Upper Tribunal
(Immigration and Asylum Chamber)

AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 June 2018	
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Before

MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE BLUM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AZ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr K Smyth, Kesar & Co Solicitors

(1) Before it has re-made the decision in an appeal, pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal has jurisdiction to depart from, or vary, its decision that the First-tier Tribunal made an error of law, such that the First-tier Tribunal's decision should be set aside under section 12(2)(a).

(2) As Practice Direction 3.7 indicates, that jurisdiction will, however, be exercised only in very exceptional cases. This will be so, whether or not the same constitution of the Upper Tribunal that made the error of law decision is re-making the decision in the appeal.

(3) Permission to appeal to the Upper Tribunal should be granted on a ground that was not advanced by an applicant for permission, only if:

(a) the judge is satisfied that the ground he or she has identified is one which has a strong prospect of success:

(i) for the original appellant; or

(ii) for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom's international Treaty obligations; or

(b) (possibly) the ground relates to an issue of general importance, which the Upper Tribunal needs to address.

DECISION AND REASONS

1. This case:

   (a) concerns the correct approach to be taken to "error of law" decisions of the Upper Tribunal, where the re-making of the decision under appeal is to be undertaken by that Tribunal; and

   (b) is an example of the difficulties that can arise when permission to appeal is granted on a ground which was not advanced by the applicant for permission.

A. The claimant's case

2. The respondent (hereafter claimant) is a citizen of Iran, who was born in January 1997. He is an ethnic Kurd. The claimant's father was said by the claimant to be involved politically in what the claimant now believed to be the KDPI Party.

3. When the claimant was 8 years old, his parents took him to live in Iraqi Kurdistan, where he was educated.

4. More recently, the claimant's father, according to the claimant, travelled to Iran for a week, on what the claimant thought was a trip in order to arrange accommodation for the family to return to that country. On reappearing in Iraq, however, the claimant's father showed the claimant a piece of paper which, according to what the claimant is recorded as saying at interview, was an Iranian arrest warrant.

5. The claimant concluded that his father must have been working for an organisation that was opposed to the Iranian regime. So, instead of returning to Iran, the family went by train and later by lorry to Europe. The claimant travelled in a separate lorry to that of his parents and found himself in the United Kingdom, where he claimed asylum.

6. The basis of the claimant's case was that he believed the Iranian government would arrest him as the son of a person who had run away from that country.

7. The Secretary of State rejected the claim. Amongst other things, the Secretary of State considered that it was not believable that an arrest warrant from Iran would have been given to the claimant's father by the Iranian authorities. Overall, the Secretary of State considered that the claimant could safely be returned to Iran.

B. The appeal before Judge Dineen

8. The claimant appealed against that decision to the First-tier Tribunal. On 20 August 2015, his appeal was heard at Hatton Cross by First-tier Tribunal Judge Dineen.

9. Judge Dineen's decision was promulgated on 13 August 2016. At paragraph 41 of his decision, the judge said: "I regret the delay which has occurred in finalising this decision, which has been due to pressure of work in the Tribunal". The judge nevertheless said that he had "carefully considered all the evidence and submissions made in the appeal both at and immediately following the hearing and in the period since then". At paragraphs 42 to 47 of his decision, the judge set out the reasons why he was not satisfied, on the lower standard of proof, that the claimant's father had been involved in activities against the Iranian regime, as the claimant had suggested.

10. At paragraph 42, the judge found that the claimant's father had not been in possession of an Iranian arrest warrant, as had been claimed. This was because of the fact that the evidence relating to such warrants, referred to in paragraph 27 of the refusal letter, rendered it incredible that the Iranian authorities would give the subject of a warrant a copy of it prior to arresting him "thus making it clear to him that he should abscond".

11. At paragraph 43, the judge found that the claimant's father had returned to a Kurdish area of Iraq and there was no evidence to suggest the Iranian authorities could execute a warrant against him there. In general, the judge was not satisfied that flight from Iraq to Europe "would have been necessary to avoid the consequences of such a warrant" (paragraph 43).

12. At paragraph 44, the judge found that, since the details of any involvement of the claimant's father in the activities of the KDPI had not been communicated to the claimant, the judge was not satisfied that the claimant's mother would have told the claimant that people they regularly visited were involved in the activities of that organisation.

13. The accounts given by the claimant of visits by the KDPI to the family home and of evenings away from the home spent by the claimant's father, were not, the judge said, specifically linked to any evidence of political activity and were consistent with many other explanations, including social activities by the claimant's father.

