 of the 2009 Act. At para. 25 of his judgment he specified the detailed information which she would need, both about the child's life and education in England and about the life she would lead, including the educational opportunities that would be open to her, if she were returned to Ecuador. He also said that the child's views needed to be ascertained but that that could not satisfactorily be done via her mother and that a "third party source" might have to be commissioned to provide "an appropriate assessment or report". In the absence of such information the decision was held to be fatally flawed. Mr Kadri submitted that the Judge's decision in the present case was flawed in the same way.

22. In SS (Nigeria) (above) Laws LJ warned against treating HHJ Thornton's observations in Tinizaray as enunciating anything in the nature of general principle (see para. 55); and Mann J with the concurrence of Black LJ, observed at para. 62 that the circumstances in which a tribunal should require further inquiries to be made, or evidence obtained, in order to satisfy itself as to the best interests of the child would be "extremely rare", saying

"In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision-maker by the individual concerned."

In R (Toufighy) v Secretary of State for the Home Department [2012] EWHC 3004 (Admin) Beatson J also emphasised that the approach in Tinizaray was peculiar to the facts of that case (see paras. 103-4).

23. I do not believe that the Tribunal in the present case was under an obligation to require information to be obtained, or inquiries made, of the kind identified in Tinizaray . I would make two points in particular:

(1) Masooma was aged 16 at the time of the impugned decision and the hearing before the First Tier Tribunal. She was well able to express her own views and did so to the Tribunal both in her witness statement and in her oral evidence. She was represented by solicitors and counsel. (She was not represented separately from her parents, but there was no conflict in their interests requiring separate representation.) Her situation was thus quite different from that of the child in Tinizaray , who was aged between seven and nine at the relevant dates.

(2) Masooma's case under article 8 was inherently much less compelling than that of the child in Tinizaray, who had lived in this country all her life, and had never known anywhere else; she did not even speak Spanish. For her to be removed to Ecuador, at the age of nine, would have been a most drastic disruption of every aspect her life. Although I would not necessarily endorse every aspect of Judge Thornton's reasoning, it is not surprising that he should have taken the view that such a step ought not to be taken without very full information. But Masooma's connection with this country was slender. She had been here for barely a year and had little more connection with the UK than she had with Afghanistan (where she had family and had visited). The Judge had already found, in her favour, that it was in her interests to remain in the UK, not least because of the better educational opportunities; but in addressing what was the determinative question, namely whether those interests should prevail over those of firm and fair immigration control, I do not believe that he required the same kind of detailed information as may have been appropriate in the Tinizaray."

46.
About a month later, the Court of Appeal returned to Tinizaray in AA (Iran) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2013] EWCA Civ 1523:-

"16. There is another aspect of the case to which I should make brief reference. The original grounds of appeal and skeleton argument on behalf of the appellant (to which Mr Drabble was not party) would have required us to consider whether consideration of the appellant's Article 8 case by the FTT – in particular the consideration of section 55 and the best interests of a child as a primary consideration – was flawed because of the failure of the FTT to consider his best interests by express reference to the checklist set out in section 1 of the Children Act. The basis for such a submission was said to reside in R(Tinizaray) v SSHD [2011] EWHC 1850 and the approach there taken to ZH (Tanzania) v SSHD (2011) 2 AC 166 SC. In the event, Mr Drabble did not press that ground of appeal. He was right not to do so. In SS (Nigeria) v SSHD [2013] EWCA Civ 550 , Laws LJ said (at paragraph 55) that Tinizaray should not be regarded as "establishing anything in the nature of a general principle" about section 1 of the Children Act. I respectfully agree. Mr Sheldon tells us that, notwithstanding what Laws LJ said, some tribunals continue to adopt the Tinizaray approach. In my view they should not do so. Tinizaray should receive its quietus. " (Maurice K ay LJ)

47.
In AJ (India) and Others v Secretary of State for the Home Department [2011] EWCA Civ 1191 ; [2012] Imm AR 10 , the Court of Appeal addressed the submission:-

“ …t hat the decision taken by the Secretary of State was wrong in law because section 55 was not considered. It is immaterial that the Secretary of State was not and could not have been aware of the birth of the child, D. The tribunal, which became aware, should have allowed the appeal and remitted the case to the Secretary of State, the primary decision-maker, for further consideration.” (paragraph 18).

48.
At paragraph 20, Pill LJ, giving the leading judgment, noted that, in this regard, reliance was placed on Lady Hale’s statement in ZH (Tanzania) that any decision taken without having regard to the need to safeguard and promote the welfare of any children involved would not be “in accordance with the law” for the purposes of Article 8(2) of the ECHR. In considering the subsequent case law, the following paragraphs of the judgment of Pill LJ are of crucial significance:-

“ 21. I do not accept Mr Malik's submissions on this issue. The decision of the Secretary of State complained of was a decision refusing leave to remain. The duty of the tribunal under section 86(3) is to determine the appeal. It must allow the appeal insofar as it thinks that the Secretary of State's decision "was not in accordance with the law (including immigration rules)".

22. The tribunal has power to hear evidence, make findings of fact and decide points of law. On the material before it, the tribunal was entitled to conclude that the decision of the Secretary of State refusing leave to remain was, on the material before the tribunal, one on which the tribunal was able to make a judgment. What the tribunal could find on the merits in this case is for further consideration in this appeal, but I have no doubt that the tribunal was in law entitled to proceed.

23. In Huang v The Secretary of State [2007] 2 AC 167 Lord Bingham of Cornhill stated at paragraph 11:

"These provisions, read purposively and in context, make it plain that the task of the appellate immigration authority, on an appeal on a Convention ground against a decision of the primary official decision-maker refusing leave to enter or remain in this country, is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it."

24. Paragraph 24 of ZH does not assist the appellant. Baroness Hale plainly contemplated that the tribunal must consider Section 55. If Baroness Hale had been of the view that the tribunal was excluded from doing so because its only option was to remit to the Secretary of State, I am confident that Baroness Hale would have said so. Further, paragraph 71 of DS (Afghanistan) v SSHD [2011] EWCA Civ 305 does not assist the appellant. Section 55 had not been mentioned at the tribunal hearing in that case. Lloyd LJ stated at paragraph 71:

"Nevertheless, it seems to me that the tribunal ought to have borne this obligation in mind when deciding the appeal, because of the Tribunal's role as decision-maker: see R (Razgar) v SSHD [2004] UKHL 27 , [2004] 1 AC 368 at paragraph 15. The position might have been different if the role of the Tribunal were not that of being a part of the decision-making process. If its function were equivalent to that of deciding a conventional appeal or a conventional judicial review application, then the process might be limited by reference to material which had been before the decision-maker and to

the law as it stood at the time of that decision. But it has long been clear that the role of the tribunal, now the First-Tier Tribunal or the Upper Tribunal, as the case may be, is not constrained in this way"”

49.
Having made that finding, with which Etherton LJ and Sir Mark Potter agreed, Pill LJ turned to the merits of the appeal. This concerned an analysis of the First-tier Tribunal’s approach to the best interests of the children. At paragraph 25, Pill LJ noted the submission of Mr Malik (counsel for AJ) that, taking account of the respondent’s guidance Every Child Matters , an attempt should be made to consult children even if they are very young. If there were no specific reference in the Tribunal’s decision to section 55, the Tribunal’s decision can stand only if it is very clear that the substance of the obligation has been taken into account.

50.
Having considered what Lady Hale had to say in ZH (Tanzania) , Pill LJ made, at paragraph 43, what he described as “the following general comments”:-

“ (a) As Baroness Hale stated at paragraph 33 in ZH , consideration of the welfare of the children is an integral part of the Article 8 assessment. It is not something apart from it. In making that assessment a primary consideration is the best interests of the child.

(b) The absence of a reference to section 55(1) is not fatal to a decision. What matters is the substance of the attention given to the "overall wellbeing" (Baroness Hale) of the child.

(c) The welfare of children was a factor in Article 8 decisions prior to the enactment of section 55. What section 55 and the guidelines do, following Article 3 of UNCRC, is to highlight the need to have regard to the welfare and interests of children when taking decisions such as the present. In an overall assessment the best interests of the child are a primary consideration.

(d) The primacy of the interests of the child falls to be considered in the context of the particular family circumstances, as well as the need to maintain immigration control. ”

51.
At paragraph 45, Pill LJ held that, in the case at issue, the failure of the Immigration Judge to refer in terms to section 55 “was not fatal and its requirements were in substance met”. The birth of the child had been brought to the attention of the Immigration Judge and his determination plainly established that appropriate weight had been given to the welfare and interests of the child, as a primary consideration. At paragraph 46, Pill LJ concluded that, whatever primacy had been given to the interests of the child, D, he could not see that, on the evidence, any other result than dismissal could properly be achieved.

52.
We now turn to the way in which the section 55 duties have been addressed in the Upper Tribunal.

53.
In JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC), McCloskey J, President of the Upper Tribunal Immigration and Asylum Chamber , was concerned with an appeal against a decision of the First-tier Tribunal made under the appellate provisions of the 2002 Act, as they were before amendment by the Immigration Act 2014 (see paragraphs 13 and 14 above). This meant that one of the grounds on which an appeal would be allowed was where the respondent’s decision was not in accordance with the law. The President set aside the decision of the First-tier Tribunal and re-made the decision by allowing the appeal on the basis that the respondent’s decision was not in accordance

with the law. This was for two reasons. The F irst-tier Tribunal had failed to recognise that the oldest child of the family was capable of succeeding under the Immigration Rules. The second reason is the one that concerns us. This was that the First-tier Tribunal had “failed to consider whether the Secretary of State had complied with” her duty under section 55(3) to have regard to the relevant guidance. This was a “fundamental error of law infecting the FtT’s decision” (paragraph 17).

