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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATION BY JR137
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

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Erik Peters BL (instructed by Wilson Nesbitt, Solicitors) for the Applicant
Joseph Kennedy BL (instructed by the Crown Solicitor's Office) for the Interested Party

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SCOFFIELD J

Introduction

[1] This is an application for leave to apply for judicial review of a decision of the Upper Tribunal (Immigration and Asylum Chamber) to refuse permission to appeal to itself.

[2] The applicant is a national of Nepal. She resides in Northern Ireland with her UK-born child, as well as with her husband, who is dependent on the applicant's claim. On 1 July 2017 the applicant claimed asylum in the United Kingdom. On 15 May 2018 the Secretary of State for the Home Department (SSHD) refused the applicant's asylum claim. The applicant appealed that decision but, as appears below, by the time her appeal came to be considered by the First-tier Tribunal (FtT), she had abandoned her own claim for asylum and instead relied on her child's residence and circumstances within the United Kingdom (UK). The applicant's appeal to the FtT was dismissed; and the FtT then further refused her permission to appeal to the Upper Tribunal (UT). The UT in turn refused permission to appeal to itself and it is that decision which is under challenge. As the FtT did, I have granted anonymity in this case, on application by the applicant, by reason of the involvement of the applicant's child and the details which the judgment and proceedings will contain concerning her.

[3] This application therefore engages the heightened threshold for the grant of leave which authority establishes should apply when a challenge is brought to a refusal of the Upper Tribunal to grant permission to appeal to itself. The error of law relied upon by the applicant in an attempt to surmount the formidable threshold for the grant of leave is, in essence, the failure of the UT to identify and act upon the failure of the SSHD to comply with her obligation under section 55(3) of the Borders, Citizenship and Immigration Act 2009 ('the 2009 Act'). The SSHD's alleged failure, in turn, resolves to a failure to adequately engage with the applicant's child in order to ascertain her wishes and feelings in the context of the applicant's claim.

[4] The applicant was represented by Mr Peters BL. The proposed respondent, the Upper Tribunal, as is its practice, declined to participate in the proceedings, allowing its decision simply to speak for itself and the SSHD to seek to defend it, should she choose to. The SSHD will be a notice party in the event that leave to apply for judicial review is granted and appeared at the leave hearing as an interested party, represented by Mr Kennedy BL. I am grateful to both counsel for their helpful written and oral submissions.

Summary of the facts

[5] For present purposes it is unnecessary to rehearse an extremely detailed synopsis of the factual background of this application. The basic facts, however, are as follows.

[6] The applicant is a citizen of Nepal. She arrived in the UK on 11 September 2009 on a valid visa, which expired on 9 September 2011. On 20 July 2011 the applicant gave birth to her daughter, when the family were living in London. The applicant made further applications to extend her visa in 2011 and 2012; but those applications were refused. The applicant nevertheless did not leave the UK.

[7] On 1 July 2017 the applicant claimed asylum in the UK. This application was refused by the SSHD on 15 May 2018. The applicant appealed against this decision and the appeal was listed to be heard in the FtT on 3 March 2020. However, on 15 January 2020, seven weeks before the hearing of the appeal, the applicant's solicitors wrote to the SSHD inviting her to reconsider the matter in light of Appendix FM, Section EX of the Immigration Rules as the child had now been living continuously for a period of over seven years in the United Kingdom. Supplementary materials evidencing the child's integration into, and private life in, the United Kingdom were provided.

[8] On 31 January 2020 the SSHD responded suggesting that, at the time of the applicant's application for asylum, the child had not been in the UK for seven years and, accordingly, that the decision to refuse the applicant leave to remain had been and was correct.

[9] On 3 March 2020 the appeal was heard in the FtT by Immigration Judge Grimes. In the FtT the applicant abandoned her original asylum claim and asked the tribunal to concentrate on the situation of her child and the child's best interests. The applicant's counsel also submitted that the Home Office failed to properly or proactively discharge its statutory duty under section 55 of the 2009 Act. That obligation is explained further below.

[10] The FtT Judge dismissed the appeal by a decision promulgated on 18 March 2020. The applicant then applied to the FtT for permission to appeal to the Upper Tribunal. A different judge of the FtT, Immigration Judge Fisher, refused the application for permission to appeal on 6 July 2020. The applicant's only further right of recourse was therefore to apply directly to the UT for permission to appeal. This application was also refused by way of a decision of Upper Tribunal Judge Macleman on 17 September 2020. It is this decision which is sought to be impugned in the present proceedings.