14. At paragraph 46, the judge found he could not be satisfied that if the claimant's father had been involved in KDPI activity, the latter would have returned to Iran

with the intention of making arrangements for his wife and child to move back there with him.

15. Having made those findings, the judge turned, beginning at paragraph 48, to the issue of risk on return. The judge said that he had considered the country guidance decision in SB (Risk on return – illegal exit) Iran CG [2009] UKAIT 00053. According to the judge, that decision indicated that "there would be no risk to an asylum seeking person returning to Iran merely on account of being a failed asylum seeker, unless there were a further risk factor such as having been involved in criminal proceedings in Iran before leaving".

16. At paragraph 50, however, the judge noted a report from Amnesty International, mentioned in the Secretary of State's refusal letter, that asylum seekers were "interrogated on return, whether or not they have been political activists in Iran or abroad". At paragraph 51, the judge found that it must be "highly likely that the appellant would be asked whether he had applied for asylum in the UK, and what grounds he had given for seeking asylum". Assuming that the claimant must be expected to respond truthfully, "this would, perhaps somewhat paradoxically, mean that he would, regardless of the truth of such claim, have to state that he had claimed that his father was a KDPI activist".

17. According to the judge, this was sufficient to put the claimant at real risk. The judge accordingly allowed the claimant's appeal on asylum and human rights grounds.

C. The grant by Judge Holmes of permission to appeal

18. The Secretary of State applied to the First-tier Tribunal for permission to appeal against Judge Dineen's decision. The Secretary of State submitted that the facts of the claimant's account, as found by the judge, fell "squarely within the country guidance case law" of SB. According to the Secretary of State, there were no further risk factors advanced by the claimant. The Secretary of State submitted that, on the judge's reasoning, "all failed asylum seekers would be at risk on return as by the very nature of them attempting to obtain refuge in the UK or any other country, the account they would advance would be one which would contain an element that placed them at risk from the Iranian authorities if it was discovered".

19. Permission to appeal was granted by First-tier Tribunal Judge Holmes on 4 May 2016. At paragraph 3, Judge Holmes considered that it was arguable Judge Dineen had failed to follow the current country guidance, without giving any adequate reasons for departing from it.

20. However, at paragraph 2, Judge Holmes raised, of his own accord, a ground which had not featured in the Secretary of State's application for permission:-

> "2. There appears to have been a very substantial, and unexplained delay in preparing the decision upon the appeal of some eight months, which gives rise to legitimate concern as to whether the parties received a fair hearing of the appeal, since the Judge could not be expected to retain a proper level of recall of the oral

evidence after four months (sic); Mario [1998] Imm AR 281 and Sambasivam [1999] IATRF 1999/0419/4."

21. Both sides accept (and we agree) that Judge Holmes' decision on permission was to grant permission to appeal on those two grounds. As we shall see, it is the ground Judge Holmes raised of his own volition that has led to this case going to the Court of Appeal and back to the Upper Tribunal.

D. The proceedings before Judge Hutchinson in the Upper Tribunal

22. In a written decision, dated 20 June 2016, which was sent to the parties, Deputy Upper Tribunal Judge Hutchinson, sitting in the Upper Tribunal, found that Judge Dineen's decision, allowing the appeal, contained "an error of law capable of affecting the outcome of the appeal and that part of the decision is set aside" (paragraph 21). She stated that the "decision on risk on return will be re-made by the Upper Tribunal" (paragraph 22).

23. The Deputy Judge's reasons for finding an error of law are set out in the preceding paragraphs of her decision. On the basis that Judge Dineen's findings, regarding the lack of any KDPI involvement on the part of the claimant's father, were to stand, the Deputy Judge accepted the submission of the Secretary of State's representative that "the most that the [claimant] could say was that he unsuccessfully applied for asylum on the basis that he claimed that his father was involved in political activity but this claim had not been accepted" (paragraph 13).