54.
The President reached that conclusion in the following way. At paragraph 8, he drew particular attention to paragraphs 35 to 37 of the judgment of Baroness Hale in ZH (Tanzania) , concluding that the “thrust of these passages is that the initial decision-maker must be properly informed”. At paragraph 9, the President cited the seven principles articulated by Lord Hodge in Zoumbas , highlighting sub-paragraphs (5) and (6), concerning the importance of having a “clear idea of a child’s circumstances” and there being “no substitute for a careful examination of all relevant factors when the interests of a child are involved in an a rticle 8 assessment”.

55.
From this, the President derived , at paragraph 10, the proposition that “in order to discharge the two fold inter-related duties imposed by section 55 (i) to have regard to the need to safeguard and promote the welfare of any children involved in the factual matrix in question and (ii) to have regard to the Secretary of State’s guidance, the decision-maker must be properly informed ” . Having cited the Secretary of State for Education and Science v Metropolitan Borough Council of Tameside [1977] AC 1014 and Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, t he President held that the “duties enshrined in section 55 cannot be properly performed by decision-makers in an uninformed vacuum. Rather the decision-maker must be properly equipped by possession of a sufficiency of relevant information”.

56.
At paragraph 11, the President held that being adequately informed and “conducting a scrupulous analysis are elementary pre-requisites to the inter-related tasks of identifying the child’s best interests and then balancing them with other material considerations”. This could not be done “unless and until the scales are properly prepared”.

57.
At paragraph 12, the President concentrated on section 55(3), noting that the decision-maker “must” have regard to the guidance: “there is no element of choice or discretion”. The President then referred to paragraph 2.7 of Every Child Matters , noting the three principles of “particular note”:-

“(a) Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.

(b) Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made .

(c) Children should have their applications dealt with in a timely way which minimises uncertainty. ”

58.
It is to be noted that sub-paragraph (b) above does not refer to the concluding sentence in the guidance that “ In instances where parents and carers are present they will have primary responsibility for the children’s concerns”.

59.

At paragraph 13, the President held that whether the duties imposed by section 55 have been duly performed in any given case would “invariably be an intensely fact-sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently, as in the present case, be confined to the application or submission made to the Secretary of State and the ultimate letter of decision”.

60.
At paragraph 14, the President highlighted some “intriguing questions thrown up by section 55”. One was whether it ha s a “procedural dimension in certain cases”. Another was whether it imposed “a proactive duty of inquiry on the Secretary of State’s officials in some cases”. The third was whether “a failure to conduct meetings or interviews with an affected child and/or its parents or others, a course specifically envisaged by the statutory guidance, will give rise to a breach of section 55”.

61.
The President considered , however, that it was not necessary to answer those question s “mainly because the existence of the three children concerned was disclosed and a not insubstantial quantity of evidence relating to them was included in the application to the Secretary of State and having regard to what I consider to be the manifest infirmities in the impugned decision”.

62.
Those “manifest infirmities” were highlighted at paragraph 15 as a failure to engage with the witness statement of the child’s mother, descri bing “family problems back home in Nigeria” and not knowing whether her family there were alive or dead; the educational progress and prowess of the oldest child; the integration of the family in United Kingdom life and culture; and the absence of any links with the mother’s country of origin . None of these issues was addressed: “ They are effectively airbrushed. ” Furthermore, no mention was made of two of the three children and the consideration given to the oldest child “was at best cursory”. The suggestion that the mother would be able to support her children while they became used to living in Nigeria was “neither contained in nor supported by the information in the application to the Secretary of State or any other source of information”. Furthermore, that suggestion had been “ belied by the evidence given to both T ribunals”.

63.
At paragraph 15(e) the President noted that the purported consideration of the best interests of the children “makes no reference whatever to the statutory guidance, explicitly or implicitly”.

64.
The President returned to these issues in MK (section 55 – tribunal options) Sierra Leone [2015] UKUT 00223 (IAC). This too concerned an appeal under the previous appeal regime.

65.
At paragraph 19, the President held that, having regard to the judgment of the Court of Appeal in AJ (India) , the respondent’s decision did not have to make specific refence to the statutory guidance, in order to comply with section 55(3). At paragraphs 20 and 21, however, the President held that, on the facts of the case, it could not be properly inferred that the decision-maker had had regard to material parts of the statutory guidance. In particular “none of the obligatory principles enshrined in paragraph 2.7 guidance is given expression”.

66.
At paragraph 23, the President noted the submission of Mr Jarvis, on behalf of the respondent, that where there had been a “total failure” to consider the best interests of the child, the Tribunal should

allow the appeal on the basis that the respondent's decision was not in accordance with the law "to the extent that it awaits a lawful decision by the SSHD acting as the primary decision-maker". Where, however, there had been engagement, albeit flawed, Mr Jarvis submitted that the Tribunal should make its own findings on what section 55 required "through Article 8 ECHR". At paragraph 25, the President noted that the Upper Tribunal in the present case had already set aside the decision of the First-tier Tribunal and had not ordered remittal. In those circumstances, he considered that three options arose:-

"The first is to re-make the decision of the FtT. The second is to remit the case to the FtT for the same purpose. The third is to allow the appeal on the basis that the Secretary of State's decision was not in accordance with the law thereby requiring the Secretary of State, as primary decision maker, to make a fresh decision giving effect to the assessment and conclusions of the Upper Tribunal."

67.
We pause here to observe that the third alternative wa s, in our view, merely an aspect of the first. Section 12 (2(b) of the Tribunal s , Courts and Enforcement Act 2007 provides that, where the Upper Tribunal sets aside a decision of the First-tier Tribunal it must re-make the decision in the appeal or remit the case to the First-tier Tribunal. Deciding the appeal on the basis that the respondent's decision was not in accordance with the law was one way in which the Upper Tribunal could re-make the decision of the First-tier Tribunal. That, in fact, is what happened in MK . W e respectfully disagree with the conclusion in paragraph 26 of MK that, following set aside , "re-making is discretionary, not obligatory". It is a statutory obligation.

68.
Having set out passages from SS (Nigeria) , (see above) the President continued as follows:-

"30. We consider that from the perspective of section 55 of the 2009 Act, the main principle to be distilled from SS (Nigeria) is that in cases where the Tribunal is assessing the best interests of an affected child it should normally do so on the basis of the available evidence without more. The decision strongly discourages the Tribunal from conducting an inquisitorial exercise. But Laws LJ stated that the Tribunal must be "armed ... with the facts required for a careful examination" of the affected child's best interests. This invites the following question: in cases where the Tribunal does not consider itself sufficiently equipped to conduct an adequate best interests assessment, what are its options? In particular, is one of the available alternatives a disposal order the effect whereof is that the Secretary of State must make a fresh, lawful decision, rectifying the failure to perform the section 55 duties in the first place? Furthermore, if an order of this kind is an available option, what is the test or criterion to be applied by the Tribunal in deciding whether to invoke it?

31. We consider that the unspoken premise in the SS (Nigeria) principle is in truth something of an assumption, namely, that in the typical case the Tribunal will be sufficiently armed and equipped to properly assess the child's best interests. This is expressed most strongly in the judgment of Mann LJ. It entails an expectation that, in the great majority of appeals, the Tribunal will have sufficient evidence to enable it to conduct this exercise properly. The most obvious source of this evidence, in the usual case, will be the material laid before the decision maker by the Appellant. There is a very broad spectrum in this respect. At one end thereof the Appellant, who may have no representation, composes some brief and possibly confusing or incoherent sentences which are transmitted to the decision maker for consideration and form part of the evidence before the Tribunal. At the other end of the spectrum, the Appellant's case is compiled by competent and experienced practitioners and consists of coherent and impressively composed representations, supplemented by materials such as

birth certificates, school records, character testimonials and expert reports, whether medical or otherwise. Between these two extremes there may, potentially, be many different permutations. Furthermore, in some cases, the evidence will be clarified and amplified by well planned and presented oral testimony. We suggest that the SS (Nigeria) principle must be considered in this light.

32. The SS (Nigeria) principle must also be balanced with what the Supreme Court has pronounced in its two landmark decisions and, indeed, what the Court of Appeal said in SS itself. As we have highlighted, one of the striking features of the decision in SS is the Court's acceptance of the argument that the child's best interests " must be properly gone into " and the Court or Tribunal must be " … armed … with the facts required for a careful examination of those interests … ": see [34]. We consider that this chimes with what this Tribunal said more recently in JO (Nigeria) [2014] UKUT 00517 (IAC). First, it distilled from the opinion of Baroness Hale in ZH (Tanzania) [2011] UKSC 4 the principle that the decision maker must be properly informed (see [8]), highlighting the importance accorded to " the quality of the initial decision " at [36]. Second, this Tribunal acknowledged the stress in Zoumbas v SSHD [2013] 1 WLR 3690 on the importance of having " a clear idea of a child's circumstances " and the necessity for " a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment ": per Lord Hodge, at [10]. Third, this Tribunal drew attention to the Tameside principle and the Padfield principle, at [10]. It stated:

"T hese principles also give sustenance to the proposition that the duties enshrined in section 55 cannot be properly performed by decision makers in an uninformed vacuum. Rather, the decision maker must be properly equipped by possession of a sufficiency of relevant information. "

Continuing, this Tribunal identified two guiding principles, each rooted in duty, at [11]:

" The first is that the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors. These principles have a simple logical attraction, since it is difficult to conceive how a decision maker could properly have regard to the need to safeguard and promote the welfare of the child or children concerned otherwise. Furthermore, they reflect long recognised standards of public law. Being adequately informed and conducting a scrupulous analysis are elementary pre-requisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations. "

We consider that there is no disharmony between the decision of the Tribunal in JO (Nigeria) and the relevant decisions of the Supreme Court and the Court of Appeal. Furthermore, the contrary was not argued.

