Upper Tribunal
(Immigration and Asylum Chamber)

Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 00216 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 May 2019	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE GILL
UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MORGAN HAYAT SMITH
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I. Jarvis, Home Office Presenting Officer
For the Respondent: Mr V. Amunwa, Counsel instructed by Duncan Lewis & Co Solicitors

(1) A decision by the First-tier Tribunal not to decide a ground of appeal constitutes a "decision" for the purposes of s.11(1) of the Tribunals, Courts and Enforcement Act 2007. It may therefore be appealed to the Upper Tribunal.

(2) If an appellant's appeal before the First-tier Tribunal succeeds on some grounds and fails on other grounds, the appellant will not be required to apply for permission to appeal to the Upper Tribunal in respect of any ground on which he or she failed, so long as a determination of that ground in the appellant's favour would not have conferred on the appellant any material (ie

tangible) benefit, compared with the benefit flowing from the ground or grounds on which the appellant was successful in the First-tier Tribunal.

(3) In the event that the respondent to the appeal before the First-tier Tribunal obtains permission to appeal against that Tribunal's decision regarding the grounds upon which the First-tier Tribunal found in favour of the appellant, then, ordinarily, the appellant will be able to rely upon rule 24(3)(e) of the 2008 Rules in order to argue in a response that the appellant should succeed on the grounds on which he or she was unsuccessful in the First-tier Tribunal. Any such response must be filed and served in accordance with those Rules and the Upper Tribunal's directions.

(4) If permission to appeal is required, any application for permission should be made to the First-tier Tribunal in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, within the time limits there set out. This includes cases where the appellant has succeeded on some grounds but failed on others, in respect of which a material benefit would flow (see (2) above).

(5) There is, however, no jurisdictional fetter on the Upper Tribunal entertaining an application for permission to appeal, even though the condition contained in rule 21(2)(b) of the 2008 Rules has not been met, in that the First-tier Tribunal has not refused (wholly or partly), or has not refused to admit, an application for permission to appeal made to that Tribunal. Rule 7(2)(a) of the 2008 Rules permits the Upper Tribunal to waive any failure to comply with a requirement of the Rules. The guidance in EG and NG (UT rule 17: withdrawal; rule 24: Scope) Ethiopia [2013] UKUT 00143 (IAC) is otherwise confirmed.

(6) The Upper Tribunal is, nevertheless, very unlikely to be sympathetic to a request that it should invoke rule 7(2)(a), where a party (A), who could and should have applied for permission to appeal to the First-tier Tribunal against an adverse decision of that Tribunal, seeks to challenge that decision only after the other party has been given permission to appeal against a decision in the same proceedings which was in favour of A.

(7) When deciding whether to make an anonymity direction, the starting point is that open justice is a fundamental principle of our legal system. Subject to statutory prohibitions on disclosure, any derogation from that principle should be allowed only to the extent that is necessary in order to secure the proper administration of justice. As a result, just as is the case in other jurisdictions, the parties in immigration proceedings should be named, unless doing so would cause harm, or create the risk of harm, of such a nature as to require derogation from the basic principle. In most cases involving international protection, anonymity of an individual will be required, lest the proceedings themselves should aggravate or give rise to such a risk. That will normally be the case throughout the course of the proceedings, including any appeals.

DECISION AND REASONS

A. Introduction

1. The respondent (hereafter the claimant) is a citizen of Belgium, born in July 1988. He has a history of offending as a juvenile. As an adult, he was convicted in 2017 of disclosing private sexual photographs and films with intent to cause distress; four counts of battery; assaulting a constable; and failing to surrender to custody at the

appointed time. The offence of battery was committed whilst the claimant was on bail.

2. On 15 September 2017, after considering the claimant's representations as to why he should not be deported from the United Kingdom, the Secretary of State made a deportation order against the claimant. He did not appeal against that decision and was deported on 3 November 2017.

3. Two days later, the claimant attempted to return but was refused entry to the United Kingdom. On 14 January 2018, the claimant was arrested by police, having entered in breach of the deportation order. The claimant was removed on 18 March 2018. The following day, he was encountered embarking on a ferry in Scotland. He was removed again on 7 May 2018.

4. On 31 May 2018, the claimant again entered the United Kingdom, in breach of the deportation order. On 15 June 2018, the claimant was convicted of knowingly entering the United Kingdom in breach of the deportation order, for which he was fined.

B. The decision letter

5. Those acting for the claimant subsequently made representations, which the Secretary of State treated as an application for the deportation order to be revoked. On 19 July 2018, the Secretary of State explained why he had, in effect, decided not to do so. The letter took account of the claimant's assertion that he had lived in the United Kingdom for the majority of his life, having lived here between the ages of 5 and 9 before returning to the United Kingdom in 2011 aged 12. The Secretary of State, on the basis of the evidence submitted, refused to accept that the claimant had been resident in the United Kingdom in accordance with the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), for a continuous period of five years.

6. The decision letter noted that the claimant had "lost his temper on three separate occasions against 2 females and on those occasions, he in fits of anger assaulted both of them". This included pushing his ex-partner by the throat until she passed out, after which he "continued to torment her by posting private and indecent photographs of her on the internet in order to humiliate her". On another occasion, the claimant threw items around his flat, hitting his current partner with a wooden incense dispenser, as a result of which she was taken to hospital for treatment. He subsequently assaulted his current partner by slamming her into a bathroom mirror, before pinning her down on the floor and placing a blanket around her face and neck.

7. The decision letter found that the claimant had a propensity to reoffend and represented a very genuine and persistent sufficiently serious threat to the public to justify maintaining his deportation. Having considered the issue of proportionality, by reference to the claimant's submissions about difficulties he would face in

Belgium, the letter concluded that it would be reasonable to expect the claimant to go to Belgium and resume his life there.

8. The letter explained in detail why, in circumstances of the claimant's case, his deportation to Belgium would not disproportionately interfere with his rehabilitation.

9. At paragraph 58 of the letter, the Secretary of State concluded that deportation was proportionate and in accordance with the principles and regulations of 23(6)(b) of the 2016 Regulations.

10. The decision letter then turned to consider Article 8 of the ECHR. Paragraph 59 reads:-

> "In addition to considering your client's position under EU law and the EA Regulations 2016, consideration has separately been given to whether your client's deportation would breach the United Kingdom's obligations under the European Convention of Human Rights (ECHR)."

11. The letter noted the various elements of the claimant's Article 8 claim, which were that he had a girlfriend in the United Kingdom, who was pregnant; that his mother remained in the United Kingdom; and that he had established a private life by virtue of his residence and education in the United Kingdom. So far as the claimant's partner was concerned, the Secretary of State considered that the claimant did not have a genuine and subsisting relationship with her, in light of his conviction for battery against that partner. There was also no evidence of co-habitation.