24. The Deputy Judge's reasoning was as follows:-

> "14. Mr Ti relied on RT (Zimbabwe v Secretary of State for the Home Department [2012] UKSC 38. It was his argument that the finding that merely being a failed asylum seeker in Iran is not a risk factor appeared to be an extension of the finding that those who exited illegally are not automatically at risk, which in turn is based on the absence of reports of ill-treatment. It was Mr Ti's submission that the absence of reports of ill-treatment can be explained by human nature, that failed asylum seekers would not admit reasons for claiming asylum that would lead to ill-treatment.
>
> 15. As I indicated at the hearing, this was unsubstantiated speculation on the part of Mr Ti and I do not find this to be properly arguable. The case of BA (Demonstrators in Britain – risk on return) [2011] UKUT 36 considered the RT (Zimbabwe) point that an appellant cannot be expected to lie about any activity, it was not considered that this would make a difference; the guidance in SB was confirmed.
>
> 16. Given his findings of fact and his findings at [48] I am not satisfied that Judge Dineen has provided any adequate reasoning for departing from what remains the leading country guidance in relation to Iran that Iranians facing forced return do not in general face a real risk of persecution. Although I accept that Judge Dineen referred to the Amnesty International Report at [50] of his decision and went on to refer to further reports from the Danish Refugee Council at [53] of his

decision I am not satisfied that cogent reasons have been given for departing from country guidance."

25. At paragraphs 17 and 18, the Deputy Judge explained why the delay in Judge Dineen issuing his decision did not amount to an error of law, with the result that Judge Dineen's findings at paragraphs 41 to 47 of his decision should stand:-

"17. Although Mr Ti relied on the comments of the permission of judge and argued that all of Judge Dineen's findings were unsafe given an almost eight month interval between the hearing of the decision (and relied on the case of Sambasivam [1999] IAT RF 1999/0419/4), I referred the parties to the more recent Tribunal authority of Arusha and Demushi (deprivation of citizenship – delay) [2012] UKUT 80 (IAC), which relied on the earlier Court of Appeal case of RK (Algeria) [2007] EWCA Civ 868. This establishes that there has to be a nexus between the delay and the safety of the decision. Judge Dineen indicates that the delay was in relation to pressure of work. Although the delay is lamentable, the judge clearly set out the evidence that was considered and made clear findings on that evidence. There were no substantive arguments before me that might establish that the delay led to any material challenge to those findings of fact.

18. I am therefore satisfied that the findings of fact in relation to credibility and the appellant's circumstances in Iran can stand."

26. As previously stated, Deputy Judge Hutchinson's error of law decision was sent to the parties, prior to the "re-making" hearing, which took place on 21 September 2016.

27. In a decision issued on 4 October 2016, the Deputy Judge dismissed the claimant's appeal on asylum and human rights grounds. At paragraph 4 of the Deputy Judge's decision, we find the following:-

> "4. Although the skeleton argument from the [claimant's] representatives sought to re-open the issues of credibility Mr Abdar [of Kesar & Co, the claimant's solicitors] properly conceded that these issues were not before me and the skeleton argument was only relied on in respect of risk on return and Article 8 …"

28. The Deputy Judge heard oral evidence from the claimant in respect of risk on return. She also had regard to the written evidence on this issue, including an expert report by Professor Joffé. That report, however, was "predicated on the basis that the [claimant's] account was true, which it is not" (paragraph 18). The Deputy Judge accepted Professor Joffé's conclusion that the claimant's return "as a failed asylum seeker in itself did not expose him to a particular danger" (ibid).

29. After further findings in relation to Professor Joffé's report, the Deputy Judge examined in detail the claimant's case under Article 8 of the ECHR. She concluded that the claimant's removal from the United Kingdom would not disproportionately interfere with his Article 8 rights.

30. Mr Abdar, the representative of Kesar & Co who appeared before the Deputy Judge at the re-making hearing, said the following, in a witness statement dated 20 October 2016:-

> "I duly attended the hearing on 19 July 2016 before DUTJ Hutchinson. At the hearing, I raised the issue of the [claimant's] credibility, in particular the erroneous findings and preserving of the [claimant's] adverse credibility findings by the First-tier Tribunal.
>
> However, DUTJ Hutchinson made it very clear to me that she had already ruled on the errors of law and was not willing to consider any arguments/submissions on the matter. The Upper Tribunal was now only interested in re-making the decision on the basis of SSH (Iran)."

E. The claimant's appeal to the Court of Appeal

31. According to the grounds of appeal to the Upper Tribunal, seeking permission to appeal to the Court of Appeal, Mr Ti, a representative of Kesar & Co who appeared on behalf of the claimant at the error of law hearing, had "failed to argue at the earlier hearing" the issue of delay, identified by Judge Holmes in his grant of permission. This assertion is reiterated in the grounds of appeal to the Court of Appeal, submitted following the refusal of permission to appeal by the Upper Tribunal. Those grounds contend that the Deputy Judge's error of law decision "was made without the benefit of full or any argument (from HZ's previous representative)".