This section 55 obligations

[11] Section 55(1) of the 2009 Act provides as follows:

> "*The Secretary of State must make arrangements for ensuring that –*
>
> *(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and*
>
> *(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.*"

[12] By section 55(2), the relevant functions for the purposes of subsection (1) include "*any function of the Secretary of State in relation to immigration, asylum or nationality*" and "*any function conferred by or by virtue of the Immigration Acts on an immigration officer*". Accordingly, in the exercise of her functions relevant to this case, the SSHD was obliged to have regard to the need to safeguard and promote the welfare of children who are in the UK, including the applicant's child.

[13] Moreover, by virtue of section 55(3):

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

[14] It is the requirement in this subsection which forms the basis of the applicant's criticism of the SSHD's approach in the present case (and, therefore, the approach of both the FtT and UT for failing to identify and correct the shortcomings in the SSHD's consideration of the case).

[15] The starting point must be the content of the guidance to which the relevant function-exerciser is obliged to have regard. It is common case that that guidance is contained in the UK Borders Agency publication from 2009 entitled '*Every Child Matters – Change for Children*' ('the section 55 guidance'), which was expressly issued as statutory guidance under section 55. Although the parties in this case each sought to emphasise different portions of this publication, the following passages appear to me to be the relevant ones for present purposes:

(a) Paragraph 6 of the 'Introduction', on page 5, states: "*This guidance is issued under section 55(3) and 55(5) which requires any person exercising immigration, asylum, nationality and customs functions to have regard to the guidance given to them for the purpose by the Secretary of State.* ***This means they must take this guidance into account and, if they decide to depart from it, have clear reasons for doing so.***" [bold emphasis in original]

(b) Paragraph 1.3 of Part 1, on page 6, states: "*The [section 55] duty does not give the UK Border Agency any new functions, nor does it override its existing functions. It does require the Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children.*"

(c) Paragraph 1.14 of Part 1, on page 11, states: "*In order to safeguard and promote the welfare of individual children, the following should be taken into account,* ***in addition to the relevant section of Part 2 of this guidance***" [bold emphasis in original]. That paragraph then sets out what are said to be "*the key features of an effective system*" [my emphasis].

(d) These "*key features*" include, at bullet point one, that "*Children and young people are listened to and what they have to say is taken seriously and acted on*"; and, at bullet point three, that "*Where possible the wishes and feelings of the particular child are obtained and taken into account when deciding on action to be undertaken in relation to him or her. Communication is according to his or her preferred communication method or language*". These are the provisions of the guidance on which the applicant places particular reliance, for reasons discussed further below.

(e) Pursuant to paragraphs 1.15 and 1.16 of Part 1, some of the principles which should underpin work with children and their families to safeguard and promote the welfare of children include that "*work with children and families should be child centred… [and] involve children and families, taking their wishes and feelings into account…*" [my emphasis].

(f) As to how children and families are to be involved, paragraph 1.17(b) says the following:

> "*In order to appreciate the child's needs and how they make sense of their circumstances it is important to listen and take account of their wishes and feelings. It is also important to develop a co-operative constructive working relationship with parents or caregivers…"* [underlined emphasis added]

[16] The practical requirements of the obligation to have regard to the section 55 guidance – taking into account the guidance's own indication that it should be followed unless there is a clear, reasoned decision to depart from it – has been examined in a number of cases.

[17] In the case of *JO and Others (section 55 duty) Nigeria* [2014] UKUT 00517 (IAC), McCloskey J (as he then was), sitting as President of the relevant chamber of the UT, examined the section 55 obligation. A key theme of his decision was that, in order to perform the inter-related duties of having regard to the need to safeguard and promote the welfare of any children involved and to have regard to the section 55 guidance, the decision maker must be *properly informed*, which was ultimately a question of law on the basis of the well-known *Tameside* doctrine (see *Secretary of State for Education and Science v Metropolitan Borough Council of Tameside* [1977] AC 1014, at 1065b). McCloskey J emphasised that what the section 55 obligations required was an assessment of some depth, rather than a superficial or cursory treatment of the issue of child welfare.

[18] The President, at paragraph [14] of his decision, then turned to "*one of the more intriguing questions thrown up by section 55*", namely whether it has a procedural dimension in certain cases (and, in particular, whether it imposed a proactive duty of enquiry on the SSHD's officials in some cases, including an obligation to meet with an affected child), but declined to engage in a detailed consideration of these questions since that was unnecessary in the circumstances of that case, in light of his finding that there were "*manifest infirmities*" with the process which had been undertaken even leaving aside a more onerous obligation of consultation. In that case, McCloskey J was critical of the FtT's failure to subject the SSHD's decision-making to the detailed analysis as to compliance with the section 55 obligations which he, in the UT, carried out. He found, at paragraph [17], that the FtT's failure to consider whether the SSHD's officials had complied with those duties, and failure therefore to conclude that they had failed to discharge them, was a "*fundamental error of law infecting the FtT's decision*".