12. So far as private life was concerned, the letter explained why the Secretary of State did not consider that the claimant was socially and culturally integrated in the United Kingdom. This was because the claimant was a persistent offender, having been convicted 8 times of 15 offences within a relatively short period of time in the United Kingdom and his "conviction history indicates an anti-social attitude towards the public and community and shows that he has not integrated into the United Kingdom society". It was not considered that there would be very significant obstacles to the claimant's integration into Belgium.

13. At paragraph 79 of the letter, the Secretary of State undertook an analysis of whether there were very compelling circumstances, such as to make it incompatible with Article 8 for the claimant to be deported. For the reasons given, it was concluded that there were no such circumstances in the claimant's case.

14. Paragraph 84 of the letter concluded the Article 8 analysis as follows:-

> "Having carefully considered the facts about [the claimant's] circumstances it is considered that [the claimant's] deportation would not breach the United Kingdom's obligations under ECHR Article 8 because the public interest in deporting [the claimant] outweighs his right to private and family life"

15. Under the heading "Appeal", the letter told the claimant that "you have a right of appeal against the decision under regulation 36 and 37 of the 2016 EEA

Regulations. Information on how to appeal and the time limits for appealing are contained in the attached notice".

C. Appeal to the First-tier Tribunal

16. On 3 August 2018, the claimant (who remained in the United Kingdom) filed a notice of appeal in the First-tier Tribunal. The grounds of appeal contended that the claimant did not meet the threshold for deportation of an EEA national with permanent residence and that his deportation would disproportionately interfere with his EU rights "and his rights under the European Convention of Human Rights, including article 8".

17. The case was heard at Harmondsworth on 15 October 2018 by Immigration Judge Lal. The claimant was present at the hearing and gave evidence, upon which he was cross-examined. The judge also heard evidence from the claimant's mother and his current partner "who confirmed that she had been the victim of the [claimant's] offending in the past but she thought that he had changed" (paragraph 60 of the decision).

18. The judge found that the claimant had been in the United Kingdom for over five years and had acquired a permanent right of residence. The judge was satisfied that the claimant "did produce credible evidence of some insight into his crimes" and that he had "reasonably addressed issues of anger management, the impact of his actions on victims and how he would deal with those situations which he accepts were the cause of his previous problems". The judge concluded that deportation on serious grounds of public policy/public security "are not made out", finding that the claimant is "back with his partner and he has no links with Belgium" (paragraph 25). There was "credible evidence" that the claimant "has family life in the UK with his mother and that all his siblings and his partner are here and it would be disproportionate to expect [the claimant] to leave the UK at the present time" (paragraph 26). In the light of these findings, the judge allowed "the appeal against the deportation order" (paragraph 28).

19. Paragraph 27 of the judge's decision reads as follows:-

> "27. In the light of its findings above the Tribunal did not go on to consider Article 8 separately."

D. Challenging the First-tier Tribunal's decision

20. The Secretary of State applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal against the judge's decision to allow the claimant's appeal under the 2016 Regulations. The grounds contended that the judge had been wrong to conclude that the claimant had acquired a permanent right of residence, given that "residence alone is insufficient" and there were no findings that the claimant had lived for the requisite time in accordance with the 2016 Regulations. That error infected the judge's proportionality findings. The judge had also failed to have regard to Schedule 1 to the 2016 Regulations, wherein paragraph 3 was of particular relevance, given the claimant's persistent offending. The judge had also,

according to the Secretary of State, failed to give adequate reasons for the findings in respect of the claimant's criminal offending; in particular, since the pre-sentence report considered the claimant to be at high risk of causing serious harm to women.

21. Permission to appeal was granted by a judge of the First-tier Tribunal on 1 November 2018, by reference to each of the Secretary of State's grounds. On 24 January 2019, shortly before the hearing in the Upper Tribunal, the claimant's solicitors filed a response under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the 2008 Rules"). The response contended that the First-tier Tribunal judge had not erred in his conclusions in respect of the 2016 Regulations. The response also, however, contained what was described as a "cross appeal", in which the claimant "hereby makes an application for permission to appeal to the Upper Tribunal (directly) to cross appeal the determination of FTJ Lal in respect of the findings (specifically non-findings) in relation to Article 8 ECHR" (paragraph 16). The response went on to give reasons why the application for permission was being made out of time. As to this, the claimant:-

> " … asks the Court (sic) to note that the [claimant] appealed on two grounds against the decision of the SSHD; firstly that the decision was in breach of EU Law and secondly that the decision breached his rights under ECHR. The appeal was allowed on the former ground and that therefore there was no benefit in him appealing the decision in relation to the latter. If it were the case that Appellant's (sic) should appeal on all grounds (even less favourable) to which they have been successful on it will result in a chaotic administration of the Tribunal appeal system and contrary to the overriding objective in both the FTT and Upper Tier Procedure Rules" (paragraph 18).

22. The response stated that the Secretary of State had made a decision to refuse the claimant's human rights claim and that an appeal against that refusal was, accordingly, before the First-tier Tribunal judge. It "was not open to him to just decide not to deal with it as he did in paragraph 27 of the determination and reasons".

23. The response explained that the claimant's human rights claim was, in part, based on the fact that he contended he had an entitlement to British citizenship through his adopted British father. There was evidence before the First-tier Tribunal to support this contention, including an adoption certificate. The First-tier Tribunal judge, when faced with this submission, declined to deal with it. The relevant part of the judge's decision is as follows: -

> "9. Mr Grennan [Home Office Presenting Officer] submitted that the proper remedy for the [claimant] was by way of judicial review and this of nationality (sic) had never been raised before. He urged the Tribunal to carry on with the appeal.
>
> 10. The Tribunal agreed with Mr Grennan as it was faced with an appeal against the deportation order. If it was to be now advanced that the [claimant] was not a national of the receiving country than that [sic] had to be specifically raised with the SSHD. It had not been done so in this case [sic]."

F. Proceedings in the Upper Tribunal

24. The appeal came before Julian Knowles J, and Upper Tribunal Judge Gill for hearing on 29 January 2019. The hearing was adjourned. Upper Tribunal Judge Gill gave directions on 30 January, requiring the Secretary of State to explain his reasons for failing to comply with earlier directions of the Upper Tribunal, which had required service of a skeleton argument. She also directed that the parties should file and serve skeleton arguments addressing, *inter alia*, whether the First-tier Tribunal had jurisdiction to entertain the appeal, given that regulation 34(4) of the 2016 Regulations required an application to revoke an EA deportation order to be made from outside the United Kingdom; and whether the permission of the First-tier Tribunal/Upper Tribunal was required in order for the claimant to cross-appeal the decision of the First-tier Tribunal judge on the ground that the judge did not consider the claimant's Article 8 claim.

25. The adjourned hearing was heard by the present constitution of the Upper Tribunal on 7 May 2019. By that time, the parties had each served a number of skeleton arguments, speaking notes and applications. We found these documents of considerable assistance, supplemented as they were by the oral submissions of Mr Jarvis and Mr Amunwa.