32. In summary, the grounds of appeal to the Court of Appeal contended that the Deputy Tribunal Judge had committed a "jurisdictional error" in refusing, at the re-making hearing, to re-visit her error of law decision, insofar as that decision preserved the findings of Judge Dineen at paragraphs 41 to 47 of his decision. The grounds contended that the Deputy Judge had wrongly assumed that she had no discretion to re-visit her error of law decision, even though the proceedings in the Upper Tribunal were not at an end.

33. Ground 2 attacked the reasoning of Judge Dineen in paragraphs 41 to 47. The attack included the submission that Judge Dineen had failed to consider or assess the claimant's evidence in the context of his age at the relevant times.

34. In a written decision of 1 December 2017, Beatson LJ granted permission on the "jurisdiction ground" and the related ground 3, which was that the Upper Tribunal's decision could not stand "because it is infected by the UT's jurisdictional error and in consequence its error in failing to consider and determine where the FtT's credibility assessment was sound in law".

35. Beatson LJ, however, refused permission on ground 2. He said:-

> "The FtT judge gave reasons for finding the [claimant's] account to be incredible at [42] (not credible that the authorities would give the subject of a warrant a copy of the warrant before arresting him thus giving him time to abscond), [43] (flight from Iraq to Europe was not necessary to avoid consequences of an Iranian warrant), [45] (no link of visits by others to the family home to evidence of political activity), and [46] (not satisfied that, if father was involved in KDPI activity, he would have returned to Iran). The FtT judge found these features of the applicant's (sic) evidence not to be credible

for the reasons he gave. There was no obligation on him to give the further explanations listed at paragraph 29 of the skeleton argument."

36. On 12 February 2018, by consent, the Court of Appeal allowed the claimant's appeal and remitted the matter to the Upper Tribunal "for reconsideration of the grounds of appeal in respect of which permission to appeal to the Court of Appeal was granted by Lord Justice Beatson". In the accompanying statement of reasons, settled by the Treasury Solicitor, the parties were said to be "agreed that the matter be remitted back to the Immigration and Asylum Chamber of the Upper Tribunal for re-hearing of the [claimant's] appeal by the Tribunal in respect of grounds 1 and 3 only".

F. Discussion

(a) The Upper Tribunal's task

37. Section 14(1) and (2) of the Tribunals, Courts and Enforcement Act 2007 makes it clear that the "relevant appellate court" (here, the Court of Appeal in England and Wales) can set aside a decision of the Upper Tribunal (which must include part of a decision) only if the court "finds that the making of the decision concerned involved the making of an error on a point of law" (subsection (1)). It is only if the Upper Tribunal's decision, or part thereof, is set aside that the court is able to remit the case to the Upper Tribunal.

38. With this in mind, we have approached the present proceedings on the basis that the Court of Appeal has set aside the Deputy Judge's decision, to the extent that she is to be taken as having held, at the re-making hearing, that she did not have jurisdiction to re-visit the "delay" ground, upon which Judge Holmes had granted permission to appeal to the Secretary of State. The Deputy Judge's re-making decision therefore also had to be treated as set aside. It did not appear to us that any issue was taken by the Court of Appeal regarding the setting aside of Judge Dineen's decision as to risk on return. If his factual findings at paragraphs 41 to 47 were sound, then his assessment of risk was plainly flawed. No submission to the contrary was made to us at our hearing on 12 June 2018.

39. Accordingly, at that hearing, we heard submissions from the parties as to whether Judge Dineen's findings at paragraphs 41 to 47 of his decision could be allowed to stand, in the light of the delay in promulgating that decision.

40. At the hearing, we went through the paragraphs in question. In each case, Mr Smyth was unable to advance any coherent reason why the findings were, in any way, rendered questionable by the delay between Judge Dineen's hearing the appeal and promulgating his decision. It is quite evident that there is no such connection. We therefore had no hesitation in coming to the same conclusion that the Deputy Judge reached in her error of law decision.

(b) Application under rule 15(2A)

41. We then considered an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce evidence that was not before the First-tier Tribunal. This evidence comprises a witness statement of the claimant, in which he gives an explanation as to how it came to be that he was recorded by the Home Office, in connection with his asylum claim, as having described the document shown to him by his father as an arrest warrant.

42. As we have seen, the issue of whether this was an arrest warrant or, perhaps, some form of summons, was a material reason why the Secretary of State and, later, Judge Dineen rejected the claimant's assertion that his father had been involved in KDPI activities in Iran.

