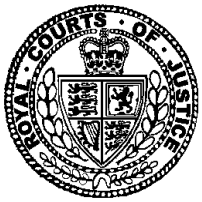

Neutral Citation Number: [2021] EWHC 2013 (Admin)

Case No: CO/1907/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2021

Before :

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

- -

Between :

The Queen on the application of **(1) MS AVB** **(2) MISS ACB**	**Claimants**
- and -	
UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)	**Defendant**
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

- -
- -

Morgan Read (instructed by **Bindmans**) for the **Claimants**
The Defendant was not represented
The Interested Party was not represented

Hearing date: Friday 9 July 2021

- -

APPROVED JUDGMENT

Mrs Justice Ellenbogen DBE:

Introduction and material facts

1. This judgment follows the substantive hearing of the Claimants' claim for judicial review of a decision of the Upper Tribunal, promulgated on 7 March 2019. In circumstances described below, the Claimants seek to amend their claim form to add a further ground of review, and 'object to' part of an order which I made in these proceedings, served on 17 June 2021 ('the 17 June Order'). Both matters were set out in a document settled by counsel for the Claimants, dated 28 June 2021, sent to the Court on 29 June 2021 ('the 28 June Document'). I shall return to them later in this judgment.

2. The Claimants are mother and daughter who appealed from the refusal of their human rights claim, on 10 October 2017, by the Secretary of State for the Home Department. Their appeals came before the First Tier Tribunal ('the FTT') on 11 April 2018, when they were represented by Mr Read, who now appears before me. They were dismissed.

3. On 13 June 2018, the Claimants applied to the Upper Tribunal for permission to appeal from the decision of the FTT, following its earlier refusal by the latter. In section G of their respective applications for permission, each Claimant answered 'no' to the following pro forma questions:

    a) If you are given permission to appeal by the Upper Tribunal, do you want the appeal to be dealt with at an oral hearing?

    b) Do you want this application for permission (as opposed to the appeal itself) to be considered at an oral hearing?

4. Permission to appeal from the decision of the FTT was granted by the Upper Tribunal on 19 September 2018. As described at paragraph 8 of the 2018 Decision (defined below), *'It was found to be arguable that the judge had provided insufficient reasons on the issues of the best interests of the second appellant and reasonableness of return as the facts were similar to those in* ***MT and ET (Nigeria)*** *[2018] UKUT 88 (IAC). Reference was also made to* ***MA (Pakistan)*** *[2016] EWCA Civ 705 - significant weight should be given to the fact that the appellant had been in the United Kingdom for over seven years.'* Notwithstanding the first answer provided by the Claimants at section G of their applications for permission to appeal, the appeal was heard by Upper Tribunal Judge Warr, at a hearing on 13 November 2018, who promulgated his reserved decision and reasons on 3 December 2018 ('the 2018 Decision').

5. Paragraph 2 of the 2018 Decision recorded:

> '*The appellants were unrepresented and did not make an appearance at the hearing. The clerk made enquiries and no messages had been received. Notice of the proceedings appeared to have been correctly served. There was no explanation for the non-attendance of the appellants.* [The respondent's representative] *had no updated information about the whereabouts of the appellants. In all the circumstances I was*

> *satisfied that it was appropriate to proceed with the hearing under Rule 38 and that it was in the interests of justice to do so.*'

6. The appeal was dismissed, on the basis that the FTT had made no material flaw in law, such that its decision should stand. An anonymity direction was made, whereby the appellants are referred to, respectively, as Ms AVB and Miss ACB.

7. On 19 December 2018, the First Claimant filed an application to set aside the 2018 Decision under rule 43 of the **Tribunal Procedure (Upper Tribunal) Rules 2008** ('the Rules'), supported by a short witness statement, dated 18 December 2018. Three 'grounds of appeal' were advanced. In summary, those were:

   a) apparent bias: it was said that the appellants had applied for the matter to be determined 'on the papers'. Instead, it had been determined at a hearing, at which the respondent's representations had been taken into account and which had been unfair because the appellants had been unable to be heard. Although entirely possible that this had resulted from a mistake, the Tribunal had been unduly influenced by the respondent and given rise to an appearance of bias;

   b) irrationality: the Tribunal's finding, at paragraph 3 of the 2018 Decision that, *'... the appellant had in the case of a previous application submitted a false United States of America passport and birth certificate claiming that the second appellant was a citizen of the United States when in fact she was a Nigerian national'* had been based upon 'the totally unsubstantiated claim of the respondent'. The Tribunal had undertaken no independent analysis of the relevant documents and, accordingly, its conclusion was one which no properly directed tribunal could have reached. [I interpose to observe that, in fact, paragraph 3 of the 2018 Decision was, on its face, an account of the SSHD's reasons for refusing the appellants' human rights claim, not the Upper Tribunal's independent assessment of the relevant documentation, or summary of the respondent's submission.]; and

   c) unlawful conduct: the Tribunal's assessment of the impact on the child had been entangled with the conduct of her mother and no assessment had been made of how reasonable it would be for the second appellant to remain in the UK without her mother; *'...in the absence of any clear process of balancing the proportionalities of the child's best interests against that of the public interest in removing those without leave to remain the Tribunal has failed to properly assess the best interests of the child and then properly balance those interests against any wrongdoing of the parent in light of the law as it stood at the time of decision.'*

8. On 7 March 2019, Upper Tribunal Judge Kekić promulgated his decision and reasons ('the 2019 Decision'). In a document headed 'Application for Permission to Appeal to the Court of Appeal', he dismissed the Claimants' application, for reasons which are set out, in full, below:

   'The appellants are mother and daughter. They did not attend the hearing before the Upper Tribunal which was then determined in their absence.

The grounds argue that it was unfair for the Tribunal to have proceeded without the appellants and to have heard arguments from the respondent because this gives the appearance of bias. It is also argued that the decision was irrational in that the Tribunal found that the appellant had presented a false US passport in a previous application. It is maintained that there was no evidence that the passport was false. Thirdly, it is argued that the best interests of the child appellant were not properly considered.

There is no arguable merit in the arguments made. In the absence of the appellants and their failure to provide any explanation for their non-appearance, it was open to the judge to proceed without them under Rule 38. The grounds fail to provide any explanation for their failure to attend. Contrary to what is argued, the best interests of the child were fully considered. As the first appellant has several convictions and prison sentences for offences involving fraud, including the use of false documentation, the judge was entitled to make the findings that he did.

The appeal does not raise any important point of principle or practice and there is no other compelling reason for it to be heard.'

The claim for judicial review

9. On 8 May 2019, the Claimants filed a claim form for judicial review of the 2019 Decision, by which they sought permission to challenge the Upper Tribunal's failure to consider their application for an order setting aside a decision which disposes of proceedings under Rule 43 of the Rules. The stated ground was that there was an error apparent on the face of the record, for two reasons:

    a) The Claimants' application had been for an order setting aside a decision under Rule 43, whereas the tribunal had refused a purported application to appeal to the Court of Appeal, under rule 44 of the Rules, which had not been made;

    b) The tribunal had stated that no explanation had been provided for the Claimants' non-attendance on 13 November 2018, yet it had been apparent from their application notices that the Claimants' rationale had been their election not to have an oral hearing.

10. The Claimants sought the quashing of the 2019 Decision; a decision in their favour (i.e. setting aside the 2018 Decision); remission of the matter to a differently constituted Upper Tribunal; an order mandating the Interested Party to provide to the Second Claimant such Home Office papers as are necessary to allow her to attend sixth form college; and costs.

11. Permission to seek judicial review of the 2019 Decision was refused, initially on paper and, again, on a renewed oral application. On 10 November 2020, the Court of Appeal granted permission to bring a claim for judicial review, for the reasons set out below:

    'I consider that there is an arguable point here. It is true, as Yip J said, that the UT has the right by r 48 UTR to treat a r43 application to set aside as if it were an application for permission to appeal. That might no doubt be a reasonable thing to do in many cases where there had been a procedural irregularity but the UT thought it had had no significant impact on the decision. But here the ground for the r 43 application was that the applicant had asked for – and so no doubt expected – her case

to be dealt with on the papers. That arguably gave her a good reason for not appearing at the hearing, although the UT does not seem to have appreciated this, and hence asking for a re-hearing. In such a case there seems to me a real prospect of success in the argument that to treat the r 43 application as an application for permission to appeal puts an additional hurdle in her way as requiring her to satisfy the more stringent test for a second appeal, or at least that if the UT is to do this it should (a) do so expressly and (b) say why…'

Directions and disclosure prior to the substantive hearing

12. When reading the court file in advance of the date on which this hearing was first listed, it appeared to me likely that, in advance of 11 November 2018, all parties would have been sent a notice of hearing by the Upper Tribunal, in accordance with rule 36 of the Rules (see below); how else would the Interested Party's representative have been aware of the need to attend on that day and the tribunal have been able to conclude that *'notice of the proceedings appeared to have been correctly served'*? Shortly prior to the original hearing date, therefore, I directed that the Interested Party interrogate her file in relation to appeal numbers HU/12802/2017 and HU/12805/2017, and lodge and serve a copy of the following documents:

    a) any notice of hearing sent to the parties by the Upper Tribunal in connection with the hearing which took place before Upper Tribunal Judge Warr, on 13 November 2018; and

    b) all correspondence passing between (1) the parties; and (2) any party and the Upper Tribunal, in relation to the need for and/or listing of that hearing (whether pre- or post-dating the notice of hearing referred to at sub-paragraph (a) above).

13. It proved not to be possible for such documents as now remain available to be retrieved in advance of the original hearing date and, accordingly, by order served on 17 June 2021 ('the 17 June Order'), I adjourned the hearing for a short period, to allow sufficient time for their retrieval and review, extending my original order to require their provision by all parties to proceedings. By paragraph 6, I made the following further provision:

    '6. By 4:00pm on Thursday 1 July 2021, the Claimants shall file and serve, electronically:

        a. *an updated indexed and paginated hearing bundle, to include, in chronological order:*

            i. a single copy of all documentation provided by one or more of the parties in accordance with paragraphs 3 to 5, above;

            ii. a full copy of the notice of appeal and attachments respectively lodged by each Claimant on 13 June 2018;

            iii. the permission to appeal granted by the Upper Tribunal on 19 September 2018, together with all attachments to that document;

iv. a copy of (a) the reserved judgment of Upper Tribunal Judge Warr, promulgated on 3 December 2018, and (b) the judgment of the First Tier Tribunal to which it related;

b. *an indexed and paginated bundle of relevant authorities and materials, to include a copy of:*

i. the Tribunal Procedure (Upper Tribunal) Rules 2008; and

ii. (at least) Chapter 2 of Part 1 of, and Schedule 15 to, the Tribunals, Courts and Enforcement Act 2007,

in each case as they stood between 3 June 2018 and 7 March 2019.'

The copy documents subsequently lodged and served in response to the 17 June Order included those following

a) two notices of decision, each in identical terms and dated 12 October 2018, sent by the Defendant to the relevant Claimant and the Interested Party, informing them that the application for permission to appeal had been granted; enclosing the Upper Tribunal's decision and directions regarding the appeal; and stating that notification of the date of any Upper Tribunal hearing would be sent to them in due course; and

b) a notice of hearing, also dated 12 October 2018, sent to the First Claimant and the Interested Party, informing them that the appeal would be heard on 13 November 2018, at 10:00am.

14. As previously noted, on 29 June 2021, those representing the Claimants sent to the Court the 28 June Document, by which objection was taken to part of the 17 June Order and an application to amend the claim form was made. No application notice accompanied the latter (contrary to paragraph 11.1 of CPR PD 54A and paragraph 9.2.1 of *The Administrative Court: Judicial Review Guide 2020*) and no appeal has been brought from the 17 June Order.

15. On 2 July 2021, in response to my request for their written responses to the 28 June Document, those representing, respectively, the Defendant and the Interested Party each stated that their client wished to remain neutral and did not intend to submit a written response.

16. The substantive hearing took place on 9 July 2021.

The Rules

17. The Rules were made in exercise of a power conferred by section 22 of the **Tribunals, Courts and Enforcement Act 2007** ('the 2007 Act'). The following are the Rules material to this claim, as they stood at the time of the 2018 and 2019 Decisions:

a) Rule 34:

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

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

...

b) Rule 36:

(1) The Upper Tribunal must give each party entitled to attend a hearing reasonable notice of the time and place of the hearing…

…

c) Rule 40:

…

(2) … the Upper Tribunal must provide to each party as soon as reasonably practicable after making a decision (other than a decision under Part 7) which finally disposes of all issues in the proceedings…—

(a) a decision notice stating the Upper Tribunal's decision; and

...

(3) … the Upper Tribunal must provide written reasons for its decision with a decision notice provided under paragraph (2)(a) unless—

(a) the decision was made with the consent of the parties; or

(b) the parties have consented to the Upper Tribunal not giving written reasons.

(4) The Upper Tribunal may provide written reasons for any decision to which paragraph (2) does not apply.

…

d) Rule 43 (within Part 7 of the Rules):

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

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

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

(2) The conditions are –

…

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

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

e) Rule 44 (within Part 7 of the Rules):

(1) … a person seeking permission to appeal must make a written application to the Upper Tribunal for permission to appeal.

…

f) Rule 45 (within Part 7 of the Rules):

…

(4) If the Upper Tribunal refuses permission to appeal it must provide with the record of its decision –

(a) a statement of its reasons for such refusal; and

(b) …

(5) The Upper Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission.

g) Rule 48 (within Part 7 of the Rules):

The Upper Tribunal may treat an application for a decision to be corrected, set-aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things.

The 2007 Act

18. Section 13 of the 2007 Act provides, in material part:

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (14).

(3) That right may be exercised only with permission…

(4) Permission… may be given by -

(a) the Upper Tribunal, or

(b) the relevant appellate court,

on an application by the party.

(5) An application may be made under subsection (4) to the relevant appellate court only if permission… has been refused by the Upper Tribunal.

(6) The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and for which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers–

(a) that the proposed appeal would raise some important point of principle or practice, or

(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.

(7) An application falls within this subsection if the application is for permission …to appeal from any decision of the Upper Tribunal on an appeal under section 11[1]*.*

(8) For the purposes of subsection (1) an "excluded decision" is -

(a) any decision of the Upper Tribunal on an appeal under section 27(3) or (5), 79(5) or (7) or 111(3) or (5) of the Data Protection Act 2018 (appeals against national security certificate),

(b) any decision of the Upper Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c. 36) (appeals against national security certificate),

(ba) any decision of the Upper Tribunal under section 88, 89(3) or 92(3) of the Tax Collection and Management (Wales) Act 2016 (anaw 6) (approval for Welsh Revenue Authority to issue certain information notices),

(bb) any decision of the Upper Tribunal under section 108 of that Act (approval for Welsh Revenue Authority to inspect premises),

(bc) any decision of the Upper Tribunal under section 181E or 181F of that Act (appeals relating to postponement requests),

[1] Section 11 of the 2007 Act confers a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the FTT, other than an "excluded decision" as defined by subsection 11(5).

(c) any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal),

(d) a decision of the Upper Tribunal under section 10—

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal, or

(iii) to set aside an earlier decision of the tribunal,

(e) a decision of the Upper Tribunal that is set aside under section 10 (including a decision set aside after proceedings on an appeal under this section have been begun), or

(f) any decision of the Upper Tribunal that is of a description specified in an order made by the Lord Chancellor.

...

(14) The Lord Chancellor may by order make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of subsection (2).

...'

Submissions

19. Both the Defendant and the Interested Party adopted a neutral position in these proceedings and did not appear before me, albeit that each made the point, in its Acknowledgement of Service, that the 2019 Decision was subject to a statutory right of appeal to the Court of Appeal which had not been exercised to date.

20. On behalf of the Claimants, in relation to the existing ground of review which has been permitted to proceed to a substantive hearing, Mr Read submitted that:

a) Whilst section G of the appeal forms submitted by the Claimants was worded in terms of a request, the general rule is that such a request cannot be refused, alternatively, that a refusal of the request will attract a right of oral renewal: *MD (Afghanistan) v SSHD* [2012] EWCA Civ 194, per Stanley Burnton LJ, at paragraph 21;

b) The First Claimant's evidence (witness statement, paragraph 4) in support of her application to set aside the 2018 Decision was, *'Of course, I was not there to represent myself, because I asked not to have a hearing.'* That afforded a good reason for the Claimants' absence, being their reasonable expectation that the matter would be dealt with on the papers;

c) Rules 40 and 45 require the Upper Tribunal to give reasons for the decisions to which each refers. Whilst the former does not apply to Part 7 of the Rules, it is further illustrative of the duty to give reasons incumbent upon a judge of the Upper Tribunal when refusing permission to appeal. That duty was identified by Lord Carnwath JSC as being aligned to fairness and the need to provide an aggrieved party with an effective means of redress: *Dover District Council v CPRE Kent* [2017] UKSC 79, at paragraph 51;

d) The Upper Tribunal's apparent decision to refuse the Claimants' application to set aside the 2018 Decision, and to treat it, instead, as being an application for permission to appeal, is inscrutable, in the absence of reasons. It leaves open the possibility that it arose by mistake and denies the Claimants an opportunity to challenge its substantive basis;

e) The failure of the receipting officer to have recorded the nature of the application in fact being made is consistent with the Tribunal having made a mistake;

f) The consequence of considering the application under rule 44 was that a more stringent test applied, to what was treated as being a second appeal. Thus, the Tribunal asked itself whether the appeal raised an important point of principle or practice, or some other compelling reason for it to be heard, whereas the test on an application to set aside was whether the Tribunal considered it to be in the interests of justice to do so. To treat the application in such a way as to require the satisfaction of a more stringent test, without giving reasons for so doing, would have been capricious. This, too, supported the most likely explanation for the Tribunal's approach being that it had misunderstood the nature of the application before it, in circumstances in which applications to set aside are less commonplace than are those for permission to appeal. Any deliberate decision ought to have been made explicit and supported by reasons;

g) The relief sought by the Claimants is the quashing of the 2019 Decision; a decision in the Claimants' favour; and remission of the matter to the Upper Tribunal, for a re-hearing of the appeal filed on 13 June 2018 (from which it follows that the pleaded order sought against the Interested Party is not pursued);

h) As to the Defendant's and Interested Party's position that the Claimants had not exercised their statutory right of appeal to the Court of Appeal, and acknowledging that such a right exists under the 2007 Act:

(1) The errors challenged are collateral to the substance of the Claimants' appeal in the Upper Tribunal and originate from the latter, rather than from the FTT. Accordingly, it is more correct to view the challenges made by the applications to set aside the 2018 Decision and to bring proceedings for judicial review as first-order challenges, rather than as a 'second appeal' relating to the substance of the Claimants' appeal from the decision of the FTT;

(2) The test on a second appeal to the Court of Appeal from the Upper Tribunal is set out at CPR 52.7(2): the Court of Appeal will not give permission

unless it considers that— (a) the appeal would— (i) have a real prospect of success; and (ii) raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it. As noted by the Upper Tribunal in the concluding paragraph to the 2019 Decision, that test is not met here, nor is it likely to be met in the circumstances in which rule 43 of the Rules is most likely to be exercised, namely where there has been an administrative error. Whilst the possibility cannot be discounted, it is unlikely that an administrative error would raise an important point of principle or practice. The Claimants should not have to meet the test applicable to a second appeal on a first-order challenge; and

(3) The Claimants should not have to exhaust a right to a second appeal on a matter which does not go to the substance of their appeal from the FTT. Essentially, theirs is a challenge to administrative errors which originated in the Upper Tribunal.

21. Mr Read's submissions regarding the Claimants' objection to part of the 17 June Order and their application to amend the claim form to add a further ground of review were as follows:

a) By paragraph 4 of the 28 June Document, '*objection is taken to that part of* [the 17 June Order] t*hat provides for the disclosure of material not relevant to* [the 2019 Decision]. *That, it is submitted, is*:

a) All material provided for at 6.a.ii. of the order excepting the IAUT-1 Application for Permission to Appeal 13.06.2018;

b) All material provided for at 6.a.iii. of the order excepting the standard directions attached to the grant of permission to appeal 12.10.2018[2] *;*

c) All material provided for at 6.a.iv of the order excepting the first two pages of the reserved judgment of Upper Tribunal Judge Warr 03.12.2018.'

b) The above objection was advanced on the basis that the proceedings for judicial review do not go to the substance of the appeals, respectively, before, and from the decision of, the FTT, or to the substance of the Upper Tribunal's decision on the latter appeal. The claim for judicial review had been brought and issued under CPR 54.5, not under CPR 54.7A. It did not touch upon the merits of the Claimants' case before the Upper Tribunal, or the FTT. Accordingly, material going to the merits was irrelevant. Whilst a legitimate question might arise as to the evidence of the procedure followed by the Upper Tribunal prior to reaching the 2019 Decision, questions relating to material which ventured into the substance of the Claimants' case were irrelevant. The only evidence falling within the former category was: a) the Claimants' applications for permission to appeal from the decision of the FTT, dated 13 June 2018; b) the directions attached to

[2] In fact, as is clear from an e-mail sent by those representing the Defendant, dated 28 June 2021 (15:47), in reply to an earlier enquiry by Mr Read, *'…there are no Upper Tribunal standard directions issued at present and this was also the case during late 2018. Each case is dealt with and managed on its own circumstances.'*

the grant of permission to appeal, dated 12 October 2018; c) the notice of hearing of the same date; and d) that part of the 2018 Decision which had related to the Upper Tribunal's decision to proceed with the hearing on 13 November 2018 in the Claimants' absence (being paragraph two). All other material disclosed pursuant to the 17 June Order ought to be excluded from consideration, as being irrelevant. Mr Read acknowledged that this court could not and should not ignore that which the Upper Tribunal had been asked to decide by the Claimants' application to set aside the 2018 Decision, that is the three bases upon which it had been advanced.

c) The additional ground of review for which permission was sought (as refined in the course of oral submissions) was that *'The Upper Tribunal, in its decision of 7 March 2019, failed to make any determination as to the fact of whether or not the Claimants received the notice of hearing dated 12 October 2018.'* The application to amend the claim form had arisen from a consideration of the 17 June Order, which had 'shone a light' on an area of the order made by the Court of Appeal on 10 November 2020, 'which had not been illuminated to that point'. (I observe that that submission had not been made in the 28 June Document, paragraph 5 of which had asserted that the application had been made 'in light of the issues arising above on the order [of] 17.06.2021'.) Implicit in whether the Claimants had had a reasonable expectation that their appeal would be addressed on paper was whether the notice of hearing dated 12 October 2018 had been received by the Claimants; a matter which the Upper Tribunal ought to have considered.

Discussion and disposal

The application to amend the claim form

22. Mr Read did not articulate the basis upon which the proposed new ground, as formulated in his oral submissions, would proceed as a ground of judicial review. I understand it to be asserted as constituting procedural unfairness. Whilst not an error on the face of the record, the issue is linked to that raised by the second aspect of the latter asserted at section 5 of the claim form. It was, pleadable at that time; paragraph 2 of the 2018 Decision had stated that notice of the proceedings appeared to have been correctly served, and the Interested Party had been represented at the hearing. The application is made late, after permission to advance the original ground has been granted, and does not comply with the CPR. As was emphasised by Dame Victoria Sharp P, at paragraph 114 of *(AB) v Chief Constable of Hampshire* [2019] EWHC 461 (Admin), *'it cannot simply be assumed by those engaging in this type of litigation that permission will be given in the absence of compliance with the rules'*. I refuse permission to amend the claim form to advance this further ground of challenge as being unarguable; the Claimants had neither contested Upper Tribunal Judge Warr's finding that notice of the proceedings appeared to have been correctly served, nor asked the Upper Tribunal to make a determination as to whether a notice of hearing had been received. In those circumstances, the latter issue had not arisen for determination.

The objection to part of the 17 June Order

23. As I have noted above, the paragraphs of the 17 June Order to which objection is taken do not, in fact, relate to disclosure but to an order requiring an updated hearing bundle, to include the documents specified. That order was made to facilitate a full

understanding of the way in which the Claimants' case had progressed through the FTT and the Upper Tribunal and in order that the 2018 Decision, which was the subject of the 2019 Decision, be available to be referred to, if and as necessary. In light of Mr Read's concession that this court could not and should not ignore that which the Upper Tribunal had been asked to decide by the Claimants' application to set aside the 2018 Decision, the submission that I ought to exclude all bar paragraph 2 of the 2018 Decision from my consideration I regard as untenable. That decision itself refers to the decision of the FTT. The notice of decision granting permission to appeal and attached reasons set out no more than that which is apparent from the 2018 Decision. As Mr Read correctly acknowledges, the directions enclosed with that document are plainly relevant to the Claimants' reasonable expectation, as asserted in these proceedings. Having been provided with notices of appeal lodged by the Claimants on 13 June 2018 which referred to attachments which had not themselves been provided, it was appropriate that I be shown those attachments. In my judgment, the objection lacks merit and it is inappropriate to exclude the documents to which it relates from consideration.

The pleaded ground of review

Jurisdiction

24. The simple answer to this claim is that the court lacks jurisdiction to hear it. Mr Read submits that the claim is brought not under CPR 54.7A but under CPR 54.5, however judicial review of decisions of the Upper Tribunal is available only in relation to unappealable decisions of that tribunal, applying the second-tier appeals criteria now set out in CPR 54.7A(7): *R (Cart) v Upper Tribunal* [2012] 1 AC 663. In this case, as Mr Read acknowledges, there is a statutory right of appeal against the 2019 Decision, conferred by section 13 of the 2007 Act. Whether viewed as a refusal to consider, or as an implicit rejection of, an application to set aside the 2018 Decision, the 2019 Decision is not an 'excluded decision' under section 13(8) of that Act.

25. CPR 54.7A itself applies where an application is made following refusal by the Upper Tribunal of permission to appeal against a decision of the FTT, for judicial review (a) of the decision of the Upper Tribunal refusing permission to appeal; or (b) which relates to the decision of the FTT which was the subject of the application for permission to appeal. It is not engaged in this case. Where it is engaged, the claim form and supporting documents required by rule 54.7A(4) must be filed no later than 16 days after the date on which the notice of the Upper Tribunal's decision is sent to the applicant (per 54.7A(3)). CPR 54.5 simply provides the time limit for filing claims for judicial review of decisions of other bodies or individuals.

26. Accordingly, I dismiss the claim for judicial review, for lack of jurisdiction.

Judicial review as remedy of last resort

27. Even if I am wrong on the question of jurisdiction, it is necessary to consider whether it is inappropriate to grant judicial review of the 2019 Decision by reason of a convenient and effective adequate alternative remedy. In so doing, I have given very careful consideration to the fact that the Court of Appeal has given permission to seek judicial review in this case and could have declined to do so on the same basis. That, of itself, does not operate as a bar to consideration of the same issue, clearly raised by

each acknowledgement of service, at the hearing of the substantive claim. (See, for example, *R (Chaudry) v SSHD and another* [2018] EWHC 3887, at paragraph 13, per Lambert J; and *(R (Islam) v SSHD* [2016] EWHC 2491, at paragraph 26, per Silber J.)

28. For the reasons set out below, had I had jurisdiction to consider the Claimants' claim for judicial review, I would have declined to exercise my discretion to grant relief in circumstances in which an adequate alternative remedy was available to the Claimants, in the form of a statutory appeal procedure, and there are no exceptional circumstances (see *R (Sivasubramaniam) v Wandsworth County Court and Another* [2002] EWCA Civ 1738; *R (Watch Tower Bible & Tract Society of Britain and others) v Charity Commission* [2016] EWCA Civ 154).

29. I reject Mr Read's submissions as to why a statutory appeal under the 2007 Act would not have been the appropriate route, for the following reasons:

a) Whether or not the alleged errors challenged are 'collateral to the substance of the Claimants' appeal in the Upper Tribunal', they are subject to a statutory right of appeal which, if granted, would afford the Claimants a convenient and effective remedy and would relate to the Upper Tribunal's own error, rather than the FTT's substantive decision;

b) An application under rule 43 of the Rules is a procedural challenge to the Upper Tribunal's own handling of the relevant matter; it does not encompass a challenge on the basis of asserted substantive judicial errors (see, for example, *SK v Secretary of State for Work and Pensions (AA)* [2016] UKUT 529 (AAC)). In my judgment, properly analysed, only the challenge relating to apparent bias amounted to an attack on the Upper Tribunal's own procedure. The remaining grounds asserted judicial error in the Upper Tribunal's substantive findings and conclusions, which could only be advanced by way of appeal, in accordance with rule 44 of the Rules, to be considered in accordance with rule 45. Accordingly, the Upper Tribunal was right to have approached those grounds as constituting, in substance, an application for permission to appeal to the Court of Appeal. Following its refusal of that latter application, the route by which the Claimants could pursue their second and third grounds of challenge was that prescribed by CPR 52.7(1), which provides (materially):

'Permission is required from the Court of Appeal for any appeal to that court from …a decision of the Upper Tribunal which was made on appeal from a decision of the First-tier Tribunal on a point of law where the Upper Tribunal has refused permission to appeal to the Court of Appeal.'

The test on a second appeal to the Court of Appeal from the Upper Tribunal is as set out at CPR 52.7(2):

'(2) The Court of Appeal will not give permission unless it considers that—

(a) the appeal would—

(i) have a real prospect of success; and
(ii) raise an important point of principle or practice; or

(b) there is some other compelling reason for the Court of Appeal to hear it.'

There can be no legitimate objection to the application of that test in the circumstances in which it applies, namely where a challenge is being made to the Upper Tribunal's substantive conclusions on appeal from the FTT. No second appeal to the Court of Appeal in relation to the relevant grounds has been brought in this case.

c) Ground one of the Claimants' challenge to the 2018 Decision (apparent bias), did, in principle, constitute a proper basis for an application under rule 43 of the Rules. That being a challenge to the Upper Tribunal's own procedure (as distinct from its substantive conclusions on an appeal from the FTT), its express or implicit refusal by the Upper Tribunal gave rise to a first appeal (on that ground only), within the meaning of CPR 52.6 (set out, in material part and with emphasis added, immediately below). That provides for a less stringent test and, thus, would not have required the Claimants 'to meet the test applicable to a second appeal on a first-order challenge', or 'to exhaust a right to a second appeal on a matter which does not go to the substance of their appeal from the First Tier Tribunal':

'(1) Except where rule 52.7 applies, permission to appeal may be given only where –

(a) *the court considers that the appeal would have a real prospect of success; or*

(b) *there is some other compelling reason for the appeal to be heard.*

…'

Here again, there can be no objection to the need to establish one or other of the disjunctive limbs of the above test. In discussion, Mr Read told me that (1) he could produce no authority to establish that an appeal from the Upper Tribunal's decision refusing a challenge to its own procedure would give rise to a second appeal; and that (2) were it to give rise to a first appeal, with its less stringent test for permission, he would not retain a concern over the need to follow that route.

d) Whilst not a submission advanced by Mr Read, I have considered whether the fact that an appeal to the Court of Appeal would now be out of time itself indicates that such a remedy would not be adequate, alternatively constitutes an exceptional circumstance which would have justified the exercise of my discretion to grant judicial review, in the presence of an alternative remedy which ought to have been pursued. I have concluded that it does not. First, it would be open to the Court of Appeal to grant an extension of time, even at this stage, were it to consider that to be the appropriate course. In any event, any time-bar is the product of the Claimants' own election to bring proceedings for judicial review and to pursue them in the face of two acknowledgements of service which noted the existence of a statutory right of appeal. Like Lambert J, in *R (Chaudry),* and Black J, in *R (Carnell) v Regents Park College and the Conference of Colleges Appeal*

Tribunal [2008] EWHC 739, I consider that the alternative remedy would have been adequate and available had the Claimants made different choices and that to grant judicial review in such circumstances would be to *'license claimants to make use of delay to bring themselves within the scope of judicial review when they would otherwise have been confined to their statutory or other alternative remedy'* (Carnell, paragraph 32).

Merits

30. In any event, I consider that, taken in the round, the Claimants' application lacks merit, for the reasons set out below.

31. It is clear that the notices of appeal lodged by the Claimants on 13 June 2018 sought a determination on the papers. Nevertheless, it was not for the Claimants to determine the appropriate means of disposal of their appeal. I have set out the material parts of Rule 34 of the Rules at paragraph 17(a), above. In the specified circumstances, that rule empowers the Upper Tribunal to make any decision without a hearing, but, when deciding whether to hold a hearing to consider any matter (and the form of any such hearing), it must have regard to any view expressed by a party. It is, therefore, unsurprising that I have been referred to no authority supportive of Mr Read's primary proposition that an appellant's request that her appeal be considered on the papers cannot be refused[3]. Rule 34 makes clear that the decision as to whether to hold a hearing is, ultimately, that of the Tribunal, subject to the obligation to have regard to a party's request that the matter be determined without one. If the Upper Tribunal did have regard to the Claimants' request that their appeals be considered without a hearing, that does not emerge from the 2018 Decision and I have been referred to no earlier correspondence or order in that connection, but the application to set aside the 2018 Decision was not based upon the Upper Tribunal's alleged failure to have acted in accordance with Rule 34; instead, the relevant ground of challenge was founded upon its alleged apparent bias.

32. Paragraph 21 of *AM (Afghanistan)*, on which Mr Read relies in the alternative, is not on point. There, the Court of Appeal held:

'It is a general rule of our civil procedure that, in the absence of any order or legislation to the contrary, a party who has applied for an order which has been refused by a judge on the papers, without oral argument, has the right to renew his application orally before a judge of co-ordinate jurisdiction. Thus, where a party applies in the Administrative Court for urgent interim relief which is refused on the papers, he has the right to renew his application orally to a High Court judge…It is only if an oral renewal is unsuccessful that the claimant may consider an application to a judge of the Court of Appeal…'

There is no evidence in this case of any order on the papers refusing the Claimants' request (not application) that their appeal be decided without a hearing, such that no right of oral renewal arose by that route.

33. The issues before the Upper Tribunal arising from the Claimants' application to set aside the 2018 Decision were as set out in that application and it is the Claimants'

[3] Paragraph 22 of his skeleton argument, dated 27 May 2021, refers.

challenge to the 2019 Decision, as permitted to proceed by the Court of Appeal, on which this court must focus.

The Upper Tribunal's duty to give reasons

34. The wording of rule 40(2) of the Rules excludes from its ambit any decision taken under rules 43 and 44, both of which are within Part 7 of the Rules. Rules 40(3) and 40(4) clearly distinguish the circumstances in which the provision of reasons is, respectively, mandatory and elective. In *Patel v SSHD* [2015] EWCA Civ 1175, at paragraph 52, Sir Richard Aikens emphasised paragraph 40(4), noting, without criticism, that written reasons for any decision to which paragraph 40(2) did not apply were not compulsory. Rule 43 derived from the power set out in paragraph 15 of Schedule 5 to the 2007 Act. It does not itself mandate the provision of reasons for a refusal to set aside (part of) a decision to which it applies: it simply confers the power to set aside such a decision in the specified circumstances. (I note that the same is true of rule 47, which confers a power to set aside a decision in proceedings under the Forfeiture Act 1982.) By contrast, rule 45 expressly requires that the Upper Tribunal provide a statement of its reasons for refusing (in whole or in part) permission to appeal. In all such circumstances, I do not consider that the Upper Tribunal was obliged, by rule 40 or 43 of the Rules, to provide reasons for any implicit refusal to set aside the 2018 Decision, or for treating the Claimants' application as being one for permission to appeal, under rule 48 of the Rules.

35. Nevertheless, in my judgment, Mr Read can derive assistance from the principles summarised in *Dover District Council v CPRE Kent*, and the line of authority to which it refers. At paragraph 51, upon which he relies, the Supreme Court observed:

> *'Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see* ***R v Secretary of State for the Home Department, Ex p Doody*** *[1994] 1 AC 531;* ***R v Higher Education Funding Council, Ex p Institute of Dental Surgery*** *[1994] 1 WLR 242, 263A-D;* ***De Smith's Judicial Review*** *7th ed, para 7-099).* ***Doody*** *concerned the power of the Home Secretary (under the Criminal Justice Act 1967 section 61(1)), in relation to a prisoner under a mandatory life sentence for murder, to fix the minimum period before consideration by the Parole Board for licence, taking account of the "penal" element as recommended by the trial judge. It was held that such a decision was subject to judicial review, and that the prisoner was entitled to be informed of the judge's recommendation and of the reasons for the Home Secretary's decision:*
>
> *"To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view …" (p565G-H, per Lord Mustill)*

It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review.'

At paragraph 54, the Supreme Court continued:

*'…**Doody** itself involved such an application of the common law principle of "fairness" in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts. Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision.'*

36. For such reasons, in my judgment if the Upper Tribunal considered it appropriate to exercise its power under rule 48 to treat the Claimants' application to set aside the 2018 Decision as an application for permission to appeal from the 2018 Decision, it ought to have given adequate reasons for so doing, which need not have been lengthy. That was particularly important because different tests apply, respectively, to an application under rule 43 and an appeal under rule 44 and the latter test is, arguably though not invariably, more difficult to satisfy. The giving of reasons would also have put beyond doubt that the Upper Tribunal had recognised and addressed the application in fact being made, rather than treating it as an application for permission to appeal by simple oversight. I now turn to address the consequence of that finding, for current purposes. In so doing, I bear in mind (1) that the gravamen of the Claimants' complaint is that their application ought to have been considered under rule 43 of the Rules, and (2) the following material provisions of section 31 of the Senior Courts Act 1981 ('the 1981 Act'):

'…

(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.

…

(5) If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition–

(a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or

(b) substitute its own decision for the decision in question.

(5A) But the power conferred by subsection (5)(b) is exercisable only if–

(a) the decision in question was made by a court or tribunal,

(b) the decision is quashed on the ground that there has been an error of law, and

(c) without the error, there would have been only one decision which the court or tribunal could have reached.

(5B) Unless the High Court otherwise directs, a decision substituted by it under subsection (5)(b) has effect as if it were a decision of the relevant court or tribunal.

…

(8) In this section "the conduct complained of", in relation to an application for judicial review, means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief.'

37. The three bases of the Claimants' application under rule 43 were as summarised at paragraph 7 above. As to those:

Apparent bias

a) I have previously noted the absence from the Claimants' application under rule 43 of the Rules of any challenge to the Upper Tribunal's statement (at paragraph 2 of the 2018 Decision) that notice of the proceedings appeared to have been correctly served. That was the premise upon which the Upper Tribunal was considering the application before it.

b) By witness statement dated 28 June 2021, served in these proceedings in support of the application to amend the Claimants' grounds of review and post-dating disclosure of the relevant documents, the First Claimant stated that she did not receive the Defendant's notice of hearing and that the post boxes located on the ground floor of the block of flats in which she has lived for nine years are not secure. She made no reference to the earlier notice of decision and its enclosures, sent to the same address; being the address to which the 2019 Decision was also sent. There is no witness statement (regarding the receipt or otherwise of any relevant document) from the Second Claimant. It was clear, from (at least) paragraphs 7 to 9 of the Upper Tribunal's directions, that the appeal would be considered at a hearing, on a date to be notified. Even accepting the First Claimant's latest evidence at its highest, no written objection to a hearing was lodged, by either Claimant, upon receipt of the notice of decision, from which it would have been clear that their request that the matter be determined on paper had been rejected.

c) The time at which to have challenged the listing of a hearing and/or to have explained why the Claimants did not intend to attend any such hearing was upon receipt of the notice of decision and directions, not after the hearing to which they referred had taken place and judgment had been promulgated. Having been served with those documents, even if the later notice of hearing was not received by the First Claimant, it is difficult to see how the Claimants may be said to have had a reasonable expectation that the matter would be dealt with on the papers. Both the First Claimant's witness statement in support of her application to set aside the 2018 Decision, made on 18 December 2018, and her witness statement made on 2 May 2019, in support of the Claimants' application for permission to bring proceedings for judicial review, were silent as to such matters. The 2019 Decision was sent to and arrived safely at the same address.

d) It is one thing for a tribunal to refuse a hearing to a party who has requested one; it is another to allow all parties the opportunity to appear at an oral hearing at which their submissions may be fully ventilated and tested. In any event, in my judgment, the material before me, and, more particularly, before the Upper Tribunal on 13 November 2018, was not such as to establish that the reason for the Claimants' non-attendance on that date was their earlier request, made by section G of each application for permission to appeal, or to explain their lack of communication with the Upper Tribunal following its decision to list a hearing, contrary to that request.

e) The nature of the appeal from the decision of the FTT was such that an oral hearing was clearly appropriate. As I have already observed, whilst the Upper Tribunal is obliged to have regard to a party's expressed view, it is not obliged to bow to it. There was no 'apparent bias' in the Tribunal's listing of a hearing to which no subsequent objection was raised by the Claimants, or in its receipt of submissions from the Interested Party following the Claimants' unexplained failure to attend that hearing, in the circumstances set out at paragraph 2 of the 2018 Decision.

Irrationality

f) This ground was misconceived, for the reason which I interposed when summarising it, at paragraph 7(b), above. In short, paragraph 3 of the 2018 Decision simply recited the reasons given by the Interested Party, from whose decision the Claimants had appealed to the FTT; it did not constitute an independent finding by the Upper Tribunal. Furthermore, as is evident from paragraphs 22 to 24 of the decision of the FTT (cited at paragraph 7 of the 2018 Decision, and below), the First Claimant's extensive criminal behaviour was a matter of record and her further deceptive conduct the subject of findings by that tribunal which did not fall within the scope of the bases upon which permission to appeal to the Upper Tribunal had been granted, on 19 September 2018:

'22. Turning to the first Appellant, her criminal behaviour was described at some considerable length, at paragraphs 6 to 12 by Judge Greasley. There has been no challenge to the entries made in the PNC printout. At page 1 of the printout there is a summary of her convictions as follows: one offence against property; six fraud and kindred offences; 18 theft and kindred offences; six offences relating to police/courts/prisons. In giving evidence today the first Appellant referred to having reached an understanding as to why she committed offences. She acknowledged that notwithstanding conditional discharges and community orders she was sentenced to 8 months imprisonment on 22 March 2017. Although she has now had the benefit of completing her LLB there is no credible evidence that she is reformed person.

23. The offence for which she was imprisoned in March 2017 was, she has stated in evidence, for a matter which related to the commencement of her employment in 2015. She used false documentation. It is significant and revealing as to her character that she has apparently learned nothing from her experiences and the comments made by Judge Greasley in 2014 at paragraphs 28 and 29 which is in the following terms:

"Whilst the offences in themselves may not be individually serious, collectively the Appellant's conduct over a period of time, does, in my judgment reflect a serious and determined willingness to commit offences of dishonesty. The fact that the Appellant when apprehended has on different occasions used an alias adds to the deceptive nature of these matters. Eight different aliases are noted in police records. She has shown a blatant disregard for the immigration laws of the UK and a cavalier attitude to the criminal laws of the UK ... Indeed it is clear from the oral evidence that the Appellant has not notified her employers of the immigration appeal hearing she has secured a character reference letter from her employer which makes no reference to her criminal past and who has been given the false impression that the letter was required as a character statement for alternative employment. I find that this further demonstrates the extent to which the Appellant is prepared to deceive and mislead others ... I find that the Appellant has committed offences of dishonesty over a prolonged period with repeated use of an alias she has committed other allied offences and has done so whilst as a visitor in the United Kingdom, the host country I find that she has also shown a willingness to deceive her current employers recently in relation to the reference letter produced before the tribunal."

On the evidence before me she clearly went on to deceive yet another employer following the hearing in 2014.

24. She attempted to explain her behaviour by claiming that in doing so, and receiving a benefit by deception, she avoided claiming state benefits which would have been paid out of the national funds. This however entirely misses the point that she has committed further acts of dishonesty without any apparent aptitude to change her ways. She added when giving her evidence that she always challenged the decisions of the Respondent and the tribunal, presumably in relation to fact-finding and other

matters, to enable her to remain longer in the United Kingdom or as she put it 'to regularise her stay.'

Unlawful conduct

g) The alleged unlawful conduct was said to lie in the entanglement of the Upper Tribunal's assessment of the impact on the Second Claimant with the conduct of the First Claimant and the absence of any assessment of how reasonable it would be for the Second Claimant to remain in the UK in the absence of her mother. That contention was unarguable in light of the Upper Tribunal's findings, at paragraphs 11 and 12 of the 2018 Decision:

'*11.* [The Respondent's representative] *referred to the recent decision of the Supreme Court in **KO (Nigeria)**. While the sins of the parents should not be visited upon the children "the record of the parents may become indirectly material" as is pointed out in paragraph 18 of the judgment. In this case the behaviour of the appellant's mother is of course deplorable and it is summarised in the judge's conclusions which I have set out above. As the judge noted there was no credible evidence that the first appellant was a reformed person. However it is important to note that at the conclusion of paragraph 21 the judge discounted any of the criminal behaviour of the first named appellant in his consideration when concluding that the child's best interests would be maintained by being accompanied by her mother to Nigeria.*

*12. The judge in my view did not err in his consideration of the case in the light of the authorities then available and his decision would have been no different had he had the benefit of the recent Supreme Court decision. He explored exhaustively the issue of the best interests of the child noting, for example, her ability to adapt during her mother's recent imprisonment. In paragraph 27 the judge refers to his finding that there will be no substantial impact on her educational development, progress and opportunities. He confirmed that he had considered the child's interests without reference to the immigration status of her mother. The case referred to in the grant of permission was decided before the recent Supreme Court case. The Tribunal in **MT and ET** refers to the "present state of the law" in paragraph 33 of its decision. It is very doubtful that the Tribunal in the case of **MT** would have described the behaviour of the first appellant in the instant case as being that of a "somewhat run of the mill immigration offender...". As the Supreme Court makes clear the record of the first appellant becomes indirectly material and one needs to focus on the position "in the real world" - see the extract from **EV (Philippines) v Secretary of State** referred to in paragraph 19 of the decision of the Supreme Court.'*

h) In short, as the Upper Tribunal found in the 2019 Decision, the best interests of the Second Claimant had been fully considered.

38. Thus, albeit considering the application as one for permission to appeal, in the 2019 Decision the Upper Tribunal reached conclusions on each of the grounds on which the application to set aside the 2018 Decision had been made, finding there to be 'no arguable merit' in any of them. Those conclusions would have been no different,

irrespective of the framework within which the Claimants' application had been addressed – in light of the matters set out above, the Upper Tribunal could not possibly have concluded that it was in the interests of justice to set aside the 2018 Decision, including on the basis of the Claimants' non-attendance at the hearing. In any event, the second and third grounds on which the Claimants relied could only have proceeded by way of appeal, for which permission was required (see paragraph 29(b), above). Putting the matter at its lowest, it is *'highly likely that the outcome for the applicant*[s] *would not have been substantially different if the conduct complained of had not occurred'*. The conduct complained of is the Upper Tribunal's treatment of the Claimants' application as being one for permission to appeal from the 2018 Decision under rule 44, rather than one to set it aside under rule 43, of the Rules.

39. In those circumstances, irrespective of my conclusions as to jurisdiction and the availability of an alternative adequate remedy, I would have been obliged to refuse to grant relief, in accordance with section 31(2A)(a) of the 1981 Act. For the sake of completeness, it has not been suggested, nor do I independently consider, that section 31(2B) of the 1981 Act applies in this case. Had I considered that the Upper Tribunal's failure to have given reasons for considering the Claimants' application under rule 44 of the Rules rendered it appropriate to quash the 2019 Decision, I would not have set aside the 2018 Decision, for the reasons outlined above. In my judgment, those reasons indicate that section 31(5A)(c), and, therefore, the power to substitute my own decision, conferred by 31(5)(b), would have applied. It follows that there would have been nothing to be remitted for determination by the Upper Tribunal.

Summary of overarching conclusions

40. For the reasons set out above, I dismiss the Claimants' claim for judicial review of the 2019 Decision, for lack of jurisdiction. Had I had jurisdiction to determine it, I would have refused to grant relief by reason of the availability of a convenient and effective adequate alternative remedy, in the form of a statutory appeal, and, in any event, because I would have been obliged to do so, in accordance with section 31(2A)(a) of the 1981 Act.

Costs

41. Neither the Defendant nor the Interested Party has sought an order for costs in the event that the Claimants' application were to fail. Accordingly, I make no order for costs.