33. The full context within which these issues arise must, of course, be appreciated. In this respect, the central theme of SS (Nigeria) is the powerful weight to be attributed to the factor of Parliamentary intervention in the field of the deportation of foreign national offenders through the provisions of the UK Borders Act 2007. These provisions must now be considered in conjunction with the new Part 5A of the Nationality, Immigration and Asylum Act 2002 inserted by section 19 of the Immigration Act 2014 (the " 2014 Act "), the effect whereof is that the public interest expressed by Parliament is probably stronger than before. In SS (Nigeria) Laws LJ, summarising, stated in [55]:

" Proportionality, the absence of an 'exceptionality' rule and the meaning of 'a primary consideration' are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision maker's margin of discretion: the policies source and the

policies nature and in particular to **the great weight which the 2007 Act attributes to the deportation of foreign criminals.** ”

[Our emphasis.]

In a later passage, Laws LJ refers to “ the extremely pressing public interest in the Appellant’s deportation ”: see [58]. Accordingly, in cases of this kind, in the proportionality scales, the factor of the best interests of any affected child, while a matter of undeniable importance **,** is to be balanced with a public interest of unmistakable potency. This must be borne in mind in every case where, having found a breach of either of the two duties imposed by section 55 of the 2009 Act, the Tribunal is considering the appropriate consequential course.

34. We consider that there are four significant aspects of section 55 of the 2009 Act which do not feature with any prominence in the jurisprudence of the Court of Appeal. The first is that the Secretary of State is the primary decision maker. The second is that the two duties enshrined in section 55 are imposed on the Secretary of State and no one else. The third is the guidance made under section 55(3) and the related statutory duty imposed on decision makers to have regard thereto: this has received at best scant attention, coupled with the fact that there is no meaningful way in which tribunals can give effect to certain aspects thereof. The fourth, as we have highlighted above, is that in the trilogy of decisions examined, the Court of Appeal has not decided the question of whether one of the options available to the Tribunal, where a breach of either or both of the duties imposed by section 55 is found, is to make an order the effect whereof is to require the Secretary of State to make fresh, lawful decision. Thus the fetters imposed on this Tribunal by binding precedent are limited.

35. We would highlight that where either the FtT or the Upper Tribunal finds that there has been a breach by the Secretary of State of either, or both, of the duties imposed by section 55 of the 2009 Act, a further assessment of and decision concerning the best interests of any affected child must be made. The author of such decision will be either the relevant Tribunal or the Secretary of State. There is no other candidate decision maker. We have raised the question of what test or criterion the Tribunal should apply in deciding which of the two candidate agencies should make the fresh decision. We turn to consider this discrete issue further. ”

69.
At paragraph 37, the President noted that there was a power of adjournment or postponement provided for by the Tribunal Procedure (Upper Tribunal) Rules 2008 and that this might be invoked where the Tribunal found itself without relevant evidence concerning a child’s best interests, in circumstances where the respondent “has breached either of the duties enshrined in section 55 of the 2000 Act” (paragraph 37). Nevertheless, at paragraph 38, the President considered “that there can be no objection in principle to an order of the Tribunal the effect whereof is to require the Secretary of State, rather than the Tribunal, to perform the two duties imposed by section 55”. The Tribunal, at both levels, had power to allow an appeal on the basis that the respondent’s decision was not in accordance with the law “thereby obliging the Secretary of State, as primary decision -maker, to re-make the decision, giving effect to an d educated and guided by such correction and guidance as may be contained in the Tribunal’s determination”.

70.
At paragraph 39, the President concluded his survey of the relevant jurisprudence , governing principles and statutory framework as yielding the following conclusions:-

“(a) Where either the FtT or the Upper Tribunal decides that there has been a breach by the Secretary of State of either of the duties imposed by section 55 of the 2009 Act, both Tribunals are empowered, in their final determination of the appeal, to assess the best interests of any affected child and determine the appeal accordingly. This exercise will be appropriate in cases where the evidence is sufficient to enable the Tribunal to conduct a properly informed assessment of the child’s best interests.

(b) However, there may be cases where the Tribunal forms the view that the assembled evidence is insufficient for this purpose. In such cases, two options arise. The first is to consider such further relevant evidence as the Appellant can muster and/or to exercise case management powers in an attempt to augment the available evidence. The second is to determine the appeal in a manner which requires the Secretary of State to make a fresh decision. While eschewing prescription, we observe that this course may well be appropriate in cases where it appears to the appellate tribunal that a thorough best interests assessment may require interview of an affected child or children in accordance with Part 2 of the Secretary of State’s statutory guidance.

(c) In choosing between the two options identified above, Judges will be guided by their assessment of the realities of the litigation in the particular case and the basis on which the Secretary of State has been found to have acted in breach of either or both of the section 55 duties. It will also be appropriate to take into account the desirability of finality and the undesirability of undue delay. ”

71.
At paragraph 40, having taken into account the fact that the Tribunal “has been strongly discouraged by the Court of Appeal in SS (Nigeria) from undertaking its own “inquisition”, the Upper Tribunal concluded “not without some misgivings, … that this Tribunal should proceed to make its assessment of the best interests of the children concerned”. In paragraph 41, it then proceeded to do so on the basis of the evidence before it.

72.
At paragraph 41, the Upper Tribunal concluded that the appellant’s two children were at a critical stage of their development. It took into account the highly positive findings of the First-tier Tribunal regarding the appellant’s conduct and lifestyle since the commission of the index offences some thirteen years ago, as well as his youth when he committed them. The Tribunal concluded that the best interests of the children “will undoubtedly be served and promoted if the status quo is preserved”. Having applied section 117C of the 2002 Act, the Upper Tribunal concluded that “in a case which is undoubtedly challenging and marginal, unusual and highly fact specific, the deportation of this Appellant would interfere disproportionately with the family life rights of the four persons concerned” (paragraph 43). The Tribunal, accordingly, allowed the appellant’s appeal.

73.
We now move to the Court of Appeal in Northern Ireland. In JG v the Upper Tribunal, Immigration and Asylum Chamber [2019] NICA 27, McCloskey J delivered the court’s judgment in an application for leave to appeal to the Court of Appeal against the decision of the Upper Tribunal, which had upheld the decision of the First-tier Tribunal to dismiss the appellant’s appeal against the Secretary of State’s decision on 11 July 2017 to refuse the appellant’s human rights claim. As a result of the changes made by the Immigration Act 2014, the sole ground of appeal was that the appellant’s removal would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act con trary to Human Rights Convention). The appellant was to be deported as a foreign criminal. The First-tier Tribunal had before it a report of an educational psychologist regarding the elder of the appellant’s

two children. The two children were British citizens, aged respectively (at the time of the Court of Appeal judgment) 11 and 2 ½ years.

74.
Beginning at paragraph 10, McCloskey J considered the ground of challenge to the way in which the First-tier Tribunal and the Upper Tribunal had applied the test of undue harshness in paragraph 399 of the Immigration Rules. What the C ourt of Appeal considered relevant, however, was the second ground of appeal. This concerned section 55 of the 2009 Act. At paragraph 19, McCloskey J referred to his decisions in JO and MK concerning the "two quite separate though intra-related duties" in subsections (1) and (3) (paragraph 19). He also referred to the judgments he had handed down in the High Court in Northern Ireland, including R e EFE's A pplication [2018] NIQB 89, in which he described the section 55(3) duty as the "servant, or handmaiden, of sub-section (1)". Compliance with section 55(3) "will have the further merit of increasing the prospects of exposing cases in which, for whatever reason, there has not been sufficient focus or concentration on the child …". Later in EFE , McCloskey J said he had found it "very difficult indeed to conceive of a case in which a failure to perform the simple, uncomplicated exercise which is required as a matter of obligation by section 55(3) could in some way be excused or substituted" (paragraph 22).

75.
The judgment in JG continued as follows :-

" [23] The nexus between the separate duties contained in Section 55(1) and (3) is undeniable. In every case where a breach of the Section 55(3) duty occurs the protection afforded to the child by Section 55(1) is weakened and undermined. Section 55(3) exists to promote and ensure the due fulfilment of the substantive obligation under Section 55 (1). The former duty is to have regard to the need to safeguard and promote the welfare of potentially affected children in the United Kingdom. As the relevant decisions of the United Kingdom Supreme Court demonstrate, the welfare of a child and its best interests have been treated as synonymous: ZH Tanzania [2011] UKSC 4 at [26], [43] and [46] (per Baroness Hale and Lord Kerr) and Zoumbas v Secretary of State for the Home Department [2013] UKSC at [10] (per Lord Hodge).

[24] Every breach of the Section 55(3) duty exposes the child concerned to the real risk that his or her best interests will simply be disregarded. Absent a conscious and conscientious assessment of the child's best interests by the decision maker, those interests are likely to be ignored in the decision making process. The scales will not have been properly prepared. The child's entitlement is to have its best interests balanced with the other facts and factors in play, in particular the public interest engaged by the immigration function being performed: most frequently the public interest in maintaining firm immigration control, stemming from the ancient right of states to control their borders, and the public interest in deporting the certain foreign offenders. Every member of this vulnerable societal cohort is exposed to the risk of being denied this entitlement where the section 55(3) duty is breached. This is not diluted by any counter-balance or remedial mechanism.

[25] Furthermore, every breach of the Section 55(3) duty defies the will of Parliament. Such breaches are exposed only where resort is had to the court or tribunal. It is well-known that legal challenges do not occur in large numbers of cases for a variety of reasons - mostly human, financial and prosaic in nature. The result is that large numbers of children are being denied the protection which Parliament deemed necessary for them. "

76.