43. In connection with the rule 15(2A) application, we heard oral evidence from Mr Turner, who is the claimant's foster father. Mr Turner explained how the significance of the description of the document (both in English and Kurdish Sorani) had not been appreciated by the claimant or Mr Turner until after the first set of Upper Tribunal proceedings. Around this time, there had been a family barbeque, at which a friend (who, it appears, is Kurdish) had explained the distinction and its significance. Mr Turner then did some internet research on the subject.

44. The upshot is that, according to Mr Turner and the claimant, at the time the claimant was recorded by the Home Office as referring to an arrest warrant, the claimant assumed that this was the correct term for the document that he had seen and he did not, at that time, have any reason to doubt it.

45. We were impressed by Mr Turner, as a witness. What he described; in particular, the events surrounding the family barbeque, struck us as having a ring of truth. We were satisfied that, in the particular circumstances of this case, there had not been unreasonable delay in producing the evidence in question.

46. In all the circumstances, therefore, we decided to grant the rule 15(2A) application, with the result that the decision in the appeal now requires to be re-heard in the Upper Tribunal by reference to both oral and written evidence. We gave directions for the filing and service of the claimant's materials and the Secretary of State's submissions. It will be for the Upper Tribunal to determine the factual matrix, in the light of the rule 15(2A) and other evidence, along with evidence as to the general position (as regards both risk return to Iran and Article 8), as existing at the present time.

(c) Revisiting error of law decisions

47. We return to the issue of the Upper Tribunal's jurisdiction to revisit an error of law decision, that results in the First-tier Tribunal's decision being set aside, where the Upper Tribunal is proceeding to re-make the decision in the appeal.

48. In VOM (Error of law – when appealable) Nigeria [2016] UKUT 00410, the Upper Tribunal held that an appeal from that Tribunal lies with the Court of Appeal "only against a decision of the UT which is finally dispositive of an appeal from the FtT".

49. Section 12 is very similar, in structure, to section 14, to which we have referred at paragraph 37 above. Section 12(1) and (2) provide as follows:-

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal –
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal; and
>
> (b) if it does, must either –
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision."

50. If, as VOM holds, the decision-making process of the Upper Tribunal is not materially complete, for the purposes of onward appeal, until the Upper Tribunal has re-made the decision pursuant to paragraph 12(2)(b)(ii), the corollary must be that, until this process is complete, the Upper Tribunal has jurisdiction to re-visit its error of law findings, notwithstanding that those findings have been set in writing and sent to the parties.

51. The fact that the Upper Tribunal possesses such jurisdiction has been recognised in this Chamber, ever since its creation in February 2010. Practice Direction 3 (Procedure on appeal) of the Practice Directions for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, made on 10 February 2010, provide (so far as relevant) as follows:-

> 3.1 Where permission to appeal to the Upper Tribunal has been granted, then, unless and to the extent that they are directed otherwise, for the purposes of preparing for a hearing in the Upper Tribunal the parties should assume that:
>
> (a) the Upper Tribunal will decide whether the making of the decision of the First-tier Tribunal involved the making of an error on a point of law, such that the decision should be set aside under section 12(2)(a) of the 2007 Act;
>
> (b) except as specified in Practice Statement 7.2 (disposal of appeals by Upper Tribunal), the Upper Tribunal will proceed to re-make the decision under section 12(2)(b)(ii), if satisfied that the original decision should be set aside; and
>
> (c) in that event, the Upper Tribunal will consider whether to re-make the decision by reference to the First-tier Tribunal's findings of fact and any

new documentary evidence submitted under UT rule 15(2A) which it is reasonably practicable to adduce for consideration at that hearing.

3.2 The parties should be aware that, in the circumstances described in paragraph 3.1(c), the Upper Tribunal will generally expect to proceed, without any further hearing, to re-make the decision, where this can be undertaken without having to hear oral evidence. In certain circumstances, the Upper Tribunal may give directions for the giving of oral evidence at the relevant hearing, where it appears appropriate to do so. Such directions may be given before or at that hearing.

3.3 In a case where no oral evidence is likely to be required in order for the Upper Tribunal to re-make the decision, the Upper Tribunal will therefore expect any documentary evidence relevant to the re-making of the decision to be adduced in accordance with Practice Direction 4 so that it may be considered at the relevant hearing; and, accordingly, the party seeking to rely on such documentary evidence will be expected to show good reason why it is not reasonably practicable to adduce the same in order for it to be considered at that hearing.

3.4 If the Upper Tribunal nevertheless decides that it cannot proceed as described in paragraph 3.1(c) because findings of fact are needed which it is not in a position to make, the Upper Tribunal will make arrangements for the adjournment of the hearing, so that the proceedings may be completed before the same constitution of the Tribunal; or, if that is not reasonably practicable, for their transfer to a different constitution, in either case so as to enable evidence to be adduced for that purpose.