[19] This topic was returned to more recently by McCloskey J, sitting in the Court of Appeal in this jurisdiction and giving the unanimous judgment of the Court, in the case of *JG v The Upper Tribunal (Immigration and Asylum Chamber)* [2019] NICA 27. There, he noted that section 55 had "*generated a fairly substantial cohort of jurisprudence*", from cases in the Supreme Court (*ZH (Tanzania)* [2011] UKSC 4; and

Zoumbas v Secretary of State for the Home Department [2012] 1 WLR 3690) to a range of cases in the High Court in this jurisdiction quashing decisions of the SSHD which were under challenge – including *Re TL's Application* [2017] NIQB 137; *Re ED's Application* [2018] NIQB 19; *Re OR's Application* [2018] NIQB 27; and *Re EFE's Application* [2018] NIQB 89. (One might add that a much earlier example is also to be found in the decision of Stephens J, as he then was, in *ALJ and A, B and C's Application for Judicial Review* [2013] NIQB 88.)

[20] Detailed repetition of large portions of the Court of Appeal's judgment in *JG* is unnecessary – although it is required reading for anyone seeking to understand the nature and effect of the section 55 obligations in this jurisdiction, as well as the issue of when non-compliance with these obligations will be found and the consequences of any such finding. For present purposes, I venture this short (and, no doubt, inadequate) summary of the main points emerging from the Court of Appeal's decision in *JG* and the case-law considered by it:

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

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

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

(iv) Separate focus should therefore be brought to bear on whether there has been a breach of the section 55(3) duty, in addition to the question of whether there has been a breach of the principal duty. To determine whether the section 55(3) duty has been complied with, the court or tribunal considering this issue should carefully consider on the one hand what the section 55 guidance envisages and, on the other, what information was available to the decision-

maker and how it was taken into account. See *JG*, at paragraph [21]. I would add that an important consideration in this regard is whether the section 55 guidance has been cited by the decision-maker (although that is plainly not determinative, as the case of *MK (Section 55 – Tribunal Options) Sierra Leone* [2015] UKUT 00223, relied upon by the interested party, confirms at paragraph [19]).

(v) The key principles, or critical requirements, are that the child be *listened to* in order to hear what they have to say and, relatedly, that their wishes and feelings are ascertained and taken into account. The section 55(3) guidance is not inflexibly prescriptive as to how this should be achieved, provided these key principles are observed where possible. The guidance does, however, refer to the possibility of certain steps being taken by the caseworker or decision-maker, each of which is designed to ensure that the decision-maker properly discharges the principal duty. This might well require direct consultation with the child, depending on the circumstances of the case; and the feasibility of directly consulting an affected child should be considered in each case. The terms of the section 55 guidance certainly appear to suggest such direct engagement (see, for instance, the enjoinder that the communication should be in *the child's* preferred method or language). Where a simple, uncomplicated exercise is required by virtue of the obligation to have regard to the section 55(3) guidance, it is difficult to conceive of a case where the failure to perform this will be excused. See *JG*, at paragraphs [21], [28] and [35]; and also *ED*, at paragraphs [17]-[19].

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

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

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

[21] The kernel of the challenge in the present case was that the FtT (and, in turn, the UT) failed to correctly identify a breach of the section 55(3) duty in the SSHD's failure, both at the initial decision-making stage and after the applicant's daughter had been resident in the UK for more than 7 years, to take appropriate steps to listen to the child and ascertain her wishes and feelings so that her best interests could be properly understood and taken into account. In short, the applicant contends that this was a case where there was no reason whatever that the child should not have been consulted with directly, much less any reason why this was impossible.

Grounds of challenge

[22] The applicant's pleaded case identifies one ground of challenge only, namely irrationality. It is contended that the decision of the Upper Tribunal was irrational in the *Wednesbury* sense in the following respects:

> "*The UT acted irrationally in refusing permission to appeal to itself and affirming the approach which had been adopted by the FtT judge, namely that*
>
> *(i) the trial FtT judge was entitled to ignore SSHD's failure to comply with statutory guidance pursuant to Section 55(3) of the Borders, Citizenship and Immigration Act 2009, and*
>
> (ii) *the trial FtT judge was entitled to assess the child's best interests without relevant evidence which the SSHD had a duty to obtain in compliance with statutory guidance referred to in Section 55(3) of the Borders, Citizenship and Immigration Act 2009.*"

[23] I intend to approach the applicant's challenge as one of error of law however, since the alleged irrationality consists of the failure to identify and correct an alleged failure on the part of the SSHD to comply with her statutory obligation under section 55(3) in the circumstances of this case. The case appears to have been pleaded in the way in which it has because of the failure of the FtT and UT in their permission to appeal (PTA) decisions to engage in any detail, if at all, with the applicant's submissions on section 55(3). In any event, the failure to grant PTA on the basis of those submissions does effectively "*affirm*" the approach adopted by the FtT Judge, which the applicant contends was in error of law.

The elevated threshold for the grant of leave

[24] In a case such as this, which has already been considered by both tiers of the specialist immigration tribunal, authority which is binding on this court is clear that leave to apply for judicial review should be granted in limited circumstances only. The leading authorities on this question remain the decisions of the Supreme Court

in *R (Cart) v Upper Tribunal* [2011] UKSC 28 and the related case of *Eba v Advocate General for Scotland* [2011] UKSC 29, in which a number of appeals from differing fields which all raised the same question – the amenability of the Upper Tribunal in its various chambers to judicial review – were heard and determined together.

[25] In this jurisdiction, Maguire J applied the approach in *Cart* in *Re Wu's Application* [2016] NIQB 34. He described the criteria for the grant of leave in a case such as this as "*now well established*", citing earlier decisions where they had been applied, and "*tailor made to meet cases such as this where there has been a decision by the decision making authority which has already been the subject of an unsuccessful appeal to the Lower Tier Tribunal and where leave to appeal to the Upper Tier Tribunal has been refused by both the Lower and Upper Tiers*". In such cases, Maguire J continued (at paragraph [19]) to explain that:

> "*… there cannot be a judicial review of the refusal of leave unless:*
>
> *(a) the proposed judicial review raises some important point of principle or practice; or*
>
> *(b) there is some other compelling reason for the court to hear the judicial review.*"

[26] These criteria (known as 'the second-tier appeal criteria') reflect those which restrict the grant of leave to appeal from the UT to the Court of Appeal under the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008 No 2834). In the present context they were considered by the Supreme Court in *Cart* to represent "*a rational and proportionate restriction upon the availability of judicial review of the refusal by the Upper Tribunal of permission to appeal to itself*" (*per* Lady Hale at paragraph [57]).

[27] This restrictive approach to the grant of leave recognises the importance of the enhanced tribunal structure which, in *Cart*, Lady Hale observed "*deserves a more restrained approach to judicial review than has previously been the case*". In *Re A and Others* [2012] NIQB 86, Treacy J further explained (at paragraph [44]) that this restrained approach recognises the specialised nature of the appeal procedure and the legislative purpose of seeking to have a "*self-contained and unified appellate immigration process*", as well as discouraging 'strategic delay' in some cases.

[28] These authorities were more recently discussed and applied in a helpful decision of Colton J in *Re Osman's Application* [2017] NIQB 52, which was opened to me by Mr Kennedy in the course of his submissions. Focusing on the first of the two second-tier appeal criteria, Colton J posed the following questions (at paragraph [31]): "*Does the judicial review in this case raise an important point of principle or practice? Does it raise a point which is "not yet established"?*" He did not closely examine the first

criterion since it was not raised in the case before him (see paragraph [36]). I return to these issues below.

Consideration in the tribunals of the section 55(1) and 55(3) duties

[29] Before doing so, it is convenient to consider briefly the consideration which was given to the applicant's daughter's best interests and that given, such as it was, to the section 55 guidance.

[30] As discussed above, the primary aim of section 55 of the 2009 Act is plainly to ensure that relevant functions are discharged appropriately taking into account the need to safeguard and promote the welfare of children in the UK. The SSHD's case is, in essence, that this was obviously done, both in terms of the original decision-making and in the consideration of the appeal by the FtT. The applicant's complaint is, at heart, a contention that this consideration was undertaken in a defective manner because it necessarily involves (in the absence of good reason otherwise in the circumstances of the case) direct contact with the child concerned in order to ascertain their wishes and feelings and, indeed, any first-hand evidence they can provide which is relevant to the determination of the issues before the decision-maker.