At paragraph 28, McCloskey J noted the guidance stated that “where possible the wishes and feelings of the particular child are obtained and taken into account when deciding on action to be undertaken in relation to him or her”. In the instant case, McCloskey J held that there was nothing to suggest that communication with the older child could not have been possible and that, in any event, the decision-maker “clearly ignored the statutory guidance outright”, so that no consideration was given to that particular passage. He continued:-

“ [30] Any temptation to underplay the importance of the two duties enshrined in Section 55 of the 2009 Act must be resisted. As the present case illustrates graphically, the decision making in cases of this kind has profound and long term consequences for the lives of children. In theory, in a given case a breach of Section 55(3) might be of no material moment, for example a mere technical or inconsequential or trivial breach. However, when one examines the detailed checklist in the statutory guidance it seems likely that such cases, if they arise at all, will be rare. The necessity of making an assessment of the best interests of every potentially affected child present in the United Kingdom is a necessary pre-requisite to performing the section 55(1) duty namely to have regard to the need to safeguard and promote those interests. Section 55(3) equips the decision maker with the means with which to make the requisite assessment by stipulating the obligatory step of having regard to the statutory guidance. The latter, in turn provides a range of tools to be employed in appropriate cases.”

77.
At paragraph 33, McCloskey J held that:-

“Fundamentally, the enquiry for the court or tribunal in every case will be whether the decision maker (i) conducted an assessment of the child’s best interests and next, having done so, (ii) had regard to the need to safeguard and promote those interests. This will be the central focus of judicial attention in every case involving a possible breach of the section 55(3) duty. It is appropriate to add that where a decision maker does comply with the section 55(3) duty, this will betoken no guarantee of the court or tribunal concluding that the section 55(1) duty was discharged. ”

78.
At paragraph 35, he said:-

“ The section 55(3) duty to have regard to the statutory guidance raises the possibility of a range of further enquiries and actions outlined in such guidance including taking steps to ensure that the child’s views are ascertained and fully taken into account. This court cannot discount the possibility that consideration of the statutory guidance would have prompted certain actions on the part of the decision maker giving rise to a fuller and more thorough assessment of the older child’s best interests, as a prerequisite to discharging the related statutory obligation to have regard to the need to safeguard and promote those interests. Realistically, this could have resulted in a different outcome for the Applicant and, in consequence the child concerned. …”

79.
McCloskey J then addressed the consequences of the change in the appellate regime effected by the Immigration Act 2014:-

“ [36] Giving effect to the foregoing analysis, the court’s conclusion is that a material breach of Section 55(3) of the 2009 Act has been established. Mindful of the heavily reduced statutory grounds of appeal surviving the reforms introduced by the Immigration Act 2104, reflected in the substantially amended section 82(1) of the Nationality, Immigration and Asylum Act 2002, we consider that this gives rise to a breach of the Article 8 ECHR rights of the Appellant and the other family members

concerned. The violation of the section 55(3) duty engages, and contravenes, the procedural dimension of Article 8, elaborated in decisions such as R (MK) v Secretary of State for the Home Department [2016] UKUT 231 (IAC) at [27] especially, in contravention of section 6 of the Human Rights Act 1998. From this it follows that leave to appeal is granted and the substantive appeal succeeds.

[37[The court has given consideration to what the consequence of its overarching conclusion should be. This issue was considered by the Upper Tribunal in MK (Sierra Leone) (ante) at [26] – [39]. The approach of the Upper Tribunal in these passages was considered by the Court of Appeal subsequently, without disapproval: see especially R (on the application of MA (Pakistan) & Others) v Upper Tribunal (Immigration and Asylum Chamber) & Another [2016] ECWA Civ 705 at [59] (per Elias LJ). The feasibility of the court or tribunal concerned, in the wake of a demonstrated breach of the section 55(3) duty, actually pursuing any of the enquiries or steps specified in SSHD's statutory guidance appears to this court to be largely theoretical. Steps could of course be taken to ensure that the affected child's/children's views are considered via separate representation, reception of new evidence and a further hearing. But this course would inevitably generate much litigation delay and increased expense. Furthermore, why this burden should fall on the court or tribunal rather than the primary decision maker, SSHD, is unclear. It is far from surprising that these considerations did not feature in the earlier English Court of Appeal decisions preceding, and considered in, MA (Pakistan) – and indeed in MA (Pakistan) itself -given that the section 55(3) duty was not in play.

[38] Furthermore, every breach of the section 55(3) duty is a failure on the part of the primary decision maker, SSHD. The proposition that SSHD, rather than the court or tribunal, should deal with the consequences of a judicially diagnosed breach of the section 55(3) duty is harmonious with section 55 itself and consistent with the distinctive roles of the executive and the judiciary generally. In addition, this court is obliged to operate within the constraints of the overriding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature. This involves inter alia distributing its finite judicial resources proportionately among all the cases in its system. The UT and the FtT are subject to the same duty.

[39] While we consider that the preferable course would be for this court to make an order remitting the case to SSHD, thereby requiring a fresh decision making process and ensuing decision this, regrettably, is not an available course. Under section 14 of the Tribunals, Courts and Enforcement Act 2007, our options are to exercise our discretion to set aside the decision of the UT and, if we do so, to re-make the decision or to remit to either the UT or the FtT. This may be considered unsatisfactory given that SSHD is the primary decision maker and the agency best equipped to have regard to the section 55 guidance, which is nothing if not intensely prosaic in its nature and operation. Furthermore, SSHD has not yet discharged the section 55(3) duty in this case. However, by statute remittal by this court to SSHD is not possible. "

80.
The decision of the Court of Appeal in JG was to allow the appellant's appeal and remit the matter to the First-tier Tribunal, on the following basis:-

"[41] … Previously in a certain class of appeals the tribunal opted to make a final order the effect whereof is to require SSHD to consider the case afresh and make a new decision. This arose in cases where the tribunal found that the decision under challenge was "not in accordance with the law" (the previous statutory formulation of one of the permitted grounds of appeal): see for example AG (Kosovo) v Secretary of State for the Home Department [2008] Imm. A. R. 19 and Patel v Secretary of

State for the Home Department [2011] UKUT 00211(IAC). If this course is, as a matter of jurisdiction, available then whether to adopt it will be a matter for the FtT and, in the event of a further appeal ensuing, the UT. Having received no argument on the issue we venture no further. ”

81.
JG was followed by Scoffield J in the High Court in Northern Ireland , in granting permission in a judicial review of the refusal of the Upper Tribunal to grant permission to appeal against a decision of the First-tier Tribunal: I n the matter of application by JR137 for leave to apply for judicial review [2021] NIQB 13. The applicant was a national of Nepal, residing in Northern Ireland with her United Kingdom-born child and her husband. Abandoning her claim to international protection, she pursued, on appeal, a human rights claim based upon her child’s residence and circumstances in the United Kingdom.

82.
Having recited the relevant legislation, guidance and the case law of JO and JG , Scoffield J ventured “this short (and, no doubt , inadequate) summary of the main points emerging from the Court of Appeal’s decision in JG and the case law considered by it”:-

“ (i) There are two separate duties within section 55: the duty to have regard to the need to safeguard and promote the welfare of children within the United Kingdom (‘the principal duty’) and the duty to have regard to the section 55 guidance (‘the section 55(3) duty’). See JG , at paragraph [19].

(ii) The section 55(3) duty is designed to ensure that the principal duty, to properly consider a relevant child’s best interests (this being synonymous with the child’s welfare), is faithfully discharged. The importance of the section 55(3) duty should not be underplayed, merely because it is subservient to the principal duty. They go hand in hand, since having regard to the section 55 guidance (and complying with it in the absence of good reason to depart from it) is the means by which the decision-maker equips themselves to make the requisite assessment of the child’s best interests, which must be taken into account pursuant to section 55(1). See JG, at paragraphs [20]-[21], [23] and [30].

(iii) Having regard to the section 55 guidance achieves this aim by increasing the prospect of there being the requisite focus on the child in the case at hand which the principal duty requires in order to be properly discharged. There is accordingly a close nexus between compliance with the principal duty and the section 55(3) duty, with breach of the latter necessarily weakening the protection which the principal duty is designed to afford to children. See JG , at paragraphs [20] and [23]-[24].

(iv) Separate focus should therefore be brought to bear on whether there has been a breach of the section 55(3) duty, in addition to the question of whether there has been a breach of the principal duty. To determine whether the section 55(3) duty has been complied with, the court or tribunal considering this issue should carefully consider on the one hand what the section 55 guidance envisages and, on the other, what information was available to the decision-maker and how it was taken into account. See JG , at paragraph [21]. I would add that an important consideration in this regard is whether the section 55 guidance has been cited by the decision-maker (although that is plainly not determinative, as the case of MK (Section 55 - Tribunal Options) Sierra Leone [2015] UKUT 223 , relied upon by the interested party, confirms at paragraph [19]).

(v) The key principles, or critical requirements, are that the child be listened to in order to hear what they have to say and, relatedly, that their wishes and feelings are ascertained and taken into account. The section 55(3) guidance is not inflexibly prescriptive as to how this should be achieved, provided these key principles are observed where possible . The guidance does, however, refer to the possibility

of certain steps being taken by the caseworker or decision-maker, each of which is designed to ensure that the decision-maker properly discharges the principal duty. This might well require direct consultation with the child, depending on the circumstances of the case; and the feasibility of directly consulting an affected child should be considered in each case. The terms of the section 55 guidance certainly appear to suggest such direct engagement (see, for instance, the enjoinder that the communication should be in the child's preferred method or language). Where a simple, uncomplicated exercise is required by virtue of the obligation to have regard to the section 55(3) guidance, it is difficult to conceive of a case where the failure to perform this will be excused. See JG , at paragraphs [21], [28] and [35]; and also ED , at paragraphs [17]-[19].

(vi) Regrettably, lack of careful and conscientious compliance with section 55(3) appears to have been a feature of many immigration decisions and challenges in recent times, notwithstanding the provision's now well-established pedigree. See JG , at paragraph [22].