3.5 Where proceedings are transferred in the circumstances described in paragraph 3.4, any documents sent to or given by the Tribunal from which the proceedings are transferred shall be deemed to have been sent to or given by the Tribunal to which those proceedings are transferred.

3.6 Where such proceedings are transferred, the Upper Tribunal shall prepare written reasons for finding that the First-tier Tribunal made an error of law, such that its decision fell to be set aside, and those written reasons shall be sent to the parties before the next hearing.

3.7 The written reasons shall be incorporated **in full** in, and form part of, the determination of the Upper Tribunal that re-makes the decision. ***Only in very exceptional cases can the decision contained in those written reasons be departed from or varied by the Upper Tribunal which re-makes the decision under section 12(2)(b)(ii) of the 2007 Act.***

…" (bold italics are our emphasis)

52. The real issue, therefore, is not whether the Upper Tribunal possesses jurisdiction in these circumstances; it does. The issue is, rather, in what circumstances will a party be permitted by the Tribunal to raise a matter, at the re-making stage, which, if accepted, would lead to a change in the written "error of law" reasons?

53. The answer is precisely that given in Practice Direction 3.7. It will only be in a "very exceptional" case that this should occur.

54. The Upper Tribunal would be hobbled if its error of law decisions could be routinely re-visited in cases where, pursuant to Practice Direction 3, the Tribunal proceeds to re-make the decision in the appeal, rather than remitting the case to the First-tier Tribunal. Neither the Secretary of State nor those who were appellants before the First-tier Tribunal would gain anything of legitimate value from such a state of affairs. The overriding objective of dealing with cases fairly and justly would be imperilled.

55. Although Practice Direction 3.5 to 3.7 deals expressly with the situation where proceedings are transferred, following the error of law decision, the same restraint must be observed where the judge who has decided to set aside the First-tier Tribunal's decision proceeds to re-make the case. As we have seen, that was the situation in the present appeal, where Deputy Judge Hutchinson produced a written "error of law decision". What she did represents best practice.

56. As we have indicated, the fact that the Court of Appeal allowed the claimant's appeal means that the Deputy Judge must be taken to have concluded that she had no jurisdiction to re-visit her error of law decision, at the hearing on 21 September 2016.

57. It will, however, be plain from what we have said already that Mr Abdar, who appeared for the claimant at that hearing, could not have advanced any argument that might, even conceivably, have put the case into the "exceptional" category, which would have required the Deputy Judge to depart from or vary her error of law decision.

58. On the contrary, the argument that Mr Abdar wanted to advance was hopeless (see paragraph 31 above). The mere fact that a different representative of the claimant, compared with the person who had attended at the error of law hearing, might have thought that he could do a better job than that person in advancing the ground based on delay, does not come near making the case an exceptional one. In any event, so far as the substance is concerned, as we have seen the Deputy Judge was right to conclude that the delay on the part of Judge Dineen in issuing his decision had no connection with his credibility findings regarding the claimant's father. The Deputy Judge was entirely correct to cite and rely on Arusha and Demushi.

(d) The effect of delay in producing a Tribunal decision

59. The issue of delay in the production of a Tribunal decision has recently been examined in detail by the Court of Appeal in SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391. After a comprehensive analysis of the relevant case law, both in the immigration jurisdiction and outside it, Leggatt LJ held as follows:-

> "28. There is no justification for applying a different or special approach on appeals to the Upper Tribunal (Immigration and Asylum Chamber) from the approach

which is generally applicable in cases of delay in giving a decision. Nor does the fact that the appellant's credibility was in issue justify applying a different test – though it may of course, depending on the circumstances, be an important factor in applying the test. There is no good reason to remit a case for rehearing just because it turned on assessment of the appellant's credibility if the appellate court or tribunal can be confident that the assessment has not been affected by the delay. In each case, the question that needs to be asked is whether the delay in preparation of the decision has caused the decision to be unsafe.

29. It can therefore be confirmed that the approach to the issue of delay adopted by the Upper Tribunal in the case of *Arusha and Demushi*, applying the decision of this court in *RK (Algeria)*, which requires a nexus to be shown between the delay and the safety of the decision, is the correct approach. The only significance of the fact that delay between hearing and decision has exceeded three months is that on an appeal to the Upper Tribunal this period remains an appropriate marker of when delay is of such length that it requires the FTT judge's findings of fact to be scrutinised with particular care to ensure that the delay has not infected the determination."