[31] The SSHD's initial decision to refuse the applicant's claim for asylum and humanitarian protection dealt with section 55 considerations in paragraphs 98 to 110 of the decision letter. It noted that the SSHD had taken into account the need to safeguard and promote the welfare of children in the United Kingdom in accordance with her duty under section 55 of the 2009 Act. This assertion is also evident in paragraph 10 of the decision. Considering the guidance set out in *E-A (Article 8 – best interests of child) Nigeria* [2011] UKUT 00135 (IAC), the SSHD's consideration addressed the issue of the child's residence in the UK, the roots which she had put down here, her personal identity, friendships which had been formed, and links which had been made with the community outside the family unit. The SSHD also appears to have placed considerable weight on the factors discussed by the Court of Appeal in the case of *EV (Philippines) and Others v Secretary of State for the Home Department* [2014] EWCA Civ 874 and its finding that, if a mother and father do not have valid leave to remain, then it is reasonable to expect a child to return with their parents to their home country and to view that as being in their best interests.

[32] The SSHD went on to consider whether and how the family unit's family life could continue on return to Nepal and the extent of the child's ties to the UK outside of her immediate family unit. It was not considered that those ties would justify allowing the family to remain in the UK. The SSHD noted that the child had extended family members who reside in Nepal who could provide her and her family with support to facilitate their reintegration; and considered that, on the basis of objective evidence available to the Home Office, there were opportunities

available for the applicant's daughter to continue her studies in her own country. In summary, the decision letter concluded at paragraph 110 as follows:

> "*Your child is at a reasonable age to return to Nepal with you where there is a school system and healthcare suitable for their needs. You also have family over there and therefore it is in your children's best interest to return to the country of their cultural identity as a family unit.*"

[33] No mention is made in the initial decision letter of the section 55 guidance, much less any detailed analysis of what it might require in the circumstances of this case; nor is there any evidence of consideration being given to any direct contact with the applicant's daughter in order to seek her first-hand input.

[34] By the time of the FtT hearing the applicant's daughter was now eight years old. As noted above, by this time the applicant had abandoned her asylum claim (to which the majority of the SSHD's initial decision letter was devoted) and was focusing squarely on the interests of her daughter. At this point, the applicant's solicitor provided a range of additional information relating to the applicant's daughter in support of the appeal, including that she had spent all of her life in the UK; that she had never lived in or spent time in Nepal; that she communicates in English as a first language; that she had a private life in her own right having developed friendships in school; and that she was involved in many extra-curricular activities. A range of additional documentary evidence was provided in support of these contentions, including school reports, photographs, and a variety of certificates and awards.

[35] At the FtT hearing it was accepted that the tribunal was required to consider section 117B(6) of the Nationality, Immigration and Asylum Act 2002. That provision states that, "*In the case of a person who is not liable to deportation, the public interest does not require the person's removal where – (a) the person has a genuine and subsisting parental relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom*". It was accepted that the applicant's daughter was a qualifying child for the purpose of this provision having regard to the definition in section 117D and the facts that she was under 18 and had then lived in the UK for a continuous period of seven years or more.

[36] The skeleton argument filed on behalf of the applicant for the FtT hearing by her counsel addressed section 117B(6) in detail, as well as relying on authorities to the effect that, where a child has been resident in the UK for 7 years or more, the starting point is that leave to remain should be granted. The skeleton argument also contended that the welfare of the applicant's child had not been "*properly or proactively*" considered under section 55 of the 2009 Act, which was therefore a live issue for the tribunal; although it is fair to say that there was nothing like the focus on the section 55(3) guidance, at least in the applicant's written case to the FtT, as there has been in the present application for leave to apply for judicial review.

[37] The FtT judge considered the relevant Article 8 rights, the family's ties in the UK, the length of residence and the private life they had established here. She also expressly considered the best interests of the applicant's child, addressing her schooling, her friendships, her health and extra-curricular activities. She considered (at paragraph 9) that "*it may well be in the child's best interest to remain in the UK, however the primary factor in her best interests must be to remain with both parents*". She therefore went on to address whether it would not be reasonable for the child to return to Nepal.

[38] One reason advanced on the applicant's behalf in this regard was that the child does not speak Nepali. However, the FtT judge found that there was a conflict in the evidence as to whether this was so. Having summarised a number of pieces of evidence relevant to this issue, she found as a matter of fact that the applicant and her husband had significantly downplayed the child's ability to speak Nepali and that she had grown up in a household where the primary language was Nepali. On a further issue, the judge was not satisfied that the family did not have links with Nepali community in the UK, as they had claimed. The judge also considered the applicant's child's wish to continue her studies and her possible future career plans, as well as her ability to access education in Nepal (even if she was wrong that she did not presently speak Nepali). On the basis of all of the evidence before her, she concluded that it was reasonable for the applicant's child to leave the UK to go to Nepal with her parents; and that the decision to refuse the application for leave to remain was proportionate to the legitimate aim of the maintenance of an effective system of immigration control.

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

[40] In the applicant's grounds of appeal against the FtT decision, specific attention was then drawn to section 55(3) of the 2009 Act, the authorities relating to

the obligations arising under it and to the section 55 guidance. Only at this point was major reliance placed on the failure of the part of the Home Office decision-maker to discharge or even consider their statutory duty under section 55(3) of the 2009 Act, with the cases of *JO* and *JG* being quoted from extensively.

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

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

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

> "2. *The grounds complain of the "scale and volume of errors of law" in the decision, but that is rhetoric.*
>
> 3. *The grounds do not arguably rise above vague insistence and disagreement. They specify nothing whereby the decision might be set aside for error on a point of law, or whereby another outcome might realistically be achieved.*"

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

section 55(1). On my reading of the authorities, including the decision in *JG* in particular, that is an incorrect analysis in law – and, at least, strongly arguably so.

Does this case surmount the elevated threshold?

[44] This analysis still leaves the question, however, whether any arguable error of law on the part of the UT surmounts the elevated threshold for the grant of leave discussed at paragraphs [24]-[28] above. Mr Peters' submissions embrace reliance on each of the criteria and I address each separately below.

[45] Mr Peters also drew my attention to the fact that McAlinden J recently granted leave to apply for judicial review in a materially similar case, referred to as *AV*, in which leave was granted on 10 August 2020. That was also a case in which the UT had refused permission to appeal to itself and this was challenged by way of judicial review, the core element of the challenge being a failure to comply with section 55(3) of the 2009 Act. McAlinden J gave an *ex tempore* ruling on the application for leave but I have had the opportunity to consider it. He determined that the first criterion for the grant of leave was surmounted on two bases, namely that important issues of principle arose (i) as to whether there was an obligation on the FtT and UT to engage in some form of "*substitute investigative role*" if the SSHD had failed to comply with what was set out in the section 55 guidance; and (ii) as to the extent to which the UT was bound to follow decisions of the Court of Appeal in Northern Ireland (there having apparently been some suggestion that the UT was not bound by authority of the Court of Appeal in this jurisdiction). Neither of these issues has been raised in quite the same way in the present case. I was told by Mr Peters that, in the result, the *AV* judicial review had then been resolved by agreement with the UT's decision being quashed, so there is no final judgment in the matter.

(i) An important point of principle or practice

[46] Mr Peters submitted that the failure identified on behalf of the applicant (but not, he submitted, the FtT or UT), namely failure to comply with the section 55(3) duty in the circumstances of this case, <u>does</u> amount to an important point of principle or practice. In support of this contention, he founded himself on the *dictum* of McCloskey J in the *JO* case (referred to at paragraph [18] above) that such a failure is a "*fundamental error of law*". Although that phrase was not repeated in the judgment of the Court of Appeal in *JG*, it is certainly not out of step with the Court's reasoning. I accept that a failure to identify a clear breach of the section 55(3) duty on the part of a decision-maker is, indeed, a significant error of law and one which ought, in an audit of legality of the decision, to result in its being quashed.

[47] However, that is not the question. The question is whether such an error of law – assuming it is arguably established – is sufficiently "*important*", in the meaning of that phrase as it is used in the *Cart* criteria, to warrant a further round of judicial scrutiny. Put another way, how important does the asserted error of law require to

be? Mr Peters relied on the reference, at paragraph [92] of Lord Phillips' opinion in *Cart*, to ensuring that "*errors of law of real significance*" do not slip through the system. But that is merely to beg the same questions. How significant? And significant for whom? It cannot be said that Lord Phillips was seeking to posit a different test from that adopted by Lady Hale since, in paragraphs [94] and [95] of his opinion, he expressly agreed with her that the second-tier appeal criteria should be used in the present context.

[48] In the *Osman* case, Colton J focused on the question of whether the point was one which was "*not yet established*". This is a well-known elucidation of what an "*important point of principle or practice*" will involve for the purpose of the second-tier appeal criteria. That was explained in the case of *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60 in the context of a second appeal to the Court of Appeal of England and Wales under Part 52 of the Civil Procedure Rules. At paragraph [18] of that judgment, having pointed out that an important point of principle or practice was a reference to such a point "*that has not yet been established*", the court drew a distinction between (a) establishing a principle and (b) applying an already established principle or practice correctly:

> "*Where an appeal raises an important point of principle or practice that has not yet been determined, then it satisfies [the criterion]. But where the issue sought to be raised on the proposed appeal concerns the correct application of a principle or practice whose meaning and scope has already been determined by a higher court, then it does not satisfy [the criterion]. We cannot accept the submission of [counsel for the appellant] that the question whether an established point of principle or practice has been properly applied in an individual case itself raises an important point of principle or practice. Were the position to be otherwise, the door would be open to second appeals in all cases which concern the application of an important principle or practice. That is clearly not what was intended.*"

[49] In *Cart*, the Supreme Court clearly adopted the same criteria as were used in the context being addressed in *Uphill* as a limitation on the grant of permission to apply for judicial review, those criteria being well known and understood (including by reference to authorities such as the *Uphill* case). Indeed, in paragraph [130] of his judgment in *Cart*, Lord Dyson referred to the *Uphill* case – a previous decision of his own – making the point that it is not enough to point to a litigant's private interest in the correction of error in order to obtain permission to appeal but that, rather, permission will only be given where there is an element of general interest which justifies the use of the court's scarce resources. He continued:

> "*It follows that, if the law is clear and well established but arguably has not been properly applied in the particular case, it will be difficult to show that an important point of principle or*

> *practice would be raised by an appeal. The position might be different where it is arguable that, although the law is clear, the UT is systematically misapplying it: see, for example, Cramp v Hastings Borough Council [2005] 4 All ER 1014.*"

[50] Lord Hope also referred to the *Uphill* decision in this context in paragraph [48] of his judgment in *Eba*, continuing that, "*Underlying the first of these concepts is the idea that the issue would require to be one of general importance, not one confined to the petitioner's own facts and circumstances.*"

[51] The requirement that the important point or principle which is relied on be a new one was applied by Maguire J in *Wu* at paragraph [22]; and by Colton J in *Osman* at paragraph [31].

[52] In my view, the alleged failings in this case – failure on the part of the SSHD to comply with the requirements of section 55(3) of the 2009 Act and failure on the part of the FtT or UT to identify and correct this – appear to fall squarely within the category of an alleged failure to apply an established, albeit important, obligation. As discussed at some length above, the requirements of section 55(3) have been considered and explained in a variety of cases, including by the Court of Appeal in this jurisdiction. Moreover, as McCloskey J stated in paragraph [13] of his decision in *JO*, on which the applicant relies, "*the question of whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one*".

[53] I do not consider, therefore, that this case raises an important point of law of the kind which qualifies for the grant of leave pursuant to the first of the two *Cart* criteria. Although the obligation under section 55(3) of the 2009 Act is an important one, I do not consider that there is any *new* aspect to it which would warrant the grant of leave on this basis. Failure on the part of the UT to apply a clear and established legal principle does not warrant the further intervention of this Court given the nature of the Upper Tribunal and the limitation on judicial resources, even if that results in a certain level of error having to be acceptable within the system (see *Cart* at paragraphs [41]-[42] and [47], *per* Lady Hale; [89], *per* Lord Phillips; [99], *per* Lord Brown; and [126] and [130], *per* Lord Dyson).

[54] That is not to say that this court would take the same view if there was evidence or a plausible suggestion of "*systematic misapplication*" of the law on section 55(3) (cf. Lord Dyson's observation cited at paragraph [49] above); for instance, if the decision of the Court of Appeal in *JG* was routinely being ignored or treated as erroneous. Mr Peters did not go so far as to suggest this in the present case; although there may perhaps have been hints of that in the application which came on before McAlinden J.

(ii) Some other compelling reason

[55] The *Cart* criteria also, however, permit leave to apply for judicial review to be granted where there is "*some other compelling reason*" for the court to do so. Necessarily, this criterion is not susceptible to a detailed, advance prescription of the circumstances in which it will be satisfied and the required value-judgment in this regard is entrusted to the court. The alternative bases on which Mr Peters has urged me to grant leave in this case – particularly on the ground that there is a "*strongly arguable error of law*" – fall within the purview of the second criterion. As discussed above, an error of law alone which does not raise an issue of principle or practice which is not yet established will not generally be enough for leave to be granted in the present context, no matter how strongly arguable that point of law is. Something additional is required.

[56] I was referred by Mr Peters in his skeleton argument to the case of *JD (Congo) v SSHD* [2012] EWCA Civ 327 which considers this issue and demonstrates that the "*other compelling reason*" criterion can be satisfied where there is a strongly arguable error of law (which enjoys a real prospect of success) *in conjunction with* very adverse consequences for the applicant: see paragraphs [22] and [27], reflecting also what Lord Dyson had said at paragraph [131] of his judgment in *Cart*. The test remains a stringent one, although sufficiently flexible to take account of the particular circumstances of the case; and the applicant's case must be *legally* compelling, not merely emotionally or politically compelling.

[57] When it comes to assessing the adverse consequences for the applicant, Sullivan LJ pointed out (at paragraph [27] of *JD (Congo)*) that, "*It may well be the case that many applicants in immigration and asylum cases will be able to point to the "truly dire consequences" of an erroneous decision*." A decision to remove an asylum applicant from the UK's jurisdiction to the place where she claims to fear persecution will be irreversible. Moreover, "*… there is no reason to minimise the significance of the consequences of a decision in the immigration and asylum field merely because legal errors in that field are often capable of having dire consequences for appellants*".

[58] For the reasons briefly summarised at paragraph [43] above, I consider that this case does raise a strongly arguable error of law – since there appears to have been no appreciation of the free-standing nature and importance of the obligation on the SSHD under section 55(3) of the 2009 Act and no detailed analysis of what it required in this case or, therefore, whether it was complied with. If a view were to have emerged in the tribunals that the requirements of section 55(3) have been misinterpreted or over-played in the line of authority culminating in *JG* – or that they have been properly interpreted but are unworkable in practice, such that the section 55 guidance itself requires reconsideration – that should be addressed head-on in a reasoned decision capable of further appeal. The decision in *JG* is binding on me as a matter of law and therefore, for present purposes, authoritatively determines the type of analysis required in a case where compliance with section 55(3) is a live issue.

[59] But is this also a case where something additional, in conjunction with a strongly arguable point of law, mean that the "*other compelling reason*" threshold may be considered to be met? In my view, it is. This is by reason of a variety of interlocking features which, taken together, mean that there is a compelling reason for the court to consider this case, as follows:

(a) First, addressing the consequences of the decision, I take into account the recognition in *JD (Congo)* that adverse consequences may often arise in the immigration field. This case is one where the applicant's family have resisted a return to Nepal by means of a claim for asylum (albeit this claim was not pursued before the FtT). More importantly, it is a case where the applicant's daughter will, as result of the decision, be required to leave the UK having lived her whole life here and where, having been resident in the UK for more than 7 years, this is likely to be highly disruptive (see *R (MA (Pakistan) v Upper Tribunal* [2016] EWCA Civ 705; [2016] 1 WLR 5093, at paragraph [46]). Although the child herself is not the applicant in these proceedings, if the FtT's decision stands, the whole family will have to relocate back to Nepal and the applicant will have to deal with the disruptive nature of that move for her daughter. Insofar as there is remains any doubt about the extent to which such a return would be disruptive to the applicant's daughter, and hence her family, I am prepared to give the applicant the benefit of the doubt on this issue, given the asserted failure to engage directly with the applicant's daughter on these matters in line with the section 55 guidance. I would not have considered the consequences of the decision alone, albeit serious, to have been sufficient to push this case into the 'other compelling reason' category. They do, however, weigh in the balance in the applicant's favour.

(b) Second, although this is plainly not in the category of case where there has been a wholly exceptional collapse of fair procedure, it is strongly arguable that each of the permission to appeal refusals failed to engage with at least one of the core legal arguments being presented on behalf of the appellant and which now forms the basis of the intended application for judicial review, *viz* failure to comply with section 55(3) in the process adopted by the SSHD. In light of the failure to grapple with this issue, although clearly raised in the grounds of appeal, it cannot really be said that the applicant has had her case on the section 55(3) question fully considered and rejected in a reasoned decision. That is so even allowing for the fact that it appears that this line of argument may have been pressed more strongly on the appellant's behalf *after* the FtT hearing at the stage of seeking permission to appeal.

(c) Finally, I also cannot ignore the context of there having been a recent decision of the High Court in Northern Ireland granting leave in a very similar case (see paragraph [45] above) which suggests that leave might alternatively have been granted on the basis of the first *Cart* criterion if the grounds of challenge had been differently formulated; and that, generally, this is an area where

> further consideration of the tribunals' approach may be in the public interest. Since that case did not proceed to a full hearing, the important issues of principle which McAlinden J identified as requiring further investigation have gone unexplored.

[60] Taking these factors in the round, I consider that this is a case which, exceptionally, may be viewed as one where there is "*some other compelling reason*" to grant leave to apply for judicial review; with the unique combination of factors leading to this conclusion being highly unlikely to set any precedent which ought to be of concern to the proposed respondent or the SSHD.

Conclusion

[61] For the reasons given above, I grant the applicant leave to apply for judicial review of the decision of the Upper Tribunal to refuse permission to appeal to itself. I recognise the restrictive nature of the *Cart* criteria which govern the application. I do not consider the first of those criteria to be met, since the requirements of section 55(3) of the 2009 Act have already been addressed in detail in earlier case-law. I consider that leave may properly be granted applying the second of those criteria however, namely that there is some other compelling reason to grant leave in this case by reason of the matters identified at paragraphs [58]-[60] above.