ILPA's response to the Proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

Introduction

The government's consultation on Judicial Review: Proposals for Reform is being hosted on an external website, through which submissions were made. We have set out below our responses as submitted via the website.

As insufficient time has been provided for organisations to respond to this consultation, please note that the length or lack of response to any specific question should not be taken as support by ILPA for any of the proposed changes.

Question 2: Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?

We do not support the proposal to discontinue the use of Cart judicial reviews. IRAL's (Independent Review of Administrative Law) report was inaccurate in its assertion that there have only been 12 successful Cart JRs. We refer to J. Bell, 'Digging for Information about Cart JRs', U.K. Const. L. Blog (1st

April 2021) and J. Tomlinson and A. Pickup, 'Putting the *Cart* before the horse? The Confused Empirical Basis for Reform of *Cart* Judicial Reviews', U.K. Const. L. Blog (29th Mar. 2021) (both available at https://ukconstitutionallaw.org/). The false premise on which it was made completely undermines the report's recommendation on this point, and the proposal should be abandoned.

The short amount of time allocated to this consultation process has limited the ability of respondents to access, consider and make submissions on relevant data. Information on the total number of judicial reviews is accessible by the government only, which makes the reliance on the erroneous data in the IRAL report even more egregious. We have requested information on the number of legal aid certificates that have been granted each year since 2012 where the Upper Tribunal is listed as the defendant, as the vast majority of these will be *Cart* judicial reviews. We advised that we wanted this information to inform our consultation response. The Legal Aid Agency has treated the request as an FOI and stated that they will respond within the statutory deadline only, i.e. by 18 May 2021. Therefore, we have tried to obtain the relevant data from the government, but have been unable to do so before the consultation deadline. We do however, expect the government's review to obtain and consider this information as part of the consultation, and for it to be explicit in the published response that this has been done.

Other relevant data is the number of applications that have been made to the Administrative Court where the Upper Tribunal is listed as a defendant, and the outcome of those applications. Again, as we are unable to easily obtain this data, we expect this to be obtained from the Ministry of Justice and considered by the government as part of its review. The Government Legal Department should also have records of cases brought against the Upper Tribunal where the Secretary of State for the Home Department was also served with the proceedings as an interested party.

The figure of 12 successful *Cart* judicial reviews in the IRAL's report is demonstrably incorrect. However, success rates cannot be considered in a vacuum, the importance of the rights involved in these cases must also be taken into account. We have set out below case studies of some successful *Cart* JRs received from our Members, this list is not comprehensive but just a sample. The Home Secretary stated in her foreword to 'The Response to the Windrush Lessons Learned Review: A Comprehensive Improvement Plan' (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/922973/CCS001_CCS0820050750-001_Resp_to_Windrush_Lessons_CP_293_Accessible.pdf) that

her ambition is to build a Home Office that sees the 'face behind the case', and that principle should apply no less in the government's consideration of the impact of these proposed changes.

In addition to evidencing that the figure of 12 successful Cart JRs is incorrect, the examples below show that the repercussions of limiting *Cart* judicial reviews and oversight of the Upper Tribunal's permission decisions by the higher courts, will have extremely serious consequences for the people affected. These are all cases where a person's fundamental rights were engaged, many of them asylum claims, and where the Upper Tribunal made the wrong decision in refusing to grant permission to appeal. These examples demonstrate a significant risk if changes are made to Cart JRs which mean that challenges to unlawful decisions are not permitted to proceed beyond Upper Tribunal stage. Decisions made the Upper Tribunal are by no means unimpugnable, as recently demonstrated in *The Joint Council for the Welfare of Immigrants v The President of the Upper Tribunal (Immigration And Asylum Chamber)* [2020] EWHC 3103 (Admin).

If further details of any of these case studies are required, and the government is unable to access these from its own records, then these can be sought from our Members. Our response has been limited by the extremely short period of time given for this consultation, which covers the same period of time as the consultation on the New Plan for Immigration.

The successful cases listed in IRAL

10 of the 12 Cart JRs identified as successful in the IRAL report are immigration matters. One of those was brought by the Secretary of State for the Home Department. The details of these cases are important, in particular regarding the rights that were involved and will be affected if this route of challenge is abolished.

IRAL 1

R (Essa) v Upper Tribunal [2012] EWCA Civ 1718 concerned the proposed deportation of a Dutch national who had been convicted in the UK while still a child, and sentenced to five years in a Young Offenders Institute. A deportation order was made on "conducive to the public good" grounds, however it was argued that the First Tier Tribunal had not properly considered the EU dimension of the case. The appeal was allowed and the matter remitted to the Upper Tribunal.

IRAL 2

R (P) v Upper Tribunal [2012] EWHC 4384 (Admin) was a case where the mother, a Vietnamese national, had been subject to imprisonment in Vietnam and had subsequently fled and claimed asylum in the UK, leaving her child behind. Due to the severe delays in the asylum system, when the SSHD came to decide the mother's asylum claim she decided to grant indefinite leave to remain instead of refugee status. The effect of this was that the mother was unable to bring her child to the UK under refugee family reunion rules. Instead, an application was made on the child's behalf under the Immigration Rules to come and join his mother in the UK. This application was refused by the Entry Clearance Officer. The Administrative Court referred to the First Tier Tribunal's reasons as "thin", and granted permission for the judicial review.

IRAL 3

R (SQ (Pakistan)) v The Upper Tribunal [2013] EWCA Civ 1251. This was a case involving a child with a very serious medical condition (beta thalassaemia) who sought to remain in the UK on medical grounds. He required blood transfusions every two to three weeks. The matter in issue was whether children have to meet the same legal threshold as adults in Article 3 claims, and consideration of the conflicting interests of immigration control and the interests of a sick child. The Court of Appeal allowed the appeal and remitted the case to the Upper Tribunal for rehearing. Legal aid.

IRAL 4

ABC v Secretary of State for the Home Department [2013] EWHC 1272 (Admin). This case involved a German national ("A") in respect of whom a deportation order was made, following her conviction on two counts of assisting unlawful immigration and two counts of possessing false identity documents. Matters in issue included whether she had acquired permanent residence, as well as the best interests of her children ("B" and "C") who had lived in the UK for at least eight years. The Administrative Court referred to the First Tier Tribunal's decision as "*clearly wrong since it failed to take account of so many highly significant matters*" and the Upper Tribunal's decision as "*also clearly wrong since an appeal was clearly likely to succeed*". It was concluded that A had a "*very strong*

prospects of success that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the FtT against which permission to appeal was sought were wrong in law".

IRAL 5

R (Akpinar) v Upper Tribunal [2014] EWCA Civ 937. This was a case involving the decision a young man who had arrived in the UK and been granted indefinite leave aged 9. Following several offences committed while still a minor, the SSHD sought to deport him. Although IRAL listed this as a case where the appellant had a successful outcome, this is incorrect as his appeal of the Cart JR decision was dismissed. The case was listed with another in the Court of Appeal in order to determine the effect and application of the judgment of European Court of Human Rights in *Maslov v Austria* [2008] EHRR 546.

IRAL 6

R (Saimon) v Upper Tribunal [2015] EWHC 2814 (Admin). The claimant in this case had come to the UK as a student in 2008. Towards the end of his Tier 4 (general) student leave he submitted an in-time application for leave to remain as a Tier 1 (Entrepreneur). This was refused by the Home Office in reliance on paragraph 322(1A) of the Immigration Rules, in doing so it was alleged that he had used false bank documents and therefore used deception in making the application. The Administrative Court quashed the decision refusing permission to appeal to the Upper Tribunal.

IRAL 7

R (Secretary of State for the Home Department) v Upper Tribunal [2015] EWHC 4182 (Admin). This was the Secretary of State's successful Cart JR, and it involved an EEA national foreign prisoner who had been convicted of murder and sentenced to life imprisonment. The First Tier Tribunal had allowed the appeal against deportation, and the UT had refused the SSHD permission to appeal that decision. The SSHD therefore availed herself of the Cart JR process, and in granting permission to appeal Cobb J said:

"*The application raises important points of principle in relation to the correct interpretation of the relevant statutory instruments for the deportation and transfer of*

a prisoner within the EEA; given the particular context of this offence/offender, there is a compelling reason to achieve clarity."

The Upper Tribunal subsequently found that the First Tier Tribunal had made an error of law and listed the matter for a resumed hearing.

IRAL 8

R (G) v Upper Tribunal [2016] 1 WLR 3417. This was a case where G was the victim of Female Genital Mutilation, and had been recognised by the SSHD as a victim of trafficking for the purpose of sexual exploitation. The SSHD was seeking to deport G on the basis of her criminal conviction, G having pled guilty to two counts of possession/control of false identity documents and been sentenced to twelve months' imprisonment for each offence, to run concurrently. G's asylum claim was made on the basis of her risk of being re-trafficked and forced into prostitution again if returned to Nigeria. In addition, it was claimed that G's daughter H would be at risk of FGM if returned to Nigeria. The Administrative Court held that the Upper Tribunal's permission refusal was wrong in law, the decision was quashed and the matter remitted to the Upper Tribunal. The case then went back to the First Tier Tribunal, where the appellant was successful.

IRAL 9

In *R (PA (Iran)) v Upper Tribunal* [2018] EWCA Civ 2495 the *Cart* JR was successful in the Court of Appeal. The vulnerable Iranian client with diagnosed learning difficulties was subsequently awarded refugee status. If it had not been for the safeguard of the *Cart* JR mechanism he would have been required to return and face a reasonable likelihood of persecution and inhuman and degrading treatment. The First Tier Tribunal had made adverse credibility findings against the client and dismissed his appeal. The client challenged the First Tier Tribunal's decision on the basis that the findings did not properly take expert evidence on his learning difficulties into account. The Upper Tribunal unlawfully refused permission to appeal. It took ten years from his asylum claim (on arrival aged 17) to the grant of Refugee status (in 2020). It was remitted by Court of Appeal to the Upper Tribunal then to the First Tier Tribunal which allowed the

appeal on Humanitarian Protection grounds, then the client appealed again and the Upper Tribunal allowed the asylum appeal.

IRAL 10

MA (Cart JR: effect on UT processes) Pakistan [2019] UKUT 353 (IAC). In granting permission in the Cart JR on 25 April 2019, His Honour Judge McKenna made the following observations:

> "*The Applicant has demonstrated a reasonable prospect of success in establishing that both the FTT and the UT made serious legal errors and the claim crossed the threshold on the basis of compelling reason*."

The Upper Tribunal subsequently allowed the asylum appeal, accepting that MA would be at risk of persecution in Pakistan, on the basis that he was a gay man.

Examples of successful Cart JRs omitted from IRAL's report

Case study 1

PA/03601/2019 and CO/3975/2019 ("ND" (Afghanistan)). ND is a young Afghan man. The First Tier Tribunal accepted he was tortured by the Taliban and would be at future risk in his home area, but dismissed his asylum appeal on the basis that he could relocate to Kabul in accordance with the country guidance decision of *AS (Safety of Kabul) Afghanistan CG* [2018] UKUT 11 ("Afghan CG"). The Upper Tribunal refused an application for permission to appeal, brought by his previous lawyer, describing the grounds in support as "hopelessly vague". He duly instructed JCWI with the help of a charity, and he issued an out of time application for judicial review, by which point he was technically out of time to challenge the decision.

ND argued that the First Tier Tribunal had failed to consider:

(1) the UNHCR's 2018 Eligibility Guidelines on Afghanistan, and

(2) the case of *AS (Afghanistan) v SSHD* [2019] EWCA Civ 873 which (although only available the day after promulgation of the First Tier Tribunal's decision) held that the Afghan CG was based on a mistake of fact amounting to a material error of law. As such any decision based on this, must also be flawed too (OO (AA (1) wrong in law) Zimbabwe CG [2006] UKAIT 0077 applied).

Rather unusually for a claim of this nature, the question of permission was adjourned to an oral hearing, at which the Secretary of State as an interested party played a considerable role (essentially standing in the Upper Tribunal's shoes).

An extension of time was granted by HHJ Stacey sitting as a Deputy Judge of the Administrative Court. Permission was granted and the following observations made:

"*The UT refused permission to appeal as it said that the grounds relied on were hopelessly vague. However the grounds of appeal appear to be sufficiently precisely drafted and I consider that there is an arguable case that has a reasonable prospect of success that it was irrational for the UT(IAC) to refuse permission to appeal in light of the Court of Appeal's judgment in AS and the fact that the UNHCR Eligibility Guidelines - which were before the FTT - were not considered by the FTT*."

The refusal to grant permission was quashed and an error of law hearing is due to take place in May 2021.

Case study 2

In *R (TS Williams) v Upper Tribunal* CO/369/2019 the applicant won in the Administrative Court. She was a lone parent of two sons with seven years' residence refused under paragraph EX1 of Appendix FM. The First Tier Tribunal took into account the mother's overstaying – contrary to authority in *KO (Nigeria)* and *Zoumbas*. The Upper Tribunal refused permission to appeal. The case was legally aided.

Case study 3

R (JRN) v UT and SSHD CO/1500/2018 was an application for judicial review of the Upper Tribunal's refusal to accept an error of law. The First Tier Tribunal had decided that there

was no live appeal. The Upper Tribunal refused permission on the basis that there was no jurisdiction. In the Administrative Court the SSHD was ordered to file an Acknowledgment of Service. When she did so, she conceded that there was jurisdiction after all. This was a TOIEC (Test of English for International Communication) related case and the outcome of allegation of deception meant the client's application had been rejected. The Administrative Court subsequently granted permission and eventually on 13 September 2019 quashed the Upper Tribunal's refusal of permission. The issue of costs is still ongoing (despite the SSHD having changed its position on jurisdiction twice). The Upper Tribunal accordingly accepted jurisdiction, remitted the case to the First Tier Tribunal where she was successful in her appeal in a determination promulgated 16 January 2021. If it had not been for the *Cart* JR review mechanism the applicant would have been unlawfully deprived of any appeal at all. She would have been unable to have her legal rights vindicated as they ultimately were by the First Tier Tribunal.

Case study 4

The case was a deport for a client with a British daughter. Before the First Tier Tribunal the Home Office conceded the applicant was not a "foreign criminal". Notwithstanding this concession, the First Tier Tribunal judge nonetheless proceeded to apply s117C and dismissed the appeal, stating that they considered themselves bound by the UT(IAC) authority of *Andell v SSHD*, overlooking the contradictory authority of *OLO*. The Upper Tribunal refused permission. In a *Cart* JR the Administrative Court also refused permission, but permission was granted by the Court of Appeal in December 2019. The case was remitted to the Upper Tribunal who by then had produced its judgment in *SC (paras A398 – 339D: 'foreign criminal': procedure) Albania* [2020] UKUT 187 (IAC) and the Court of Appeal had given its judgment in *Mahmood, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Ors* [2020] EWCA Civ 717. These confirmed, respectively, that *OLO* was to be preferred to *Andell*, and the process for determining when an offence has caused serious harm. SSHD agreed that in light of these judgments, and the First Tier Tribunal not following the guidance in them, the appeal should be allowed and reheard. The First Tier Tribunal rehearing happened in February and a decision is awaited.

The matter has been privately funded throughout as the client is not eligible for legal aid. The SSHD was ordered to pay the client's costs for the *Cart* JR. If it had not been for the *Cart* JR this British child could have been unlawfully separated from her father.

Case study 5

The applicant had a successful Cart JR last year (2020) for a human rights Article 8 appeal that had been refused permission to appeal to the Upper Tribunal.

The Administrative Court Judge considered the grounds and concluded one was arguable and asked SSHD to make representations on it (they had initially defended the matter). SSHD then conceded and a consent order was agreed.

The Upper Tribunal has now ruled that the First Tier Tribunal judge made an error of law and it is proceeding to a new hearing in the Upper Tribunal.

Case study 6

This is another example of a Cart JR that succeeded, and eventually resulted in the appellant being recognised as a refugee. He was an asylum seeker from Iran. The Cart JR had to go to the Court of Appeal before being granted permission, and then in the Upper Tribunal error of law hearing the SSHD conceded that the First Tier Tribunal's decision needed to be remade in its entirety. The matter was remitted to the First Tier Tribunal where the appellant was successful.

Case study 7

An Article 8 matter, where the client's partner and children had been granted leave to remain under the 'legacy' process and the client was applying for leave to remain in line with them. When permission was granted in the Cart JR, the Home Office conceded and granted the client leave to remain.

Case study 8

An Asylum/Article 8 appeal for an Iranian domestic violence matter. I took it on at the Cart JR stage. Permission was granted (on Edgehill/Haleemudeen point) and following an Upper Tribunal hearing the client was subsequently recognised as a refugee.

Case study 9

This one was successful in the Court of Appeal in 2019 (C4/2018/1632) after the Administrative Court also refused to grant permission.

This was a human rights appeals by a family of four where five year old UK-born child with Autism Spectrum Disorder (ASD) was receiving significant educational support and supervision in the UK. Medical evidence confirmed that he was at a "very crucial point" with his ASD and that his development would be adversely affected by "change and transition." The primary issues for the First Tier Tribunal to determine were the impact on the child's private life of removing him from the intensive professional support network which he already has in the UK; and the availability and accessibility (in practical terms) of adequate educational and medical support in Pakistan. Despite the material evidence submitted in support of the appellant's position, including relating to the stigma attached to autistic children in Pakistan and expert evidence, the First Tier Tribunal dismissed the appeals. The Court of Appeal agreed that there was an important point of principle or practice to be considered in relation to the approach to the Article 8 rights of a child with a development difficulty (ASD) at what is a crucial stage of their treatment and need for support.

The case has been remitted to the Upper Tribunal for a three hour error of law hearing listed for next month, after the Upper Tribunal initially said they were content to find an error of law on the papers in light of Simon LJ's Order.

Funding: LAA initially refused funding for the judicial review. It was only granted on appeal but after the substantive work had already been completed within the 16 days' time limit to issue proceedings, work that had to be done in order to protect the appellants' position. When the Administrative Court refused to give permission, the LAA refused to grant funding for the appeal to the Court of Appeal on the basis that there

were insufficient merits in the case. We therefore acted pro bono with the Court of Appeal, ultimately vindicating our position.

Case study 10

Client (IS) is an extremely vulnerable EEA national, mentally unwell, coerced into taking part in a sham marriage (a fact that had been accepted as credible by the Competent Authority and Tribunal). She was facing deportation for a sole conviction relating to this, which had resulted in 15 months' imprisonment. On remittal from the Administrative Court to the Upper Tribunal, she was successful in her deport appeal.

Case study 11

CR was an EEA deportation appeal where the First Tier Tribunal and the Upper Tribunal erred in their assessment regarding the level of protection afforded against expulsion for an EEA national who held Permanent Residence prior to going to prison. The key issue was whether time spent in prison broke the integrative links and whether he should be able to benefit from the highest level of protection against expulsion. The SSHD subsequently conceded the case in April 2013 and agreed to pay costs (CO/7584/2011).

Case study 12

This case concerned a Sri Lankan torture survivor, who has since been granted refugee status. Their case was processed in the Detained Fast Track and dismissed. The First Tier Tribunal determination did not mention a medico-legal report which had been prepared by Medical Justice and which supported the appellant's account that he had been a victim of torture. On 20 April 2015 an order was made in the Cart JR quashing the decision of the Upper Tribunal refusing permission to appeal. The First Tier Tribunal decision was subsequently quashed on procedural fairness grounds and remitted to the First Tier Tribunal.

Case study 13

A second case involving a Sri Lankan torture survivor, who has subsequently been granted refugee status. There was a very convoluted procedural history, the Cart JR was in May 2014.

Case study 14

The reported decision in *AB (Article 1F(a) – defence - duress) Iran* [2016] UKUT 00376 (IAC) (https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-376). The following observations were made in the Cart JR that preceded that decision:

"*The Grounds for seeking Judicial Review are reasonably arguable. Furthermore, a point of principle of general importance is at issue, namely the proper burden of proof when an applicant for refugee status claims that she should not be regarded as complicit in a crime against humanity because of duress (and, more specifically, whether it is for her to show that she could not have avoided the duress by, for instance, resigning from her post, or whether it is for the SSHD to show that this was a course that had been open to her).*"

Following the grant of permission on the papers, the Upper Tribunal's refusal of permission was quashed. The First Tier Tribunal's decision on the contested issue was set aside. Although the appellant was ultimately unsuccessful, this case clarified the law on duress in the context of Article 1F(a) exclusion from refugee status.

Case study 15

The Administrative Court reference is CO/598/2020. The Claimant was a Sudanese gentleman who was accepted by the SSHD to be a member of the Tama tribe, which is a non Arab tribe from Darfur. He asserted in his asylum claim that he would be at risk due to his ethnicity. In addition, he claimed that he had been targeted by the government having been accused of working for the opposition. The SSHD did not accept he would be at risk and his appeal came before the First Tier Tribunal.

The First Tier Tribunal rejected the Appellant's account of having come to adverse attention in Sudan. He did not accept that he had been arrested and detained as claimed. The Judge considered the risk that he would face upon return due to his ethnicity alone but concluded that the country guidance case of IM and AI (Risks – members hop of the Beja Tribe, Beja Congress and JEM(Sudan CG [2016] UKUT 00188 provides that being a non Arab Darfuri was now an insufficient basis alone to conclude that a person was at real risk of ill treatment upon return. He therefore concluded that the Appellant did not succeed in his claim for Refugee Status

Permission was sought to the Upper Tribunal. The appeal was brought on the single ground that Judge of the First Tier Tribunal had materially erred in law in his application of the country guidance case law. There was no challenge to the adverse credibility findings relating to the Applicant's account of events in Sudan. It was asserted in the grounds that due to the acceptance of his ethnicity the current country guidance case law of AA (Non-Arab Darfuris- relocation) Sudan CR [2009] UKAIT 00956 and MM (Darfuris) Sudan CG [2015] UKUT 10 (IAC) provides that he will be at real risk of persecution on return to Sudan and is therefore entitled to Refugee Status. It was said that contrary to the conclusion of Judge of the First Tier Tribunal AA and MM continue to be the applicable country guidance cases in respect of the risk faced by non-Arab Darfuris and the decision in IM and AI does not change that position. It was pointed out that this was confirmed by the Upper Tribunal in the reported case of AAR & AA (Non-Arab Darfuris - return) Sudan [2019] UKUT 282 (IAC).

Permission was refused by both the First Tier Tribunal and the Upper Tribunal.

The First Tier Tribunal judge refusing permission concluded that there was no material error of law in the First Tier Tribunal's decision. It was said that the experienced Judge gave full and secure reasons for dismissing the appeal mainly on adverse credibility grounds. It was said that the Judge had meticulously considered the evidence including the Appellant's ethnicity and its implications. It was said that the Judge's analysis of current country conditions reflected in the evidence before him and he had correctly applied the country guidance as it stands with him noting that AAR and AA is not country guidance.

In the Upper Tribunal it was concluded that the grounds are without merit noting that the Judge commenced his findings with reference to AA and MM before going on to consider IM and AI which she stated discussed the plight of non Arab Darfuris. She noted that the Appellant's evidence was recorded as being woeful and she concluded that given the country guidance and the Appellant's complete lack of credibility there could have been no other outcome to the appeal.

The Cart JR was argued on the basis that the refusal of PTA was irrational. In short it was argued that upon the proper application of the case law to the facts accepted by the SSHD, namely that the Applicant is a member of the Tama tribe, the Applicant succeeds in his asylum claim. This is the only possible outcome on the accepted facts when the country guidance case law is properly applied to those facts.

When the matter came before HHJ Klein, sitting as a High Court Judge on the papers he adjourned the consideration to a court hearing. In an order sealed on 7th August 2020 he directed that the matter be listed as soon as possible after 24th August and gave directions to the SSHD to file and serve an AoS and summary grounds of defence if she was minded to oppose the grant of permission.

On 2nd September 2020 the SSHD wrote to the solicitors confirming that she would be withdrawing her decision to refuse asylum and reconsidering it within two months. A consent order was therefore agreed in which the SSHD stated she would withdraw the decision and the Claimant withdrew the JR and the SSHD would pay the Claimant's reasonable costs.

The Claimant was subsequently granted refugee status

Plainly there was successful outcome for the Claimant in a case where he had wrongly been refused asylum. There was a clear failure by the First Tier Tribunal and the Upper Tribunal to properly apply the decided CG case law along with the reported decision of AAR & AA (Non-Arab Darfuris - return) Sudan [2019] UKUT 282 (IAC) which confirmed that the case law in respect of non Arab Darfuris had not been altered and should be applied. Without the remedy of a Cart JR available to the Claimant, he would have been

refused asylum in circumstances where the CG case law is clear, and the SSHD subsequently accepted, that he was entitled to it.

Case study 16

HAA v Upper Tribunal v SSHD (CO/1098/2020). Client was a minor who was granted HP and refused asylum. First Tier Tribunal dismissed appeal on asylum grounds and also considered it was able to consider – and dismiss – the Humanitarian Protection claim. The Upper Tribunal refused permission to appeal on the basis that the grounds did not give rise to an arguable error of law. The Administrative Court granted permission by order sealed 3 June 2020 on the basis that the First Tier Tribunal and Upper Tribunal arguably erred in considering that they had jurisdiction to consider the HP appeal.

Case study 17

Asylum appeal by Ugandan lesbian, who was initially representing herself. The First Tier Tribunal refused asylum claim. She appealed based on grounds she drafted herself. The First Tier Tribunal refused PTA to Upper Tribunal. She renewed to Upper Tribunal, again representing herself. Upper Tribunal refused her renewed permission. Basis for refusal of renewed PTA was that, in addition to the grounds that the appellant had sent it herself, the Upper Tribunal had also received a letter, purporting to come from the appellant, stating *"my name is xxx. I'm coming UK for job. I'm no lesbian sorry. I'm liar I was waiting for my document then I start working. Please give me document."* The judge refusing permission stated that this letter, purportedly admitting that her claim was false, represented admirable candour by the appellant.

We sought Cart JR (and an extension of time) on the basis of irrationality and procedural irregularity: no reasonable judge could possibly have relied on this letter in rejecting the error of law grounds (plus other grounds). Did not need to proceed as far as Cart JR permission stage because the Upper Tribunal accepted that this needed to be looked again, matter then proceeded to error of law hearing, remitted to First Tier Tribunal. Appellant was later granted asylum.

The letter was later discovered to have been written by a homophobic housemate of the appellant.

Case study 18

AA (Nigeria) v The Upper Tribunal (2020) C2/2020/1506. This was a fresh claim challenge to deportation where the passage of four years amounted to a fresh claim regarding the best interest of children and the public interest. COA granted permission and awaiting a new decision.

Case study 19

R (BK (Sri Lanka)) v The Upper Tribunal (2018) C5/2015/0193. This was a fresh asylum claim and Detained Fast Track 2005 challenge. The Court of Appeal granted permission and the matter is now stayed until the SC outcome in TN & US.

Case study 20

TR (Ethiopia) v The Upper Tribunal (2017) C5/2016/2353. Asylum Country Guidance challenge as the guidance was 10 years old. The Court of Appeal granted permission and decision reversed (Oromo Country Guidance changed/updated as a result).

Case study 21

R (RP (Jamaica)) v The Upper Tribunal (2016) C5/2015/4009. This was a long residence challenge. The Court of Appeal granted permission and the decision was reversed with the client being granted indefinite leave to remain.

Case study 22

R (HH) v Upper Tribunal CO/4301/2020. The order of Holman J dated 27 January 2021 stated the following:

1. It is easy to dismiss the appeal to the FTT judge and then to the UT as no more than disagreement with FTT judge Bonavero as to the facts.

2. I am, however, uneasy about this case (which of course concerns asylum and a claimed risk of persecution). Counsel, Mark Symes, by his well drafted SFG dated 18 November 2020, has raised a cogent case that both FTT judge Bonavero in his original determination, and UT judge Macleman in his decision of 26 October 2020 have made, or arguably have made, significant errors which can be characterised as errors of law.

3. In my view, this case requires to be reconsidered by the UT at an oral hearing. It will, however, be entirely a matter for the SSHD whether she wishes to contest the jr or permit a Master of the Administrative Court to make a quashing order under CPR rules 54.7A (9)(b) and (10).

This decision strengthens case for Cart JR as a remedy of last resort.

Case study 23

R (OM) v The Upper Tribunal CO/2939/2020. This was a deportation matter. Permission was granted on 28 October 2020. Order of Jay J stated "*In the light of the recent case of Mahmood in the CoA, and despite Cart, I am persuaded that this case should be considered on its merits in the Upper Tribunal.*"

Case study 24

Asylum claim. Permission granted by Administrative Court on 24 May 2013 (CO/7384/2012). Error of law found by Upper Tribunal on 23 July 2014 (AA/00553/2012).

Case study 25

Family life claim. Permission granted by Administrative Court on 3 December 2014 (CO/4011/2014).

Case study 26

Family life claim. Stayed by Court of Appeal pending the outcome of linked cases (C4/2015/3968). Permission granted by agreement between the parties and remitted to Upper Tribunal circa February 2017.

Case study 27

Asylum claim. Permission granted by Administrative Court on 12 October 2017 (CO/3769/2017). Error of law found by the Upper Tribunal on 7 August 2018 (PA/08308/2016). Allowed substantively by the Upper Tribunal at the same time.

Case study 28

Asylum claim and deportation appeal. Permission was granted by the Court of Appeal on 31 October 2018 (C4/2018/0219). Case subsequently stayed pending a decision on further submissions, developments since then not known.

Case study 29

Family life claim. Permission granted by Administrative Court on 26 March 2019 (CO/177/2019), error of law found by the Upper Tribunal 28 August 2019 (HU/13903/2017). Appeal subsequently allowed substantively by the Upper Tribunal.

Case study 30

Family life claim. Permission granted by Administrative Court on 26 November 2019 (CO/3474/2019). Error of law found by the Upper Tribunal on 29 July 2020 (HU/18439/2018). Case ongoing.

Case study 31

This case was in Scotland and was an Eba JR. The case (which I believe was in 2013) was robustly contested at the permission stage of the JR process by the Office of the Advocate General for Scotland acting on behalf of the Secretary of State for the Home Department. The permission stage involved a long oral hearing at the Outer House of the Court of Session. A grant of permission to proceed with the JR was obtained and a

hearing date was set. As soon as that happened, the SSHD consented to drop the case and the case was sent back to the Upper Tribunal to re-consider granting permission to appeal.

Case study 32

This was another Eba JR in Scotland. The appellant was a failed Palestinian asylum seeker. An appeal was refused by the First-tier Tribunal and permission to appeal refused by both the First-tier Tribunal and the Upper Tribunal in 2014. Judicial review proceedings in an Eba JR were initiated, seeking reduction (quashing) of the 2014 decision of the Upper Tribunal to refuse permission to appeal. Counsel for the Respondent (the Office of the Advocate General for Scotland acting on behalf of the Secretary of State for the Home Department) considered the case and, very unusually co-authored a joint minute to the court accepting the arguments raised in the petition and consenting to the reduction of the decision without even opposing permission. Although there is no published judgment, the granting of consent is narrated at paragraph 7 of a later judgment of the Inner House of the Court of Session in *Al-Khatib v The Secretary of State for the Home Department* [2016] ScotCS CSIH_85 (https://www.bailii.org/scot/cases/ScotCS/2016/%5b2016%5dCSIH85.html):

[7] The appellant applied for permission to appeal the determination of 5 March 2014. Permission to appeal was refused by the Upper Tribunal on 8 May 2014. The appellant presented an application for judicial review seeking reduction of that refusal which was determined of consent in favour of the appellant's application on 14 August 2014. Permission to appeal to the Upper Tribunal was then granted by the Vice President on 15 September 2014.

The case concerned the interpretation of Council Directive 2004/83/EC (the Qualification Directive) in relation to a stateless Palestinian whose country of former habitual residence was Syria. This was a case which, subsequent to the Eba JR, raised important points of principal, such that the then President of the Upper Tribunal granted permission to appeal to the Inner House of the Court of Session against his own Upper Tribunal decision to refuse the appeal. This is the only time in my career that I have seen the Upper Tribunal grant permission to appeal against its own decision. But for the Eba

JR, the case would have been ended in 2014 by the unlawful decision of the Upper Tribunal to refuse permission to appeal.

Case study 33

The Claimant's application for a residence card was refused with a blatant error of law. A paper appeal was made on this basis. The Home Office did not argue their position and the judge decided the matter on the papers before him or her – or rather on the basis of the absence of the Home Office bundle - giving a completely new reason for refusal (the full set of the application papers had not been filed with the tribunal because they were irrelevant to the error of law issue).

In granting permission in the Cart JR (CO Ref: 13303/2013) in 2013, the following observations were made by Burnett J:

"*The claimant was refused a residence card as a dependant of her British son-in-law. The SSHD refused that on the sole basis that she considered the relationship of son-in-law did not count. The FTT judge concluded that the SSHD was wrong in that, but dismissed the appeal because she was not satisfied that sufficient evidence of dependency was provided. The SSHD had not taken that point and so the claimant had no warning of it, nor any opportunity to produce further evidence. It was said that the only evidence was the payment of a medical bill, although there was evidence that the claimant's daughter and son-in-law provided her with a home in the United Kingdom. Be that as it may, permission to appeal was refused on the basis that if an appellant before the FTT opts for a paper appeal, the judge is bound to proceed on the information available without an opportunity to obtain more (UTIAC) or that the appellant should have been aware that the issue on which she lost would be considered by the FTT judge (FTT).*

It seems to me that this case raises an issue of procedural importance. It is generally the position that an appeal should not be determined on a basis which the parties have not had an opportunity to comment upon."

The SSHD subsequently withdrew the refusal and the Upper Tribunal allowed the appeal on the basis that the SSHD's decision was not in accordance with the law (appeal ref:

IA/13521/2013). The consequences of being unable to correct this error of law would have been absolutely devastating to the Claimant. Cart JR was the only remedy available.

Case study 34

Another successful Cart JR was *The Queen otao CL v UTIAC (SSHD as Interested Party)* CO/6671/2015, raising not only compelling reasons of risk on return for the client but important points of legal principle and practice concerning inter alia:

(i) the correct legal approach to the assessment of the risk of retrafficking in domestic servitude cases; and

(ii) the discriminatory impact of the immigration rules prior to April 2012 on diplomatic domestic workers 'tied' to employers vis a vis domestic workers in private households which are not.

Permission was granted by Sir Stephen Silber on 14 March 2016 as the case reached the very high *Cart* threshold "*in this very difficult and important area."*

On remittal to the First Tier Tribunal the client was granted refugee status by the SSHD who withdrew the negative decision under appeal before the remitted / listed First Tier Tribunal appeal A v SSHD (Appeal Ref AA/02436/2014).

Case study 35

MMM v Upper Tribunal CO/3586/2020. The Appellant is originally from Brava in southern Somalia and is a member of the Bravanese minority clan. He has been in a relationship with his British Citizen partner for over ten years. They have three children together, all of whom were born in the UK, aged 10, 8 and 3. Appellant was subject to a deportation order following a prison sentence of under four years.

The Appellant claims refugee status on the basis that he has a well-founded fear of persecution on return to Brava, due to his Bravanese ethnicity, his imputed political opinion as a 'Western' apostate, and his Shia Muslim religion. His relocation to Mogadishu would be unduly harsh. He contests the revocation of any resulting refugee

status/humanitarian protection on the basis that he has not committed a particularly serious crime and is not a danger to the community. Alternatively, his deportation to Somalia would breach Articles 2, 3 and/or 8 of the ECHR.

Following a Cart JR, Mostyn J's decision found that the First Tier Tribunal judge had erred in finding that the Appellant's deportation would not be unduly harsh on his partner and children because they can all meet up in Kenya (it being unduly harsh otherwise), without considering their limited financial means (they are all on benefits) and the Appellant's mobility issues, none of which were dispute. The matter has been remitted to the Upper Tribunal.

Case study 36

A case involving an Iranian Kurdish minor (at the time of the asylum claim) – after the successful Cart JR (the Administrative Court granted permission and remitted, ref: CO/1069/2018), the Appellant was successful in the First Tier Tribunal on asylum grounds.

Case study 37

A protection based claim involving the danger of an honour killing, *R (IM)* CO/1921/2014. Holman J granted permission on 9 June 2014. The SSHD did not request an oral hearing, and the Upper Tribunal's refusal of PTA was quashed. The Upper Tribunal granted PTA on 7 November 2014 and then the Upper Tribunal allowed the Appellant's appeal and remitted the matter to the First Tier Tribunal in a determination of 22 July 2015.

Case study 38

JH (Palestinian Territories) CO/4353/2016 & C4/2017/0391 and involved the proper legal approach to assessment regarding the possibility of return to the Gaza strip where firm evidence regarding a person's status on the Population Register is hard to come by and in the context of claims that he will suffer persecution if returned to Israel and then denied entry to the Gaza strip. The Administrative Court refused permission in this matter, but permission was subsequently granted by Sales LJ on renewal to the Court of

Appeal, stating that "*The appellant has a reasonably arguable case that according to the appropriate standard the finding should have been that he would not be admitted to Gaza upon return to Israel.*"

The Upper Tribunal's refusal of PTA was then quashed and the matter was resolved at an Upper Tribunal error of law hearing at which the Home Office withdrew their appeal against the First Tier Tribunal's determination granting the client Humanitarian Protection and agreed to grant the client status. The client in such circumstances did not wish to proceed with his asylum based appeal to the Upper Tribunal. The relevant procedural history is detailed in the Court of Appeal's judgment in *R (JH (Palestinian Territories))* [2021] 1 WLR 455 CA concerning the costs of the JR in which the Court of Appeal accept in terms at [48] that the client was the successful party.

Given that the determination of these proceedings fell within the 2012-2019 period and the Court of Appeal's judgment was available on Westlaw and BAILII, its exclusion at [3.45] of the IRAL report is concerning and requires explanation.

Case study 39

The Administrative Court (CO/3878/2015) refused permission in this matter, but Holroyde LJ then granted permission on 15 January 2018 (C4/2015/4401). The Upper Tribunal then granted us permission to appeal on 6 June 2018 and the Upper Tribunal then allowed the Appellant's appeal outright on Humanitarian Protection grounds in a determination of 15 October 2018.

Case study 40

IM is an asylum seeker from Iraq, and was part of *SMO, KSP & IM (Article 15(c); identity documents) CG Iraq* [2019] UKUT 400 (IAC). The Cart JR is summarised as follows:

"*440. Permission to appeal against the decision of the FtT was refused by the FtT and the UT. The appellant pursued an application for judicial review under CPR 54.7A. He was unsuccessful at first instance but successful in obtaining permission from the Court of Appeal. In light of the grant of permission in AA (Iraq), Sir Stephen Richards was concerned about the sustainability of the Tribunal's conclusions regarding the appellant's ability to survive in Iraq without a CSID. It*

was then accepted, in a form of consent which was sealed by Master Bancroft-Rimmer on 19 January 2018, that the appeal should be remitted to the Upper Tribunal as a result of the decision of the Court of Appeal in AA (Iraq).

441. Permission to appeal to the Upper Tribunal was duly granted and it was agreed between the parties that the decision on the appeal was to be remade in the Upper Tribunal on Article 15(c) and Article 3 ECHR grounds. The scope of that remaking exercise was agreed between the parties in a consent order which was approved by Upper Tribunal Judge O'Connor on 28 November 2018. It was agreed between the parties that only certain of the findings of the findings of fact made by the FtT would be preserved. Those findings included the absence and inability to obtain a CSID and the absence of any support in Baghdad. They did not include the acceptance that the appellant would be at risk of Article 15(c) conditions in Mosul. Nor did they include the judge's finding – made in relation to the Refugee Convention but relevant to his eligibility for Humanitarian Protection – that the appellant had failed to rebut the presumptions in section 72 NIAA 2002.

442. The circumstances in this case are highly unusual and the respondent has recognised that by granting the appellant leave to remain on the basis that his removal would be contrary to Article 3 ECHR."

Following this concession by the SSHD, IM was eventually granted two and a half years' discretionary leave. IM paid privately for the Cart JR and was not awarded any costs.

Case study 41

AA is an asylum seeker from Iraq, previously a Country Guidance case. Permission in the Cart JR was granted on 7 November 2019, quashing the decision of the Upper Tribunal (CO/3919/2018). The matter is now back in the Upper Tribunal and may possibly be part of the new Iraq Country Guidance case.

Case study 42

The Appellant/Claimant had sought leave to remain based on his family life with his partner and British daughter (who he didn't live with) and argued that he satisfied

s117B(6). The First Tier Tribunal judge dismissed the appeal. Permission to appeal was refused; in the Upper Tribunal there was also an application for an extension of time. The Upper Tribunal declined to admit the application and said that permission to appeal would in any event have been refused.

In the Cart JR, permission was granted (and it was found expressly that this constituted a Cart JR, notwithstanding that the Upper Tribunal had declined to admit the application) because (a) the Upper Tribunal had failed to engage with the reasons that an extension of time was said to be justified and (b) PTA arguably should have been granted because the First Tier Tribunal had wrongly said that there was no independent evidence of certain matters when in fact there was, had made adverse findings on points that were never raised with the A, and had failed to have regard to photos of the A with his daughter over a period of time which were supportive of his claim to have a genuine and subsisting parental relationship with her notwithstanding that they didn't live together.

There was no full hearing and the Upper Tribunal granted permission in the usual way. Material errors were found in respect of the matters in (b) above. There was then a rehearing in the Upper Tribunal; by this time the Appellant no longer had a relationship with his partner, but continued to see his daughter, and the appeal was allowed, the Upper Tribunal having found that s117B(6) applied.

Case study 43

Tribunal reference: IA/21942/2015, Administrative Court reference: CO/3850/2018. This was a privately funded case. The Appellant/Claimant had sought leave to remain based on his family life with his children, who lived with their mother. He relied on s117B(6), as his children had lived in the UK for over seven years by the date of the hearing. Evidence was produced to show their continuity of residence for that period in order to show that they were qualifying children.

However, in its decision, the First Tier Tribunal did not accept that the children had been here for over seven years, stating that they were abroad between two specific dates which broke their continuity of residence. This was simply a mistake on the part of the First Tier Tribunal judge, who seemed to have mis-recorded some of the dates. One of

the children had in fact been born in the UK, as proved by their birth certificate, during the period when the First Tier Tribunal had said that they were all outside the UK. PTA was sought on the basis that the First Tier Tribunal had been wrong to say that the children were not qualifying children. It was refused by the First Tier Tribunal and Upper Tribunal but permission was granted for a Cart JR. There was no full hearing and the Upper Tribunal granted permission in the usual way. A material error was found on the basis that the First Tier Tribunal had been mistaken on the evidence to find that the children had not been here for seven years; this material error was expressly accepted by the HO at the error of law hearing.

There was then a rehearing in the Upper Tribunal; after the Appellant produced updated documentary evidence to show that he continued to have a genuine and subsisting relationship with the children, the HO conceded that the appeal should be allowed without needing to hear from the witnesses. The appeal was therefore allowed. This was a case in which a very basic error of fact by the First Tier Tribunal would, but for the Cart JR, have stood uncorrected, meaning that the Appellant would have been separated from his children (who had leave in their own right). Its strength is perhaps demonstrated by the fact that the HO conceded the error and the overall appeal when the case was eventually heard in the Upper Tribunal.

Case study 44

CO/177/2019. Administrative Court granted permission on 26 March 2019. Deportation appeal. Administrative Court stated in grant of permission it was arguable that the Upper Tribunal in refusing permission had not correctly applied the test in *KO (Nigeria)* and that the First Tier Tribunal had appeared to weigh up the interests of the children against the seriousness of the Claimant's behaviour which was the wrong approach.

Case study 45

Kosovan deportation case. It was the Claimant's contention that he was a pre-existing beneficiary of HP and his appeal before the First Tier Tribunal was therefore a revocation appeal. In the determination the First Tier Tribunal rejected that argument. This was an important issue for the Claimant as although he retained his ILR as a result of the Article 8 appeal being allowed, the effect of the First Tier Tribunal's findings was to strip him of

international protection without the benefit of a revocation appeal. Administrative Court granted permission on 16 August 2017, CO/1774/2017.

Case study 46

Applicants were father and two minor children facing removal to Jamaica. Father was sole carer of the children. PTA to the Upper Tribunal was sought on the grounds that the IJ decision and that of the SSHD which preceded it was unlawful in its application of section 55 of the Borders Act 2007. Court of Appeal decision was 6 April 2017 (C4/2015/3968).

Case study 47

It was proposed to remove the Claimant to the DRC. Grounds of Cart JR were that the First Tier Tribunal had erred in law in failing to consider his claim under Article 8 ECHR on the basis of his relationship with his British Citizen wife. Administrative Court decision was 2 July 2015 (CO/4011/2014).

Case study 48

AA/07281/2014 and CO/2676/2015 ("TO (Nigeria)"). TO was a child victim of trafficking. Her asylum appeal was dismissed by the First Tier Tribunal, which found that she was not trafficked and would not be at risk on return. The reasoning behind this conclusion was expressed at paragraph 76 of the determination:

"*She voluntarily came to this country to work with the family*."

TO was 15 years of age when she was transported to the United Kingdom. Permission to appeal to the Upper Tribunal was sought as the First Tier Tribunal's finding that the appellant had been brought to the United Kingdom to work was determinative of her trafficking claim, since as a question of law she could not 'voluntarily' undertake such work as a minor. As a victim of trafficking and given her profile, the objective evidence demonstrated that she would be at risk of persecution on return.

Permission to appeal was refused by both the First Tier Tribunal and Upper Tribunal. Mr. Justice Goss subsequently granted permission to apply for judicial review and made the following observation:

"*Neither the First Tribunal nor the Upper Tribunal addressed the consequences flowing from the finding that the Claimant came to this country to work aged 15 years in the context of the ECAT definition of trafficking and Article 2 of the EU Anti-Trafficking Directive*."

The decision of the Upper Tribunal to refuse permission to appeal was quashed and permission to appeal to the Upper Tribunal was granted.

The appeal before the Upper Tribunal was allowed to the extent that it was remitted to the SSHD to make a further decision. At the hearing, the parties, including the representative for the SSHD, "*agreed that the judge had found that the Appellant had been trafficked because he found that she had come to work for the family here*."

TO was subsequently recognised as a refugee.

Case study 49

IA/17363/2015 and CO/4582/2016 ("MI" (Nigeria)). MI has a serious and enduring mental health condition. He has been sectioned several times under the MHA. He has been diagnosed with Bipolar Affective disorder. The First Tier Tribunal dismissed his human rights appeal, despite making positive findings of fact, including that MI:

- is vulnerable;
- struggles with compliance with his medication;
- requires ongoing support;
- would not be able to fund healthcare on return to Nigeria, and even if he could, he wouldn't be able to access it;
- does not have any material support in Nigeria;
- would be at significant risk of relapse with his MH if returned and
- the mental health facilities are almost non-existent in Nigeria.
- Nevertheless, it was found that there would not be very significant obstacles to his reintegration on return (paragraph 276ADE(1)(vi).

- In refusing permission to appeal, the Upper Tribunal found that the First Tier Tribunal judge took proper account of the immigration rules as set against the particular circumstances.

Permission to apply for judicial review was subsequently granted by Mr Justice Edis, who observed:

"*….The real argument is that the findings of fact in relation to the claims under Articles 3 and 8 claims outside the Rules demonstrate very significant obstacles to integration because he will rapidly succumb to serious mental illness there and will not be able to integrate, or do anything else. The fact that he can speak the language may be of limited relevance to this issue. He knows no-one to speak to, and will be unable to function normally*.

It appears that the FTT judge took quite a narrow approach to the question of "integration" and arguably excluded the mental illness when he ought not to have done so. Given that he will suffer from it, how will he integrate?

This is, in my judgment, one of the very rare cases where a second appeal should be permitted so that UTIAC can consider whether the FTT judge did apply the proper test in paragraph 276ADE(vi). I do not think that the FTT judge sufficiently explained why his findings of fact as to the applicant's future in Nigeria did not enable his application to succeed under the Rules. There are the necessary prospects of success and the consequences of the decision are of great importance to the applicant which is a compelling reason why his case should be further considered."

The refusal was quashed and MI was granted permission to appeal to the Upper Tribunal, who found that the First Tier Tribunal judge had made a material error of law and allowed MI's appeal under paragraph 276ADE(1)(vi) of the immigration rules and under Article 8 ECHR.

Case study 50

R (AH) v Upper Tribunal CO/2736/2017. Permission was granted on 18 July 2017. This was an asylum appeal where the appellant did not attend the appeal hearing because he did not receive the notice of hearing, despite having notified the Tribunal of his new address the notice had been sent to his old address. Counsel for the appellant sought an adjournment which was refused. Both the First Tier Tribunal and the Upper Tribunal refused permission to appeal the decision. Following the successful Cart JR, the Upper Tribunal set aside the First Tier Tribunal's decision and remitted the matter back to the First Tier Tribunal where the appeal was allowed and the appellant subsequently granted refugee status.

Case study 51

This case involved a person who had applied for leave to remain on the basis of his 20 years' residence in the UK. He had used aliases in his time in the UK, this was disclosed in his application to the Home Office. Despite an abundance of evidence, the First Tier Tribunal did not accept that the Claimant was the same person as his alias, and the Upper Tribunal refused permission to appeal, referring to the First Tier Tribunal's reasoning as "cogent and sustainable". Following a Cart JR (CO/4303/2020) the Upper Tribunal's decision was quashed. In granting permission Holman J stated that "In my view, those reasons are far from being cogent and sustainable, and are at least well arguably tainted by error". The Upper Tribunal subsequently found that there had been a material error of law and the matter has been remitted to the First Tier Tribunal de novo.

Case study 52

SR (Sri Lanka) v. SSHD PA/03767/2017 (remitted back by the Administrative Court) permission to appeal having been granted by the Court of Appeal in C4/2018/2337. The Appellant's appeal had been dismissed by the First Tier Tribunal and permission to appeal to the First Tier Tribunal and Upper Tribunal had been refused. Application for permission to apply for judicial review (a Cart JR) was sought of the Administrative Court, and was also refused. However, following an application for permission to appeal to the Court of Appeal Hickinbottom LJ granted permission on one ground, namely that the

First Tier Tribunal had failed to consider the evidence of the Applicant's diaspora activities in the UK and whether, in light of the evidence and in particular the arguable change in conditions in Sri Lanka since GJ (Sri Lanka) he would be at risk on return. Following the grant of permission to appeal he ordered that the application for permission to apply for judicial review be dealt with by the Administrative Court and on 21 January 2019 the Administrative Court quashed the Upper Tribunal's refusal of permission to appeal. The matter went before the Upper Tribunal who found an error of law in the First Tier Tribunal's consideration of the above issues and the hearing was adjourned for substantive hearing.

The Upper Tribunal then directed that this appeal be a country guidance case for consideration of diaspora activity in the UK and risk on return in light of such activity. Following two directions hearings on this matter, it was set down for hearing but the Secretary of State subsequently decided to grant the Appellant refugee status.

Case study 53

The Queen (on the application of Dona) v. SSHD co/2914/2019, Tribunal appeal references HU/13118/2018 and HU/13025/2018. Appeals of husband and wife (with child as dependant) in Article 8 case. The main basis of the appeal was that the child had been resident in the UK for more than 7 years and it was not reasonable to expect her to leave the UK. Appeal in the First Tier Tribunal dismissed. Application for permission refused by both First Tier Tribunal and Upper Tribunal. Cart JR lodged. Permission granted by Her Honour Judge Karen Walden-Smith in October 2019, in which she stated:

"The claimants' daughter was born in the UK and had been residing in the UK for more than 7 years. There is a strongly arguable case that the FTT Judge erred in his application of the law by taking into account the immigration history of the claimants in determining whether it was proportionate for the child to leave the UK. The assessment is child focused and the FTT needed to consider whether there were reasons for concluding that it would be reasonable for a qualifying child to leave the UK taking into account the impact upon the qualifying child, particularly where she has never been to Sri Lanka. This application for judicial review is not a mere disagreement with the findings of the FTT.

Not only is there a strongly arguable case that there are errors in the FTTs decision, but this is an important point of principle and there is a compelling reason as to why the appeal should be heard."

By Order of the Administrative Court the decision of the Upper Tribunal refusing permission to appeal was quashed. It was then remitted to the Upper Tribunal which subsequently granted permission and the error of law hearing was listed in May 2020 before UTJ Ockelton (Vice President). A decision on the error of law is awaited.

Case study 54

A Sri Lankan Tamil asylum appeal relying upon extensive diaspora activity in the UK and the perception that the appellant's activities would be viewed as someone who is seeking to destabilise the integrity of Sri Lanka and so at risk if he returns to Sri Lanka. The First Tier Tribunal judge refused to watch DVD evidence showing the appellant actively involved in diaspora activity at the hearing. He made findings stating that evidence had not been provided to show that the photographs of the appellant are on the internet. It was argued that he had acted procedurally unfairly in refusing to watch the DVD and then to make findings that the appellant was not actively involved in diaspora activity as claimed. He also failed to have regard to other evidence before him such as online news reports etc. Permission to appeal was refused by both First Tier Tribunal and Upper Tribunal. Permission was then granted by Cheema J on the papers who considered that there were legally compelling reasons for granting permission. Following this, an Order was made quashing the Upper Tribunal decision refusing permission.

Case study 55

An example of a successful Cart JR in Northern Ireland is *R (Jenkins)* [2019] NIQB 87 (https://www.judiciaryni.uk/judicial-decisions/2019-niqb-87), in which the applicant had been refused a residence card under the Immigration (European Economic Area) Regulations 2006. The applicant is a Brazilian national married to an Irish citizen living in Northern Ireland. The applicant sought an extended residence card as she was unable to meet the requirements for permanent residence. In the Cart JR decision, Keegan J stated: "*In my view it is patently clear from a reading of the decision that having*

accepted that an alternative of extended residence arose and having considered the case of MDB the FtT failed to apply the law properly to determine the application." It was held that the Upper Tribunal had erred in refusing leave to appeal, and the decision was quashed.

Case study 56

An Article 8 ECHR appeal against deportation, involving a claimant with a British partner and two young British children. The partner suffers from serious health conditions. The claimant's appeal was dismissed by the First Tier Tribunal and permission to appeal was refused by the First Tier Tribunal and the Upper Tribunal. The Administrative Court granted permission to bring a CJR (funded by legal aid). No hearing of the CJR was necessary and the Upper Tribunal's permission decision was quashed. The Upper Tribunal then found that the First Tier Tribunal had erred in law and reheard the appeal, allowing it on Article 8 grounds. Without the possibility to bring a Cart JR, the Home Office would have become entitled to remove the claimant from the UK, leaving his children without their father.

Case study 57

An asylum appeal, involving a claimant who is a gay man originating from a country where gay men who live openly are persecuted. The sole issue was whether a material reason why the claimant would conceal his sexuality on return to his country of origin would be his fear of persecution. The claimant's appeal was dismissed by the First Tier Tribunal and permission to appeal was refused by the First Tier Tribunal and the Upper Tribunal. The Administrative Court granted permission to bring a Cart JR. No hearing of the CJR was necessary and the Upper Tribunal's permission decision was quashed. The Upper Tribunal initially upheld the First Tier Tribunal's decision. The claimant appealed to the Court of Appeal. Permission to appeal was granted and the appeal was remitted to the Upper Tribunal by consent. The Upper Tribunal then found that the First Tier Tribunal had erred in law and reheard the appeal, allowing it on asylum grounds. Without the possibility to bring a Cart JR, the Home Office would have become entitled to remove the claimant from the UK to a country where he would have to conceal his sexual orientation due to his well-founded fear of persecution.

Question 3: Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?

Yes.

In respect of Northern Ireland, we refer to The Law Society of Northern Ireland's response to the Independent Review of Administrative Law (https://www.lawsoc-ni.org/DatabaseDocs/new_70715__lsni_response_to_iral_call_for_evidence_oct20.pdf), in particular their comment that "*It must be noted that justice and administrative law are devolved matters for Northern Ireland. Therefore any UK-wide reforms in this context would be problematic*." If these proposals are implemented, then they should also not extend to Scotland.

There are various issues with the evidence used to justify these proposals already noted elsewhere in the response to the consultation. However, it is noted that none of the evidence relied upon emanates from the Scottish jurisdiction or the Scottish experience. There is as such no evidence base to apply such changes to the Scottish jurisdiction.

The suggestion is that in England and Wales, there have been only 12 positive results in Cart JRs there from 2012 to 2019, a success rate of 0.22%. We have not consulted members on this matter, but it is noted that a single one of the Co-Convenors of the ILPA Scotland Working Group has had involvement with more than 12 positive results in Eba JRs in that time period; thus even if the figures relied upon by the UK Government are correct, it appears that on a very brief analysis the figures in Scotland are substantially different with a far higher success rate of positive outcomes.

Even if these figures were accurate, the Scottish jurisdiction has additional safeguards that do not exist in England and Wales. Any application for judicial review in Scotland must be raised in the Outer House of the Court of Session. The relevant Rules of the Court of Session require a petition for judicial review to be signed by Counsel and where such a signature cannot be obtained, then the matter is placed before a judge (a Lord Ordinary) for leave to proceed without said signature, that decision being final and not subject to appeal (Chapter 4 Rule 4.2(5)). As such, there is an additional "sift" in Scotland that does not exist in England; either the requirement of a signature of Counsel, or leave of the court to proceed.

It would appear to be inappropriate for the UK Government to be legislating on this matter for the Scottish jurisdiction. Schedule 5 of the Scotland Act 1998 reserves certain legislative matters to Westminster, and anything not so listed there is devolved to the Scottish Parliament (sections 29 and 30 of the Scotland Act 1998). Whilst head B6 of Schedule 5 reserves issues pertaining to immigration and nationality to Westminster, para 2A does not reserve the transfer to a Scottish tribunal of functions of a tribunal that relate to reserved matters insofar as those functions are exercisable in relation to Scottish cases; and in addition the jurisdiction and procedure of the Court of Session is not a reserved matter. It is therefore clear that relevant jurisdiction, court rules and procedure for judicial review matters in Scotland is not for the UK Government. Should this matter be felt to be an issue for the Scottish jurisdiction, then this is properly a matter for the Scottish Government and Scottish Parliament to consider and not the UK Government.

Question 4: (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?

No, we do not agree.

Question 5: Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

We do not agree with the proposals. We do not accept the premise of the proposed approaches, as Statutory Instruments are not properly scrutinised by Parliament. See, for example, the report by Public Law Project's Alexandra Sinclair and Joe Tomlinson 'Plus ça change? Brexit and the flaws of the delegated legislation system' (https://publiclawproject.org.uk/resources/plus-ca-change-brexit-and-the-flaws-of-the-delegated-legislation-system/).

Question 9: Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.

We agree with the proposal to remove the promptitude requirement, however the court must retain the discretion to extend the application deadline. We also suggest that, as with applications to the Supreme Court set out in their Practice Direction 8.12.3,[1] the clock is stopped where an application for legal aid has been made, until 28 days after the determination of the application for legal aid (including any subsequent challenges to the funding decision).

Question 10: Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

The issue with the pre action process as it relates to immigration judicial reviews is a lack of engagement on the part of the Home Office, we do not consider that an extension to the time limit will resolve this problem.

Question 11: Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

We recommend that the CPRC should look at particular cases where this would be an issue.

Question 12: Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?

No, this would not be useful. We do not have any suggestions as to how allocation could take place. Our position is that there is no problem with the current system, and no obvious benefit to this proposal.

Question 13: Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?

No. The existing duty in CPR 54.17 is sufficient.

[1] https://www.supremecourt.uk/procedures/practice-direction-08.html

Question 14: Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?

Yes, the current process involves a lot of additional work that is in our view unnecessary. While the Administrative Court Guide states at 7.2.5 that "Replies are rarely if ever necessary and are not encouraged", this is not our experience. Due to poor engagement at the pre action stage, the Acknowledgment of Service and Summary Grounds are often the first opportunity for a claimant to understand the Home Office's position in relation to their case. It is not rare for there to be errors that require correction via a reply. It would be sensible for there to be formal provision for an optional reply, and that the court waits to make its decision on permission until the deadline for the provision of a reply has passed. Otherwise the court risks making permission decisions without all of the relevant information, and an error at this stage requires an amount of work that is disproportionate to the very simple fix that has been proposed.

Question 15: As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?

Paragraph 105(a) refers to the Summary Grounds, not the Detailed Grounds. As this question is unclear, we are unable to meaningfully engage with it.

Question 16: Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

No. We are aware that government departments have 'expressed strong views' with regard to the length of the judicial review process.[2] This proposal would build further delay into the system, including in cases where it is not necessary. There is already provision for the court timetable to be amended where appropriate, and it is also open to the Defendant to make their position clear at an early stage in respect of the timetable for directions.

[2] IRAL report, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf para 4.75

Question 17: Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?

Please see the case studies of Cart JRs provided. A proper evidence base is needed in order to carry out a full impact assessment, and that is currently absent.

Question 18: Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals?

Please see the case studies of Cart JRs provided. A proper evidence base is needed in order to carry out a full impact assessment, and that is currently absent.

Question 19: Are there any mitigations the Government should consider in developing its proposals further? Please provide data and reasons.

Due to the piecemeal approach being taken in respect of the proposed changes (for example some proposals around immigration judicial reviews being made via the New Plan for Immigration), it is not possible to properly assess the impact of the proposals and therefore to provide any options for mitigation. Our case studies make clear the harm that will be caused in abolishing Cart JRs. An effective process for change would be evidence based, which this is not, and changes could be piloted and then the impact assessed against the intended goals.

28 April 2021