60. In the claimant's grounds of appeal to the Upper Tribunal for permission to appeal to the Court of Appeal against the Deputy Judge's decision, there is an assertion that the delay in issuing the decision of Judge Dineen in some way constituted a "substantive issue in and of itself", going to the fairness of the judge's findings. It is clear from the Secretary of State for the Home Department v RK (Algeria) [2007] EWCA Civ 868 that such an assertion is false. As Wilson LJ said of the Secretary of State in that case:-

> "She is not appealing against the delay. She is appealing against the decision; and, if she can, she must, in some rational way, present the delay as a source of infection of the decision." (paragraph 22)

(e) Granting permission to appeal on a ground not advanced by the applicant

61. The reason why the proceedings in the present appeal have continued for nearly two years after the Deputy Judge issued her re-making decision in October 2016 is because First-tier Tribunal Judge Holmes decided to grant permission partly by reference to a ground that had not featured in the Secretary of State's application for permission to appeal against Judge Dineen's decision. It is therefore necessary to remind ourselves of the law on this issue.

62. In R v Secretary of State for the Home Department ex parte Robinson [1998] QB 929, the Court of Appeal was concerned with an application for judicial review of a refusal by the Immigration Appeal Tribunal of permission to appeal against a decision of a special adjudicator. The court said:-

> "38. It is …. necessary for us to identify the circumstances in which it might be appropriate for the Tribunal to grant leave to appeal on the basis of an argument not advanced before the special adjudicator, or for a High Court judge to grant leave to apply for judicial review of a refusal of leave by the Tribunal in relation to a point not taken in the Notice of Appeal to the Tribunal.

> 39. Because the rules place an onus on the asylum-seeker to state his grounds of appeal, we consider that it would be wrong to say that merely arguability should be the criterion to be applied for the grant of leave in such circumstances. A higher hurdle is required. The appellate authorities should of course focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the special adjudicator or, so far as the Tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely "arguable" as opposed to "obvious". Similarly, if when the Tribunal reads the Special Adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so, there will be a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do. It follows that leave to apply for judicial review of a refusal by the Tribunal to grant leave to appeal should be granted if the judge is of the opinion that it is properly arguable that a point not raised in the Grounds of Appeal to the Tribunal had a strong prospect of success if leave to appeal were to be granted."

63. As is pointed out at 4.222 of Jacobs, *Tribunal Practice and Procedure* (Fourth Edition), the "Robinson" approach was, in effect, extended to all Tribunals by Scott Baker J in R (Begum) v Social Security Commissioners [2002] EWHC 401 (Admin). This was on the ground that it would be confusing and without logic to apply different tests. Here, also, the court emphasised that mere arguability is not the test and that a higher hurdle must be surmounted. The point had to be obvious, in the sense of being one with a strong prospect of success, were permission to be granted (see paragraphs 20 and 31).

64. In its application to asylum law, the "Robinson" approach applies only in favour of the individual, who is seeking asylum; not in favour of the Secretary of State. An exception, however, arises where the point identified concerns a possible breach of the Refugee Convention, which would result from recognising a person as a refugee who is, in fact, covered by one of the exclusion clauses in the Refugee Convention (see, in this regard, paragraph 21.38 of *MacDonald's Immigration Law and Practice* (Ninth Edition) and A (Iraq) v Secretary of State for the Home Department [2005] EWCA Civ 1438.

65. In Bulale v Secretary of State for the Home Department [2008] EWCA Civ 806, the Court of Appeal considered an appeal by a citizen of the Netherlands against a decision of the Secretary of State to deport him under the provisions of the Immigration (European Economic Area) Regulations 2006. His appeal failed before a panel of the Asylum and Immigration Tribunal and also on reconsideration by that Tribunal, pursuant to section 103A of the Nationality, Immigration and Asylum Act 2002.

66. During the proceedings in the Court of Appeal, Counsel for the appellant sought to raise an issue that had not featured in the Asylum and Immigration Tribunal; namely, whether the appellant's propensity to commit robberies constituted a sufficiently serious threat to society to justify his expulsion.