G. The jurisdictional issue

26. The first issue is whether the First-tier Tribunal had jurisdiction to decide the claimant's appeal under the 2016 Regulations. Upper Tribunal Judge Gill's directions of 30 January referred to regulation 34. So far as relevant, this reads as follows: -

> "**Revocation of deportation and exclusion orders**
>
> 34.- (1) An exclusion order remains in force unless it is revoked by the Secretary of State under this regulation.
>
> (2) A deportation order remains in force—
>
> (a) until the order is revoked under this regulation; or
>
> (b) for the period specified in the order.
>
> (3) A person who is subject to a deportation or exclusion order may only apply to the Secretary of State to have it revoked on the basis that there has been a material change in the circumstances that justified the making of the order.
>
> (4) An application under paragraph (3) must set out the material change in circumstances relied upon by the applicant and may only be made whilst the applicant is outside the United Kingdom.
>
> (5) On receipt of an application under paragraph (3), the Secretary of State must revoke the order if the Secretary of State considers that the criteria for making such an order are no longer satisfied.

(6) The Secretary of State must take a decision on an application under paragraph (2) no later than six months after the date on which the application is received."

So far as appeals are concerned, regulation 37, again so far as relevant, provides as follows: -

"37.- (1) Subject to paragraph (2), a person may not appeal under regulation 36 whilst in the United Kingdom against an EEA decision -

(a) to refuse to admit that person to the United Kingdom;

(b) to revoke that person's admission to the United Kingdom;

(c) to make an exclusion order against that person;

(d) to refuse to revoke a deportation or exclusion order made against the person;

…

37.- (2) Sub-paragraphs (a) to (c) of paragraph (1) do not apply where the person is in the United Kingdom; and -

…"

27. The first point to observe is that neither the representatives nor the First-tier Tribunal judge appeared to have been aware at all of what is said in regulations 34 and 37. So far as the First-tier Tribunal judge was concerned, this may be because the judge considered, wrongly, that the EEA appeal was against the Secretary of State's decision to make a deportation order against the claimant, rather than its being against the decision to refuse to revoke that order. This is apparent from paragraphs 3 and 29 of the Judge's decision.

28. It is also apparent that the writer of the Secretary of State's decision letter was unaware of regulation 34(4), which – as we see - provides that an application to revoke a deportation order may be made only whilst the applicant is outside the United Kingdom. Whether the Secretary of State is able to waive that requirement in such a way as to keep the resulting decision within the ambit of the 2016 Regulations is a moot point. It is, however, an issue upon which the parties did not make discrete submissions and, in the circumstances, we are not persuaded that it is appropriate for us to say more about it.

29. Attention in fact focused upon regulation 37(1)(d) which, as we can also see, provides in terms that a person may not appeal whilst in the United Kingdom against an EEA decision to refuse to revoke a deportation order made against that person. The appellant was in the United Kingdom when the notice of appeal was filed.

30. In Anwar and Adjo v the Secretary of State for the Home Department [2010] EWCA Civ 1275, the Court of Appeal considered the effect of section 92 of the Nationality, Immigration and Asylum Act 2002 which, as then in force, provided as follows:

> "**92. Appeal from within United Kingdom: general**
>
> (1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.
>
> (2) This section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f) and (j).
>
> …..
>
> (4) This section also applies to an appeal against an immigration decision if the appellant—
>
> (a) has made an asylum claim, or a human rights claim, while in the United Kingdom, or
>
> ……"

31. In Nirula v the First-tier Tribunal (Asylum and Immigration Chamber & another) and Secretary of State for the Home Department [2012] EWCA Civ 1436, the Court of Appeal explained that Sedley LJ's judgment in Anwar had, in effect, been misunderstood: -

> "27. The question that arose in Anwar was whether a tribunal could proceed to a determination in a deception case if the appellant was inside the United Kingdom. The Secretary of State had determined that the appellant had obtained leave to remain by deception; on appeal the Secretary of State objected to the tribunal hearing the appeal because the appellant was in the United Kingdom. The tribunal decided it did have jurisdiction and, moreover, that the appellant had not obtained leave by deception. The Secretary of State obtained an order for reconsideration and, on reconsideration, the AIT decided that the appeal could not be pursued while the appellant remained in the United Kingdom and there was thus no jurisdiction in the tribunal to entertain the appeal. This court then granted permission to appeal to Mr Anwar as well as to another appellant (Ms Pangeyo) who raised the same point. By the time Mr Anwar's appeal came to be heard, the Secretary of State had agreed that he had not obtained leave by deception but since the case was ready for argument, both sides were heard on the question of jurisdiction "at the court's request" (para 9). "
>
> 28. Anwar is therefore a considered decision of this court, contained in a reserved judgment, on the question whether a tribunal (then the AIT, now the FTT) has jurisdiction to hear an appeal against removal in a deception case when the appellant is in the United Kingdom. Sedley LJ (with whom Lloyd and Sullivan LJJ agreed) set out the facts, the statutory provisions and the issues, explaining how the first tribunal came to consider that they did have jurisdiction. He then proceeded to decide the jurisdiction point under the heading "Jurisdiction"
>
> 29. "…In circumstances in which this court has requested argument on a point about jurisdiction and has expressly decided that question, its reasoning must be

treated as part of the ratio of the case. Mr Ockelton thought that because the point on jurisdiction had been taken in Anwar's two cases as per paragraph 23 above, the whole of the rest of this passage was obiter with the result that, had it been relevant to his decision, he could have disagreed with it because it was wrong. This is with respect a misunderstanding of the doctrine of precedent in two quite separate ways. In the first place, judges at first instance should accept a considered judgment of this court on a question of jurisdiction as a judgment that binds them. In the second place Mr Ockelton was able to decide (in my view correctly) that the point on jurisdiction had been taken in this case. In these circumstances his own remarks about what the position would be if the point had not been taken at all (or not been taken by the right person) were themselves obiter, as he himself acknowledges in his judgment. On the basis on which Mr Ockelton proceeded (namely that the views on jurisdiction in Anwar were obiter), it is not appropriate for a first instance judge to say obiter that considered remarks of this court are wrong. One consequence is a disruption to the body of authority by which tribunals are guided. If he believes that the view of this court is wrong, a judge of first instance should give permission to appeal. If this court where it falls for decision in an appropriate case considers the view to be wrong (and obiter) it will say so and first instance tribunals will know where they are.

30. Of course any decision of this court is only authority for what it decides and for any reasoning necessary for that decision. One thing that is immediately clear from paragraphs 19-23 of the Anwar decision is that nothing is said on the question whether the tribunal is entitled to take a point on its own jurisdiction of its own motion. That is a point which remains open for decision. It is not a particularly difficult decision. In my view any tribunal is entitled (and indeed well advised) to air any doubts it has about its jurisdiction and invite submissions on that question and then decide it. Anwar does not question that proposition in any way.

31. Mr Ockelton, however, thought (para 47(b)) that it was "implicit" in Anwar that the jurisdiction point has to be taken by the party affected and it is true that in paragraph 19 of his judgment Sedley LJ says that the point would operate in bar of the proceedings "once the point was taken by the Home Office". But that did not mean that only the Home Office could take the point: it simply reflected the fact that in the two cases before the court the Home Office had in fact taken the point. In any event there is an air of unreality in the suggestion that, if the tribunal takes the point, the Home Office does not. In the first place, the Home Office may not be represented before the tribunal; in that event it would border on the absurd to say that the tribunal cannot take the point of its own motion. If the Home Office is represented (as it was in this case), the representative will naturally permit the tribunal to make the running. If the appellant fails to persuade the tribunal that it has jurisdiction, it would again border on the absurd for the tribunal to have specifically to ask the Home Office representative if he wants to object to its jurisdiction to hear the appeal and to wait for an affirmative answer. If the Home Office does not think it fair or right to take the point it can always say so (and in a case such as Anwar it may have a public law duty to say so) and the tribunal can then proceed.

32. Mr Ockelton also thought (para 47(c)) it wrong to say that a failure to consider the issue of jurisdiction can give a tribunal a jurisdiction it would not otherwise have. Anwar does not so say. What it does say is that the Secretary of State can choose not to take any jurisdictional objection if she wishes to take that course, just as a

defendant can waive his entitlement to plead limitation or, more likely, choose not to plead a limitation defence. If a tribunal gives a decision without anybody considering the jurisdictional position, the decision may be precarious but as Mr Ockelton himself points out in para 53 the decision stands until set aside. It will become less precarious once the time for applying for permission to appeal has expired.

33. Mr Ockelton also pointed out (para 47(a)) that there was no consideration in Anwar of the terms of the Secretary of State's Notice of Decision. In the present case the Notice of Decision does expressly say that Mr Nirula had a right of appeal which he could exercise "After removal". Mr Ockelton considered that, if it was necessary for the Secretary of State to take the jurisdiction point, she had taken it then. For my part, I agree with that conclusion but that does not in any way influence my decision that the jurisdiction point can be taken by the tribunal just as much as by the Secretary of State.

34. I would therefore reject Mr Malik's submission that the Secretary of State had herself to take the jurisdictional point and would hold that it was open to the FTT itself to do so. It made the correct decision on the point since it was clear that Mr Nirula was not abroad – he was actually in the room at the appeal hearing."

32. In the light of Nirula, it is, therefore, plain that, regardless of what occurred (or, more to the point, did not occur) at the hearing before the First-tier Tribunal, the Upper Tribunal is entitled to take the "jurisdiction" point and that, if we conclude the First-tier Tribunal did not have jurisdiction to decide the appeal under the 2016 Regulations, this was an error of law. Neither Mr Jarvis nor Mr Amunwa sought to argue the contrary.

33. Instead, the claimant's case for saying that the First-tier Tribunal did have jurisdiction rests upon the judgment of Michael Fordham QC, sitting as a deputy judge of the High Court, in BXS v Secretary of State for the Home Department [2014] EWHC 737 (Admin).

34. BXS concerned the effect of regulation 24A of the Immigration (European Economic Area) Regulations 2006, which provided as follows:-

"24A (1) A deportation or exclusion order shall remain in force unless it is revoked by the Secretary of State under this regulation.

(2) A person who is subject to a deportation or exclusion order may apply to the Secretary of State to have it revoked if the person considers that there been a material change in the circumstances that justified the making of the order.

(3) An application under paragraph (2) shall set out the material change in circumstances relied upon by the applicant and may only be made whilst the applicant is outside the United Kingdom.

(4) On receipt of an application under paragraph (2), the Secretary of State shall revoke the order if the Secretary of State considers that the criteria for making such an order are no longer satisfied.

(5) The Secretary of State shall take a decision on an application under paragraph (2) no later than six months after the date on which the application is received."

35. Regulation 27(1) of the 2006 Regulations provided that: -

"(1) … a person may not appeal under regulation 26 whilst he is in the United Kingdom against an EEA decision -

…

(b) to refuse to revoke a deportation order made against him."

36. The following provisions of the judgment of the deputy judge are relevant for our purposes: -

"23. If, … the uncompromising language of Regulation 24A, which describes an exclusive route of revocation under its provisions and requires that an application must be out of country, were incompatible either with EU law or the European Convention on Human Rights, then I would have no hesitation in concluding that that uncompromising effect could not lawfully be visited on a claimant for whom it would be such a violation. Whether by reading in words or reading the provision down, there would in my judgment be no difficulty in arriving at that conclusion. There are no clear words of primary legislation (for the purposes of section 3 of the Human Rights Act) that would mandate the maintenance of the otherwise uncompromising shape of Regulation 24A."

24. What arises in the present case is a question as to whether the mere act of removing an individual pursuant to an EEA deportation order, so that they are placed in the position envisaged by Regulation 24A, is of itself a violation of their human rights. It is not difficult to think of examples where that action would plainly be a violation of human rights. The fact that the regulations permit the individual from abroad to apply for the deportation order to be revoked may very well be a good and perhaps a complete answer in most case when considering the implications of the ongoing exclusionary effect of a deportation order. But one can suppose examples of an individual who is not fit to fly, or examples of an individual whose family life will necessarily be harmed by the action of removing them, or by the necessary period of exclusion from the United Kingdom while they make the envisaged out of country application or pursue an out of country appeal. Circumstances of that nature can be envisaged in which that action of itself could constitute a violation of Convention rights. That being so, if Regulation 24A stood alone and were exhaustive of all remedies and rights of the individual, then there would, in my judgment, be an incompatibility with the human rights protections guaranteed by the Human Rights Act. In such a case, as it seems to me, the Secretary of State would only be acting consistently with her statutory human rights duty (under section 6 of the Human Rights Act) where the removal, of itself, could be said to be consistent with and not to violate those applicable human rights. That does lead to two conclusions.

…

54. As for in-country appeal or out of country appeal, in my judgment, it must follow that if revocation can lawfully and justifiably be required to be pursued out of country, then it follows that insistence that any consequential appeal be

out of country can also be justified. I ought to add that, in fact, as it happens, the out of country appeal position was already part of the EEA regime, not only from 2006 but, in fact, going to the previous Regulations of 2000. I ought also to add, in the context of appeal rights, that parliament has in section 109 of the 2002 Act recognised that different appeal provisions have been made in EEA cases than in non-EEA. None of that, of course, was to empower the making of provisions that were contrary to Convention rights.

…

56. My answer to issue 1 then, for all those reasons, is that there is no incompatibility, either in EU or Human Rights Act terms, in the insistence, leaving aside the narrow human rights point which I have analysed, the insistence on an application for revocation based on change of circumstances and human rights and an appeal being pursued out of country, even though they would not be in a non EEA case.

…

59. I ought to make it clear, at this point, that I do not accept the submission that the decision of 19 March 2013 was of itself an unlawful one in the light of the now recognised relevance that article 8 can have for a removal. The same is true of the letter of 28 March 2013 from UKBA. It is right that the Secretary of State was not at that stage considering the article 8 implications of the mere act of removal. Moreover, I have held that that is a proper human rights argument which an individual must always be entitled to raise and which engages the Secretary of State's section 6 Human Rights Act duty. However, the fact in this case is that the claimant's solicitors very clearly were invoking as the relevant provision, regulation 24A, and were inviting a revocation based on material change in the circumstances. In circumstances where that contention was rejected and in which I have held that the regulation which requires the application to be out of country is compatible both with EU and ECHR law, and in circumstances where the Secretary of State came later in the decision 15 November 2013 to grapple with article 18 and the question of removal, there is no ground on which the court could be justified in intervening. Nor, in my judgment, could there be any utility in the point so as to justify relief."

37. The Upper Tribunal accepts the submissions of Mr Jarvis, on behalf of the Secretary of State, that it is not possible to extract from the judgment in BXS any support for the proposition that, as a general matter, regulation 37(1)(d) of the 2016 Regulations should be somehow "read down", so as to enable the present claimant to prosecute an appeal under those Regulations whilst he is in the United Kingdom. What concerned the deputy judge was the fact that there might be circumstances in which the mere fact of removal could violate Article 8 of the ECHR.

38. As Mr Jarvis pointed out, however, regulation 33 of the 2016 Regulations requires the Secretary of State, when giving directions for removal, to turn his mind specifically to that issue, in circumstances where the individual concerned has not appealed against the EEA decision, but would be entitled to do so and remains within time to do so, from within the United Kingdom; or where the individual has so appealed but the appeal has not been finally determined. In the claimant's case,

the decision to remove by way of deportation was taken in 2017, when he was in the United Kingdom. The claimant did not challenge that decision.

39. Furthermore and in any event, we have seen that the decision letter in the claimant's case separately addressed the claimant's submissions by reference to Article 8 of the ECHR. The letter thus comprised two separate decisions; namely, a decision to refuse to revoke the deportation order and a decision to refuse the claimant's human rights claim.

40. Section 82(1)(b) gives a person a right of appeal to the First-tier Tribunal where the Secretary of State has decided to refuse a human rights claim made by that person. Section 84(2) provides that the ground of appeal is that removal would be unlawful under section 6 of the Human Rights Act 1998.

41. Accordingly, the claimant was entitled, through the mechanism of the human rights appeal, to contend that his removal would violate Article 8, including (if it were the position) that the mere fact of his removal would constitute such a violation, irrespective of the outcome of his out of country appeal under the 2016 Regulations.

42. In the light of paragraphs 29 to 39 above, we conclude that the First-tier Tribunal judge did not have jurisdiction to determine the claimant's appeal under the 2016 Regulations and that he erred in law in purporting to do so. The notice of appeal filed in August 2018 was of no effect. We set aside the judge's decision in respect of the 2016 Regulations and remake it by substituting a decision formally dismissing the appeal for want of jurisdiction.

H. The human rights appeal

43. For the reasons we have just given, the First-tier Tribunal judge was, in fact, seized of an appeal under section 82(1)(b) of the 2002 Act. That is accepted by Mr Jarvis and also by his colleague, Mr Wilding, in the latter's skeleton argument of 12 February 2019. The position is, accordingly, exactly that hypothesised by Sales LJ at paragraph 30 of Amirteymour v Secretary of State for the Home Department [2017] EWCA Civ 353, albeit by reference to the previous legislative regime:

> "Depending on the facts, if the Secretary of State did happen to address Article 8 arguments in her decision letter in such a case, it might be possible to say that the Secretary of State had waived the requirement for an application form to be completed in respect of her exercise of her residual discretion under the 1971 Act by reference to Article 8 and that she had then made two decisions, an "EEA decision" in relation to entitlements under the EEA Regulations and an "immigration decision" within the scope of section 82(1) of the 2002 Act, with distinct rights of appeal under regulation 26(1) and under section 82(1) respectively……."

44. It would be desirable if, henceforth, the Secretary of State were to make it plain in decision letters of the present kind that he is not only deciding an application by reference to 2016 Regulations but also refusing a human rights claim under section 82(1)(b) of the 2002 Act. Such an approach may well have assisted the parties and the judge in the present case.

45. As we have noted, the claimant's grounds of appeal to the Upper Tribunal included a specific reference to Article 8 of the ECHR. That could only be taken as a challenge to the passages of the Secretary of State's decision letter, where article 8 was expressly and extensively considered. Section 86(2)(a) imposes a duty on the First-tier Tribunal to determine any matter raised as a ground of appeal. At paragraph 27 of the First-tier Tribunal judge's decision, however, the judge "did not go on to consider Article 8" in the light of his findings in respect of the 2016 Regulations.

(a) Did the judge make a decision?

46. Before us, there was some discussion as to whether paragraph 27 of the First-tier Tribunal judge's decision constituted a decision for the purposes of section 11(1) of the Tribunals, Courts and Enforcement Act 2007. This provision confers a right of appeal "on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision". Mr Jarvis indicated that the Secretary of State might wish to reserve his position on this matter.

47. With respect to Mr Jarvis, the answer is, in our view, manifest. In paragraph 27, the First-tier Tribunal judge was making a decision not to consider Article 8. That was a decision in violation of the obligation placed upon the Tribunal by section 84 of the 2002 Act. It would, we find, be highly undesirable if the position were otherwise. If a judge's refusal to decide a human rights appeal cannot be categorised as a decision within the scope of section 11(1) of the 2007 Act, the only remedy will be judicial review. As the present case shows, such as a bifurcation of routes of challenge would give rise to complexity, delay and expense. It cannot have been Parliament's intention, in enacting the 2007 Act, to bring about such a state of affairs.

(b) Challenging the judge's decision

48. Having said this, how should the claimant have sought to challenge the decision in paragraph 27? Here, attention focuses on rule 24 (response to the notice of appeal) of the 2008 Rules. So far as relevant, this provides as follows: -

> "**24.**
>
> …
>
> (1)(A) Subject to any direction given by the Upper Tribunal, a respondent may provide a response to a notice of appeal.
>
> (2) Any response provided under paragraph (1A) must be in writing and must be sent or delivered to the Upper Tribunal so that it is received.
>
> (a) if an application for permission to appeal stands as the notice of appeal, (which it does here) no later than 1 month after the date on which the Respondent was sent notice that permission to appeal had been granted;
>
> …

(3) The response must state -

…

(e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal), any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal; and

… "

49. In EG and NG (UT rule 17: withdrawal; rule 24: Scope) Ethiopia [2013] UKUT 00143 (IAC), the Upper Tribunal had before it a case in which the claimants had succeeded in the First-tier Tribunal on Article 3 grounds, by reason of them facing a real risk of torture or inhuman or degrading treatment if returned to Ethiopia, but where the First-tier Tribunal had dismissed their appeals on asylum grounds, on the basis that the claimants were excluded from the benefits of the Refugee Convention (and, likewise, from those of the Qualification Directive). The Secretary of State sought and obtained permission to appeal against the decision to allow the appeal on Article 3 grounds, following which the claimants filed responses under rule 24, in which they contended that their appeals should have been allowed under the Refugee Convention etc.

50. The Upper Tribunal found as follows: -

"33. Mr Eicke said that we have no power except that given us by statute and so we have no power to hear an appeal without permission. Parliament says unequivocally that a right may be exercised only with permission (2007 Act section 13(3)). An application can only be made in writing (First-tier Tribunal Rules, rule 24(1)) and an application for permission cannot be entertained by the Upper Tribunal unless an application has been made first to the First-tier Tribunal (Upper Tribunal Rules 21(2)(b)). Mr Eicke said that it made no sense for provisions that required permission to be obtained before a hearing in writing from a First-tier Judge to be swept aside and replaced by a system that enabled a respondent to an appeal to assert as of right arguments that were raised by the respondent in a notice of appeal which could otherwise only be raised with permission given in response to a written application.

34 Miss Dubinsky contended that appeal rights cannot be lightly displaced but we agree with Mr Eicke that we cannot give ourselves jurisdiction we do not have and it is not for us to create a right of appeal without permission. The claimants cannot appeal the decision of the First-tier Tribunal because they do not have permission to appeal and the Upper Tribunal has no power to give permission to appeal unless the First-tier Tribunal has refused permission (rule 21(2) of the Upper Tribunal Rules).

35. It does not follow from this that there are no circumstances when claimants would be unable to argue that any of the findings adverse to the respondent are wrong or that the First-tier Tribunal erred in law by not allowing the appeal for more reasons than it did but the claimants cannot rely on rule 24 notices as an alternative to seeking permission to appeal.

36. Mr Eicke submitted that a rule 24 Notice was analogous to a Respondent's Notice under rule 52 of the Civil Procedure Rules. There a party that is seeking permission to appeal from the appeal court must ask for permission and a party that (alternatively) wishes to ask the appeal court to uphold the order of the lower court for reasons different from or additional to those given by the lower court must give notice of that intention. His point was that the need for permission to cross-appeal was well understood in civil proceedings and seeking it was not something that the respondent to an appeal in the Upper Tribunal could be expected to ignore.

37. In many ways the provisions of rule 52 of the CPR are analogous to a rule 24 Notice but they are not the same. Under rule 52.3(2) of the CPR a party that does not have permission to appeal from the lower courts can seek it from the higher court but in the civil courts the failure to secure permission from the lower court (even if through culpable neglect) can be remedied by the higher court but the failure to seek permission to appeal to the Upper Tribunal cannot be corrected by the Upper Tribunal. The First-tier Tribunal must decide a written application for permission to appeal before the Upper Tribunal can be involved (see rule 24(1) of the 2005 Rules and rule 21(2) of the Upper Tribunal Rules). This is a cumbersome procedure once proceedings have begun before the Upper Tribunal. An application in writing can be made at any stage, and a judge deciding a case in the Upper Tribunal could no doubt withdraw and determine a written application for permission to appeal as a judge of the First-tier Tribunal. However if the judge did not extend time (for such an application would almost always be very late) or refused permission to appeal there would no doubt be an application for an adjournment so that the papers could be put before a judge sitting the Upper Tribunal. This, we find, must be the deliberate intention of the rules and rather underlines the importance of a party that needs permission to appeal seeking it in accordance with the prescribe time scales and well before a rule 24 notice would ordinarily be appropriate.

38. Against this background we look carefully at the terms of rule 24 of the Upper Tribunal Rules. Although the rule prescribes a time scale for providing a respondent's notice and prescribes its contents, the rule does not create a general obligation on a respondent to provide a notice at all. Rather if the respondent chooses to send a notice then rule 24 prescribes its content. In this case directions echo the rule and specify the contents of a Notice rather than insist on one being served.

39. Certain of the requirements are informative rather than controversial, such as stating the respondent's name and address, whether the respondent wants a hearing and, usefully, whether or not the respondent opposes the appeal. Rule 24(3)(e), it was submitted, assists the appellant. It requires the respondent to state in the response:

> "The grounds on which the respondent relies including (in the case of an appeal against the decision of another Tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely on in the appeal."

40. The 2002 Act provides statutory grounds of appeal to the First-tier Tribunal (see section 84(1)) but the Secretary of State can never appeal to the First-tier Tribunal and so cannot rely strictly on the grounds listed at section 84(1) which are all

grounds of appeal against an immigration decision. It follows that "grounds" in rule 24 must have a wider meaning and include any reason relied upon by the parties to support the decision. It does not follow that a respondent can raise a point in a response that should have been raised in the respondent's own appeal.

41. Ms Dubinsky argued that the rule 24 response permitted her to argue, without seeking permission to appeal, that the First-tier Tribunal should have resolved any point in the claimant's favour that the claimant relied upon before the First-tier Tribunal. Ms Dubinsky submitted that this rule is incapable of being interpreted in a way that does not assume that a respondent can challenge a First-tier Tribunal's decision in this manner without permission to appeal having been granted. Ms Dubinsky argued that a respondent who opposes an appeal can be expected, without need for express confirmation, to rely on grounds which were *successful* before the First-tier Tribunal. It would hardly be informative for an appellant before the First-tier Tribunal who succeeded in persuading the First-tier Tribunal (for example) that a decision was not in accordance with the immigration rules (section 84(1)(a)) to be required to state in a notice that it relied on the same successful ground when responding to an appeal brought by the Secretary of State and the rule makes no such requirement. Rule 24(3)(e) requires the respondent to state if it intends to rely on grounds that were *un*successful "in the proceedings which are the subject of the appeal" but intends to rely on in the appeal to the Upper Tribunal. Ms Dubinsky submitted that the rule does not make sense unless it is interpreted to mean, without qualification, that there is a right to say that a ground that was unsuccessful before the First-tier Tribunal should have succeeded.

42. When Mr Eicke addressed us on rule 24(3)(e) he tried to circumvent Ms Dubinsky's submission by emphasising that the claimants were required to identify any grounds on which they intended to rely including grounds "on which the respondent was unsuccessful in the proceedings which are the subject of the appeal". He said that the words "which are the subject of the appeal" are crucial. The proceedings which are the subject of the appeal were not, he submitted, all the proceedings that were before the First-tier Tribunal, but only the proceedings that were before us and the proceedings before us, were identified by reference to the grant of permission to appeal. Clearly, if he is right, the points relied on by the claimants are excluded because they were not part of that grant.

43. The bright line distinction between the First-tier section 85 appeal and the Upper Tier section 11 appeal suggested by Mr Eicke's argument is inconsistent with the continuum suggested by section 104(4) of the 2002 Act and by rule 17A of the Upper Tribunal Rules. A section 11 appeal does not continue when a section 85 appeal has been abandoned. Similarly a section 11 appeal does not exist without regard to the section 85 appeal that encapsulated the dispute between the parties. In some ways this is an unattractive line of argument. It follows that we do not accept that the words "in the proceedings which are the subject of the appeal" are limited to the grounds on which permission to appeal has been given. The "proceedings" that are the "subject of the appeal" are those that came before the First-tier Tribunal and it is those "proceedings" that are the subject to further appeal.

44. Ms Dubinsky's contention that rule 24 is meaningless unless it permits raising *any* points that failed to impress the First-tier Tribunal, including a point that should have been the subject of an appeal, is attractive but is, we find, wrong.

45. Although section 11 of the 2007 Act extends the right of appeal (with permission and subject to excluded decisions) to an appeal "on any point of law" save for extraordinary cases, a party will not normally be given permission to appeal, and will not be expected to seek permission to appeal, a point that would not make a material difference to the outcome. However that party might still have very good reasons to respond to an appeal by arguing that the First-tier Tribunal should have dismissed or allowed the appeal for reasons other than those given in the Determination or rather for grounds which were unsuccessful in the proceedings that are the subject of the appeal.

46. Suppose a man seeks entry clearance as a husband and suppose that the Entry Clearance Officer finds that he has not shown that he can be either accommodated or maintained in accordance with the rules. A First-tier Tribunal Judge may decide, arguably wrongly, that the husband can satisfy the accommodation requirements but not the maintenance requirements. In that event the judge would dismiss the appeal. The Entry Clearance Office would have no interest in appealing. He is content with the decision to dismiss the appeal. The husband however may want to challenge the decision. He might want to argue that the decision that he did not satisfy the maintenance requirements was wrong in law and he may be given permission to appeal. In that event the Entry Clearance Officer may well want to argue not only that the decision that the husband did not meet the maintenance requirements was right but that the decision that he did meet the accommodation requirements was wrong. In short, without wanting to appeal the decision, the Entry Clearance Officer may want to rely on a ground that failed before the First-tier Tribunal. Rule 24 permits the Entry Clearance Office to give notice of his intention to raise such a point in a reply. In short rule 24 does have a meaning that does not depend on Ms Dubinsky's premise and we reject the construction that she urged on us. Rule 24 does not create a right of appeal to a party who has not asked for permission to appeal. Rule 24 is not in any way to do with seeking permission to appeal and it is not an alternative to seeking permission where permission is needed. It is to do with giving notice about how the respondent intends to respond to the appeal that the appellant has permission to pursue. If a respondent wants to argue that the First-tier Tribunal should have reached a materially different conclusion then the respondent needs permission to appeal.

47. This is probably more significant in international protection cases than entry clearance cases because an appeal can be allowed on different grounds. An appellant may have shown, for example, alternatively, that he is a refugee, or entitled to humanitarian protection or that removal is contrary to his rights under article 8 of the European Convention on Human Rights. The beneficial consequences of success would be different in each case. For example a person found to be entitled to humanitarian protection may want to argue that he should have been recognised as a refugee whilst the Secretary of State may want to argue that the appeal should only have been allowed with reference to article 8. In such cases both parties would want a result materially different from the one decided by the Tribunal and both should seek permission to appeal."

51. We must respectfully take issue with paragraph 37 of EG. Despite the mandatory nature of rule 21(2) of the 2008 Rules, there is no jurisdictional fetter on the Upper Tribunal entertaining an application for permission to appeal, even though the First-tier Tribunal has not refused (wholly or partly) or has not refused to admit, an application for permission to appeal made to that Tribunal. Rule 7 (failure to comply with rules etc), so far as relevant provides: -

> "7.(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings."
>
> (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Upper Tribunal may take such action as it considers just, which may include -
>
> (a) waiving the requirement;
>
> …"

52. In Ved and another (appealable decision; permission application; Basnet) [2014] UKUT 00150 (IAC), the appellants applied to the First-tier Tribunal for permission to appeal against a decision that their appeals to that Tribunal were not valid. The First-tier Tribunal refused to entertain the applications. The appellants then applied to the Upper Tribunal for permission to appeal.

53. The Upper Tribunal held that even though, for the purposes of rule 21(2)(b), the First-tier Tribunal had not refused, or refused to admit, the application for permission to appeal, it was appropriate to apply rule 7(2) so as to waive that requirement and enable the appellants to apply for permission direct to the Upper Tribunal. The Upper Tribunal held as follows: -

> "24. On the particular facts of the present case, the requirement in rule 21(2), that the appellant should have applied for permission to the First-tier Tribunal and been refused or had their application not admitted, clearly should not be a reason to preclude the appellants from applying for permission to the Upper Tribunal. We would, however, emphasise the following important points.
>
> 25. … the existence of rule 7(2)(a) is not in any way to be regarded as excusing appellants from first applying to the First-tier Tribunal for permission to appeal, before approaching the Upper Tribunal. Indeed, we cannot readily envisage a situation where the Upper Tribunal would be likely to accept an application for permission from a party to proceedings in the First-tier Tribunal who has chosen not to make any prior application to that Tribunal, whether or not such an application would be out of time. The same is likely to be true where no such prior application is made, as a result of inadvertence."

54. Although it is necessary to make that *caveat* to paragraph 37 of EG, the point made in paragraph 25 of Ved holds good, in the particular circumstances with which EG was concerned. The Upper Tribunal is very unlikely to be sympathetic to a request that it should invoke rule 7(2)(a), where a person who could and should have applied for permission to appeal to the First-tier Tribunal against an adverse

decision of that body seeks to challenge that adverse decision only after the other party has been given permission to appeal against a decision in the same proceedings which was in favour of the first-mentioned person.

55. So far as the present case is concerned, we consider that the key question is what is meant by "a materially different conclusion" in paragraph 46 of EG.

56. There is, we find, considerable force in Mr Amunwa's submission that, in the case of the claimant, there was no material benefit to him in applying for permission to appeal against the decision of the First-tier Tribunal judge (as we find it to be) not to determine his human rights appeal, given that, on the face of the judge's decision, the claimant had succeeded in resisting removal by reference to the 2016 Regulations. As a general matter, it would be undesirable if individuals were encouraged to seek permission to appeal against adverse decisions which, if decided differently, would confer upon them no tangible benefit, given the decision in their favour. The litigation of what in most circumstances would be academic issues is not in the interests of the overriding objective.

57. In EG, the appellants would plainly have been in a materially better legal position, if they had been found by the First-tier Tribunal to have the status of refugees within the scope of the Refugee Convention, rather than persons who could not, for the present, be removed without a real risk of Article 3 mistreatment. They would have enjoyed the benefits of that Convention.

58. We do not consider that the answer to the question of what is meant by "a materially different conclusion" necessarily turns upon whether (as here) two distinct appeals are in play. A paradigm instance exists in section 82 of the 2002 Act, where subsection (1)(a) confers a right of appeal against the decision to refuse protection claim, whilst subsection (1)(b) confers such a right in respect of the refusal of a human rights claim. A person who succeeds in a protection claim, on the basis that he or she is found to be a refugee or a person entitled to the grant of humanitarian protection, may have been unsuccessful in a human rights appeal brought by reference to Article 8 of the ECHR. In such circumstances, there would be nothing to be gained by seeking permission to appeal in respect of the Article 8 human rights decision of the Tribunal.

59. We accordingly conclude that the test of materiality, as articulated in EG and as further explained above, remains the correct touchstone in respect of the appellate system contained in the 2002 Act (as amended by the Immigration Act 2014) and in the 2016 Regulations.

60. In the present case, therefore, the claimant was entitled to raise, in his rule 24 response, the Article 8 grounds on which he had been unsuccessful in the First-tier Tribunal. That means it was unnecessary for those advising the claimant to couch this aspect of the response in terms of a "cross appeal", with all the attendant procedural complexity that an application for permission to appeal would, at that stage, entail.

61. It may be helpful to set out our general conclusions under this Part:

(i) A decision by the First-tier Tribunal not to decide a ground of appeal constitutes a "decision" for the purposes of s.11(1) of the Tribunals, Courts and Enforcement Act 2007. It may therefore be appealed to the Upper Tribunal.

(ii) If an appellant's appeal before the First-tier Tribunal succeeds on some grounds and fails on other grounds, the appellant will not be required to apply for permission to appeal to the Upper Tribunal in respect of any ground on which he or she failed, so long as a determination of that ground in the appellant's favour would not have conferred on the appellant any material (ie tangible) benefit, compared with the benefit flowing from the ground or grounds on which the appellant was successful in the First-tier Tribunal.

(iii) In the event that the respondent to the appeal before the First-tier Tribunal obtains permission to appeal against that Tribunal's decision regarding the grounds upon which the First-tier Tribunal found in favour of the appellant, then, ordinarily, the appellant will be able to rely upon rule 24(3)(e) of the 2008 Rules in order to argue in a response that the appellant should succeed on the grounds on which he or she was unsuccessful in the First-tier Tribunal. Any such response must be filed and served in accordance with those Rules and the Upper Tribunal's directions.

(iv) If permission to appeal is required, any application for permission should be made to the First-tier Tribunal in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, within the time limits there set out. This includes cases where the appellant has succeeded on some grounds but failed on others, in respect of which a material benefit would flow (see (ii) above).

(v) There is, however, no jurisdictional fetter on the Upper Tribunal entertaining an application for permission to appeal, even though the condition contained in rule 21(2)(b) of the 2008 Rules has not been met, in that the First-tier Tribunal has not refused (wholly or partly), or has not refused to admit, an application for permission to appeal made to that Tribunal. Rule 7(2)(a) of the 2008 Rules permits the Upper Tribunal to waive any failure to comply with a requirement of the Rules. The guidance in EG and NG (UT rule 17: withdrawal; rule 24: Scope) Ethiopia [2013] UKUT 00143 (IAC) is otherwise confirmed.

(vi) The Upper Tribunal is, nevertheless, very unlikely to be sympathetic to a request that it should invoke rule 7(2)(a), where a party (A), who could and should have applied for permission to appeal to the First-tier Tribunal against an adverse decision of that Tribunal, seeks to challenge that decision only after the other party has been given permission to appeal against a decision in the same proceedings which was in favour of A.

(c) Disposal of the human rights appeal

62. As will be apparent, once it is determined that the claimant can use rule 24 to challenge paragraph 27 of the First-tier Tribunal judge's decision, that challenge

must succeed. So much is common ground between the parties. The judge failed to make a lawful decision on the claimant's appeal against the refusal of his human rights claim.

63. The judge's error was, in the circumstances, material. The decision in the human rights appeal is set aside and requires to be re-made.

64. We have seen that, before the First-tier Tribunal judge, it was contended on behalf of the Secretary of State that the issue of whether the claimant could prove on balance that he is a British citizen was one which had to be resolved by judicial review proceedings. We did not hear submissions on what relevance, if any, the claimant's assertion of British citizenship will have to his unresolved human rights appeal. A person who asserts that his or her removal would be unlawful under section 6 of the Human Rights Act 1998, and whose circumstances engage Article 8(2) of the ECHR, must succeed if the challenged decision is not one which can lawfully be made in respect of that person: Charles (Human Rights Appeal: Scope) [2018] UKUT 89 (IAC). At first sight, therefore, the issue of the claimant's nationality may not be capable of being side-stepped.

65. On the other hand, section 1(1) of the Immigration Act 1971 entitles the Secretary of State to qualify the right of those who have the right of abode to live in and come and go into and from the United Kingdom, to the extent that "may be required … to enable their right to be established or as may be otherwise lawfully imposed on any person". The Secretary of State might, therefore, contend that he is entitled to have an application for recognition as a British citizen determined in a particular manner, so as to resist its adjudication within the framework of a human rights appeal.

66. This issue is one which requires adjudication at Upper Tribunal level. We have accordingly decided to re-make the decision in claimant's human rights appeal. The parties are hereby directed to address this issue in their skeleton arguments, which shall be filed and served not later than 14 days before the resumed hearing.

I. Anonymity

67. Upper Tribunal Judge Gill's directions required the parties to make submissions as to anonymity of the claimant. We have considered the parties' submissions. We find that the First-tier Tribunal judge was wrong to order anonymity and we lift his order. The judge's reasons were that he considered it "in the interests of justice" to make an anonymity direction. (paragraph 2). The judge provided no explanation of why he had reached this conclusion.

68. The starting point is that open justice is a fundamental principle of our legal system. Any derogation from that principle should be allowed only to the extent that is necessary in order to secure the proper administration of justice. As a result, just as is the case in other jurisdictions, the parties in immigration proceedings should be named, unless doing so would cause harm, or create the risk of harm, of such a nature as to require derogation from the basic principle. In most cases involving international protection, anonymity of an individual will be required, lest the proceedings themselves should aggravate or give rise to such a risk. That will

normally be the case throughout the course of the proceedings, including any appeals.

69. Applying the correct approach to the present case, we note the claimant has a partner, who was pregnant at the time of the hearing before the First-tier Tribunal judge. The partner is not named in this decision. We are not satisfied that the claimant has shown that naming him in our decision would give rise to any material harm to the partner or any other third party.

70. The claimant would, no doubt, prefer it if our decision did not refer to him by name. He is not, however, asserting a risk of harm to himself, as in the case of a person seeking international protection. Irrespective of whether the Article 8 rights of the claimant or any other person are in due course found to be of such a kind as to defeat the Secretary of State's attempt to remove the claimant, the public has a right to know about the criminal behaviour of the claimant, which led to the decision that he should be deported. There is also a strong public interest in recording the fact that the claimant has repeatedly behaved in flagrant contravention of what is, on its face, a valid deportation order.

71. The claimant's request for anonymity is refused.

J. Decision

72. The decision of the First-tier Tribunal involved the making of errors on points of law. The decision of the First-tier Tribunal in the appeal under the 2016 Regulations is set aside and re-made by formally dismissing it. The decision in the appeal against the refusal of the claimant's human rights claim is set aside and will be re-made by the Upper Tribunal.

Signed Date: 24 June 2019

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