(vii) Where the section 55(3) duty has not been complied with, this will usually result in the decision at issue being set aside unless, exceptionally, the court can conclude that the duty was complied with in substance (perhaps fortuitously); or that the decision would have been the same if the statutory guidance had been conscientiously taken into account, so that the failure to have regard to the guidance demonstrably made no material difference. This reflects the importance of the duty, the possible life-long consequences for the child of the decision at issue, and that the section 55(3) duty is part of the protection for children deemed necessary by Parliament. See JG, at paragraphs [21], [24]-[25] and [31]-[34].

(viii) Proper compliance with the section 55(3) duty is, however, no guarantee that the principal duty has then also been properly discharged. See JG , at paragraph [33]. So, save in the exceptional cases mentioned at (vii) above, compliance with the section 55(3) duty will be a necessary, although not sufficient, condition of compliance with the principal duty. "

83.
At paragraph 30, Scoffield J held that the appellant's complaint was, the contention that the consideration of the best interest of the child -

"was undertaken in a defective manner because it necessarily involves (in the absence of good reason otherwise in the circumstances of the case) direct contact with the child concerned in order to ascertain their wishes and feelings and, indeed any first-hand evidence they can provide which is relevant to the determination of the issues before the decision-maker. "

84.
Beginning at paragraph 31, Scoffield J set out the consideration given in the Secretary of State's decision to the section 55(1) duty. The Secretary of State took the view that the family could return, as a unit, to Nepal, where there are opportunities for the appellant's daughter to continue her studies. At paragraph 33, however, Scoffield J noted that no mention was made in the decision letter "of the section 55 guidance, much less any detailed analysis of what it might require in the circumstances of this case; nor is there any evidence of consideration being given to any direct contact with the applicant's daughter in order to seek her first-hand input".

85.
At paragraph 34, Scoffield J noted that at the time of the First-tier Tribunal hearing the focus was "squarely on the interests of [the appellant's] daughter". The appellant's solicitor had provided a range of additional information regarding the daughter, including that she had spent all her time in

the United Kingdom, had never lived any time in Nepal, communicated in English as her first language , had developed friendships at school and was involved in many extra-c u rricular activities . Documentary evidence included school reports, photographs, and a variety of certificates and awards.

86.
At paragraph 37, Scoffield J noted that the First-tier Tribunal Judge expressly considered the best interests of the child, addressing her schooling, friendships, health and extra-curricular activities. So far as the child's linguistic ability was concerned, the First-tier Tribunal Judge found as a fact that the appellant and her husband had significantly downplayed the child's ability to speak Nepali and that she had grown up in a household where the primary language was Nepali (paragraph 38).

87.
The striking effect of the Court of Appeal's judgment in JG can be seen from what follows:-

" [39] I am satisfied that the FtT judge did clearly address herself to the applicant's daughter's best interests and no doubt did so conscientiously. But that is not the issue . In light of the case-law discussed above - and, in particular, the case of JG which is binding on this court - an additional question is whether the FtT judge also adequately addressed the requirements of the section 55(3) duty. In the FtT decision, there was no consideration of the section 55 guidance or what it might have required in the circumstances of this case as regards listening to the applicant's daughter and ascertaining her wishes and feelings. There was a good deal of information before the FtT judge about the child's current life in Northern Ireland; and it seems to have been assumed (no doubt correctly) that the child wished to remain in Northern Ireland with her family and pursue her education and private life here . I consider that there is force in Mr Peters' submission, however, that no consideration appears to have been given at any point by the SSHD to any direct contact with the child which might have shed more light on these issues; and that, on the important issue of contention between the parties as to the level of the child's knowledge of Nepalese (or ability to pick the language up), a potentially important strand of evidence was missing.

[40] In the applicant's grounds of appeal against the FtT decision, specific attention was then drawn to section 55(3) of the 2009 Act, the authorities relating to the obligations arising under it and to the section 55 guidance. Only at this point was major reliance placed on the failure of the part of the Home Office decision-maker to discharge or even consider their statutory duty under section 55(3) of the 2009 Act, with the cases of JO and JG being quoted from extensively.

[41] The FtT's refusal of permission to appeal contains the following summary:

" It is clear that the respondent had given consideration to the best interests of the child, because the Judge mentioned in paragraph 6 of her decision . The appeal was advanced on the basis that the appellant could not meet the requirements of the Immigration Rules, although the Judge was careful to point out that this was not being held against child. The Judge gave primary consideration to the child's best interests. It was accepted that she was a qualifying child. However, it was open to the Judge to find that her best interests were served by remaining with her parents. She had not reached a critical point in her education, which she could continue on return, and there were no medical factors. There was a conflict in the evidence concerning the language spoken at home. The Judge was therefore entitled to conclude that the child had a knowledge of the Nepali language, or that she would be able to develop, the family participated in Nepalese cultural events and there were family members in Nepal. "

[42] The further refusal of permission to appeal by the UT itself is in rather more terse terms, with the material part reading as follows:

“ 2. The grounds complain of the “scale and volume of errors of law” in the decision, but that is rhetoric.

3. The grounds do not arguably rise above vague insistence and disagreement . They specify nothing whereby the decision might be set aside for error on a point of law, or whereby another outcome might realistically be achieved. ”

[43] Both the SSHD and the FtT Judge obviously considered the applicant’s daughter’s welfare and best interests. There was, however, no detailed engagement with what might separately be required by the section 55(3) obligation at any point. The FtT decision refusing permission to appeal did not grapple with this issue. In my view, the UT decision on permission to appeal also too readily brushed aside the applicant’s detailed submissions on section 55(3), particularly in light of the authorities (including the UT’s own decision in JO and a decision of the Court of Appeal in Northern Ireland in JG) which were relied upon and cited in the course of those submissions. Rather, the section 55(3) duty appears to have been treated as adding nothing material to, or being subsumed within, the principal duty under section 55(1). On my reading of the authorities, including the decision in JG in particular, that is an incorrect analysis in law - and, at least, strongly arguably so”.

88.
At paragraph 46, Scoffield J held that:-

“A failure to identify a clear breach of the section 55(3) duty on the part of a decision-maker is, indeed, a significant error of law and one which ought, in an audit of legality of the decision, to result in it being quashed”.

89.
For the purposes of the judicial review proceedings, however, Scoffield J had to decide whether the error of law was sufficiently “important” to justify the grant of permission or leave. At paragraphs 52 and 53 , he found that the point of law was not important, in the sense that there was any “new aspect to it which would warrant the grant of leave on this basis”. The failure on the part of the First-tier Tribunal and the Upper Tribunal to identify and correct the failure on the part of the Secretary of State to comply with her requirements under section 55(3) were, rather, “an alleged failure to apply an establish ed , albeit important, obligation”. He held, nevertheless, that there was an “other compelling reason” to grant permission; namely, “ the variety of interlocking features” .

90.
The case of JG fell to be considered by the Inner House of the Court of Session in ZG v Secretary of State for the Home Department [2021] CSIH 16. The appellant was a citizen of China, “convicted of assault to severe injury” in September 2016 and sentenced to twelve months’ imprisonment. Accordingly, the appellant became a foreign criminal and proceedings were commenced to effect his deportation. He contended that his child, born in 2009, would find it unduly harsh to live in China; and that it would also be unduly harsh for her to remain in the United Kingdom without the appellant.

91.
The respondent accepted the appellant had a genuine and subsisting relationship with his daughter but concluded that it would not be unduly harsh for her to live in China; alternatively, that it would not be unduly harsh for her to remain in the United Kingdom if the appellant were deported. On appeal to

the First-tier Tribunal, the appellant submitted a report by a clinical psychologist regarding the daughter. The psychologist had interviewed the daughter and also the deputy head teacher at her primary school. He found that the daughter was well integrated into life in Glasgow. She told the psychologist that she wanted to live with both her parents. She would feel very sad if she had to live in China because she liked her school and her friends in Scotland. The psychologist concluded that there would be a significant negative impact on the daughter's emotional educational well-being if the appellant were removed from the United Kingdom. She would be susceptible to developing psychological difficulties if she were separated from him and/or had to leave her life in Glasgow.

92.
Neither before the First-tier Tribunal nor the Upper Tribunal was it contended that the Secretary of State had been in breach of section 55(1) or (3) of the 2009 Act. In the proposed grounds of appeal to the Court of Session, however, for the first time the appellant raised these issues. Reliance was placed on the case of JG in the Court of Appeal in Northern Ireland.

93.
It is instructive to note the submissions made to the Inner House by the respondent:-

"[25] Section 55(1) and section 55(3) impose statutory obligations upon the respondent and those exercising her authority. In the present case the respondent had complied with her duties under both subsections. She had had regard to the best interests of N as a primary consideration. There had been no need to record and deal with every piece of evidence in her decision letter (Zoumbas v Secretary of State for the Home Department 2014 SC (UKSC) 75 , Lord Hodge JSC at paragraph 23). It had not been necessary for her to make specific reference in the letter to the guidance which had been issued under section 55(3). The issue was one of substance and not form (MK (Section 55 Tribunal Options) Sierra Leone [2015] UKUT 223 (IAC) , [2015] INLR 563 , McCloskey J at paragraph 19) .

[26] Section 55 imposes obligations on the respondent and those acting on her behalf. It does not impose obligations upon the FtT, or the UT, or the court. When carrying out an assessment of proportionality under Article 8 in a case where a child is involved, the FtT, the UT, and the court must have regard to the best interests of the child as a primary consideration. The source of that obligation is section 6(1) of the HRA 1988 not section 55 of the 2009 Act.

[27] Where the respondent has decided to refuse a person's human rights claim, that person may appeal to the FtT on the ground that the respondent's decision is unlawful under section 6 of the HRA 1998 (section 82(1)(b) and section 84(2) of the 2002 Act). It is settled law that, in hearing such an appeal, the FtT's jurisdiction is not a judicial review jurisdiction. Nor is it merely an appellate jurisdiction which is limited to considering the evidence which was before the decision-maker. Typically the evidence before the FtT is more extensive than the material which the respondent had. Usually the FtT will have the benefit of written witness statements and oral evidence, as well as additional documents. The FtT requires to consider all of the evidence put before it and to come to its own decision on the merits (Huang v Secretary of State for the Home Department [2007] 2 AC 167 , Lord Bingham at paragraph 11; Singh v Secretary of State for the Home Department [2017] 1 WLR 4340 , Ryder LJ at paragraphs 28 to 34). If, as counsel for the appellant seemed to suggest, JG v Upper Tribunal, supra , indicated that whenever the respondent has breached section 55 the FtT must allow the appeal, that was not correct. In JG the court seems to have been heavily influenced by judicial review cases. It was important to remember that the FtT's jurisdiction was wider than that.

[28] Even if the respondent had breached one or both of her section 55 duties, that would not have the consequences which the appellant suggested. At the end of the day any such breach would not

have been material because the FtT had been able to assess the best interests of N properly and it had treated those interests as a primary consideration. It had the benefit of all of the evidence before it relating to N, including statements from the appellant and L, oral evidence from the appellant, and Dr Ul-Hassan's report. It conducted a careful analysis of N's circumstances. The grounds of appeal do not contend that the FtT had insufficient material before it to assess N's best interests and to determine for itself whether or not deportation of the appellant would breach her Article 8 right to family life. The position was clearly distinguishable from that in JG , where the court found (i) that the evidence before the FtT was not materially different from the information before the respondent, and (ii) that the FtT had substantially adopted the respondent's decision and reasoning. The FtT had not erred in law in determining that it would not be unduly harsh for N to live in China, and that deportation of the appellant was a justified i nterference with N's Article 8 right to family life."

94.
The Inner House began its substantive consideration at paragraph 29 of the judgment (delivered by Lord Doherty). At paragraph 32, the Inner House held that although there was no specific reference to section 55(3) in the Secretary of State's decision "it was not essential that there should be. What was important was whether there was compliance with the substance of the section 55 duties. What such compliance requires in a particular case is intensely fact sensitive". Referring to J O , Lord Doherty held that sometimes "there may be nothing in an applicant's representations which suggest a need for the respondent to obtain further information about a child, or that there is a need to ascertain a child's views independently of the child's parents". The information before the Secretary of State, however, was "far from up-to-date", which inclined the Inner House "to the view that she ought to have sought more recent information and that failing to do so would have been a breach of section 55".

95.
Lord Doherty continued:-

"[33] What would be the consequences of that breach? If the FtT's jurisdiction had been a judicial review jurisdiction the issue would have been whether the breach was material and ought to lead to the respondent's decision being set aside. However, as we discuss below, it was not a judicial review jurisdiction and that was not the issue.

[34] Where the respondent has refused an applicant's human rights claim against a deportation order, the applicant may appeal to the FtT in terms of section 82(1)(b) of the 2002 Act against the refusal. The only relevant ground of appeal (section 84(2) of the 2002 Act) is that the decision is unlawful under section 6 of the HRA 1998. It is important to bear that in mind. Until the amendment of sections 82, 84 and 86 by the Immigration Act 2014 (with effect from 20 October 2014) there were more extensive rights of appeal from a decision of the respondent, and the grounds upon which an appeal could be advanced were considerably wider. In particular, the former version of section 84 included a ground that the respondent's decision "is otherwise not in accordance with the law" (section 84(2)(e)), and in terms of the former section 86(3)(a) an appeal could be determined on the basis that the decision appealed against "was not in accordance with the law". That is no longer the position.

[35] In a section 82(1)(b) appeal the FtT's jurisdiction is not limited to a judicial review jurisdiction or an ordinary appellate jurisdiction (Huang v Secretary of State for the Home Department, supra , Lord Bingham at paragraphs 11, 13 and 15; Ali v Secretary of State for the Home Department [2016] 1 WLR 4799 , Lord Reed JSC at paragraphs 8, 42, 43, and 50; R (MM (Lebanon) v Secretary of State for the Home Department [2017] 1 WLR 771 , Baroness Hale of Richmond JSC at paragraph 64; Singh v

Secretary of State for the Home Department, supra , Ryder LJ at paragraphs 28 to 34). The FtT is an extension of the decision-making process in human rights cases (cf Singh v Secretary of State for the Home Department, supra , Ryder LJ at paragraph 30). The FtT will accord respect to the respondent's decision and give weight to her policies (Ali v Secretary of State for the Home Department, supra , Lord Reed JSC at paragraphs 44-50), but it is not restricted to considering the material which was before her. It is entitled to hear evidence (section 85(4) of the 2002 Act) and it usually does so. It has to decide for itself on the basis of the evidence before it whether the decision is unlawful under section 6 of the HRA 1998. W hatever the defects of the respondent's decision, it is the duty of the FtT to ensure that the ultimate disposal of the human rights claim is consistent with the Convention (R (MM (Lebanon)) v Secretary of State for the Home Department, supra , Baroness Hale of Richmond JSC at paragraph 59). (original emphasis)

[36] G enerally in a case where the Article 8 right to family life of a child is founded upon the critical question for the FtT will not be whether the respondent has breached one or both of her section 55 duties. Usually the crucial issues will be whether paragraph 399(a) of the Immigration Rules applies; and, if it does not, whether the interference with the Article 8 right is justified . In some cases, even though the respondent may have breached section 55, the evidence before the FtT enables it to identify and have proper regard to the best interests of the child as a primary consideration. In that connection we remind ourselves of the observations of McCloskey J in MK (Section 55 Tribunal Options: Sierra Leone) , supra , at paragraph [9]:

"9. Our survey of the relevant jurisprudence, governing principles and statutory framework yields the following conclusions:

(a) Where either the FtT or the Upper Tribunal decides that there has been a breach by the Secretary of State of either of the duties imposed by Section 55 of the 2009 Act, both Tribunals are empowered, in their final determination of the appeal, to assess the best interests of any affected child and determine the appeal accordingly. This exercise will be appropriate in cases where the evidence is sufficient to enable the Tribunal to conduct a properly informed assessment of the child's best interests.

(b) However, there may be cases where the Tribunal forms the view that the assembled evidence is insufficient for this purpose. In such cases, two options arise. The first is to consider such further relevant evidence as the Appellant can muster and/or to exercise case management powers in an attempt to augment the available evidence. The second is to determine the appeal in a manner which requires the Secretary of State to make a fresh decision. While eschewing prescription, we observe that this course may well be appropriate in cases where it appears to the appellate tribunal that a thorough best interests assessment may require interview of an affected child or children in accordance with Part 2 of the Secretary of State's statutory guidance.

(c) In choosing between the two options identified above, Judges will be guided by their assessment of the realities of the litigation in the particular case and the basis on which the Secretary of State has been found to have acted in breach of either or both of the Section 55 duties. It will also be appropriate to take into account the desirability of finality and the undesirability of undue delay." ”

96.
At paragraph 37, the Inner House held that, properly read, the judgment of McCloskey J in JG did not suggest a different approach was required. It agreed with the emphasis placed by the Court of Appeal of Northern Ireland on the importance of the section 55 obligations and the undesirability of undermining them. In JG , however, the First-tier Tribunal had not been provided with a proper basis

to identify the best interests of the elder of the appellant's two children. A psychology report which the appellant had submitted to the First-tier Tribunal was dismissed as not having addressed the material issues and the First-tier Tribunal had not had the benefit of materially different information from the information which had been before the respondent.

97.
By contrast, in the case before the Inner House, Lord Doherty was not persuaded that a similar analysis was appropriate. The First-tier Tribunal had considerably more material relating to the daughter than the respondent had possessed at the time of her decision. The material was up-to-date. The daughter's views were adequately ascertained and ventilated before the First-tier Tribunal. There was, accordingly, "sufficient evidence to enable to FtT to properly assess [the daughter's] best interests and to treat them as a primary consideration" (paragraph 38).

D. DISCUSSION

98.
We have taken time to set out, in some detail, the relevant provisions of the Every Child Matters guidance because it is necessary to understand the nature of that guidance , as it impacts upon the duties of the respondent's officials , before one can reach any safe conclusions about what might flow from any failures to have regard to the guidance.

99.
In our respectful view, insufficient attention has hitherto been paid to this issue. This failing can most graphically be seen in the judgment in Tinizaray , where the position of the UKBA was examined, without reference to the fact that the UKBA's position differ ed significantly from that of other agencies, which have the duty of supporting a child once initial concerns about its welfare have been identified.

100.
Contrary to what HHJ Thornton QC held in paragraph 24 of Tinizaray , there is nothing in Every Child Matters which requires the respondent's officials to operate by reference to the principles contained in the Children Act 2004. In particular, there is nothing in the guidance which suggests th ose officials should consider commissioning reports about wh ere a child's best interests might lie , as between remaining in the United Kingdom or leaving it with one or both parents. The third bullet point in paragraph 2.7 of the guidance is about consulting children and taking into account their wishes and feelings. The last sentence of that bullet point says that where parents and carers are present "they will have primary responsibility for the children's concerns". It is impossible to extract from th ese the proposition that, even if the parents have made it plain that the chil d wishes to remain in the United Kingdom with both of those parents, the respondent should nevertheless commission an independent expert, such as a psychologist or social worker, in order to investigate whether that asserted wish is genuinely held by the child.

101.
The reason for the absence of such a provision in the guidance is not hard to discern. When , in the immigration context, the respondent's officials first discover a child, with his or her parents, the ordinary position will be that the child's best interests lie in remaining with the parents, whilst the immigration position of the family is established.

102.

As explained in the guidance (see paragraph 30 above) , t he s ection 55 duty nevertheless makes it plain that those officials need to be alive to any signs that the ostensible position of the child may not be the position in truth and that, for example, the child may in fact have been trafficked to the United Kingdom and/or be at risk of sextual or other exploitation. Even in such circumstances, however, the nature of the respondent's immigration functions is not such as to require the respondent's officials to undertake or commission a detailed examination of the position. That is the task of other agencies, whose core function is to safeguard the welfare of children.

103.
At the other end of the immigration process is the position of children at or near the point at which either they are to be removed from the United Kingdom , along with a parent or parents; or where a parent is to be removed in circumstances where the child may be remaining in the United Kingdom. Here , we enter the area with which we are primarily concerned; namely, the appeal regime under sections 82 and 84 of the 2002 Act . This, in turn , brings us back to the question posed in paragraph 1 above: how, if at all, does a breach of section 55(3) impact upon the Tribunal's determination of an appeal against refusal of a human rights claim?

104.
So far as England and Wales is concerned, the answer is to be found in the judgment of Pill LJ in AJ (India) (see paragraph 4 8 above). As is evident from ZH (Tanzania) and DS (Afghanistan) , the Tribunal 's functions are an extension of the decision-making process, which begins with the respondent's consideration of the human rights claim. This means that, in deciding whether the removal of an individual in consequence of the refusal of their claim would be a proportionate interference with the Article 8 rights of anyone affected by that removal, the Tribunal must make the best interests of any affected child a primary consideration in the proportionality-balancing exercise.

105.
The Tribunal's function is not limited to considering the submissions and evidential material put to the respondent. It must consider the position as at the date of its own decision on the appeal. As Pill LJ held at paragraph 22 of AJ (India) , the Tribunal "has power to hear evidence, make findings of fact and decide points of law". Indeed, the last two powers are, in truth, duties; and the power to hear evidence is in most instances an obligation, unless the evidence is not filed in accordance with procedural requirements or is irrelevant to the subject matter of the appeal.

106.
What this means is that, even at the time when the appellate system included a duty to allow an appeal on the basis that the respondent's decision was "not in accordance with the law", a failure by the respondent's officials to comply with section 55 was extremely unlikely to prevent the Tribunal from reaching a lawful decision on the appeal. As Pill LJ explained at paragraph 24, Lady Hale in ZH (Tanzania) plainly contemplated that the fact-finding Tribunal must consider section 55 ; and if she had been of the view that a failure to do so on the part of the respondent meant that the Tribunal had no option but to remit to the respondent (under the former appeal system), then she would have said so.

107.
The position, therefore, is that, as between the competing principles that the respondent is the primary decision-maker in the immigration field, and that the Tribunal is an extension of the respondent's decision-making pr ocess , it is the latter principle which holds sway as regards the discharge of the duties under section 55.

108.
This position accords precisely with the result in SS (Nigeria) , where Laws LJ held at paragraph 35 that it will be “extremely rare” for the Tribunal to change its proceedings from the adversarial and “exercise an inquisitorial function on its own initiative”. In the great majority of cases, the Tribunal will not err in law by deciding the “best interests issue” as an aspect of Article 8(2), on the basis of the submissions and evidence before it, rather than deciding the matter on the basis of the respondent’s failure to comply with section 55, or adjourning to enable a party to assemble evidence on that issue.

109.
Although the Upper Tribunal in JO and MK made reference to SS (Nigeria) and although AJ (India) was mentioned in paragraph 19 of MK , both decisions were , in fact, decided per incuriam in relation to the relevant part of the judgment in AJ (India) . A ccordingly, what JO and MK say about the result of a breach of a section 55 duty by the respondent has to be read in that light.

110.
It is against this important background that we turn to the judgment of the Court of Appeal in JG . Since judgments of the Court of Appeal of England and Wales are no more than persuasive in the separate legal jurisdiction of Northern Ireland, the absence of any relevant consideration of AJ (India) cannot affect the binding nature of JG in that jurisdiction . If the judgment in JG had emanated from England and Wales, however, it is plain that the weight placed by McCloskey J at paragraphs 38 and 39 on the respondent as the primary decision-maker would be problematic, given the absence of any consideration of the case law emphasising the role of the Tribunal as an extension of the decision-making process in section 55 matters . In particular, the judgment in JG pays no regard to (i) the ability of the appellant, as part of the Tribunal ’s appellate proceedings, to adduce evidence about the wishes of his 13 year -old s on regarding the proposed deportation of his father; (ii) th e reference in Every Child Matters to the parents having “primary responsibility for the child’s concerns” (paragraph 2.7); and (iii) t he absence of any normative statement in the guidance regarding the commissioning by the respondent of an independent assessment of the child’s position.

111.
Overall, the conclusions reached in JG are more forthright than those reached by the same author in JO and MK . In particular, his earlier suggestion that, in an appropriate case, the Tribunal could adjourn and direct the filing of relevant evidence is replaced by the finding at paragraph 37 of JG that ensuring the child’s views are considered via separate representation “ would inevitably generate much litigation , delay and increased expense” .

112.
At paragraph 39, McCloskey J expressed regret that the new appellate provisions no longer enable the Tribunal to remit the case to the respondent . The Court of Appeal, therefore, concluded that it would set aside the judgment of the Upper Tribunal and remit the case to the First-tier Tribunal. The judgment does not explain what course the First-tier Tribunal should or could take at the remitted hearing. In particular, the question arises as to whether the First-tier Tribunal would direct the respondent to ask the 13 year old son whether he wanted his father to be deported to China , even if the evidence before the Tribunal already gave it the answer.

113.
The way in which the C ourt disposed of the matter in J G raises an issue which was touched upon by Lady Hale in ZH (Tanzania) . At paragraph 24, she recorded the acknowledgment on behalf of the Secretary of State that a decision which was taken without having regard to the need to promote the

welfare of any children involved would not be “in accordance with the law” for the purposes of Article 8(2) of the ECHR.

114.
This is particularly significant for the present appeal system, where the only ground of appeal is that the decision to refuse the human rights claim (and thus to remove) would be contrary to section 6 of the Human Rights Act 1998.

115.
Lady Hale’s recording of the respondent’s stance is not part of the ratio of ZH (Tanzania) . It is doubtful that the stance wa s, in any event, correct. The question for the purposes of Article 8(2) of whether the decision “is in accordance with the law” is not necessarily determined by whether the actual decision is in accordance with the domestic law . W hat is meant by “in accordance with the law” for the purposes of the ECHR Article 8(2) analysis is whether the proposed interference has a proper basis in domestic law, including whether the law is accessible to the person concerned and foreseeable as to its effects: AB v HM Advocate [2017] UKSC 25, paragraph 25 and paragraphs 49 to 53 of R (A) v Secretary of State for the Home Department [2021] UKSC 37 . Section 55 of the 2 009 Act undoubtedly satisfies those requirements. If the position were otherwise, and any failure to comply with section 55 on the part of the respondent rendered her decision not in accordance with the law for the purposes of Article 8(2), then the Court of Appeal could not have decided as it did in AJ (India) .

116.
That is not, however, the end of the matter. As the Upper Tribunal held in OA and Others (human rights: “new matter” s.120) Nigeria [2019] UKUT 00065 (IAC) ; [2019] Imm AR 647 , in any human rights appeal , a finding that a person satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that the respondent will not be able to point to the importance of maintaining immigration control as a factor weighing in favour of the respondent in any proportionality - balancing exercise under Article 8(2), so far as that factor relates to the particular immigration rule which the judge has found to be satisfied.

117.
It can immediately be seen that there is a fundamental difference between, on the one hand, a decision which – if correctly made – means the individual concerned is entitled to remain in the United Kingdom in accordance with the respondent’s own system of immigration controls and, on the other hand, a decision to refuse a human rights claim that may, in substance, be entirely correct and where any initial procedural failing can be corrected as part of the overall decision-making process , including the Tribunal’s decision on appeal.

118.
This point is forcefully made in the judgment of the Inner House in ZG . At paragraph 35, Lord Do herty expressly recognised that the First-tier Tribunal “is an extension of the decision-making process in human rights cases” and that it is “not restricted to considering the material which was before [the respondent]”. The First-tier Tribunal:-

“ …h as to decide for itself on the basis of the evidence before it whether the decision is unlawful under section 6 of the HRA 1998. Whatever the defects of the respondent’s decision, it is the duty of the FtT to ensure that the ultimate disposal of the human rights claim is consistent with the Convention.”

119.
At paragraph 36 of JG , the Court of Appeal held that a material breach of section 55(3) “gives rise to a breach of Article 8 ECHR rights”, in that the violation “ engages, and contravenes, the procedural dimension of Article 8 ”. This was the basis upon which the C ourt decided that JG’s substantive appeal succeeded.

120.
Leaving aside the problem , already mentioned, about where such a conclusion takes a court o r tribunal in terms of sections 12 and 13 of the 2007 Act, the conclusion in JG that there has been a procedural breach of Article 8 is incompatible with the approach taken in England and Wales in AJ (India) and by the Inner House in ZG , whereby the procedural breach can be cured by the remainder of the decision-making process.

121.
Our analysis of the case law ha s deliberately been undertaken by reference to section 55(1) and (3). Since , in McCloskey J’s words, the section 55(3) duty is merely the “handmaiden” of the duty in section 55(1) (see paragraph 74 above) , the way in which courts have dealt with non-compliance with section 55(1) plainly informs the view that must be taken of any failure to comply with section 55(3). If, as we have seen, the courts of England and Wales and Scotland regard breaches of section 55(1) as being r ectifiable by the First-tier Tribunal in a human rights appeal, it would be strange if a different view were taken of breaches of the section 55(3) duty to have regard to Every Child Matters . This is particularly so, given that th e guidance, properly read, carries nothing of material significance, beyond the requirement to take the child’s wishes and feelings into account “even though it will not always be possible to reach decisions with which the child will agree”. Apart from MK and JG (and Sc offield J’s decision following the latter), the case law conspicuously does not draw any distinction between section 55(1) and (3).

122.
This brings us to the following point. As we have already been at pains to emphasise, paragraph 2.7 of Every Child Matters places primary responsibility for identifying and communicating the wishes and feelings of the child on the child’s parents or carers. In the case of a human rights appeal, th at accords precisely with the established legal position. The appellant bears the burden of showing that his or her removal would be a breach of section 6 of the 1998 Act because it would be an unlawful interference with the Article 8 rights of the appellant or some other affected person. Although, once one reaches the final stage of the exercise mandated by Article 8(2), there is a requirement on the respondent to show that the interference is proportionate, the appellant is nevertheless expected to put before the Tribunal evidence which is within the appellant’s realm of knowledge. In cases involving children, this is routinely done by the provision of witness statements, school record s , and other materials, showing that (a) the child wishes to remain in the United Kingdom ; and (b) the child wishes the appellant to so remain.

123.
Even if the respondent could be said to have failed to consult the child in order to ascertain his or her wishes and feelings, the result would almost invariably not be to deprive the Tribunal of evidence about th ose wishes and feelings. On the contrary, the result will be that the respondent wi ll have to make her case for removing the appellant in the light of the evidence that the child’s wishes and feelings are as described by the appellant ; and th us on the basis that the child’s best interests run counter to the result the respondent is seeking to achieve.

124.
Whilst this is the paradigm scenario , as the Court of Appeal acknowledged in SS (Nigeria) , there may be rare or exceptional cases where the Tribunal would be wrong to proceed on the basis of such evidence as is before it regarding the position of the child. Such cases will, however, by their nature be extremely uncommon. As Laws LJ emphasised, the Tribunal must not li ghtly step out of its role in what are , in this jurisdiction, adversarial proceedings (paragraph 43 above) .

125.
Mr Peters submitted that the effect of JG i s to assist appellants who lack the finances or aptitude to assemble and adduce evidence about their children, in connection with a human rights appeal. Section 55(3) ensures that the respondent must, in all cases, provide the Tribunal with that evidence.

126.
This submission is problematic on a number of levels. Section 55(3) does not require the respondent to apply the guidance but merely to have regard to it. Properly read, the guidance does not envisage the respondent doing more in this re spect than to take account of the child's wishes and feelings. It does not envisage the commissioning by the respondent of independent reports on the child, whether to determine the latter's wishes and feelings or to identify any harm that might be caused to the child by the removal of the appellant from the United Kingdom. Lastly , it needs to be pointed out that it is not the purpose of section 55(3) to alleviate the procedural consequences for the appellant of bringing a human rights appeal.

127.
What , then , might constitute a rare or exceptional case? One example has already been foreshadowed . J udges working in the immigration jurisdiction may be required from time to time to decide a human rights appeal , where the y harbour a concern regarding the welfare of a child upon whom an adult appellant is relying in order to resist removal . The child's welfare may be at risk if the appellant remains with the child in the United Kingdom. There may , for instance , be a concern that the appellant is not, in fact, in a genuine parental relationship with the child and/or that the child is, or is at risk of, being exploited by the appellant in this country . Where a judge has such concerns, he or she ha s a duty to draw them to the attention of the appropriate authorities ; and it would be wrong in such a case to proceed solely on the basis of the position put forward by the appellant .

128.
What we have just said is not intended to be comprehensive . Other exceptional instances may be envisaged, using "exceptional" in its post- Huang [2007] UKHL 11 ; [2007] Imm AR 571 sense of something unlikely or rarely to be encountered. The important point, however, is that in the very great majority of cases, the evidence adduced by the appellant regarding the position of the child will enable the Tribunal to decide the human rights appeal, whether or not there has been a failure by the respondent to comply with section 55 of the 2009 Act.

129.
At paragraph 37 of ZG , the Inner House sought to distinguish JG on its facts. We are unable to take the same view in this case . The subject matter in JG was, as we have sought to demonstrate, far from being the sort of unusual or exceptional case envisaged by the Court of Appeal in England and Wales . Were this appeal governed by the law of England and Wales or the law of Scotland , it w ould be clear that the grounds of appeal could not succeed . T he fact that the immigration jurisdiction of the Upper Tribunal extends to the whole of the United Kingdom does not give the Upper Tribunal , when deciding a case arising under the law of one part of the United Kingdom , the ability to ignore the

authority of the appellate court of that part and instead follow the authority to the contrary of an appellate court w hose jurisdiction is confined to a different part of the United Kingdom . So much is plain from the judgment of Laws LJ in Clarke v Staddon /Caulfield and others v Marshalls Clay Products Ltd [2004] EWCA Civ 422. In that case, the Court of Appeal was concerned with the jurisdiction of the Employment Appeal Tribunal, which, like the Upper Tribunal's jurisdiction in immigration, extended across the United Kingdom. The Inner House of the Court of Session had construed the EU Working Time Directive in a particular wa y (MPB S tructures Ltd v M unro [2003] IRLR 350). The Court of Appeal rejected the submission that the EAT was bound to follow the decision of the Inner House in an appeal arising in England and Wales. Laws LJ held:

"30. As I have indicated Mr Hogarth submitted that the EAT in these cases ought to have followed Munro . I understood him to mean that as a matter of law, not discretion or good sense, it should have done so. If it is right this implies that this court would also be bound by the Court of Session, at least to the extent that we should be obliged to correct the EAT's failure to follow the Inner House; and that would give effect within this jurisdiction to the Munro judgment.

3 1 . I am afraid I regard this argument as nothing but a distraction from the real questions posed by this appeal. However, I acknowledge these following propositions at once. (1) The ET, EAT, and the Court of Session on appeal from the EAT administer in Scotland (with some esoteric qualifications not relevant for present purposes) the same statutory regimes as do the ET, EAT, and the Court of Appeal on appeal from the EAT in England. (2) Indeed the EAT spans the jurisdictions of England Wales and Scotland as a single jurisdiction: s.20 of the Employment Rights Act 1996 provides that it is to be a superior court of record and is to have a central office in London, but may sit in any place in Great Britain. (3) As a matter of pragmatic good sense the ET and the EAT in either jurisdiction will ordinarily expect to follow decisions of the higher appeal court in the other jurisdiction (whether the Court of Session or the Court of Appeal) where the point confronting them is indistinguishable from what was there decided.

3 2 . In my judgment, however, none of this brings Mr Hogarth's argument home. The rules of precedent or stare decisis cognisable here are given by the common law. Part of their substance, though not its whole, is that decisions of the Court of Appeal bind the Court of Appeal itself and all lower courts. They include refinements which teach where the edge of precedent is to be found, so that often the earlier decision can be distinguished. I need not go into those. The essence is that precedent confines the very power of the courts subject to it. It is not a rule of discretion or comity or anything of the kind. It is therefore of necessity a doctrine whose reach is limited to the jurisdiction in which the courts in question operate. The House of Lords is no exception; by statute its writ runs to three jurisdictions, and accordingly it binds the lower courts within each of those jurisdictions. Statute might also extend the scope of precedent, as was done by the European Communities Act 1972, part of whose effect is to give binding force over the national courts to decisions of the European Court of Justice (in matters within the latter's proper competence). Had the Human Rights Act 1998 provided that the courts of the United Kingdom should be bound by decisions of the European Court of Human Rights, rather than take account of them, that would have been another instance. Now, statutory provisions which give dominion to courts in one jurisdiction (international or otherwise) over courts in another are apt, here at least, to father constitutional tensions. But it is at least clear, and here is the point on this part of the case, that it would be a constitutional solecism of some magnitude to suggest that by force of the common law of precedent any court of England and Wales is in the strict sense bound by decisions of any court whose jurisdiction runs in Scotland only or

– most assuredly – vice versa . Comity and practicality are another thing altogether. They exert a wholly legitimate pressure.

3 3 . Mr Hogarth's argument on this part of the case is thus in my judgment mistaken. The EAT here was not obliged by law to follow the Court of Session. And this court certainly is not. ”

130.
In his judgment (with which the other members of the Court agreed), Laws LJ went on to explain why he did not consider that Munro was rightly decided and to dismiss the appeal against the decision of the EAT, which had reached a different view. T here was no suggestion that the EAT would not be bound by the judgment of the Inner House in cases arising in Scotland. On the contrary, at paragraph 53, Laws LJ , discussing the fact that another Tribunal had meanwhile made a reference to Luxembourg regarding the interpretation of the Directive, opined that “ some time will pass in which I suppose the EAT deciding Scottish cases will follow Munro and the EAT deciding English cases will follow the judgments in these appeals ” .

131.
We do not consider there is anything in the 2007 Act that mandates a different approach. Section 2 6 enables the Upper Tribunal to decide a case in England and Wales, Scotland or Northern Ireland “even though the case arises under the law of a territory other than the one in which the case is decided”. Whilst this expression clearly covers jurisdictions administered by the Upper Tribunal, where the statutory regime is different in certain respects in one part from another (or where the jurisdiction is confined to one part), we do not consider that it is to be read so narrowly . In any event, clear language would be required before it could be inferred that Parliament intended to create either the “ constitutional solecism ” envis aged by Laws LJ or the no less palatable situation in which the Upper Tribunal could choose which appellate court to follow, irrespective of where the appeal arose.

132.
We therefore conclude that there is a material difference in the treatment of section 55(3) of the 2009 Act as between, on the one hand, Northern Ireland and, on the other, England and Wales and Scotland. Since this is an appeal governed by the law of Northern Ireland, we are required by JG to find that the decision of Judge Grimes contains an error of law. We are further compelled by JG to set the decision aside. So far as concern s disposal, we follow the course taken in JG and remit the matter to the First-tier Tribunal for a de novo hearing before a judge other than Judge Grimes.

Sig ned

Mr Justice Lane

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber

6 September 2021