67. Buxton LJ dealt with the matter in this way:-

> "*Is this argument open to Mr Bulale?*
>
> 23. Miss Broadfoot pointed out, correctly, that this issue had not been raised before the AIT, nor in the skeleton settled by Mr Bulale's previous advisers in this court. The AIT could not, therefore, have erred in law in not addressing the point, on a reconsideration, which this case was, the AIT only had jurisdiction to consider points addressed in the order for reconsideration or those which were *Robinson*-obvious; and accordingly this court in turn had no jurisdiction to consider the point on appeal.
>
> 24. I have concluded that this court does have jurisdiction to consider this issue, but I would emphasise the importance of the principles referred to in the previous paragraph, and the importance of only departing from them in very particular circumstances. I would agree with Miss Broadfoot that the point now under consideration is not "*Robinson*-obvious" in the sense that a court could be criticised for not taking it of its own motion. However, the issue appeared to this court, on seeing the papers, to be engaged and to be of some general importance. That was the principal reason why the court went to the considerable length described earlier in this judgment to ensure that Mr Bulale was represented before it, and that this point was taken on his behalf. The basis of the *Robinson* doctrine is, as Lord Woolf MR said, [1998] QB at p 945B-G, that as organs of the state the appellate authorities are bound to exercise their powers to ensure the state's compliance with its international obligations. That observation was in *Robinson* itself directed at the High Court in its appellate role, but they must apply equally to the Court of Appeal. Accordingly, and whether or not the point is "obvious", once it has in fact occurred to the court it must be open to the court to pursue it. I stress that that gives no general licence to the parties to reformulate their case once it arrives in this court."

68. There are two points to observe about Bulale. First, the Court of Appeal was speaking about itself, rather than laying down any qualification of the "Robinson" doctrine, as it applies to tribunals. Secondly, Buxton LJ was concerned with whether the Court had jurisdiction to consider the matter. As the last sentence in paragraph 24 of his judgment makes plain, the fact that the Court might have jurisdiction does not mean that a new issue will, in fact, be entertained. In the light of these points, it is unclear to what extent Bulale represents a relaxation of the threshold contained in the "Robinson" approach, as it applies at Tribunal level.

69. In conclusion, we consider that any judge who is considering whether to grant permission to appeal to the Upper Tribunal must not grant permission on a ground which does not feature in the grounds accompanying the application, unless the judge is satisfied that the ground he or she has identified is one which has a strong prospect of success for the original appellant; or for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United

Kingdom's international treaty obligations; or (possibly) if the ground relates to an issue of general importance, which the Upper Tribunal needs to address.

70. The basic point to be borne in mind is that there must be an extremely sound reason for, in effect, compelling the parties to an appeal to engage with a matter that neither of them has identified.

71. The present case is an object lesson in what can happen when this principle of restraint is not respected. In paragraph 2 of his grant of permission, Judge Holmes referred to two cases on delay: Mario [1998] Imm AR 281 and Sambasivam [1999] OATRF 1999/0419/4. As we have seen, however, this was not a correct identification of the relevant case law. In particular, Judge Holmes failed to have regard to Arusha and Demushi. Had he done so, he would have seen – as did the Deputy Judge – that there was, in fact, no nexus between the delay in issuing the decision and the findings regarding credibility.

72. In other words, far from being a case where the ground raised of Judge Holmes's own volition was strongly arguable, it was not a ground at all.

73. Furthermore, the party applying for permission to appeal to the Upper Tribunal was the Secretary of State. As we have seen, this raises its own issues. The subsequent proceedings have clearly shown that granting permission on the "delay" issue was not something that was of assistance to the Secretary of State. It may be that, in granting on this ground, Judge Holmes was intending to present the claimant with a potential counter-argument to the effect that, even if Judge Dineen had erred in law regarding his findings on risk on return, based on his findings of fact, the claimant could advance the "delay" issue before the Upper Tribunal in order to secure a re-hearing of the entire case.

74. If that was so, Judge Holmes should, in our view, have made it plain in his grant of permission. In any event, the basic point is that permission on the "delay" issue should never have been granted. The fact that there has been a successful rule 15(2A) application is nothing to the point.

(f) Summary of the position

75. The position we have reached is, accordingly, as follows. Judge Dineen's decision remains set aside because it contained a material error of law regarding the assessment of risk on return, based on his findings of fact. Following the allowing of the appeal in the Court of Appeal and its remission to the Upper Tribunal, we have re-heard the claimant's submissions on the "delay" issue. Those submissions have failed to persuade us that Judge Dineen's findings of fact fall to be disregarded because of the issue of delay.

76. We have, however, granted permission under rule 15(2A) for the claimant to adduce evidence at the forthcoming re-making hearing, concerning the issue of the document which he says his father showed him. For this reason, Judge Dineen's

findings regarding the claimant's father will not necessarily be material to the outcome of the appeal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date
29 June 2018

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber