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Case No: CO/2197/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Friday 20th November 2020

Before:
MR JUSTICE FORDHAM

Between:
THE JOINT COUNCIL FOR THE WELFARE OF
IMMIGRANTS

Claimant

- and -

THE PRESIDENT OF THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Defendant

- and -

THE LORD CHANCELLOR

Interested
Party

Charlotte Kilroy QC, Naina Patel, Jennifer MacLeod and Rachel Jones (instructed by Freshfields
Bruckhaus Deringer LLP) for the Claimant
Richard O’Brien and Jack Holborn (instructed by Government Legal Department) for the Defendant
The Interested Party did not appear and was not represented

Hearing dates: 21st and 22nd October 2020

FINAL JUDGMENT

Covid-19 Protocol: This Judgement was handed down by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand- down will be deemed to be 10:00 am on 20/11/2020. A copy of the judgement in final form as handed down can be made available after that time, on request by email to the administrativecourtoffice.listoffice@hmcts.x.gsi.gov.uk

MR JUSTICE FORDHAM:

Part 1. Introduction

1.1 This judicial review case is about oral hearings and paper determinations in substantive appeals dealt with by the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) during the Covid-19 pandemic. The Claimant challenges as unlawful the President’s Guidance Note (PGN) (§3.8 below) issued by the Defendant pursuant to a statutory power

(§2.4(2) below) on 23 March 2020. Permission for judicial review was granted by Steyn J on two grounds (§1.2 below). She refused permission of the PGN on a number of other grounds and she refused permission for judicial review of the Pilot Practice Direction (PPD) issued by the Senior President of Tribunals (SPT) on 19 March 2020 (§3.8 below). The Lord Chancellor, initially named as a Defendant, became an Interested Party in these proceedings and made no submissions at the substantive hearing. This case involved a two-day remote hearing by *Microsoft Teams*. That was the parties' preference. They were satisfied, as was I, that this mode of hearing involved no prejudice to their interests. This was a public hearing and the open justice principle was secured: the case and its start time were published in the cause list with an email address usable by any member of the press or public who wished to observe, as many did. We eliminated the risk to any person in having to travel to or be present in a Court room. I am satisfied that the mode of hearing was necessary, appropriate and proportionate.

Grounds for Judicial Review

- 1.2 The two grounds on which permission for judicial review was granted by Steyn J, in their essence, come to this (the encapsulation is mine, based on the key sections within the grounds for judicial review):

Ground (1). *In communicating an 'overall paper norm' (a 'usual' position whereby UTIAC substantive appeals will be determined on the papers), the PGN is ultra vires because: (a) this is a 'radical' change in practice (which only the Tribunal Procedure Committee could effect); and/or (b) this is a position incompatible with common law principles (engaging the principle of legality); and/or (c) it is a position inconsistent with the policy and objects of the statutory scheme.*

Ground (2). *The PGN is contrary to common law principles – with the consequence that (i) it is erroneous in law and/or (ii) it would, if followed, lead to, permit or encourage unlawful acts – because: (a) it communicated an 'overall paper norm'; and/or (b) it stated that "the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing"; and/or (c) it stated in relation to issues of law that 'particular' rather than 'ordinary' complexity is required as a reason to convene an oral hearing; and/or (d) it made 'no mention of a number of other relevant factors, including the right to an oral hearing as an aspect of procedural fairness, the importance of participation in the process, the power of oral argument in an adversarial system, in particular the ability to respond to the points troubling the decision maker and the importance of open justice as well as the need for the highest standards of fairness in asylum and immigration appeals'.*

Grounds (1)(a)-(c) and Ground (2)(a) are answered in Parts 4-6 of this judgment. Grounds (2)(b)-(d) are answered in Part 7 read in the light of Part 6. There is a lot to explain and synthesise and I will use internal cross-references to promote easier navigability.

The Key Question, an Agreed Consequence and an Explanation

- 1.3 The following question is at the heart of this case (I answer it in Part 4):

Key Question. *Does the PGN, read objectively and as a whole, communicate to its audience of UTIAC Judges an 'overall paper norm' for determining UTIAC substantive appeals during the pandemic?*

It was common ground before me that *if* – which is hotly disputed – the answer to the Key Question is 'yes', then it would follow that the PGN is unlawful (§5.15 below). In my judgment, the Defendant is right to accept that this would be the consequence. But it

is important to identify why. I will do this in Parts 5 and 6. In my judgment, the correct explanation comes to this:

Explanation. *An overall paper norm for UTIAC substantive appeals would be inconsistent with the overriding objective – and the basic requirements of common law procedural fairness which must inform the overriding objective. That makes it unlawful for the PGN to communicate an overall paper norm, in circumstances where: (i) the PGN was describing the effect for UTIAC substantive appeals of a contingent paper norm directed by the PPD; and (ii) that contingent paper norm included a proviso which gave primacy to the overriding objective.*

This judgment therefore comes with a lexicon. I will explain “overall paper norm” (§2.13 below); “contingent norm”, “proviso” (§2.14 below) and “contingent paper norm” (§3.3 below); and why I use the word “describing” (§2.4(2) below). I will discuss the “overriding objective” (§2.6 below) and the “basic requirements of common law procedural fairness” (§2.2 below).

The Claimant, the Defendant and the SSHD

- 1.4 The Claimant is an independent national charity founded in 1967 which campaigns for justice in immigration, nationality and refugee law and policy. Evidence before this Court from its Legal Director Nicola Burgess explains, and illustrates, its long history in litigating and intervening before the domestic courts, in cases where it sees a wider public interest in doing so. The Claimant acts in this case (the clue is in the name) to protect the interests of those individuals and families involved in UTIAC substantive appeals. The Claimant’s standing to bring this claim was not contested. The Defendant is the President of UTIAC and was acting in that capacity when issuing the PGN. He is also a High Court Judge. It is common ground that the PGN is susceptible to judicial review and that the issues whose resolution will determine whether judicial review succeeds raise objective questions of law which it is for this Court to decide. Substantive UTIAC appeals involve individuals and families on the one side and the Secretary of State for the Home Department (**SSHD**) on the other. The appeal will be against a decision of the First-Tier Tribunal (**FTT**) where the FTT judge has found in favour of one side or the other. That means the SSHD also has an obvious interest in the mode of hearing adopted in UTIAC substantive appeals. I asked the parties about the SSHD’s position in these proceedings. I was told, by Counsel on both sides, that I could ‘take it that the SSHD is well aware of these proceedings’.

Part 2. Contextual Reference Points

- 2.1 Before I come on to the PPD and the PGN (Part 3) and then proceed to analyse the two grounds for judicial review (Parts 4-7), I will lay some groundwork, much of which was common ground. It involves identifying and explaining some contextual reference points which are prominent features for understanding this case. If this case is a jigsaw, then these contextual reference points are corner pieces and straight edge pieces, and those pieces are always a good place to start.

Basic Requirements of Common Law Procedural Fairness

- 2.2 As Lord Steyn explained in *R v SSHD, ex p Pierson* [1998] AC 539 at 591F: “the rule of law enforces minimum standards of fairness, both substantive and procedural”. As Lord Dyson explained in *Al Rawi v Security Service* [2011] UKSC 34 [2012] 1 AC 531 at

paragraph 22, the “parties” to proceedings have a “*fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice*”. The basic requirements of common law procedural fairness engage the principle of legality (§2.9 below). They inform the overriding objective (§2.6 below). They are at the heart of the Explanation as to the Agreed Consequence if the answer to the Key Question is ‘yes’ (§1.3 above).

Contextual Application of Common Law Procedural Fairness

2.3 The basic requirements of common law procedural fairness are flexible and contextual in their application. In *Lloyd v McMahon* [1987] AC 625, Lord Bridge expressed that point in the following way (at 702H): “*the so-called rules of natural justice are not engraved on tablets of stone... What the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates*”. As Lord Mustill put it in *R v SSHD, ex p Doody* [1994] 1 AC 531 at 560D-G: “*The standards of fairness are not immutable. They may change with the passage of time, both in ... general and in their application to decisions of a particular type... The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects... An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken*”. This passage was cited most recently in *R (Pathan) v SSHD* [2020] UKSC 41 at paragraph 55.

Statutory Functions in the 2007 Act

2.4 A series of statutory functions were conferred by Parliament in the *Tribunals, Courts and Enforcement Act 2007 (the 2007 Act)*. The following are particularly relevant to the analysis in this case.

- (1) First, there is the SPT’s statutory function of giving practice directions. By section 23(1) of the 2007 Act, Parliament empowered the Senior President to “*give directions – (a) as to the practice and procedure of the First-tier Tribunal; (b) as to the practice and procedure of the Upper Tribunal*”. Such practice directions need the Lord Chancellor’s approval (section 23(4)) unless “*they consist of guidance about ... (a) the application or interpretation of the law*” or “*(b) the making of decisions by members of the First-tier Tribunal of Upper Tribunal*”. By section 2(3), in exercising that (and any other) function, the Senior President is statutorily obliged to “*have regard to – (a) the need for tribunals to be accessible, (b) the need for proceedings before tribunals – (i) to be fair, and (ii) to be handled quickly and efficiently, (c) the need for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters, and (d) the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals*”. It is this function which was being exercised when the SPT made the PPD. As a footnote, I add that section 23 also empowers a Chamber President (acting with the Senior President’s approval) to give ‘practice directions’ for that Chamber – including ‘guidance on the application or interpretation of the law’ – but that was not the function exercised when the Defendant issued the PGN.

- (2) Secondly, there is a Chamber President’s statutory function of issuing guidance on changes in law and practice. Paragraph 7 of Schedule 4(1) to the 2007 Act provides that the Chamber President of a chamber of the FTT or UT “*is to make arrangements for the issuing of guidance on changes in the law and practice as they relate to the functions allocated to the chamber*”. It is this function which was being exercised when the Defendant issued the PGN. Two important things were common ground about this statutory function. It is common ground that the UTIAC President’s statutory function of issuing guidance pursuant to Schedule 4(1) paragraph 7 is a “*descriptive*”, and not an “*originating*”, function. This explains why I used the word “*describing*” in formulating the Key Question (§1.3 above). The function is descriptive because it takes as its starting point some change or changes in law or practice (or both) and then gives guidance “*on*” that change or those changes. It describes what the change means for cases within the jurisdiction of the Chamber. It is also common ground that Schedule 4(1) paragraph 7 guidance, issued by a Chamber President, including the PGN in this case, is in principle amenable to judicial review on grounds of (a) ultra vires (Ground (1)) and (b) ‘*Letts Unlawfulness*’ (§2.5 below) (Ground (2)).
- (3) Thirdly, there is the Tribunal Procedure Committee (TPC)’s function of making Tribunal Procedure Rules (TPRs). Section 22 of the 2007 Act confers on the TPC (s.22(2)) the function of making TPRs “*governing – (a) the practice and procedure to be followed in the First-tier Tribunal, and (b) the practice and procedure to be followed in the Upper Tribunal*” (s.22(1)). That function is statutorily required to be exercised “*with a view to securing – (a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done, (b) that the tribunal system is accessible and fair, (c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently, (d) that the rules are both simple and simply expressed, and (e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently*”. Schedule 5(1), which makes further provision about the content of TPRs (s.22(3)), provides by paragraph 7 that TPRs “*may – (a) make provision for dealing with matters without a hearing; (b) make provision as respects allowing or requiring a hearing to be in private or as respects allowing or requiring a hearing to be in public*”, and by paragraph 18 that TPRs “*may make provision in the form of presumptions (including, in particular, presumptions as to service or notification)*”. Schedule 5(3), which makes provision about the making of TPRs by the TPC (s.22(3)), provides by paragraph 28 that TPRs are to be: made with consultation; subject to Lord Chancellor approval; and laid before Parliament as a statutory instrument.

Judicial Review of Guidance for ‘Letts Unlawfulness’

- 2.5 As I have explained (§2.4(2) above), it is common ground that Schedule 4(1) paragraph 7 guidance issued by a Chamber President, including the PGN issued by the Defendant in this case, is in principle amenable to judicial review for ‘*Letts Unlawfulness*’. That is my shorthand for the principles that judicial review will lie against a guidance document which (a) “*promulgates ... advice which is erroneous in law*” (*R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin) [2015] 1 WLR 4497 at paragraph 114, discussing *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112) or (b) is

guidance which “if followed [would] (i) lead to unlawful acts (ii) permit [i.e. sanction] unlawful acts or (iii) encourage such unlawful acts” (*Letts* at paragraph 118, discussing *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 827 [2014] 1 WLR 4620 at paragraph 46). A recent discussion of ‘*Letts Unlawfulness*’ is in *R (W) v SSHD* [2020] EWHC 1299 (Admin) at paragraph 58.

The Overriding Objective

- 2.6 The “overriding objective” applicable to the Upper Tribunal is set out in Rule 2 of the *Tribunal Procedure (Upper Tribunal) Rules 2008* (SI 2008 No. 2698) (**UTPR 2008**) made by the TPC pursuant to section 22 of the 2007 Act (§2.4(3) above). Rule 2 provides:

(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly. (2) Dealing with a case fairly and justly includes – (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Upper Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues. (3) The Upper Tribunal must seek to give effect to the overriding objective when it – (a) exercises any power under these Rules; or (b) interprets any rule or practice direction. (4) Parties must – (a) help the Upper Tribunal to further the overriding objective; and (b) co-operate with the Upper Tribunal generally.

It is common ground that “fairly and justly” in the overriding objective has to be read consistently with the basic requirements of common law procedural fairness (§2.2 above). The same point was recognised in the *Ewing* case at paragraph 24 (§3.4 below). A UTIAC Judge is therefore duty-bound to seek to give effect to those basic common law requirements when exercising a power or interpreting a Rule or Practice Direction (Rule 2(3)): that includes when exercising the power under Rule 34 (or Rule 5A) (§§2.7-2.8 below); and when interpreting paragraph 4 of the PPD (**PPD4**) (§3.2 below).

UTPR 2008 Rule 34

- 2.7 Rule 34 of the UTPR 2008 was made by the TPC under Schedule 5(1) paragraph 7 (§2.4(3) above) and is headed: “*Decision with or without a hearing*”. It provides:

(1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing. (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing. (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings. (4) Paragraph (3) does not affect the power of the Upper Tribunal to— (a) strike out a party’s case, pursuant to rule 8(1)(b) or 8(2); (b) consent to withdrawal, pursuant to rule 17; (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.

Pursuant to Rule 1(3), the word “hearing” in Rule 34 “means an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication”. It therefore includes a ‘remote hearing’ (§2.16 below). It has had that meaning since the UTPR 2008 were first made in 2008. As has been seen, when the Rule 34 power is exercised the UT/UTIAC Judge is required to give effect to the overriding objective (§2.6 above). That brings in the basic

requirements of common law procedural fairness (§2.2 above), as the principle of legality would in any event require (§2.9 below).

UTPR 2008 Rule 5A

2.8 UTPR 2008 Rule 5A was introduced by the TPC by the *Tribunal Procedure (Coronavirus) (Amendment) Rules 2020* (SI 2020 No. 416) with effect from 10 April 2020. Rule 5A, headed “*Coronavirus temporary rule (decisions without a hearing)*”, provides:

(1) Notwithstanding anything in rule 34 (decision with or without a hearing), the Upper Tribunal may make a decision which disposes of proceedings without a hearing if the Upper Tribunal considers that the conditions in paragraph (2) are satisfied. (2) The conditions are – (a) the matter is urgent; (b) it is not reasonably practicable for there to be a hearing (including a hearing where the proceedings would be conducted wholly or partly as video proceedings or audio proceedings); and (c) it is in the interests of justice to do so. (3) This rule does not prejudice any power of the Upper Tribunal to make a decision which disposes of proceedings without a hearing other than under this rule.

A consequence of Rule 5A is to introduce a power to disapply Rule 34(3) (§2.7 above) so that “*immigration judicial review proceedings*” may be disposed of without holding a hearing, provided that the conditions (Rule 5A(2)) are satisfied. SI 2020 No. 416 was made on 8 April 2020 some three weeks after the SPT gave the PPD (19 March 2020) and just over two weeks after the Defendant issued the PGN (23 March 2020).

The Principle of Legality and Common Law Procedural Fairness

2.9 Alongside Lord Steyn’s recognition in *Pierson* (§2.2 above) that “*the rule of law enforces minimum standards of fairness, both substantive and procedural*” were descriptions by him and Lord Browne-Wilkinson of “*the principle of legality*” (Lord Steyn at 587H, 588F and Lord Browne-Wilkinson at 573H). The principle of legality has been prevalent in public law jurisprudence ever since *Pierson*, notably in the context of human rights. In its roots in *Pierson* was the endorsement (at 573H and 587H-588F) of *Cross, Statutory Interpretation* (1976) where Sir Rupert Cross had explained that:

Statutes ... are not enacted in a vacuum... Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules ... Long-standing principles of constitutional and administrative law are ... taken for granted, or assumed by the courts to have been taken for granted, by Parliament. Examples are the principles that ... administrative tribunals and other such bodies must act in accordance with the principles of natural justice ...

In that same passage, endorsed in *Pierson*, Sir Rupert Cross went on to speak of those “*presumptions of general application [which] not only supplement the text, they also operate at a higher level as expressions of fundamental principles ... as constitutional principles ... not easily displaced by a statutory text.*” The recognition of basic requirements of common law procedural fairness (natural justice) as engaging the principle of legality led Lord Steyn to say this (at 588E-H): “*This explanation is the intellectual justification of the often quoted proposition ... that ‘although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission’*”. Lord Steyn went on to discuss *Doody* (§2.3 above), a case whose “*premise was that Parliament must be presumed to have intended that the Home Secretary would act in conformity with the common law principle of*

procedural fairness”, adding that: “*our public law is ... replete with other instances of the common law so supplementing statutes on the basis of the principle of legality*”. This approach was applied by the Court of Appeal in *R (McNally) v Secretary of State for Education and Employment* [2001] EWCA Civ 332 [2002] ICR 15 at paragraphs 38-40. In *Al Rawi*, Lord Hope (at paragraph 72) spoke of “*fundamental principles of open justice and of fairness*” as being demanded by “*the principle of legality*”. In my judgment, the principle of legality – engaged by common law procedural fairness – gives rise to this proposition (the encapsulation is mine):

At least absent a provision of primary legislation which clearly effects or empowers an abrogation of the basic requirements of common law procedural fairness, statutory powers of public authorities are to be interpreted as being subject to the duty to secure those basic requirements, as contextually applicable.

I will illustrate what this means. There being no clear provision of primary legislation to the contrary, the TPC’s power to make a TPR allowing for determination without a hearing (2007 Act Sch 5(1) paragraph 7(a): §2.4(3) above) could not be exercised to effect or empower the abrogation of basic requirements of common law procedural fairness (any more than could the neighbouring power in paragraph 7(b) be exercised to effect or abrogate an abrogation of the ‘open justice principle’: §6.15 below); nor could the SPT’s power to make a practice direction (2007 Act s.23: §2.4(1) above) do so. The principle of legality features in the Claimant’s Ground (1)(b) (§1.2 above), but I have concluded ultimately that it is unnecessary to the analysis (§6.17 below).

UTIAC Substantive Appeals

2.10 The PGN is concerned with UTIAC substantive appeals. What that means is as follows (leaving to one side what I was told was a ‘very small number’ of ‘historic’ cases). (1) UTIAC substantive appeals are ‘protection claim’ appeals (including ‘revocation of protection’ appeals), ‘human rights claim’ appeals and ‘EEA’ appeals (to which Mr O’Brien added ‘deprivation of citizenship’ appeals). The class of UTIAC substantive appeals is predominantly ‘protection claim’ appeals (refugee and humanitarian protection cases) and ‘human rights claim’ appeals. (As will be seen in due course, this point is reflected in PGN at paragraph 16.) Protection claim (including revocation of protection) appeals and human rights claim appeals are governed by section 82 of the Nationality, Immigration and Asylum Act 2002 (as amended), the current provisions of which came into effect in 2014, all of which appeals by definition concern claims for protection or human rights or both. (2) UTIAC substantive appeals are appeals “*on any point of law*” arising out of a decision of the FTT (2007 Act s.11). (3) UTIAC substantive appeals are appeals in which permission to appeal has been given (s.11(3)), whether by the FTT or the UT (s.11(4)). (This point is reflected in the PGN at PGN10: §3.9 below). This means that the hopeless cases are intended to have been filtered out, and only properly arguable appeals on points of law remain. (4) The nature and importance of this cohort of appeals was discussed in *ILPA* (§6.12 below) at paragraphs 17-20 by Blake J. (5) An analysis by the Claimant’s representatives of data in the witness statement of Joe Tomlinson, Research Director at the Public Law Project, based on 305 finalised appeals determined by UTIAC between 23 March 2020 (when the Guidance Note was issued) and 11 September 2020, put protection claim appeals (not including revocation of protection appeals) at 50% and human rights claim appeals at 36%, together making up 86% of the UTIAC substantive appeals. Nothing provided or submitted to the Court on behalf of the

Defendant suggested that this description of proportions was unsound or unrealistic. I accept that it is properly supported by evidence and is a factually accurate picture. (6) It follows from all of this that the following description is accurate: the substantive appeals to which the PGN applies are, of their nature, cases: (a) predominantly concerning refugee protection, humanitarian protection and fundamental human rights protection; and (b) necessarily engaging a point or points of law, judicially assessed as properly arguable through the prior grant of permission to appeal.

Pre-March 2020: Oral hearings in the ‘vast majority’ of UTIAC Substantive Appeals

2.11 Everyone agrees that the practice for determination of UTIAC substantive appeals until March 2020 involved oral hearings (not paper determination pursuant to Rule 34(1)) in the majority – indeed “*the vast majority*” – of cases. Ms Kilroy QC for the Claimant submitted that there was an unchanged “*presumption reflected in the prior 40 years’ practice that statutory immigration and asylum appeals have generally been determined following an oral hearing*”. Mr O’Brien for the Defendant accepted that this was ‘the practice’ but said it was borne out of efficiency and not simply (as Ms Kilroy QC submits) procedural fairness. Surrinder Singh, the Operations Manager at Field House, made a witness statement on behalf of the Defendant in which she described the pre-March 2020 practice. In doing so, she described her understanding of an “*attitude ... supported by senior judges, including judges with whom I work*” that “*hearings are often the most time-efficient way of carrying out their tasks in a fair and well-informed way*” so that “*the most efficient, and therefore the most desirable method in the vast majority of cases, is to hold a hearing*”. The phrase “*the vast majority of cases*” is Ms Singh’s. I am satisfied, on all the evidence before me, that this description of the frequency prior to March 2020 of hearings (rather than paper determinations) is accurate.

The Post-PPD/PGN Practice: Appeals not “normally considered at a hearing”

2.12 Everyone also agrees that the practice for mode of hearing in UTIAC substantive appeals changed from March 2020, following the PPD and the PGN. Again, recognition of change of practice is reflected in Ms Singh’s witness statement. She speaks of the “*senior judges*” as having confirmed to her that “*they look forward to being able to return to the previous practice by which appeals are normally considered at a hearing*”. The description of a “*return*” reflects the fact that the current practice is that appeals are not “*normally considered at a hearing*”. The practice, as described by Ms Singh, has therefore gone from oral hearings “*in the vast majority of cases*” to appeals now not “*normally considered at a hearing*”. As I shall explain when I discuss the ‘impact evidence’ (§4.23 below) the picture is of paper determinations in two-thirds of UTIAC substantive appeals.

‘Norm’, ‘exceptional’, ‘overall norm’ and ‘overall paper norm’

2.13 I have used the phrase ‘overall paper norm’ from the start of this judgment. I use it to describe the unmistakable idea, at the heart of this case, that it is possible to describe a mode of determination of UTIAC substantive appeals which is adopted “*usually*” or “*generally*” or “*normally*”. The Claimant’s Grounds for Judicial Review claim that the PGN communicated “*a ‘usual’ ... position whereby [UTIAC substantive appeals] will be determined on the papers ...*” That would be an ‘overall paper norm’. I have quoted Ms Singh’s witness statement as describing a return to a “*practice by which appeals are normally considered at a hearing*”. That would be an ‘overall hearing norm’. In this

judgment I will adopt the following language. (1) By ‘norm’ I mean a mode of determination which is being recognised as a mode to be “usually” or “normally” or “generally” adopted. (2) By ‘exceptional’ I mean a mode which is not the ‘norm’. So, taking Ms Singh’s description of return to a “*practice by which appeals are normally considered at a hearing*”: in that situation paper determination would be ‘exceptional’ (not the ‘norm’). (3) By ‘overall norm’ I mean a ‘norm’ across the entirety of the range of relevant cases. Here, that means UTIAC substantive appeals. (4) By ‘overall paper norm’ I mean a ‘norm’ – across the entirety of UTIAC substantive appeals – where determination on the papers is what “usually” (or “generally” or “normally” happens), and where oral hearings are “exceptional”.

- 2.14 To be able to speak of a ‘norm’, and of an ‘overall norm’ is important. That is because a ‘norm’ (and ‘exceptional’) are ideas which can apply to a sub-category of cases. Let me illustrate these ideas and this language by taking an everyday example: a lunchtime walk. It might be my ‘norm’ to go for a lunchtime walk at weekends, but that would not make it an ‘overall norm’ (it is applying only at weekends, not across the whole week). It might be my ‘norm’ to go for a lunchtime walk whenever it is not raining (a ‘contingent norm’, with a ‘proviso’: a ‘norm’ applicable provided that it is not raining): that would only be an ‘overall norm’ if it is not usually raining at lunchtime. Other language has been used in this case to describe what I am calling a ‘norm’ (what “normally” happens): notably the phrase “*default position*” and the word “*presumption*”. I will use ‘norm’, as a single term for consistency and clarity. It is important to say this: a description of alternatives may involve the communication of no ‘norm’ at all. It may be entirely neutral. An example of this is seen in *Ewing* at paragraph 23 (§3.4 below).

The Covid-19 Pandemic

- 2.15 The pandemic features in the first sentence of this judgment. In discussing the PPD (§3.1 below), Steyn J (giving judgment in this case at the permission stage) said this of “*the Covid-19 pandemic*”:

This health crisis, which is unprecedented in modern times, is the key background to the making of the [PPD]. The [PPD] has been given – for a 6-month period – to assist tribunals in adjusting their ways of working during the pandemic, with the aims of limiting the spread of Covid-19 and managing the tribunals’ workloads appropriately. The Covid-19 pandemic is, inevitably, a significant factor in case-management decisions. Considerations as to how to protect the health of litigants, other members of the public and judges while continuing to administer justice have an impact on the outcomes that result from applying the existing procedural rules.

As Ms Burgess’s witness statement on behalf of the Claimant puts it, referring to the issuing of the PGN:

... the Defendant was faced with the unenviable task of maintaining the good administration of justice whilst protecting appellants, respondents, court staff, the judiciary and representatives in the very difficult times of the pandemic.

Oral Hearings can be Remote Hearings

- 2.16 ‘Hearing’ does not necessarily mean ‘in-person’ (face-to-face) hearing. As I have explained (§2.7 above), “*hearing*” in the UTPR 2008 has, since 2008, included a remote hearing (where consistent with the overriding objective and basic requirements of common law procedural fairness). Both the PPD (§3.1 below) and the PGN (§3.10 below)

describe in detail ‘remote hearings’ as being available during the pandemic. Ms Singh has described “*senior judges ... who look forward to being able to return to the previous practice by which appeals are normally considered at a hearing*”. That “*previous practice*” was ‘in-person’ hearings. But nobody in this case has suggested that UTIAC Judges could not – or should not – have been using remote hearings as (dare I say it) a ‘new normal’ during the pandemic, if that is what the overriding objective and basic requirements of common law procedural fairness required.

Part 3. The PPD and PGN

The PPD

3.1 The SPT issued the PPD on 19 March 2020, pursuant to section 23 of the 2007 Act (§2.4(1) above), with the approval of the Lord Chancellor. It was issued on a pilot basis for a period of six months, subject to review. In due course it was extended for a further six months to 18 March 2021. I will set it out in full:

PILOT PRACTICE DIRECTION: CONTINGENCY ARRANGEMENTS IN THE FIRST-TIER TRIBUNAL AND THE UPPER TRIBUNAL

Background

1. *During the Covid-19 pandemic, it may be necessary for tribunals to adjust their ways of working to limit the spread of the virus and manage their workloads appropriately. I have therefore decided to issue this Practice Direction on a pilot basis for a period of six months, although it may be reviewed within that period should it become inappropriate or unnecessary and may be revoked at any time.*
2. *The Lord Chancellor has approved the issue of this Practice Direction in accordance with s23 Tribunals, Courts and Enforcement Act 2007.*

Scope

3. *This Practice Direction applies to all appeals and applications in the First-tier Tribunal and the Upper Tribunal, save for paragraphs 10 and 11 which apply solely to the First-tier Tribunal Property Chamber.*

Decisions on the papers without a hearing

4. *Where a Chamber’s procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties’ ECHR rights and the Chamber’s procedure rules about notice and consent.*

Triage

5. *In many tribunal jurisdictions, a hearing is required unless the parties consent to a determination on the papers. To deal more efficiently with cases in which a successful outcome for the applicant or appellant is highly likely, Chamber Presidents may decide to follow the following scheme to ‘triage’ appeals and applications for some or all of their jurisdictions where paper determinations are possible with the parties’ consent:*
 - (a) *Where the parties have not already consented to a determination without a hearing, the tribunal may assess a case on the papers.*
 - (b) *If the tribunal considers it could decide the matter without a hearing, it will provide a provisional decision to the parties.*
 - (c) *The parties will then be asked whether they consent to the tribunal making a binding decision on the papers that is in the same terms as the provisional decision.*
 - (d) *If one or both of the parties confirm that they require a hearing, a hearing will be listed (which may be conducted remotely).*
 - (e) *If the parties consent to a paper determination (or do not object, if there is a provision in the Chamber’s rules that allows for non-objection), the tribunal will issue a final decision in the same form as the provisional decision, unless:*
 - (i) *it considers that it made an error in relation to the provisional decision; or*
 - (ii) *the circumstances have materially changed since the provisional decision was made.*

- (f) *If paragraph 5.(e)(i) or (ii) above applies, the tribunal shall either provide the parties with a revised provisional decision and follow paragraph 5.(c) onwards in respect of the new provisional decision, or list a hearing. In either case, the tribunal will explain to the parties why it decided not to issue the first provisional decision.*

Hearings

Paragraphs 6-9 apply where a tribunal decides in a particular case that a hearing is necessary.

Remote hearings

6. *Where it is reasonably practicable and in accordance with the overriding objective to hear the case remotely (that is in any way that is not face-to-face, but which complies with the definition of ‘hearing’ in the relevant Chamber’s procedure rules), it should be heard remotely.*
7. *For the avoidance of doubt, where a tribunal decides that a hearing will take place remotely, references in the Chamber’s procedure rules to a ‘hearing’ will apply to that remote hearing and references in the Chamber’s procedure rules to a party’s entitlement to attend a hearing shall be such participation as may be directed.*

Hearings in a party’s absence

8. *Where a party fails to attend a hearing without an application made in advance to adjourn or postpone the hearing, and the relevant Chamber’s procedure rules allow the tribunal to continue with the proceedings in the party’s absence, the hearing may proceed on that basis provided this is in accordance with the overriding objective.*
9. *Where a party fails to attend a hearing without an application made in advance to adjourn or postpone it, a request by that party to set aside a decision made in their absence will not usually be granted if the decision fully upholds or allows their appeal or application.*

Inspections

10. *Inspections of properties and land under the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 are suspended with immediate effect. To mitigate the impact of the suspension, the Tribunal may consider the following:*
- (a) *Parties may be permitted to produce photographs and/or videos of the condition or other relevant aspects of the property or land;*
- (b) *External “drive by” inspections by Tribunals may be permitted in appropriate cases;*
11. *If an inspection is essential to deal with the case fairly and justly and in accordance with the overriding objective then the case should be stayed pending the amendment or withdrawal of this Practice Direction.*

General

12. *Insofar as compatible with the efficient administration of justice, the tribunals will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions and the postponement of hearings.*

PPD4

- 3.2 The central provision within the PPD for the purposes of this case is PPD paragraph 4 (**PPD4**), headed: “*Decisions on the papers without a hearing*”. It applies (see PPD3) to “*all appeals and applications in the First-tier Tribunal and the Upper Tribunal*”, including UITAC. It constitutes a “*direction[] – ... as to the practice and procedure of the Upper Tribunal*” (2007 Act section 23(1)(b): §2.4(1) above). PPD4 is worth setting out again:

Decisions on the papers without a hearing. *Where a Chamber’s procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties’ ECHR rights and the Chamber’s procedure rules about notice and consent.*

PPD4: Interpretation

- 3.3 PPD4 has a premise, a principle and a proviso. The premise is: “*Where a Chamber’s procedure rules allow decisions to be made without a hearing*”. That premise applies to

UTIAC substantive appeals because of Rule 34 of the UTPR 2008 (§2.7 above). The principle (reversing the language so it makes sense) is: “*decisions should usually be made ... without a hearing*”. That is a ‘paper norm’. The proviso is: “... *provided this is in accordance with the overriding objective, the parties’ ECHR rights and the Chamber’s procedure rules about notice and consent*”. Because there is a proviso, the ‘paper norm’ in PPD4 is a ‘contingent paper norm’ (§2.14 above). PPD4 is not the only ‘contingent norm’ in the PPD: PPD6 communicates remote hearings as a contingent norm for hearings.

- 3.4 The proviso in PPD4 secures (inter alia) the overriding objective (§2.6 above) which, in turn, secures basic standards of common law procedural fairness (meaning the principle of legality does not need to be invoked). The meaning and structure of PPD4, with its contingent paper norm, and with the primacy of its proviso, can be illustrated by using the language of PPD4 but putting the proviso first: ‘*In those cases where it is in accordance with the overriding objective, the parties’ ECHR rights and the Chamber’s procedure rules about notice and consent for decisions to be made without a hearing, decisions should usually be made without a hearing*’. PPD4 is directing a ‘paper norm’ but it is not *per se* (by its language or design) directing an ‘overall paper norm’ (§2.13 above). That is because: (a) there is the clear and express proviso; (b) the paper norm applies only in the space unoccupied by the proviso; and (c) the proviso is to occupy whatever space (big or small) as is necessitated by its application in accordance with its terms. As Steyn J put it:

[PPD4] does not create a presumption, per se, that decisions should usually be made without a hearing. Rather, it provides that if it is in accordance with the Chamber’s procedure rules, the overriding objective and the parties’ ECHR rights to make a determination without a hearing, then that is the procedure that should usually be followed. It is effectively directing tribunals to consider the powers they have to determine matters without a hearing, and to use those powers if it is lawful, fair and just to do so.

There was a helpful reference point in the authorities cited to me. In *R (Ewing) v Department of Constitutional Affairs* [2006] EWHC 504 (Admin) [2006] 2 All ER 993 this Court considered an amended Practice Direction regarding applications by ‘Vexatious Litigants’ for leave to commence proceedings. Counsel for the DCA had argued that the structure of the Practice Direction communicated “*the presumption ... that applications ... will be decided without a hearing*” (paragraph 22). Sullivan J explained that “*the practice direction does not contain any presumption either way*” (paragraph 23). Sullivan J referred to the effect of the overriding objective (and basic requirements of common law procedural fairness), which meant: “*judges, in exercising their discretion ... should be guided by the overriding objective ... and direct a hearing, if one is required, in order to deal justly with the application; or, to use the language of natural justice, if they consider that fairness requires a hearing*” (paragraph 24).

- 3.5 This brings into focus an important truth regarding the interpretation of PPD4: as a matter of interpretation, PPD4 (at ‘source’) does not mean an ‘overall paper norm’. Put another way, as a matter of interpretation, the proviso is not an ‘exceptionality proviso’. That means it would be wrong in law to say: ‘*What PPD4 means, as correctly interpreted, is that during the pandemic decisions on appeals should usually be made without a hearing.*’

PPD4: Application – An overall paper norm?

- 3.6 I have explained that PPD4 could not lawfully be interpreted as communicating an overall paper norm. But what about application? Here, there is another important truth: as a matter of application (on ‘reception’) PPD4 might or might not have the effect, within the work of a tribunal Chamber, of producing an overall paper norm. It could be correct in law to say : “*What PPD4 means, as correctly applied to the work of this Chamber, is that during the pandemic, decisions on appeals should usually be made without a hearing*”. That message could be communicated, and it could be legally accurate guidance. Whether such a communication were correct in law would depend on whether an analysis of the contextual application of the proviso (including the overriding objective, securing basic requirements of common law procedural fairness to the work of the Chamber).

PPD4 is lawful

- 3.7 The arguments proceed on the basis that PPN4 is sound in law. It is not open to the Claimant to suggest otherwise: Steyn J refused permission for judicial review of PPD4. What the SPT did in PPN4 was to promote paper determination, during the pandemic, wherever it is consistent with the overriding objective, the Human Rights Act 1998 (ECHR rights), basic requirements of common law procedural fairness, the natural justice principle, the open justice principle, and the principle of legality. That course promoted the use of a power to decide cases on papers, but only where it was fair to do so. It meant no unfair paper determinations. That was promoting the effective and ongoing operation of the machinery of justice, during an international pandemic, using resources in a proportionate way. It was fully consistent with the statutory duties applicable to the SPT when exercising statutory functions, including the function of making a practice direction. The SPT was communicating a change in practice (a new, contingent norm) in the exercise of an originating function (§2.4(1) above), not a descriptive one (§2.4(2)).

The PGN

- 3.8 The Defendant issued the PGN for UTIAC on 23 March 2020, pursuant to Schedule 4 paragraph 7 of the 2007 Act (§2.4(2) above). Like the PPD, it was issued on a pilot basis for a period of six months, subject to review, and was in due course extended for a further 6 months to 18 March 2021. The Claimant’s claim for judicial review concerns paragraphs 9 to 17 of the PGN. I am going to set out the PGN in full, remembering that one of the Defendant’s core submissions in this case – which I accept – is that it is necessary and appropriate to read the PGN as a whole.
- 3.9 For presentational purposes, I will first set out paragraphs 1-17 (PGN1-PGN17) (Sections A-D). They are undoubtedly the primary focus for the submissions:

***PRESIDENTIAL GUIDANCE NOTE No.1 2020:
ARRANGEMENTS DURING THE COVID-19 PANDEMIC***

A. INTRODUCTION

1. ***On 19 March 2020, the Lord Chancellor approved the Practice Direction made by the Senior President of Tribunals: Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal. The Practice Direction states that, during the Covid-19 pandemic, it may be necessary for tribunals to adjust their ways of working to limit the spread of the virus and to work appropriately. The Practice Direction is to be in force for 6 months from 19 March 2020, although it may be reviewed within that period should it become inappropriate or unnecessary and may be revoked at any time. The Practice Direction can be found here [link given]:***

2. *This Guidance is issued pursuant to the Practice Direction. It will last as long as the Practice Direction is in force.*
3. *On 19 and 20 March 2020, the UTIAC informed parties of the postponement of hearings of cases that had been the subject of hearing notices, beginning on 23 March. This Guidance explains what will happen with regard to those cases and to the other cases which are before the UTIAC or which may come before it during the pandemic.*

B. THE OVERRIDING OBJECTIVE

4. *Both the Practice Direction and this Guidance are intended to enable the UTIAC to give effect to the overriding objective during the Covid-19 pandemic. For our purposes, the overriding objective is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the UT Rules”). The overriding objective is “to enable the Upper Tribunal to deal with cases fairly and justly”.*
5. *Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.*
6. *Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally. This duty is particularly significant at this time.*

C. DECISIONS WITHOUT A HEARING

7. *Paragraph 4 of the Practice Direction reads as follows:*
*“**Decisions on the papers without a hearing***
4. Where a Chamber’s procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties’ ECHR rights and the Chamber’s procedure rules about notice and consent.”
8. *Rule 34 provides:*
“34. – (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
(2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
(3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
(4) [Enables the UTIAC to do various things without a hearing in immigration judicial review proceedings, including deciding paper applications under rule 30].”

D. MAKING CERTAIN APPEAL DECISIONS WITHOUT A HEARING

9. *Rule 34 gives the UTIAC power to make decisions in appeals without a hearing. Provided it has regard to any view of a party or parties, the UTIAC may do so without the parties’ consent. Paragraph 4 of the Practice Direction provides that, during the pandemic, decisions should usually be made in this way.*
10. *In view of this, a UTIAC judge will examine, on the papers, any case where permission has been granted to appeal against a decision of the First-tier Tribunal, and where a hearing has not yet taken place in UTIAC. This will happen, irrespective of whether an adjournment of the hearing has been sought.*
11. *The judge will consider whether, in all the circumstances known to the judge, his or her provisional view is that it would be appropriate for UTIAC to decide the following questions without a hearing:*
 - (a) *whether the making of the First-tier Tribunal’s decision involved the making of an error on a point of law; and, if so*
 - (b) *whether the First-tier Tribunal’s decision should be set aside [fn. Section 12(1) and (2)(a) of the Tribunals, Courts and Enforcement Act 2007].*
12. *Where the judge reaches that provisional view, he or she will give directions to the parties, including a direction to the party who has been given permission to appeal to make further submissions on the error of law and set aside issues; a direction for the other party to file and*

- serve any submissions in response; and (where there is such a response), directions to the appellant to file and serve a reply.
13. The process just described will include a direction to enable the parties, within a stated time, to express their respective views, if any, on whether there should be a hearing to decide the questions in paragraph 11(a) and (b) above, giving reasons for any such views. The judge will have regard to any such views, pursuant to rule 34(2).
 14. In formulating the process, the UTIAC is drawing on its expertise since 2010 in making error of law decisions and decisions on whether, in the light of finding an error of law, the First-tier Tribunal's decision should be set aside. It is unusual for the questions in paragraph 11(a) and (b) above to require oral evidence and/or findings of fact by UTIAC; but, if that is the position, the judge may decide a hearing is necessary. The presence of particularly complex or novel/important issues of law may also be such as to necessitate a hearing.
 15. The judge can also be expected to have regard to whether a party is unrepresented, in deciding whether a hearing is necessary to decide the questions in paragraph 11(a) and (b). It is important to appreciate that the fact a party is unrepresented will not necessarily lead the judge to conclude a hearing is necessary. On the contrary, a person with no or limited English language ability may find it easier to make their submissions in writing, with the assistance of a relative, friend or other third party, rather than to address the UTIAC orally, through an interpreter, on what are legal issues. Here, as elsewhere, the judge will have regard to all relevant circumstances.
 16. In deciding whether it is necessary to hold a hearing, the judge can be expected to have regard to paragraph 4 of the Practice Direction and rule 2 of the UT Rules. The fact that the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing to decide the relevant questions. Almost all appeals in the immigration jurisdiction are important to the individuals affected; and to the Secretary of State, in the discharge of her statutory responsibilities. In particular, human rights and protection appeals necessarily involve the prospect of an individual being removed from the United Kingdom.
 17. It is important to emphasise the limited scope of the process described in this Part of the Guidance. It is confined to whether the First-tier Tribunal's decision should stand. If the decision reached is that the First-tier Tribunal's decision should be set aside, the UTIAC will then need to determine whether to remit the case to the First-tier Tribunal or re-make the decision. [fn. Section 12(2)(b)(i) and (ii)] In reaching its determination on that issue, the UTIAC will require the parties' submissions, if it does not already have them. If the outcome is that the appeal should be re-made in the UTIAC, then, again, the parties can expect further directions. In the event that oral evidence needs to be given and findings of fact made, in order to re-make, the UTIAC is more likely to proceed by way of a hearing; but where some or all of this evidence is uncontroversial, UT rule 15(1)(e), permitting evidence to be given by witness statement, may be of assistance.

3.10 The remainder of the PGN is paragraphs 18 to 37 (PGN18-PGN37) (Sections E-H). It provides as follows:

E. REMOTE HEARINGS

18. Paragraph 6 of the Practice Direction applies where a tribunal decides in a particular case that a hearing is necessary. Paragraph 6 reads as follows:

“Remote hearings

6. Where it is reasonably practicable and in accordance with the overriding objective to hear the case remotely (that is in any way that is not face-to-face, but which complies with the definition of ‘hearing’ in the relevant Chamber’s procedure rules), it should be heard remotely.”

19. ***If a hearing is necessary, the “default” option during the pandemic is, therefore, that the hearing should be conducted remotely. Rule 1 of the UT Rules defines a “hearing” as “an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication”. There is, accordingly, no question that a remote hearing is a hearing for the purposes of the UT Rules, including rule 34 (see above) and rule 40(1A), which states that, in immigration judicial review proceedings, a decision which disposes of proceedings shall be given at a hearing.***

Form of remote hearing

20. *A remote hearing may involve a live audio link or a live video link. A live audio link will usually be by telephone (probably BT conference call; but might be BTMeetMe). A live video link might involve a video link from a courtroom that has fixed “kit” for the purpose to a barristers’ chambers/presenting officers’ premises; although three-way video links are likely to be impracticable. For three-way (or more) video links, Skype for Business may be available.*
21. *Whichever form of remote hearing is used, the principle of open justice must continue to be respected. Unless the circumstances are exceptional or there is a reason why, in any event, regardless of whether the hearing is a remote hearing, it should be held in private, pursuant to a direction under rule 37(2), the remote hearing will be in public. In order to achieve this, the UTIAC will, wherever practicable, make the audio or video link through a courtroom at Field House, or other centre where the UTIAC sits, so that any member of the public who wishes to do so can attend to hear or see/hear the proceedings. That is, of course, subject to the courtroom being open for the purpose. Where no relevant courtroom is open, owing to the pandemic, the UTIAC can be expected to proceed in accordance with such procedures as may be enacted by Parliament for the purpose [fn. See Coronavirus Bill, Schedule 24 (Public participation in proceedings conducted by video or audio), paragraph 2, inserting new ss.29ZA to 29ZD in Tribunals, Courts and Enforcement Act 2007]; or – exceptionally – by making a direction under rule 37(2) for the hearing to be private in the interests of securing the proper administration of justice.*
22. *Where a judge (or UTIAC Lawyer exercising delegated judicial functions) considers that a remote hearing is necessary and feasible, the UTIAC will inform the parties of that fact and of the intended means of delivering the remote hearing. This will either be in the notice of hearing or in a separate communication. Each of the parties will be directed to respond by email, copied to the other party/parties, giving the details required in the direction in order to participate in the remote hearing by the intended means. Any objection to the intended means of delivering the remote hearing, or to the use of any form of remote hearing, must give reasons. These will be considered by a judge or UTIAC Lawyer under delegated judicial functions. The parties will be informed of the UTIAC’s decision.*

Documents

23. *Documents which a party intends to rely on at a remote hearing must, if practicable, still be filed by sending by post to the UTIAC, in advance of the hearing, and served by post on the other party. In all cases of remote hearings, however, the documents must in any event be filed and served electronically, in advance of the hearing.*
24. *Because of this requirement for electronic filing and service, it is important that the documentation to be relied upon at a remote hearing is confined what is essential. Where case law is relied upon, the bundle should contain a list of the cases concerned, with citations, rather than the text of the judgments; provided the cases are publicly accessible online. Where other documents are publicly accessible online, only the parts relied on should be included in the bundle, together with a reference to the online site at which the full document can be found.*
25. *The reason for requiring only what is essential is that large electronic files can be slow to transmit and unwieldy to use. Attachments to an email must not, in total, exceed 15 MB, otherwise the email will not be delivered. For this reason, several separate emails may be necessary, in order to deliver the complete bundle electronically.*
26. *If practicable, electronic bundles should be indexed and paginated. They must be prepared in .pdf, .doc, .docx or other format readily capable of being opened and read on computers using Microsoft Windows operating systems.*

The remote hearing itself

27. *Unlike face to face hearings, remote hearings in the UTIAC listed for a particular day will be listed at different times, rather than all at 10am. The UTIAC staff member assigned to facilitate the remote hearing will establish contact with the parties approximately 10 minutes before the scheduled time of the remote hearing. The parties must, accordingly, make themselves ready and available in advance. If the judge is to conduct the remote hearing from a courtroom, the judge will enter at the appointed time and conduct the hearing. If the judge is participating remotely, he or she will be invited to join by the staff member, once the parties are logged in.*
28. *Wherever practicable, the UTIAC will record the proceedings electronically. If in a courtroom with DARTS facilities, that will be used and/or a recording facility on the telephone system or Skype etc. The parties shall not make an audio and/or visual recording of the proceedings without the judge’s express permission.*

Oral evidence

29. *In an appeal to the UTIAC, it may be necessary to hear oral evidence to make findings of fact; in particular, in order to re-make the decision under section 12(2)(b)(ii) of the TCEA 2007: see paragraph 17 above. If so, a remote hearing may still be appropriate, depending upon the nature and extent of the evidence and of the findings that may need to be made on it.*
30. *If it is decided that, in a case where a hearing is necessary in order to make a particular decision, there is a particular reason why a remote hearing would not be appropriate, the parties will be so informed. In such a situation, arrangements will be made for the case to proceed by means of a face to face hearing in court, with appropriate precautions to prevent the transmission of Covid-19. Where no such precautions are practicable, the case will be adjourned; but the position will be reviewed from time to time, as may be necessary.*

Other

31. *It is quite possible that the above requirements will be modified or supplemented, in the light of experience. Here, as elsewhere, the parties are reminded of their obligation under rule 2(4) to cooperate with the UTIAC (see paragraph 6 above). In each case, the parties will, in any event, be given directions that explain what is needed in advance of the remote hearing.*

F. INTERPRETERS

32. *The Big Word, which supplies interpreters for hearings in UTIAC, has confirmed it has interpreters available, who are able to provide interpretation services via conference calls to connect with the UTIAC. In the event that an interpreter is needed for a remote hearing, the parties can, therefore, expect the UTIAC to make appropriate arrangements.*

G. JUDICIAL REVIEW

33. *Beginning on 23 March 2020, applications to the UTIAC for judicial review that require urgent or immediate consideration (using or including form T 483 or T 484), must be filed by email to [address]. This applies where the applicant is represented; or where the applicant is unrepresented and not in immigration detention or at a removal centre. Details can be found here: [link]. This applies to the whole of England and Wales. There is no change to the existing arrangements for urgent/immediate applications, where the applicant is unrepresented and in immigration detention or at a removal centre. There is also no change to the previous arrangements, whereby applications made after 4pm on working days and at any time on a non-working day (weekends and bank holidays) must be made using the out of hours court service.*
34. *If an application for urgent or immediate consideration has been refused by UTIAC without a hearing, the applicant can ask for the matter to be reconsidered at a hearing. During the pandemic, this hearing will take place by telephone with a judge.*
35. *Applications to UTIAC for judicial review, which do not require urgent or immediate consideration may continue to be filed by post (or by hand, if circumstances permit and the relevant office is open).*
36. *UT rule 40(1A) provides that, in immigration judicial review proceedings, a decision that disposes of proceedings shall be given by the UTIAC at a hearing (subject the exceptions listed in rule 40(1B)). As explained in paragraph 19 above, this requirement may be satisfied by the use of a remote hearing. If, in a particular case, a remote hearing is not appropriate, paragraph 30 above applies.*

H. FINAL MATTERS

37. *It needs to be appreciated that unfolding events during the pandemic may affect the extent to which UTIAC can operate by reference to this Guidance. In any event, the need to adopt new ways of working may well lead to challenges on the ground, which will need to be approached sympathetically by parties and the UTIAC alike.*

Part 4. Does the PGN communicate an ‘overall paper norm’?*Answering the Key Question*

- 4.1 At the outset of this judgment, I identified the Key Question (§1.3 above). It lies at the heart of the Claimant’s Grounds (1)(a), (b) and (c) and Ground 2(a) (§1.2 above). Ms Kilroy QC for the Claimant submitted that (i) the PGN communicates an overall paper

norm, and (ii) if that is right then in consequence the PGN is unlawful. Mr O'Brien for the Defendant disputes (i), but he accepts (ii) (§5.15 below). In my judgment, the answer to the Key Question is "yes": the PGN does communicate an overall paper norm. In this Part of the judgment I will explain why I have reached that conclusion. I described the Explanation at the outset (§1.3 above).

The Approach to Interpreting the PGN

- 4.2 There was no material dispute between the parties about the approach which this Court should take to interpreting the PGN. It comes to this. The PGN is to be read and interpreted objectively and straightforwardly, as a whole, in the light of its function and purpose, and having always in mind that it was directed in its application to an audience of UTIAC Judges. I adopt that approach.

The Importance of PGN Sections A-C

- 4.3 Sections A-C are important. Mr O'Brien's submissions rightly emphasised that, before the PGN ever arrives at the 'operative' Section D on "*making certain appeal decisions without a hearing*", the PGN sets out in very clear terms the key aspects of the context, in Sections A-C. Section A (Introduction) describes the pandemic and the PPD (PGN1); it says that the PGN is pursuant to the PPD (PGN2); and it then identifies the cases in relation to which the PGN is explaining what will happen (PGN3). The PGN puts, up front and central, and as a self-standing section (Section B): "*the overriding objective*". It reminds UTIAC Judges what the overriding objective is (PGN4), what it includes (PGN5), and what duties the parties have in relation to it (PGN6). The PGN explains (PGN4) how central the overriding objective (dealing with cases "*fairly and justly*") is: it says the PPD and the PGN are "*intended to enable the UTIAC to give effect to the overriding objective*" during the pandemic. The point is later reinforced (PGN16: "*In deciding whether it is necessary to hold a hearing, the judge can be expected to have regard to paragraph 4 of the Practice Direction and rule 2 of the UT Rules*"). Mr O'Brien emphasises that the PGN sets out – in terms – and under another self-standing section (Section C) "*decisions without a hearing*" – the two key provisions. First, there is PPD4, quoted in full (PGN7). Next, there is Rule 34, quoted in full (PGN8). Nobody – least of all a switched-on UTIAC Judge – could miss the proviso within PGD4, says Mr O'Brien, because there it is set out within PGN7. Nor could they miss the link to the overriding objective within the proviso (PGN7), or its central significance (Section B: PGN4 to PGN6). I accept all of this.

Section D is the Operative Section on Hearings and Paper Determination

- 4.4 Having said all of this, there is no mistaking that it is Section D ("*Making Certain Appeal Decisions Without a Hearing*") which contains the 'operative' paragraphs, so far as concerns guidance on UTIAC Judges 'deciding cases without a hearing' pursuant to Rule 34 and PPD4. Mr O'Brien accepts that. So – it is Section D which delivers, so far as PPD4 and Rule 34 are concerned, the function which was seen in PGN3: "*This Guidance explains what will happen with regard to ... the cases ... which are before the UTIAC ... during the pandemic*". It is important, moreover, to recall that this is in the nature of "*guidance on changes in the law and practice as they relate to the functions allocated to the chamber*", under the statutory function being exercised by the Defendant (§2.4(2))

above). The ‘operative section’ (Section C) is where the audience of UTIAC Judges can expect to find the guidance on what PPD4 means for us.

PGN9: ‘decisions should usually made in this way’

4.5 The first paragraph within the ‘operative’ section on “*making certain appeal decisions without a hearing*” (section D), is PGN9. As has been seen, it tells UTIAC Judges this:

Rule 34 gives the UTIAC power to make decisions in appeals without a hearing. Provided it has regard to any view of a party or parties, the UTIAC may do so without the parties’ consent. Paragraph 4 of the Practice Direction provides that, during the pandemic, decisions should usually be made in this way.

There is no getting away from the final sentence of PGN9. The message of that sentence is straightforward. It is saying, by reference to PPD4, this: during the pandemic, decisions in UTIAC substantive appeals should usually be made without a hearing, pursuant to Rule 34. Those are the words used.

PGN9 is ‘correct’ and ‘nobody has lost sight of’ the proviso (overriding objective)

4.6 Mr O’Brien’s primary answer to PGN9 was to submit – and to maintain – that the last sentence of PGN9 is “*correct*”, emphasising that “*nobody can have lost sight of*” the proviso to PPD4 (set out in full earlier on the same page at PGN7) and the overriding objective (with its own prominent section: Section B). On this basis, Mr O’Brien submits that PGN9 does not communicate an overall paper norm. I cannot accept that conclusion.

- (1) A first problem is a very straightforward one. What the words convey is that, during the pandemic, decisions should usually be made without a hearing.
- (2) A second problem is that this is explained as derived from PPD4 (as being what PPD4 “*provides*”). Mr O’Brien does not say – as he might have done – that PGN9 is ‘obviously wrong’ because it ‘omits the all-important proviso’; but there is no harm done because any UTIAC Judge reading it would ‘spot the obvious error’. Rather, Mr O’Brien says the final sentence of PGN9 is “*correct*”, in a world where “*nobody has lost sight of*” the proviso to PPD4. In my judgment, that is illuminating. There is a basis on which the last sentence of PGN9 would be read as “*correct*”, in circumstances where “*nobody has lost sight of*” the proviso. That is where the PGN is read and understood as communicating guidance on a change in the law and practice, which tells UTIAC Judges what PPD4 means for the work of UTIAC during the pandemic: decisions should usually be made without a hearing. Whether that was based on interpretation (§3.5 above) (in the event, an incorrect interpretation, like that of DCA’s Counsel in *Ewing*: §3.4 above), or on application (§3.6 above) (where correctness depends on whether legal analysis supports the position), it could indeed be received as “*correct*”, where “*nobody has lost sight of the proviso*”. PGN9 is telling UTIAC Judges what PPD4 means for us.

PGN9 is ‘just a preamble’

4.7 Mr O’Brien had a second answer to PGN9. He submitted that PGN9 was in the nature of a ‘preamble’: it referred to Rule 34 and PPD4, but it was communicating no operative guidance at all, and the reader would understand that. That would mean the reader would

pass over PGN9 ‘none the wiser’ and would proceed for the guidance (as to “*what will happen*”: PGN3) to the ‘operative’ paragraphs found later in Section D. I cannot accept that characterisation of PGN9. This is the first paragraph of the operative section. The two preceding paragraphs (in Section C) have described the very same provisions: Rule 34 and PPD4. Why have another restatement here? Why simply re-reference them, with no message about what they mean for UTIAC substantive appeals? The message, straightforwardly, is in the last sentence of PGN9. As it happens, the fact that PGN9 is an operative paragraph which communicates guidance also makes best sense of the opening words of PGN10 (“*In view of this ...*”). It also means PGN9 is a guidance paragraph in relation to the provisions set out at PGN7-8, just as – later on – PGN19 (with its “*‘default’ option during the pandemic*” and “*therefore*”) is a guidance paragraph in relation to the provision set out at PGN18. I cannot accept that PGN9 is to be interpreted as ‘just a preamble’ which leaves the reader ‘none the wiser’.

What the rest of Section D communicates

- 4.8 PGN9 is, of course, only the start of Section D. Mr O’Brien emphasises, rightly, that Section D must be read as a whole. It is important to see what is communicated in the paragraphs which follow PGN9. As can be seen, PGN10-PGN13 and the first sentence of PGN14 are describing the ‘process’ – including what was called at the hearing a ‘minded-to decision’ by the UTIAC Judge, prior to hearing representations so as to satisfy Rule 34(2). That section also explains that the guidance is focusing on the first two questions arising on a UTIAC substantive appeal (PGN11): (a) whether the FTT made an error on a point of law; and (b) whether the FTT’s decision should be set aside. That point is repeated at PGN17 and excludes the consequential remedial questions: (c) whether to remit and, if not; (d) retaking the decision. PGN15 discusses cases where there is an unrepresented party, stating that this “*will not necessarily lead the judge to conclude a hearing is necessary*”. PGN16 contains the statement that: “*In deciding whether it is necessary to hold a hearing, the judge can be expected to have regard to paragraph 4 of the Practice Direction and rule 2 of the UT Rules.*” That leaves PGN14 and PGN16-17, on which the further submissions focused.

PGN14, 16-17: Fact, Law and Importance

- 4.9 Those paragraphs give guidance in relation to three aspects of substantive UTIAC appeals: (i) fact; (ii) law; and (iii) importance. As to (i), this is the guidance in PGN Section D as regards fact (from PGN14 read with PGN11):

... It is unusual for the questions [whether the making of the First-tier Tribunal’s decision involved the making of an error on a point of law; and, if so whether the First-tier Tribunal’s decision should be set aside] to require oral evidence and/or findings of fact by UTIAC; but, if that is the position, the judge may decide a hearing is necessary...

Then at PGN17:

... If the outcome is that the appeal should be re-made in the UTIAC, then ... the parties can expect further directions. In the event that oral evidence needs to be given and findings of fact made, in order to re-make, the UTIAC is more likely to proceed by way of a hearing ...

In my judgment, this is a clear message: the ordinary consideration of factual matters on a UTIAC substantive appeal (on a point of law) will not normally be a reason for an oral

hearing, on the two issues at the heart of every UTIAC substantive appeal. The key words communicating that message are “*unusual*” and “*if that is the position*”. It is different if UTIAC, unusually, has to make findings of fact or hear oral evidence, including where the appeal succeeds and UTIAC is retaking the factual decision.

- 4.10 As to (ii), this is the guidance communicated in PGN Section D as regards law (from PGN14):

... The presence of particularly complex or novel/important issues of law may also be such as to necessitate a hearing.

The message here is again, in my judgment, clear: the consideration of legal issues on a UTIAC substantive appeal (on a point of law) will not normally be a reason for an oral hearing. The key words communicating that message are “*particularly complex*”, “*novel/important*” and “*such as to necessitate*”.

- 4.11 As to (iii), this is the guidance communicated in PGN Section D as regards importance (from PGN16):

... The fact that the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing to decide the relevant questions. Almost all appeals in the immigration jurisdiction are important to the individuals affected; and to the Secretary of State, in the discharge of her statutory responsibilities. In particular, human rights and protection appeals necessarily involve the prospect of an individual being removed from the United Kingdom.

Once again, in my judgment, the message is clear: the importance of the case, in terms of its outcome for the individual, will not normally be a reason for an oral hearing. The key words communicating that message are “*will not, without more*”, “*Almost all*” and “*necessarily involve*”. (A distinct issue arises on PGN16: §7.1 below).

- 4.12 In my judgment, even leaving aside PGN9 – whether treating it as a ‘preamble’ or reading it as impliedly repeating the proviso in PGN7, or as containing an ‘obvious mistake’ – and keeping well in mind that PGN16 says the Judge should “*have regard to paragraph 4 of the Practice Direction and rule 2 of the UT Rules*” – the operative ‘guidance’ section (Section D) takes three key topics of fact, law and importance and communicates that each of them is not, of itself, a reason normally to have a hearing in the application of PPD4, Rule 34 and the overriding objective. That is a powerful message in relation to each. It is a yet more powerful message in combination.

No Counterbalancing Content

- 4.13 There is a final point on what Section D communicates. It concerns what Section D does not say. There is no counterbalancing message in Section D. There is no identification of a factor or even a combination of factors, which will regularly be encountered, which would support having a hearing. There is nothing which communicates that the UTIAC Judge would or could or may well conclude that the correct understanding of PPD4 involves having a hearing in a typical UTIAC substantive appeal.

Conclusion

- 4.14 For all these reasons, I have concluded that – reading and interpreting the PGN objectively and straightforwardly, as a whole, in the light of its function and purpose, and having always in mind that it was directed in its application to an audience of UTIAC Judges – the PGN does communicate an overall paper norm. The answer to the Key Question is ‘yes’. That establishes the premise for Grounds (1)(a), (b) and (c) and a component of Ground (2)(a).

External Aids to Construction?

- 4.15 Ms Kilroy QC and Mr O’Brien agreed that PGN should be interpreted by this Court objectively (§4.2 above), based on what was said in the PGN itself, just as this Court would have interpreted it on the day after it was issued. Ms Kilroy QC did suggest, however, that there were materials before the Court which could assist in the interpretation.
- 4.16 One was a letter which the Defendant wrote four days after issuing the PGN. It was addressed to the Chair of the Bar Council Amanda Pinto QC. She had written on 24 March 2020 passing on a concern expressed by a barrister:

... about the guidance issued ... yesterday which indicates a presumption that appeals from the FTT will be considered on the papers to decide whether the FTT made an error of law.

The Defendant’s letter of response said this:

You refer to the Pilot Practice Direction of the Senior President of Tribunals, approved by the Lord Chancellor on 19 March 2020. As you will see, paragraph 4 of the Practice Direction provides that decisions should be taken without a hearing, where the relevant Rules permit and where this is in accordance with the overriding objective etc. This is, accordingly, the “default” position during the current emergency. The Guidance Note No.1 2020, issued on 23 March, is in complete accord with the Practice Direction.

As to this:

- (1) I would accept that this is a description of the PPD4 as communicating a ‘*default position in favour of paper determination*’, with which the PGN was ‘*in complete accord*’. The words are “‘*default*’ position”, used in response to a description of a “‘*presumption*”. And it is striking that the Defendant used the phrase “‘*default*’ position” in PGN19 when addressing whether hearings should be remote or in-person (“*the ‘default’ position during the pandemic is ... that the hearing should be conducted remotely*”).
- (2) I would accept that the letter indicates that the Defendant, in defending the PGN shortly after issuing it, was expressing the position that what PPD4 meant for UTIAC was an overall paper norm, and that this was what the PGN was communicating. It is a position which – for so long as it subsisted – may be a reason why the PGN was maintained in the face of the present legal challenge. However, by the time the case came before me, the Defendant’s position in defending it was that (a) it did not communicate an overall paper norm (and nor did PPD4) and (b) if it did, it would not be lawful. I can also see the forensic difficulty for Mr O’Brien in submitting that UTIAC Judges would not read the PGN as giving this message, if this was the writer’s own description.

(3) I do not, however, accept that this letter is a legitimate aid to interpretation. It could go no further than indicating what, subjectively, the Defendant may have understood and intended. In that respect, it is similar to an internal document, candidly disclosed in judicial review proceedings. In the end, the question is not what the Defendant intended and understood subjectively – nor why he maintained the PGN in correspondence – but what, objectively, he communicated. It would be different if the letter of 27 March 2020 or its substance had been circulated to UTIAC Judges. But I can be confident that the Defendant and his legal representatives would have told me had that, or any similar communication, been shared with the UTIAC Judges who were the recipients of the PGN.

4.17 I was shown a template *Standard Directions* document which falls into that category: it was a document provided to UTIAC Judges after the PGN was issued. It states:

1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules [fn. The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4)], I have reached the provisional view that it would in this case be appropriate to determine the following questions without a hearing: (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so (b) whether that decision should be set aside. 2. I therefore make the following DIRECTIONS ...

This document is consistent with the message that there was to be an ‘overall paper norm’. But I do not accept that this document materially assists the exercise in interpretation of the PGN. It is the PGN which communicates the ‘guidance’. These *Standard Directions* could have been issued alongside guidance which communicated an overall paper norm, or an overall hearing norm, or no overall norm. Ms Kilroy QC, rightly, did not place any real weight on the *Standard Directions*.

4.18 I will return below to what I made of the ‘impact evidence’ and its relevance. I am satisfied that it cannot assist in the interpretation of the PGN. Nor do the materials relating to the Lands Chamber, in relation to which Ms Kilroy QC submitted that the pre-existing practice of holding hearings continued notwithstanding PPD4. I could not see that anything in this case could turn on that material.

Saved by the Audience?

4.19 In interpreting the PGN I have borne closely in mind that the application of the PGN would necessarily be a matter for UTIAC Judges, exercising their Rule 34 power in individual cases, in accordance with the procedure described in the PGN (PGN11 to PGN13), and having regard to PPD4 and the overriding objective in Rule 2 (PGN16). Further, both by design (PGN13), and as required (Rule 34(2)), any such Judge will consider any representations from the parties about the mode of determination. Moreover, as Parliament recognised and required (s.2(3)(c) of the 2007 Act) UTIAC Judges are “*experts in the subject-matter of*” or “*the law to be applied in*” cases which they decide. These factors do not, in my judgment, affect the answer I have given as to the objective meaning of the PGN, bearing in mind its audience.

4.20 It might I suppose be said that, given their expertise as UTIAC judges, each and every one of those Judges is – in principle – just as well able as is this Court to see the PGN in

its legal setting and get the law right. That would include baulking against any overall paper norm. I accept of course that a UTIAC Judge could see that an overall paper norm could not be sustainable in law – as Mr O’Brien accepted at the hearing before me – and could therefore, for that reason, decline to treat the PGN as communicating an overall paper norm. Such a Judge could ‘read it down’ or simply ‘depart’ from it. I can well imagine a Judge saying: ‘what matters is the overriding objective and I am able, whatever this guidance says or means – normally to have hearings, because that is my assessment of what fairness typically requires’. But none of this, in my judgment, can save the PGN on this claim for judicial review *if* its straightforward, objective meaning – viewed in terms of its audience – is to communicate an overall paper norm. There are a number of reasons why I think that is so. (1) Parliament conferred on Chamber Presidents the statutory function of “*issuing ... guidance on changes in the law and practice*” (2007 Act Sch 4(1) paragraph 7: §2.4(2) above). It is common ground that this function is ‘descriptive’ of changed law and practice. Parliament must, in principle, have envisaged that judges within a Chamber – notwithstanding being “*experts in the subject-matter of, or the law to be applied in, cases in which they decide matters*” (2007 Act s.2(3)(c)) – would therefore ‘be guided’ by guidance issued by the President. (2) In principle, as is common ground, judicial review will lie against such guidance on the ground that it misdescribes the law (*Letts Unlawfulness*: §2.5 above). If the legal expertise, and principled independence, of the ‘guided’ judiciary meant the audience could always be expected to see through error and identify correctness, no such judicial review claim could succeed. (3) I have also explained why, in my judgment, the overall paper norm communicated in the PGN could be taken, by a UTIAC Judge who had well in mind the proviso in PPD4, to have been the product of ‘analysis’ as to what the proviso in PGN4 means – as a matter of application – when contextually applied to UTIAC substantive appeals (§§3.6, 4.6(2) above). (4) However undoubted and impressive their expertise (s.2(3)(c)), the fact is that the practice described by Ms Singh as having been applied in the “*vast majority of cases*” of routinely having oral hearings will have insulated UTIAC Judges from having to address the Rule 34 power against the backcloth of the applicable legal principles. They did not have that body of experience. They were being given guidance. (5) Put at its highest, even if the expert legal minds of the discerning UTIAC judiciary recipients of the guidance could be relied on to put the guidance alongside the correct legal position and interpret or apply it consistently with that correct legal position, this would in my judgment still be a case of *Letts Unlawfulness* based on guidance which “*if followed*” would “*lead to unlawful acts or decisions*”; or “*which permits or encourages such acts*”.

Impact Evidence

4.21 I turn to the evidence before this Court about what actually happened to UTIAC substantive appeals after the PGN was issued. The judicial review Court may receive evidence of the practice in relation to oral hearings: see for example *West* at §33 (Lord Bingham). I tested the position by asking myself this question: would it be significant if the Defendant in the present case had been able convincingly to show me that – following the issuing of the PGN – UTIAC Judges were not in fact led by the PGN into adopting an overall paper norm. Suppose it could be shown that the Judges had adopted a practice involving no overall paper norm; a practice in which, unmistakably, oral hearings remained predominant in the resolution of UTIAC substantive appeals? Suppose I were shown (I was not) a series of decisions on mode of determination in which the reasoning

of UTIAC Judges demonstrated that they had not understood to PGN to communicate an overall paper norm. I was and still am able to well imagine submissions made by Mr O'Brien placing strong reliance on such evidence, had it been presented. I can see that such evidence could, as a real-world practical feature, inject caution as to whether the Court is making sufficient allowance for the way in which guidance would be read by the informed, expert audience. But, in my judgment, the principled answer is that such evidence – whatever it shows – could not be used to 'reverse-engineer' the straightforward, objective meaning of the PGN, as it would be interpreted when issued. If that is right, impact evidence relied on by Ms Kilroy QC, showing the prevalence of paper determinations, can fare no better.

- 4.22 In my judgment, the true legal import of impact evidence goes to two issues which arise after the objective meaning of the PGN has been identified. The first is as to whether any error of law in the guidance is to be characterised as material (judicial review lies for material error of law, not for immaterial error of law). The second is as to whether it would be appropriate to give any remedy (remedy in judicial review is always a question of discretion: exercised judicially and in accordance with relevant principles). Viewed in that way, impact evidence can be a proper factor in considering whether the guidance is 'saved by the audience', further to the factors (1)-(5) (§4.20 above). This is factor (6): 'the proof of the pudding'. This is where it features, and features for the first time, in the legal analysis within this judgment.
- 4.23 The impact evidence adduced in this case was the product of conspicuous industry on the part of the legal teams. It was hotly controversial. But at the hearing before me the position resolved itself into what, in my judgment, was a clear and straightforward picture.
- (1) On the Claimant's side, through Joe Tomlinson (Research Director of the Public Law Project) an analysis had been done of the published determinations of appeals by UTIAC Judges since the PGN was issued. Mr O'Brien accepted that there was no different or better way in which the Claimant or the Public Law Project could have undertaken an analysis of impact of the PGN. The picture was this. Out of 305 finally determined UTIAC substantive appeals between 23 March 2020 and 25 September 2020, 235 (77%) had been determined on the papers. Two caveats need to be entered in relation to that analysis. First, the Defendant pointed out that – if determinations on paper had come through the system more speedily than determinations after oral hearings (which is obviously possible but I was shown no evidence convincingly demonstrating that it had happened or the extent to which it had happened) – then the figure of 77% would be too high. Secondly, at the hearing before me on 21 October 2020 Ms Kilroy QC told me, out of appropriate claimant candour, that the latest overall picture was 66%. (I was not told that UTIAC Judges had received any further communication from the Defendant, after March 2020, to put alongside the PGN and which would have influenced their practice or understanding.)
 - (2) On the Defendant's side, evidence was adduced which calculated the number of determinations after oral hearings as a percentage of the overall pool of cases of which UTIAC is seized, including a backlog of cases through which it has to work. That evaluation produced a figure of 30% of paper determinations. The obvious problem with that evidence is that it does not show the pattern of what UTIAC Judges are doing in dealing with cases on the papers or with oral hearings. It uses

the pool of cases which will at some stage reach a Judge for a decision as to mode of determination. The 30% statistic was for that reason unhelpful, even were it accurate in every other respect (something hotly disputed which requires no resolution). On reflection, and wisely, Mr O'Brien did not rely on this 30% figure or the methodology behind it. Nor will I.

I am satisfied, based on the evidence, that the pattern of cases which have been determined by UTIAC Judges since the PGN was issued has involved two-thirds paper determinations and one-third hearings. I find that I can rely on that as a realistic assessment of the post-March 2020 practice, and that it constitutes the best evidence before the Court. What flows from that impact evidence may, in my judgment, be expressed in two ways (though they are really the same point). First, in the light of this evidence it cannot be said that the 'overall paper norm' meaning of the PGN has involved no material unlawfulness. Secondly, this evidence serves further to undermine any suggestion that the PGN is 'saved by the audience'.

Conclusion

4.24 The conclusion from Part 4 is this: Ms Kilroy QC is right as to the premise for Ground (1)(a), 1(b) and 1(c), and the content of Ground (2)(a): the PGN communicates an overall paper norm.

Part 5. Why an 'overall paper norm' PGN is contrary to law

The Agreed Consequence and Correct Explanation

5.1 As I recorded at the outset (§1.3 above), Mr O'Brien accepted that if the PGN communicates an overall paper norm then it is contrary to law. In my judgment, that concession is rightly made, but it is appropriate to identify why it is rightly made. I address that question, given the various ways in which the unlawfulness is put (Grounds (1)(a), (b) and (c) and Ground (2)(a)), because different consequences may flow, because the point is important, and because this case may go further and the SSHD may put in an appearance. I identified at the start of the judgment what I consider to be the correct Explanation (§1.3 above). It means Ground (2)(a) is made out (and Ground (1)(b) is essentially the same point: §6.17 below). It means I reject Grounds (1)(a) and (1)(c). This Part of the judgment deals with all of that.

Unlawful New Practice, Even if Consistent with the Proviso: The Short Answer

5.2 Ms Kilroy QC maintained, from first to last, that the communication of an overall paper norm in the PGN would be unlawful even if an overall paper norm for UTIAC substantive appeals were held to be consistent with the overriding objective and basic requirements of common law procedural fairness and so consistent with the proviso to PPD4. She put that argument in a number of different ways. But I cannot accept any of them. I will deal with each argument in turn. But, in my judgment, there is a short answer to all of them.

- (1) PPD4 – which is lawful (§3.7 above) – communicates, as a direction, a contingent paper norm (including for UTIAC substantive appeals), subject only to the proviso (securing, in particular, consistency with the overriding objective and basic requirements of common law procedural fairness) (§§3.3-3.4 above).

- (2) It follows that if the PGN communicates an overall paper norm for UTIAC substantive appeals, but if it does so consistently with the proviso (including with the overriding objective and basic requirements of common law procedural fairness), then the PGN is a lawful exercise of the descriptive statutory power (§2.4(2) above) to give guidance on a change in practice. The Defendant would have done no more – and no less – than to have faithfully followed PPD4.
- (3) In my judgment, this is the beginning and the end for Grounds (1)(a) and (c). None of this is answered, and none of it becomes any less true, by the fact – as Ms Kilroy QC emphasised – that the Lands Chamber did not adopt guidance communicating an overall paper norm.

Unlawful ‘Radical’ New Practice (Even if Consistent with the Proviso)

- 5.3 This is Ground (1)(a). It was put in two ways. First, Ms Kilroy QC submitted that the communication by the PGN of an overall paper form for UTIAC substantive appeals – even if consistent with the overriding objective and basic requirements of common law procedural fairness – would be a ‘radical change’ falling foul of the principle applied in the *Al-Rawi* case (§2.2 above). I cannot accept that. (1) *Al Rawi* was a case concerned with a ‘closed material procedure’: that was the sort of ‘radical change’ which attracted the legal analysis in that case. What made a ‘closed material procedure’ so ‘radical’ was that one party did not get to see the evidence being disclosed to a court by another party: that is like a procedure at which UTIAC has an oral hearing on a substantive appeal to hear submissions from the SSHD about which the other party is kept in the dark. (2) The principle in *Al Rawi*, where it applies, requires a basis in primary legislation for the procedure. But the basis for paper determinations is Rule 34, with its legislative source in the 2007 Act Schedule 5(1) paragraph 7(a) (§2.4(3) above). (3) It is true that the power, and measures made under or in relation to it, would be approached in light of the principle of legality which protects against an abrogation of basic requirements of common law procedural fairness (§2.9 above). But that goes nowhere: we are talking about an overall paper norm consistent with those requirements and with the overriding objective (§5.2 above).
- 5.4 Secondly, Ms Kilroy QC submitted that the communication within the PGN of an overall paper form for UTIAC substantive appeals – even if consistent with the overriding objective and basic requirements of common law procedural fairness – would be a ‘radical change’ of a nature which the legislative and regulatory framework required, and its objective purpose intended, to be a change which the TPC alone could effect. She relied as a reference point on Rule 5A (§2.8 above). I cannot accept this argument. (1) In the 2007 Act at Schedule 5(1) paragraph 7(a), Parliament expressly empowered the TPC to make rules which “*make provision for dealing with matters without a hearing*” (§2.4(3) above). Rule 34 reflects the design of the legislative scheme and the discernible statutory purpose (§2.7 above). A discretionary power to deal with matters without a hearing is a “*provision*”. Rule 5A was a rule and it addressed the situation (see Rule 34(3)) which paper determination was excluded for a class of case (§2.7 above). (2) In the 2007 Act section 23 (§2.4(1) above) Parliament expressly empowered the SPT to give directions about the practice and procedure in UT (including UTIAC), a direction power which plainly extends to discretionary powers like Rule 34. By section 2(3), Parliament required the SPT to approach the direction-giving function by having regard to (inter alia) accessibility, speed, efficiency and innovation. To say that ‘TPRs can make provision in

the form of presumptions’ (Sch 5(1) paragraph 18) is not to say that ‘all presumptions regarding practice and procedure must be within the TPRs’ (rather than the subject of a direction). (3) Directions as to practice and procedure have to be fair (s.2(3)(b)(i)) and the principle of legality would require nothing less. PPD4, with its contingent paper norm during Covid-19, subject always to the overriding objective and basic requirements of common law procedural fairness, is squarely within the scheme and its discernible purpose. Nor is it open to the Claimant to submit to the contrary (§3.7 above). It follows that I reject Ground (1)(a) (§1.2 above).

Inconsistent with the policy of the statutory scheme (even if compatible with the proviso)

5.5 This was Ground (1)(c). Ms Kilroy QC submitted, by reference to an analysis of the statutory scheme, viewed in the light of its history and three key authorities, that the ‘policy of the legislation’ recognises that a hearing is the ‘usual position’ and determination of a UTIAC substantive appeal without a hearing is a ‘departure’ from that usual position. On that basis, she submitted that the communication of an ‘overall paper norm’ would – independently of any consideration of the contextually-applicable basic requirements of common law procedural fairness – be unlawful as contrary to the objectively discernible purpose of the legislation. That would be unlawful as breaching the principle in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, which makes it unlawful to exercise statutory power to frustrate the policy and objects of the statute.

5.6 The essence of the argument, as I saw it, was put in two ways. The first was historical. Ms Kilroy QC points to the structure of Rule 15 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005 No. 230), made by the Lord Chancellor after (in 2000) substantive appeals to the Asylum and Immigration Appeals Tribunal (AIT) had been limited to a ‘point of law’. Rule 15 (as enacted) was as follows:

Method of determining appeal. (1) Every appeal must be considered by the Tribunal at a hearing, except where – (a) the appeal– (i) lapses pursuant to section 99 of the 2002 Act; (ii) is treated as abandoned pursuant to section 104(4) of the 2002 Act; (iii) is treated as finally determined pursuant to section 104(5) of the 2002 Act; or (iv) is withdrawn by the appellant or treated as withdrawn in accordance with rule 17; (b) paragraph (2) of this rule applies; or (c) any other provision of these Rules or of any other enactment permits or requires the Tribunal to dispose of an appeal without a hearing. (2) The Tribunal may determine an appeal without a hearing if– (a) all the parties to the appeal consent; (b) the appellant is outside the United Kingdom or it is impracticable to give him notice of a hearing and, in either case, he is unrepresented; (c) a party has failed to comply with a provision of these Rules or a direction of the Tribunal, and the Tribunal is satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing; or (d) subject to paragraph (3), the Tribunal is satisfied, having regard to the material before it and the nature of the issues raised, that the appeal can be justly determined without a hearing. (3) Where paragraph (2)(d) applies, the Tribunal must not determine the appeal without a hearing without first giving the parties notice of its intention to do so, and an opportunity to make written representations as to whether there should be a hearing.

Ms Kilroy QC submits that Rule 15(2)(d) was, by its nature, describing a ‘departure’ from the ‘usual position’ in Rule 15(1). The ‘policy of the legislation’ was that appeals would normally be by way of oral hearing. Once that premise is recognised, submits Ms Kilroy QC, that same ‘policy of the legislation’ must have carried through into Rule 34 of the UTPR 2008 (§2.7 above), made under Sch 5(1) paragraph 7 of the 2007 Act (§2.4(3)

above). In that regard she relied on a citation (from a witness statement of Nicola Burgess, the Claimant's Legal Director) of a passage from the 2004 White Paper which preceded the 2007 Act and which described the new UT system as one which would "*still retain the right and duty to hold hearings*", continuing: "*No appellant will lose their right to a hearing*".

- 5.7 The second way it was put was contemporary. Even leaving aside the history, submits Ms Kilroy QC, the use of "*may make any decision without a hearing*" in Rule 34 of the UTPR 2008 (§2.7 above) is a structure and language which 'assumes that the usual position is a hearing', because a decision to decide without a hearing is a 'departure from the norm'. Further support can be found, according to Ms Kilroy QC, in (1) the statement of Lord Phillips in *R (Cart) v Upper Tribunal* [2012] AC 663 at paragraph 86: "*what must, I believe, be beyond doubt is that it was Parliament's intention that the two tier structure set up by the [2007 Act] would provide a statutory right of appeal in relation to decisions of tribunals that would, in most cases, provide a satisfactory alternative to judicial review*"; and (2) the 'second appeals test' applied by the Court of Appeal on appeals from UTIAC substantive appeals, which is premised on there being a full judicial process at both FTT and UTIAC levels (citing *PR (Sri Lanka) v SSHD* [2012] 1 WLR 73 at paragraph 41). The contemporary legislative scheme and principled application thus, says Ms Kilroy QC, clearly indicates an 'overall hearing norm' for UTIAC substantive appeals.
- 5.8 I will discuss the historical argument at §§5.9-5.13 below. But I will deal first with the contemporary points. I readily accept that the language of "*may*" in Rule 34 is qualified by the overriding objective (Rule 2) and thereby the basic requirements of common law procedural fairness (which the principle of legality would in any event achieve). I would also accept that Parliament intended a "*satisfactory alternative to judicial review*"; that the approach to judicial review in immigration and asylum cases is based on an assessment that a UTIAC substantive appeal is a suitable alternative remedy; and that the 'second appeals test' in the Court of Appeal is based on the idea that an appeal to UTIAC is a full judicial process. I can quite see how all of these points dovetail with the imperative – reflected in the proviso to PPD4 – that UTIAC appeals must be determined justly and fairly, consistently with the overriding objective and basic requirements of common law procedural fairness. None of this, in my judgment, extends any further than that. The word "*may*" in Rule 34 does not mean "*may, but only as a departure in exceptional circumstances from the usual position*". It means "*may, provided that it is consistent with the overriding objective including basic requirements of common law procedural fairness*". That is the limit of the restriction. Were it otherwise, PPD4 would be unlawful, because its proviso would be legally inadequate. That argument is not open to the Claimant (§3.7 above). But I am quite sure that it is wrong, even if it were open. Provided that there is consistency with the overriding objective, basic requirements of common law procedural fairness and so the principle of legality, a paper norm involves no freestanding breach of the *Padfield* principle. Putting it another way, a contingent paper norm as in PGD4 involves no ultra vires.
- 5.9 Nor, in my judgment, does Ms Kilroy QC's historical analysis produce any different result. In support of her premise – regarding the structure of Rule 15 of the 2003 Rules

(§5.6 above) – Ms Kilroy QC went back to the 1990s, and so must I. She relied on the position in relation to Rule 35(1)(e) of the Asylum Appeals (Procedure) Rules 1996 (SI 1996 No. 2070)) considered by the Immigration Appeal Tribunal (IAT) in *Gioshev v SSHD* (Case 15801, 24 November 1997) and by Sullivan J in *R v Immigration Appeal Tribunal, ex p S* (CO/2544/97, 9 February 1998). In order to understand those cases, it is necessary to appreciate that the 1996 rules, applicable in those cases, included Rule 9(4) and Rule 35(1) and (4), all of which were set out by Sullivan J in *Ex p S*. I will need to set them out as well. Rule 9(4) of the 1996 Rules provided:

Except where an appeal is determined without a hearing in accordance with rule 35 or summarily in accordance with rule 36, a hearing shall be held to decide an appeal.

Rule 35(1) provided:

An appeal may be determined without a hearing under this rule if – (a) the special adjudicator has decided, after giving every other party to the appeal an opportunity of replying to any representations submitted in writing by or on behalf of the appellant, to allow the appeal; or (b) the special adjudicator is satisfied that the appellant is outside the United Kingdom or that it is impracticable to give him notice of a hearing and, in either case, that no person is authorised to represent him at a hearing; or (c) a preliminary issue has arisen and, the appellant having been afforded a reasonable opportunity to submit a written statement rebutting the respondent's allegation- (i) the appellant has not submitted such a statement, or (ii) the special adjudicator is of the opinion that matters put forward by the appellant in such a statement do not warrant a hearing; or (d) the parties agree in writing upon the terms of a determination; or (e) the special adjudicator is satisfied, having regard to – (i) the material before him; (ii) the nature of the issues raised; and (iii) the extent to which any directions given under r 23 have been complied with, that the appeal could be so disposed of justly.

Rule 35(4) provided:

This paragraph applies where- (a) the decision appealed against has been withdrawn or reversed by the respondent, and the special adjudicator is satisfied that written notice of the withdrawal or reversal has been given to the appellant by the respondent; or (b) the special adjudicator is satisfied, having regard to the material before him or to the conduct of the appellant or his failure to appear or otherwise to prosecute the appeal, that the appeal has been abandoned; or (c) the special adjudicator is satisfied, having regard to the material before him or to the conduct of any party, that the decision appealed against has been withdrawn.

- 5.10 *Ex p S* was a judicial review case. It concerned an appeal to a special adjudicator (SA), the first-tier appellate authority predecessor to the FTT. As Sullivan J explained, it was a case in which “*as in so many other asylum appeals, the [SA’s] determination turned on the credibility of the [claimant]*”. What happened in that case was that the SA had decided to proceed to determination without a hearing under rule 35(1)(e), on the basis that the appellant had failed to comply with a number of directions. The SA dismissed the claimant’s appeal and the IAT (by inference, refusing permission to appeal) had upheld the SA’s determination. Sullivan J granted judicial review, ultimately because the SA’s reasons for proceeding without a hearing under rule 35(1)(e) had failed to address “*why it was proper to proceed without a hearing notwithstanding that credibility would clearly be in issue*”. In the course of the judgment, Sullivan J concluded that – on its proper interpretation – rule 35(1)(e) applied only where directions had not been complied with. It was not a general power to decide an appeal without a hearing on the basis that the

appeal could be disposed of justly without one. He then went on to address the interrelationship between (i) life and liberty being at stake (ii) credibility being in issue and (iii) directions not having been complied with. In his reasons as to why rule 35(1)(e) required non-compliance with a direction but was a general power to decide an appeal without a hearing on the basis that the appeal could be disposed of justly without one, Sullivan J rejected the submission of Counsel for the SSHD “*that a hearing may be dispensed with under r.35(1)(e) even if there has been no failure to comply with directions*”. Sullivan J concluded that this would “*drive a coach and horses through r.35 and confer a very broad discretion upon Special Adjudicators to dispense with a hearing in any case*”. He emphasised that “*the circumstances in which a hearing may be dispensed with are carefully defined and circumscribed*” and there was no “*open-ended discretion on Special Adjudicators to dispense with a hearing whenever they conclude that an appeal could be disposed of justly without one*”, that analysis having started by taking as a premise “*the position that the ‘policy of the legislation’ is that appeals will normally be by way of oral hearing*”. That, then, was the expression of ‘an overall hearing norm’.

- 5.11 I am not persuaded by Ms Kilroy QC’s submissions that Sullivan J’s analysis in *S* would have applied to Rule 15(2)(d) of the 2005 Rules (§5.6 above), derived from the ‘policy of the legislation’. True it is that Rule 15(2)(d) was part of a set of carefully defined and circumscribed circumstances. But it was not linked to the question of compliance with directions. On its face, rule 15(2)(d) was a power to dispense with a hearing when the IAT was “*satisfied ... that the appeal can be justly determined without a hearing*”, having had “*regard to the material before it and the nature of the issues raised*”. The ‘policy of the legislation’ would certainly have included basic requirements of common law procedural fairness. I can quite see that – on analysis – an ‘overall hearing norm’ could have been the product of the application of the principle of legality, or the overriding objective, securing the basic requirements of common law procedural fairness, in the context of the determination of an appeal on a point of law by the IAT. But for present purposes we are putting that to one side since that is back to the Proviso.
- 5.12 Even if Ms Kilroy QC is right that there was still a discernible ‘policy of the legislation’, independently of the overriding objective and basic requirements of common law procedural fairness, through the ‘carefully defined and circumscribed’ circumstances – together with the wording of Rule 15(1) (mirroring Rule 9(4)) – I am not persuaded that this then survived the transition to Rule 34 of the UTPR 2008. The cited passage in the White Paper (§5.6 above) is far too slender a basis, in my judgment, to support such a conclusion. On its face, Rule 15(1) – read with Rule 2 (overriding objective) – is a power on the UT to dispense with a hearing where they conclude that an appeal can be disposed of fairly and justly without one.
- 5.13 That leaves the case of *Gioshev v SSHD* (Case 15801, 24 November 1997), on which Ms Kilroy QC also relied. In my judgment, that case takes her no further forward. That was a case where the IAT overturned a SA’s rejection of an asylum appeal. The SA had decided, pursuant to rule 35(1)(e) to determine the appeal without a hearing. In allowing the appeal from the SA in *Gioshev* the IAT said: “*Rule 35(1)(e) is designed, in the view of the Tribunal, to deal with appeals where there is clearly no merit in the case or where*

the parties have ignored directions under Rule 23". Pausing there, the interpretation of the rule was three months later resolved by Sullivan J in *E p S*, which may well have been the "higher court" considering "the vires of an adjudicator acting pursuant to that rule" to which the IAT referred in *Gioshev*. The IAT then said: "In the view of the Tribunal rule 35(1)(e) is not designed to preclude an appellant from the opportunity of presenting his case before an adjudicator at an oral hearing, if the Appellant has indicated that he is desirous of an oral hearing and he wishes to submit evidence which is material to a point raised by the [SSHD] in his letter of refusal. In such circumstances, and such circumstances exist in the instant case, the Tribunal would express the view that at the preliminary hearing, if these matters are considered, the adjudicator should direct that the appeal should be determined at a full hearing". That passage is very clearly focusing on the position of the SA in considering an appeal on factual matters. It speaks of a "case before an adjudicator", in "circumstances" where an appellant wished an oral hearing "to submit evidence ... material to a point raised" in the SSHD's refusal letter being challenged on the appeal. Indeed, in *Gioshev* the appellant's grounds of appeal to the IAT had described the "fundamental right to an oral hearing" on the basis that: "[o]nly at [an] oral hearing could the issue of credibility be determined by the [SA]". It follows from all of this that I do not accept Ground (1)(c) (§1.2 above).

The Reason Why an Overall Paper Norm in the PGN is Unlawful

5.14 I set out what I consider to be the correct Explanation at the outset of this judgment (§1.3 above). Three points combine to provide the answer. (1) The PGN, as an exercise of *descriptive* power (§2.4(2) above), could not lawfully communicate an overall paper norm unless PPD4, which it is describing, has itself communicated an overall paper norm. (2) As a matter of interpretation, PPD4 does not – at source – communicate an overall paper norm (see §3.5 above). (3) As a matter of application, PPD4 does not – on 'reception' – mean an overall paper norm for UTIAC appeals (§3.6 above). That is because an analysis of the key principles from the common law (which I will identify in Part 6 below) does not support such a contention. This means Grounds (1)(b) and (2)(a) succeed (§6.17 below).

When Would an Overall Paper Norm be Lawful Guidance in the PGN?

5.15 I recorded at the outset Mr O'Brien's acceptance (§1.3 above) that – if the PGN has communicated an overall paper norm for UTIAC substantive appeals – then it cannot be lawful. It was open to Mr O'Brien to submit that, if the PGN did communicate an overall paper norm for UTIAC substantive appeals, that was nevertheless lawful and consistent with PPD4 as applied to those appeals. I put to him whether, even as a 'fallback' (if he were wrong about what PGN communicated), he advanced this contention. He confirmed that he did not. He did not contend that an overall paper norm for substantive UTIAC appeals would be consistent with the contextual application of basic requirements of common law procedural fairness. Had it been consistent with those requirements, the PGN would have been lawful. In my judgment, Mr O'Brien was right not to contend that an overall paper norm would be consistent with common law principles, contextually applicable to UTIAC substantive appeals. This will become clear when I address the key themes regarding the basic standards of common law procedural fairness which are

applicable in the context of this case (Part 6 of this judgment), and which are moreover relevant to Grounds (2)(b)-(d).

Reinterpretation?

5.16 Mr O'Brien did not submit that – if the natural, objective meaning of the PGN was to communicate an overall paper norm, inconsistent with basic requirements of common law procedural fairness – the answer could lie in reinterpreting the PGN (by '*reading in*' content which is not there). I only mention this because some cases on the principle of legality (§2.9 above), especially in the context of abrogations of human rights recognised at common law, have involved situations where an instrument (eg. a prison rule or standing order) is 'read down' so as to be lawful, with the application of the instrument being unlawful. In my judgment, reinterpretation by 'reading down' or 'reading in' to achieve conformity would be a dangerous approach in a context of judicial review of guidance. This is a case in which the statutory function is giving *guidance on a change in law or practice* (2007 Act Sch 4(1) paragraph 7: §2.4(2) above). Such guidance should be interpreted objectively and straightforwardly (§4.2 above). It is amenable to judicial review for *Letts Unlawfulness* (§2.5 above): if and insofar as there is legal error in such guidance, then in principle judicial review lies and should be granted to correct the error. It cannot be right, in my judgment, to reinterpret guidance – after the event – by straining the meaning, or reading-in content which is not there, so as to give it a meaning other than its natural objective meaning, in order to be able to uphold it as lawful.

Part 6: Key Themes from the Common Law Principles

6.1 The contextual application of the basic requirements of common law fairness is what drives the lawful application of the proviso to PPD4. All grounds except Ground (1)(a) and (c) are informed, ultimately, by these requirements. I received detailed written and oral submissions in relation to common law principles, as reflected in the case law. The relevant analysis is intersectional where the two cross-beams of light are: (a) common law fairness and oral hearings; and (b) protection/human rights cases (including appeals). As it happens, the two leading cases on procedural fairness and oral hearings (*R (West) v Parole Board* [2005] UKHL 1 [2005] 1 WLR 350 and *R (Osborn) v Parole Board* [2013] UKSC 61 [2014] AC 1115) concern the parole board and assessment of whether a prisoner (with a contingent right of liberty) poses a risk. Remembering always that context, there was no dispute that the principles articulated by Lord Bingham for the House of Lords in *West* and by Lord Reed for the Supreme Court in *Osborn* are relevant to the present case. As Ms Kilroy QC explained, those cases are particularly helpful because *West* corrected an error of approach by the Court of Appeal in focusing on whether primary facts were in dispute (§6.4 below), and *Osborn* corrected an error of approach by the Court of Appeal in focusing on whether an oral hearing would assist in better decision-making (§6.10 below). It is obvious that I have been placed, through the endeavours of Counsel on both sides, and – as it happens – the engagement of a hearing on points of law, in a far, far better position than the Defendant would and could have been in over that weekend in March 2020 during the Covid-lockdown after PPD4 had been issued and the Defendant was seeking to give practical guidance to expert UTIAC Judges. Having said that, everybody in this case agrees that it is necessary and appropriate for this Court to understand and evaluate the relevant common law principles and exercise this Court's supervisory jurisdiction against the backcloth of having done so. What follows is my attempt to encapsulate the key themes from the case-law relied on by the

parties in this case. Many of the themes are closely interlinked. I shall track, wherever possible, the language used by the Courts in the cases.

(1) *No Exhaustive Definition/Universal Rules, but General Guidance is Possible*

6.2 “It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary” (*Osborn* at paragraph 2(ii); Lord Reed). “[W]hat fairness requires” of a court or tribunal “depends on the circumstances” which “can vary greatly” so that it is “impossible to lay down rules of universal application”, but “general guidance” is something that can be given (*Osborn* at paragraph 80; Lord Reed).

(2) *Oral hearing wherever the overriding objective (and fairness) requires one*

6.3 Where a procedural rule, whose exercise is subject to the overriding objective, confers on a Judge a discretion to determine an application on the papers or with an oral hearing, “judges, in exercising their discretion ... should be guided by the overriding objective ... and direct a hearing, if one is required, in order to deal justly with the application; or, to use the language of natural justice, if they consider that fairness requires a hearing” (*Ewing* at paragraph 24; §3.4 above). It is unnecessary for a Head of Division to tell Judges this, “[j]ust as it is unnecessary to teach one’s grandmother how to suck eggs” (*Ewing* at paragraph 24).

(3) *Factual Content (beyond ‘dispute of primary fact’)*

6.4 The factual content of a case can be a basis why fairness requires a hearing. An oral hearing “is most obviously necessary to achieve a just decision in a case where facts are in issue which may affect the outcome” (*West* at paragraph 31; Lord Bingham). In cases “where credibility and veracity are at issue ... written submissions are a wholly unsatisfactory basis for decision” (*Goldberg v Kelly* (1970) 397 US 254, 269 (Brennan J), cited in *West* at paragraph 31 by Lord Bingham). “[A]n oral hearing will ... often” be necessary “[w]here facts which appear ... to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility” (*Osborn* at paragraph 2(ii)(a); Lord Reed). Even where there is “no dispute on the primary facts” so that “important facts are not in dispute”, a court or tribunal “may well be greatly assisted” by an oral hearing because facts may be “open to explanation” or “may lose some of their significance in the light of other ... facts” (*West* at §§34-35 (Lord Bingham). It is an unduly “constricted” approach to “the common law duty of procedural fairness” to apply, as a “test” of whether an oral hearing is required, the question whether “the primary facts” are in “dispute” (*West* at paragraphs 34-35; Lord Bingham). It is necessary to “guard against any tendency to underestimate the importance of issues of fact which may be ... open to explanation” (*Osborn* at paragraph 2(ii)(a); Lord Reed).

(4) *Closer Examination of the Case*

6.5 There is a “closer examination which an oral hearing can provide” and it is “important”, “in order to act fairly”, to “consider” whether the assessment of the issues “may benefit from th[at] closer examination” (*Osborn* at paragraph 2(iii); Lord Reed). In deciding whether fairness requires an oral hearing, in the light of the facts of the case and the importance of what is at stake, the court or tribunal “should consider whether its ...

assessment ... may benefit from the closer examination which an oral hearing can provide” (Osborn at §81: Lord Reed). In considering whether to have an oral hearing it is relevant whether the decision falls into a category which “it has been said” that the court or tribunal “should scrutinise” the case “more anxiously” (Osborn at paragraph 83: Lord Reed).

(5) *Importance of Close Examination: Protection and Human Rights Cases*

6.6 UTIAC substantive appeals are a review jurisdiction (appeal on a ‘point of law’) which calls for rigorous scrutiny by the tribunal. That is because, even “within th[e] limitations” of a court or tribunal exercising a “power of review” in relation to a decision, and not resolving “any issue of fact”, it is appropriate for a court (or tribunal) to adopt a “more rigorous examination, to ensure that [the decision] is in no way flawed, according to the gravity of the issue which the decision determines”, so that “when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis of the decision must surely call for the most anxious scrutiny”: *R v SSHD, ex p Bugdaycay* [1987] 1 AC 514 at 531F-G (Lord Bridge). This ‘anxious scrutiny’ principle is applicable in relation to protection claims (see eg. *R (Brown) v SSHD* [2015] UKSC 8 [2015] 1 WLR 1060 at paragraph 31: Lord Hughes) but also human rights claims (see eg. *R (Razgar) v SSHD* [2004] UKHL 27 [2004] 2 AC 368 at paragraphs 16 (Lord Bingham) and 69 (Lord Carswell)). In the context of a substantive appeal, “the exercise of the right to be heard” for the individual affected “may literally be a matter of life and death” (*FP (Iran) v SSHD* [20017] EWCA Civ 13 at paragraph 43: Sedley LJ). It is applicable to appellate processes. As it was put in the context of judicial review, of putative ‘fresh claims’ made by failed protection claimants, and of the “overriding obligation” of non-refoulement of refugees to face persecution: “The risk to an individual if a state acts in breach of this obligation is so obvious and so potentially serious that the courts have habitually treated asylum cases as calling for particular care at all stages of the administrative and appellate processes”: *R v SSHD, ex p Onibiyo* [1996] QB 768 at 778C (Sir Thomas Bingham MR), and see 785A (referring to judicial review under the approach in *Bugdaycay*).

(6) *Reactive Engagement/Effective Representations*

6.7 A hearing brings a dynamic engagement between those involved in the process and the decision-making authority. In a paper determination, “written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mould his argument to the issues the decision maker appears to regard as important” (*Goldberg v Kelly* (1970) 397 US 254, 269 (Brennan J), cited in *West* at paragraph 31: Lord Bingham). “It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker” (*West* at paragraph 35: Lord Bingham). A hearing will “often” be necessary “[w]here it is maintained on tenable grounds” that it involves an “encounter” which “is necessary for ... [a party] or his representatives to put their case effectively” (Osborn at paragraph 2(ii)(c), also paragraph 82: Lord Reed).

(7) *The Power of Oral Argument*

6.8 A basic element of knowledge of our “legal culture” is recognition of “the central place accorded to oral argument in our common law adversarial system”, for “oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of

mind by a judge. That judges change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it” (*Sengupta v Holmes* [2002] EWCA Civ 1104 at paragraph 38: Laws LJ). Oral argument, through the ‘engagement’ of the hearing, can persuade a Judge to take a different view from one formed, or which would be formed, when considering papers alone. The *“benefit enjoyed by the court of listening to oral argument ... is a fundamental part of our system of justice and ... is a process which as a matter of common experience can be markedly more effective than written argument”* (*Sengupta* at paragraph 47: Keene LJ).

(8) *Importance of What is at Stake*

6.9 In the context of oral hearings, *“[i]n considering what procedural fairness ... requires, account must first be taken of the interests at stake”* (*West* at paragraph 30: Lord Bingham). Generally, an oral hearing should be held *“wherever fairness ... requires such a hearing in the light of the facts of the case and the importance of what is at stake”* (*Osborn* at paragraph 2(i), also paragraph 81: Lord Reed). The *“importance of what is at stake”* includes all of *“the interests at stake”* and embraces the interests of an affected individual, but also important interests advanced by an arm of the State (*West* at paragraph 30: Lord Bingham).

(9) *Better decision-making/the potential to make a difference*

6.10 One *“purpose of holding an oral hearing is ... to assist [the court or tribunal] in its decision-making”* (*Osborn* at paragraph 2(v), also paragraph 82: Lord Reed). That is linked to *“one of the virtues of procedurally fair decision-making”* being *“that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested”* so as *“to improve the chances of the tribunal reaching the right decision”* (*Osborn* at paragraph 67: Lord Reed). An oral hearing may *“guarantee better decision in terms of the uncovering of facts, the resolution of issues and the concerns of the decision-maker”* where an oral hearing has *“utility ... in assisting in the resolution of the issues”* (*Osborn* at paragraph 66: Lord Reed). It is relevant that *“an oral hearing has the potential to make a difference”*, and whether the case is one in which *“that potential ... exist[s]”*: *Osborn* at §81 (Lord Reed). However, it is wrong to consider that *“in determining whether an oral hearing [is] necessary, what [falls] to be considered [is] the extent to which an oral hearing would guarantee better decision making”*, and it is wrong to place *“the emphasis ... on the utility of the oral procedure in assisting in the resolution of the issues”*, because *“the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision”*; there are *“other important values ... engaged”* (*Osborn* at paragraphs 66-67: Lord Reed).

(10) *Participatory interests (beyond utility): appearances, dignity and the rule of law*

6.11 A *“purpose of holding an oral hearing”*, distinct from it being *“to assist [the court or tribunal] in its decision-making”*, is *“to reflect the [party’s] legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute”* (*Osborn* at paragraph 2(iv), also paragraph 82: Lord Reed). One of the *“important values”* which is *“engaged”* by procedural fairness in the context of whether a tribunal should have an oral hearing – independently of whether the process *“is liable to result in better decisions”* or *“improve the chances of the tribunal reaching the right decision”* – is *“the avoidance of the sense of injustice which the person*

who is the subject of the decision will otherwise feel”, the “reason for [which] sense of injustice” is that “justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions”; where “respect” and the protection of “dignity” entail that “such persons ought to be able to participate in the procedure by which the decision is made, provided that they have something to say which is relevant to the decision to be taken”: *Osborn* at §§67-68 (Lord Reed). That is why fairness can be seen to involve a hearing even where an “omniscient” decision-maker does not “require to hear [the person affected] in order to improve the quality of [the] decision-making”: *Osborn* at §69 (Lord Reed, discussing God allowing Adam to “make his defence”). Another of the “important values” which is “engaged” by procedural fairness in the context of whether a tribunal should have an oral hearing – independently of whether the process “is liable to result in better decisions” or “improve the chances of the tribunal reaching the right decision” – is “the rule of law”, for “[p]rocedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions”: *Osborn* at §§67, 71 (Lord Reed). This theme was discussed most recently in *R (Pathan) v SSHD* [2020] UKSC 41.

(11) *Protection/human rights appeals: the highest standards of procedural fairness*

6.12 It is recognised as “plain that asylum decisions are of such moment that only the highest standards of fairness will suffice” (*SSHD v Thirukumar* [1989] EWCA Civ 12 [1989] Imm AR 402 at paragraph 46: Bingham LJ). That principle was first articulated in the context of decision-making by the SSHD, in identifying appropriate standards for asylum interviews (*Thirukumar*). It was applied in the context of FTT protection appeals in *R (Detention Action) v FTT* [2015] EWCA Civ 840 [2015] 1 WLR 5341 at paragraph 27, where Lord Dyson MR referred to “the importance of the principle that only the highest standards of fairness will suffice in the context of asylum appeals”. The *Thirukumar* principle has been recognised as applicable in principle to UTIAC substantive appeals (*R (ILPA) v Tribunal Procedure Committee* [2016] EWHC 218 (Admin) [2016] 1 WLR 3519 at paragraphs 17-20: Blake J). It was applied in the context of appeals to the AIT (the predecessor of UTIAC substantive appeals) in *FP (Iran)* where the then Arden LJ invoked Bingham LJ’s *Thirukumar* principle in the context of AIT rules which “balance the requirements for fairness, speed and efficiency”. This is congruent with Sir Thomas Bingham MR’s own observation that “the courts have habitually treated asylum cases as calling for particular care at all stages of the administrative and appellate processes” (*Onibiyo* [1996] QB 768 at 778C).

(12) *Time and Trouble/Benefit of the Doubt*

6.13 The court or tribunal “should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense” (*Osborn* at paragraph 2(viii): Lord Reed). It can be “prudent” for a court or tribunal “to allow an oral hearing if it is in doubt whether to do so or not” (*Osborn* at paragraph 2(xi): Lord Reed).

Conclusion based on these Key Themes

6.14 There was little, if any, real dispute about the content of the principles identified in the case-law, the key themes from which I have identified in this Section of this judgment,

and which I have numbered (1) to (12). Nor was there any real dispute as to their relevance to the question of whether guidance communicating an overall paper norm for UTIAC substantive appeals would be consistent with the basic requirements of common law procedural fairness, contextually applied. Ms Kilroy QC's case in this claim for judicial review is that it would not be. Mr O'Brien's defence of this claim for judicial review does not contest that point (§5.15 above). It is sufficient, having set out the key themes from the common law principles, as I see their essence, drawn from the authorities cited to me in this case, to say that I agree with both Counsel. Any conclusion, and any communication, that UTIAC substantive appeals can 'usually' or 'normally' be determined on the papers and without an oral hearing would not be consistent with the basic requirements of common law procedural fairness, because the features of the case law which I have summarised would not support it. That means it would not be consistent with the overriding objective. It would not be consistent with PPD4, correctly interpreted and applied, because it would misinterpret or misapply the Proviso.

Open Justice Principle

6.15 One of the features within Ms Kilroy QC's Ground (2)(d), which she says is relevant to the exercise of the power to determine a UTIAC substantive appeal without a hearing is the 'open justice principle'. That principle is a fundamental constitutional principle which requires that hearings should be public rather than private, absent justification based on strict necessity. I have no difficulty accepting that the principle of legality and the overriding objective engage and must comply with the open justice principle. I can see that for the engagement between court/tribunal and the parties to be in the setting of a hearing may also tend to promote the open justice principle. I can see that the importance of a case together with the open justice principle could be a reason to hold a hearing rather than determine a case on the papers. But Ms Kilroy QC has not persuaded me that a paper determination of a UTIAC asylum appeal which otherwise satisfied the overriding objective and basic requirements of common law procedural fairness would be a departure from the open justice principle. There is no hearing being conducted in private. Access can be granted, as appropriate, to the written submissions. The determination will be published. I have not been persuaded that the open justice principle, important though it is, makes a difference to the analysis in this case. That is why it is absent from my discussion of the principles and the case-law.

Covid-dilution?

6.16 I have explained how PPD4 introduced the contingent paper norm of paper determination during the pandemic, subject to the proviso. I have explained that the basic requirements of common law procedural fairness are contextually applicable. The Defendant did not submit that the principles arising from the case-law – which I have sought to encapsulate in this Section of this judgment – were to be taken as having been materially affected by the pandemic, so far as their substantive content is concerned. The Defendant did not maintain before me that an 'overall paper norm' was consistent with the overriding objective and basic requirements of common law procedural fairness, because of the pandemic. Had such an argument been advanced, it would have been necessary to give careful consideration to the availability of remote hearings – very well established under the UTPR 2008, and expressly recognised in the PPD and the PGN. To take an example from the case-law, I can see that the description of a "*face-to-face encounter ... to put [the] case effectively*" (*Osborn* at paragraph 2(ii): Lord Reed) readily becomes a '*hearing*

... *to put the case effectively*’ in the context of appeal on a point of law. The hearing before me was a remote hearing, but with no lack of reactive engagement and the full force of oral advocacy. In the circumstances, I am satisfied that the principles identified above are and remain relevant to the question of paper determination and oral hearings within the Covid era.

Ground (1)(b) or Ground (2)(a) or both?

6.17 I set out an Explanation at the start of this judgment (§1.3 above) as to what, in my judgment, is the reason why it was unlawful for the PGN to communicate an overall paper norm. The reason has these components. (1) An overall paper norm for UTIAC substantive appeals would be inconsistent with the overriding objective and the basic requirements of common law procedural fairness which must inform the overriding objective. That is because it cannot stand with the contextual application of the key principles of the common law set out in this Part of this judgment. (2) That makes it unlawful for the PGN to communicate an overall paper norm, in circumstances where: (i) the PGN was describing the effect for UTIAC substantive appeals of a contingent paper norm directed by the PPD; and (ii) that contingent paper norm included a proviso which gave primacy to the overriding objective. As to the descriptive nature of the power, see §2.4(2) above. As to the proviso and the primacy which it gave to the overriding objective, see §3.4 above. On this basis, the PGN was ‘*ultra vires*’ (beyond the Defendant’s powers), because it was not consistent with PPD4, in the light of applicable common law principles. The principle of legality is not necessary to the analysis, because the proviso in PPD4 (through the overriding objective) gives primacy to the basic requirements of common law procedural fairness. As part and parcel of this analysis, the inconsistency between the Guidance and applicable common law principles is another way of expressing the PGN’s unlawfulness. In my judgment, they are – in the end – two ways of identifying the legal problem. Each is correct. It follows that Grounds (1)(b) and (2)(a) succeed.

Part 7. The Other Issues in the Case

Whether “will not, without more” in PGN16 is unlawful

7.1 This is Ground (2)(b) (§1.2 above). Ms Kilroy QC says that PGN16 is contrary to common law principles, with the consequence that (i) it is erroneous in law and/or (ii) it would, if followed, lead to, permit or encourage unlawful acts, in stating that:

The fact that the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing.

This, says Ms Kilroy QC, is a case of *Letts Unlawfulness* (§2.5 above).

7.2 In defence of this guidance, Mr O’Brien’s core submission was crisply articulated in writing, as follows:

... the importance of the case, without more, is never sufficient reason to require an oral hearing.

In developing this core submission, the essence of Mr O’Brien’s position ultimately resolved into these propositions. (1) An oral hearing can be required by reason of “*the facts of the case and ... the importance of what is at stake*” (citing *Osborn* at paragraph

81: §6.9 above). These, moreover, are “*not ... separate criteria*” but can be regarded as “*two sides of the same coin*”. (2) The “*facts of the case*” is a phrase which would include within it the affected individual having “*something to contribute*”. The “*importance of the case*” together with the affected individual having “*something to contribute*” can be a sufficient reason to require an oral hearing (at least in a ‘life and limb’ asylum or human rights case). Moreover, the affected individual could be taken to have “*something to contribute*” in any UTIAC substantive appeal unless (a) it had been conceded by the SSHD or (b) it had been identified as “*obvious*” by a UTIAC Judge. (3) It follows that it is legally correct to say that “*the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing*”, it being legally correct that “*the importance of the case, without more, is never sufficient reason to require an oral hearing*”. There always has to be “*more*”. Accordingly, PGN16 (i) is not erroneous in law and (ii) would not, if followed, lead to, permit or encourage unlawful acts, applying the principles of *Letts Unlawfulness*.

- 7.3 In my judgment, the short answer to this issue is that Mr O’Brien’s own points at (1) and (2) do not support his conclusions at (3). His analysis, in my judgment, runs into a number of difficulties, leaving his core submission and the impugned statement in PGN16 legally unsound.
- 7.4 I can start with the importance of a case given its facts. Mr O’Brien is right, in my judgment, to characterise “*importance of what is at stake*” and “*the facts of the case*” as ideas which can be seen as two sides of the same coin. The ‘coin’ is the composite, encapsulated in the idea of “*the importance of the case*”. Thus, Mr O’Brien’s ‘two sides of the same coin’ are “*importance*” and “*the case*”, found within his core proposition, making it wrong. They are also found in “*the appeal*” and “*importance*”, within the impugned sentence in PGN16, making it wrong too. The idea of “*importance*” will never arise in the abstract. It will always arise in a particular case with particular facts. And “*the case*” is “*this case*”, “*this case (with these facts)*”. Mr O’Brien’s core submission – that “*the importance of the case*”, “*without more*”, can “*never*” be sufficient reason to require an oral hearing – is, in my judgment, wrong in law. The point can be tested by taking Sir Thomas Bingham MR’s observations in *Onibiyo* (§6.6 above): he spoke of the “*risk to an individual if a state acts in breach of [the non-refoulement] obligation [in the Refugee Convention]*” as being “*so potentially serious that the courts have habitually treated asylum cases as calling for particular care at all stages*” including “*appellate processes*”. Take a classic protection case (§§6.6, 6.12 above) where the issue is sufficiency of protection or safety of internal relocation. The “*outcome*”, if the protection claimant loses, means return to the country of putative persecution. UTIAC is, of course, trying to get the answer right. But the “*importance*” to the individual of the “*outcome*” of “*the case*” is that if the individual loses the case and UTIAC got it wrong, the protection claimant is being returned to a place where they have a well-founded fear of persecutory ill-treatment from which they will not be safe. That is what “*is at stake*” (§6.9 above). Sedley LJ encapsulated it in *FP (Iran)* (at paragraph 43), when he said that exercising the right to be heard in an asylum appeal “*may literally be a matter of life and death*”. That is the “*importance*” of the “*outcome*” of “*the case*”. The importance of the outcome of the case can, of itself, be a sufficient basis in law for an oral hearing.
- 7.5 Then there is the inherent importance of a contentious case. Mr O’Brien is right, in my judgment, to recognise that “*importance*” together with “*having something to*

contribute” can be sufficient reason to require an oral hearing. He is also right to recognise that there can nearly always be taken to be “*something to contribute*” in any asylum (or ‘life and limb’) case: “*important implications*” and “*something useful to contribute*” (§6.11). That is not because of anything particular about the case. It arises in the mainstream of cases. Mr O’Brien carves out sub-categories of cases which are ‘non-contentious’ or ‘obvious’. But his logic is that in all contentious and ‘non-obvious’ cases, the importance of the case together with the inherent fact that the individual can be taken to have ‘something to contribute’ can be a sufficient reason to require an oral hearing. Once that is accepted, it is in my judgment misleading to say that the importance of the outcome will not “*without more*” be a reason for a hearing. It is misleading, in my judgment, to say that the importance of the case “*without more*” can never be a sufficient reason for a hearing. On analysis the “*more*” is simply the fact that it is a mainstream substantive appeal (§2.10 above) which is neither conceded nor ‘obvious’. In my judgment, there is an added problem with “*obvious*”, if it is intended to include a category of cases in which the UTIAC Judge is minded – having considered the papers – to decide the appeal against the individual and in favour of the SSHD. The problem with carving out “*obvious*” is that it risks falling into the same error as did the Court of Appeal in *Osborn*: focusing on whether it is assessed that an oral hearing could assist the quality of the decision-making. The broader considerations identified in *Osborn* may be inherent in an appeal to UTIAC in which the case is important. Contribution to the process engages not just utility but the appearance of justice and the rule of law. For these reasons, I am not persuaded that Mr O’Brien is right to ‘carve out’ his sub-category of “*obvious*” cases, as cases where the importance of the case and having ‘something to contribute’ could not of themselves be a reason to require an oral hearing.

- 7.6 Then there is the importance of an appeal, given features inherent in the appeal process. During Mr O’Brien’s submissions, a question arose as to whether he accepted that: ‘the importance of the case, together with the importance of the rule of law and the importance of the appearance of justice, could in combination be a sufficient reason to require a hearing.’ On reflection, Mr O’Brien did not accept that proposition. In my judgment, it is a proposition which is correct, when the relevant common law principles are borne in mind (§§6.6, 6.11-6.12). Moreover, there are other features which are inherent in a UTIAC substantive appeal which could, with importance, be a sufficient reason for a hearing: for example, that the case involves what has been recognised to be an arguable point of law (§2.10 above) given the potency of engagement and oral argument (§§6.7-6.8 above). Once importance together with features inherent in a UTIAC appeal can be a sufficient reason to require a hearing, it is misleading to say that “*more*” is needed than importance.
- 7.7 In my judgment, for all these reasons, PGN16 infringes *Letts Unlawfulness*. It is, in my judgment, erroneous in law. It would, at minimum, if followed, lead to, permit or encourage unlawful acts. The importance of the outcome of a case given its inherent facts, or given that it is a mainstream (contentious, or even a non-obvious, case) where the individual is to be taken to have something useful to contribute, or given features inherent in UTIAC substantive appeals, can all be reasons to require a hearing. They are all, on analysis, situations where the ‘*importance of the appeal*’ is sufficient, and where it is artificial to suggest that something “*more*” is needed than is already a given or inherent. The elements which can require a hearing are necessary parts of the case or the importance of the case or the appeal process. They are aspects necessarily linked to the importance

of the outcome of the appeal within this appeal process. I would reach the same conclusions if PGN16 had stood within guidance which did not otherwise communicate an ‘overall paper norm’. In this PGN, however, the problems with PGN16 are part of what informs the conclusion that the PGN is communicating an ‘overall paper norm’. The problems with PGN16 are, moreover, exacerbated by what is communicated elsewhere in the PGN. Ground (2)(b) succeeds.

Whether “particularly complex or novel/important issues of law” in PGN14 is unlawful

7.8 I have described this as Ground (2)(c) (§1.2 above). It was a pleaded point: that PGN14 is contrary to common law principles, with the consequence that (i) it is erroneous in law and/or (ii) it would, if followed, lead to, permit or encourage unlawful acts, in stating that *“The presence of particularly complex or novel/important issues of law may also be such as to necessitate a hearing”*. It was not, however, advanced as a distinct aspect of Ground (2) either in the skeleton argument or in the oral submissions. The position is as follows. (1) This statement in PGN14 is one of the features which supports the conclusion that the PGN communicates an overall paper norm (§4.10 above): it is therefore part of the analysis under Ground (1)(b) and Ground (2)(a). (2) This statement in PGN14 is also bound up with Ground (2)(b), in that the inherent feature of a UTIAC substantive appeal – that there is an arguable point of law (§2.10) – which could combine integrally with the importance of the appeal to be a sufficient reason for an oral hearing (§7.6 above). (3) PGN14 is also bound up with Ground (2)(d), where it is said that the PGN is materially incomplete. (4) In all these circumstances, and given that the point was not in the event advanced as a distinct part of Ground (2), I will dispose of it by concluding that no separate issue arises and recording that it fails.

Whether ‘making no mention of other relevant factors’ is unlawful

7.9 This is Ground (2)(d) (§1.2 above). It is that PGN14 is contrary to common law principles, with the consequence that (i) it is erroneous in law and/or (ii) it would, if followed, lead to, permit or encourage unlawful acts, because (as it is put in the Grounds for Judicial Review):

It makes no mention of a number of other relevant factors, including the right to an oral hearing as an aspect of procedural fairness, the importance of participation in the process, the power of oral argument in an adversarial system, in particular the ability to respond to the points troubling the decision maker and the importance of open justice as well as the need for the highest standards of fairness in asylum and immigration appeals...

7.10 Mr O’Brien submitted, in essence, as follows. (1) The PGN discussed a number of non-exhaustive factors. It did not purport to be, and was not required to be, a comprehensive description of the legal principles. (2) It gave prominence to the overriding objective which emphasises the importance of participation (*“ensuring, so far as practicable, that the parties are able to participate fully in the proceedings”*). (3) As to other matters relied on, although they are all accepted as relevant factors under the key principles of the common law, in these circumstances and since the *Guidance Note* was directed to expert UTIAC Judges who are perfectly well aware of such matters, it did not need to make reference to *“the right to an oral hearing as an aspect of procedural fairness, ... the power of oral argument in an adversarial system, in particular the ability to respond to the points troubling the decision maker and the importance of open justice as well as the need for the highest standards of fairness in asylum and immigration appeals”*. (4) It was

not necessary to give guidance to UTIAC Judges on these matters, any more than it is to ‘teach grandmothers to suck eggs’: see *Ewing* at paragraph 24 (§6.3 above). (5) There was thus no error of law by omission and it has not been shown that the PGN would, if followed, lead to, permit or encourage unlawful acts.

- 7.11 In my judgment, the answer to this issue lies in the way the PGN was written. The correct analysis is as follows. (1) The Defendant was not obliged to give guidance on “*what will happen*” with regard to UTIAC substantive appeals (PGN3) in the light of PPD4, including an ‘operative’ section (Section D) in which the implications of key features (facts, law and importance) were discussed. The Defendant could have brought PPD4 to the attention of the UTIAC Judges. That would have been the equivalent of *Ewing*, grandmothers and eggs (§6.3 above). (2) Although UTIAC Judges would be fully familiar with oral advocacy, fact, law, importance, anxious scrutiny, high standards of fairness, open justice, such was the pre-existing practice of hearings in “*virtually all*” substantive appeals that UTIAC Judges were not routinely applying Rule 34 to impose paper determination. As Steyn J pointed out (§3.4 above), PPD4 required that they consider Rule 34 and whether to have an oral hearing. (3) Parliament empowered the Defendant to give the UTIAC Judges ‘*guidance on a change in law and practice*’. Parliament must have envisaged that Judges would rely on that help, even though it related to the meaning and application of a Practice Direction, viewed against the relevant legal principles. (4) General guidance is possible (§6.2 above). The Defendant did not need to write an equivalent of Part 6 of this judgment, produced with Counsel’s assistance after a two-day hearing. Indeed, Ms Kilroy QC’s summary (§7.9 above) is not co-extensive with the analysis that has emerged from the authorities in Part 6. The point is a different one. Having embarked on the process of writing guidance of this kind, and identifying key features known to the audience of Judges – fact, law and importance – and in each case described in a way which contra-indicated a hearing (§§4.9-4.12 above), the Defendant needed in my judgment either (a) to make some reference to other features (§7.9 above) which are positive indicators in favour of a hearing or (b) to make clear that there were (or even may well be) such indicators. (5) That is reinforced by the fact that it is an error of approach to focus on (a) whether there are disputed primary facts (*West*) (§6.4 above) or (b) whether the Judge considers that an oral hearing would be likely to assist the quality of the decision-making (*Osborn*) (§§6.10-6.11 above). In each case, that was a point which would have been apparent from the headnote of a leading case, but a leading case in an area of law which it could not be taken that UTIAC Judges would have encountered. (6) Ultimately, the problem is intimately linked to the question whether the PGN was communicating an ‘overall paper norm’. There needed, at least, to be something which clearly explained that it was not doing so, and that there are a series of good reasons why a hearing (which could well be a remote hearing during the pandemic) might very frequently be necessary. (7) The PGN is not ‘saved by the audience’, for essentially the reasons I have already identified (§4.20 above). (8) Read as a whole, Section D of the PGN was erroneous in law. In any event, it means that Section D would, if followed, lead to, permit or encourage unlawful acts. It infringes *Letts Unlawfulness* (§2.5 above).
- 7.12 It is intellectually difficult, as well as rather artificial, to ask whether this ground for judicial review succeeds on a freestanding basis. I am clear that a Guidance Note could be written without referring to the matters about whose omission complaint is made. It is not difficult to think of overall messages which could have been communicated at PGN9 which would have solved the problem arising under this ground for judicial review,

depending at least on what was then said about fact (PGN14), law (PGN14) and importance (PGN16). Ultimately, however, and in the context of this guidance and the exercise which it undertook in identifying key points – and even if I am wrong about the overall paper norm communicated in the PGN – Ms Kilroy QC has persuaded me that Ground (2)(d) succeeds as a further and freestanding ground for judicial review. A series of really important points were omitted from the discussion. That is not sufficiently explained by the fact that UTIAC Judges ‘don’t need to be taught to suck eggs’ – they were being told about fact, law and importance. In my judgment, Ground (2)(d) is more than simply another way of expressing Ground (2)(a).

Part 8. Conclusions and Consequences

Conclusions

8.1 For the reasons set out above, my conclusions as to the Grounds for Judicial Review (§1.2 above) are as follows. Ground (1)(b) and Ground (2)(a) (as different ways of making the same essential point) succeed. Grounds (1)(a), (1)(c) and (2)(c) fail. Grounds (2)(b) and (d) succeed. I will now explain the outcome in a more straightforward way, and without acronyms. I have concluded as follows:

- (1) The *President’s Guidance Note*, directed to Upper Tribunal (Immigration and Asylum Chamber) Judges, is unlawful because it communicated that appeals should normally be decided on the papers rather than at remote hearings during Covid. That position is inconsistent with basic common law requirements which inform the overriding objective of just and fair disposal, with which Judges are duty-bound to comply. That means the *Guidance Note* misdescribed the effect of the Senior President of Tribunals’ Covid *Pilot Practice Direction*. [Ground (1)(b) and (2)(a)]
- (2) Had the *Guidance Note* been consistent with those common law requirements, it would have lawfully described the effect of the *Practice Direction* and would have been lawful. [Ground (1)(a) and (c)]
- (3) The *Guidance Note* is also unlawful because it said: “*The fact that the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing to decide the relevant questions*”. That is advice which (a) is erroneous in law and (b) would, if followed, lead to, permit or encourage unlawful acts. [Ground (2)(b)]
- (4) Although relevant to the other issues, no separate issue arises from the fact that the *President’s Guidance Note* said: “*The presence of particularly complex or novel/important issues of law may also be such as to necessitate a hearing*”. [Ground (2)(c)]
- (5) Because of the way the *Guidance Note* is written, it is also unlawful because it has omitted important factors recognised at common law which support holding a hearing. That also makes it advice which (a) is erroneous in law and (b) would, if followed, lead to, permit or encourage unlawful acts. [Ground (2)(d)]

Consequences

8.2 It was common ground, as Mr O’Brien put it in his skeleton argument, that: “*were the Court to find any aspect of the paragraphs under challenge to be unlawful, ... (absent agreement) the Court should consider the question of any relief in separate submissions after judgment*”. One purpose of circulation of a judgment in draft is to elicit submissions regarding consequences to enable the Court to deal with the question of relief and other consequential matters, following an appropriate process, which a Court is then able to embody at the end of its judgment. Having circulated this judgment in draft and received submissions from the parties I decided to make the following Order, for the reasons I will explain below.

UPON hearing Leading Counsel for the Claimant and Counsel for the Defendant at a remote hearing on 21-22 October 2020 (Recital 1)

AND UPON the Defendant having decided to withdraw paragraphs 9-17 of his Guidance Note of 23 March 2020 (the “Guidance Note”), and having undertaken to do so by 9am on 20 November 2020, for the reasons given by Mr. Justice Fordham in his judgment dated 20 November 2020 [2020] EWHC 3103 (Admin) (“the Judgment”) (Recital 2)

AND UPON the Defendant having further undertaken that (Recital 3):

- (i) *In all cases of a UTIAC substantive appeal (as described in paragraph 2.10 of the Judgment) where, between 23 March 2020 and the date of this Order either (a) the appeal has been determined without a hearing and in favour of the Secretary of State for the Home Department (“SSHJ”) or (b) a UTIAC Judge has decided that the appeal will be determined without a hearing, the Defendant shall use all reasonable endeavours to bring to the attention of the person who is party to the appeal (and who is not the SSHJ), in writing: (i) the Judgment (ii) this Order (iii) the statement: “If you have not taken legal advice on your position, you are strongly advised to do so now”; and that*
- (ii) *The Defendant will by 4pm on Friday 27 November 2020 file and serve a letter stating by what means and in what time-frame he is approaching the discharge of the undertaking at (i) above.*

IT IS ORDERED THAT:

1. *The Claimant’s claim is allowed for the reasons set out in the Judgment.*
2. *It is declared that paragraphs 9-17 of the Guidance Note of 23 March 2020 are unlawful.*
3. *The Defendant is to publish the Judgment and this Order on the www.judiciary.uk website as soon as possible following receipt of the sealed Order from the Court.*
4. *Liberty to the parties to apply on notice in writing for further order or directions regarding the discharge of the undertakings at (i) and (ii) of Recital 3 above.*
5. *The Defendant pay the Claimant’s costs, to be limited to the costs of the Claimant’s Counsel team at Attorney General’s civil counsel panel rates in accordance with the Order made by Steyn J on 17 August 2020, those costs to be subject to detailed assessment if not agreed.*

Withdrawal of PGN9-17 (Recital 2)

8.3 As regards Recital 2 recording the Defendant’s decision and undertaking regarding withdrawal of paragraphs 9-17 of the PGN, the terms of this were offered by the Defendant and agreed by the Claimant. Ms Kilroy QC asked me to include within the main body of the Order “*liberty to apply to enforce the Defendant’s undertaking*”, to ensure an enforcement mechanism “*supplementing the inherent and implicit liberty to apply to enforce the terms of the main Order*”. Judicial review operates on the basis of

mutual confidence and respect between defendant public authorities and the Courts and there is no reason whatsoever to suppose that the Defendant will not promptly do what he has decided and undertaken to do. Moreover, I accept Mr O'Brien's submission that there is "*no need for a liberty to apply provision to enable enforcement of an undertaking*". I resolve this dispute in favour of the Defendant.

Paragraphs 1-3 and 5

8.4 As regards paragraphs 1-3 and 5 of the Order, these were agreed between the parties subject to the following points. Ms Kilroy QC asked me to include within paragraph 1 (the claim being allowed), but not paragraph 2 (the declaration), text which repeats §8.1 above (using added wording "*... namely, as summarised in paragraph 8.1 of the Judgment: (1) the Guidance Note is unlawful because ... [etc]*"). This is linked to a point with which I will deal below, as to those affected being "*promptly informed of key findings in the judgment in a format which is accessible and easily comprehensible to them*". I accept Mr O'Brien's submission that it is sufficient that the Order "*refers to the reasons set out in the Judgment*" and "*the Judgment and Order will be published together on the www.judiciary.uk website*". That website location is identified in the Order itself (paragraph 3). The reasoning at §8.1 and the other reasoning in this judgment can be readily found. There is no need for more. Ms Kilroy QC asked that publication should be on the website of UTIAC, but I accept Mr O'Brien's submission that "*the appropriate website*" is www.judiciary.uk, that being "*where guidance of the Chambers of the Upper Tribunal and First-tier Tribunal is published*" including the PGN itself. I resolve these disputes in favour of the Defendant.

Notification (Recital 3 and paragraph 4)

8.5 As regards what became Recital 3 and paragraph 4 of the Order, the position was as follows. Ms Kilroy QC submitted that it was appropriate for this Court to order: "*The Defendant is to promptly notify the Order and Judgment to all those appellants or respondents who have been party to paper determinations made since the publication of the [PGN], informing them that the Judgment may have implications for their appeal determination and that they should seek legal advice*". Mr O'Brien submitted that no such order should be made, relying on various concerns including: "*the extremely onerous nature of the task, the deeply problematic precedent it would set, the availability of more proportionate methods of bringing the Judgment and Order to the attention of the public, and the fact that such novel and disproportionate relief was not even pleaded ...*" It was necessary for me to resolve that dispute, which I did, circulating the reasons set out below (§§8.6-8.8) and communicating what I proposed to order (§8.9 below).

8.6 In considering the submissions made (§8.5 above) it is necessary, in my judgment, to focus on three key aspects: principle, precedent and proportionality. I deal first with principle. Ms Kilroy QC submits that it is appropriate to take steps aimed at "*ensuring individuals affected by the unlawful Guidance in the period since 23 March 2020 are promptly informed of key findings in the Judgment, in a format which is accessible and easily comprehensible to them, together with an indication of the possibility it may have implications for them and the need to take legal advice*". Mr O'Brien, rightly in my judgment, does not dispute that (a) this Court has jurisdiction to make an Order of this nature (b) that the judgment may have implications for appeal determinations and (c) that it is appropriate for those affected to know that and be encouraged to take legal advice.

Judicial review courts have, for example, directed that judgments be brought to the personal attention of a Minister (*R v SSHD, ex p Sanusi* [1999] INLR 198), and to those bodies concerned with supervision and training of magistrates (*R v Feltham Justices, ex p Haid* [1998] COD 440). In the present case it is agreed that paragraph 3 of the Order should be made – which directs publication on a website – the agreed purpose of which is to communicate so that those affected can come to know what this case has decided and consider or take advice on its implications for them. The agreed paragraph 3, moreover, is accepted to be appropriate notwithstanding that it was not pleaded in the grounds for judicial review. Provided always that the Court is satisfied – as I am – that has been a full and fair opportunity to address the question of relief, and no party has been unfairly taken by surprise, the Court may “select one or more of those ... forms of relief” put forward by the parties or “craft a different remedy of its own” (*R (Thornton Hall Hotel Ltd) v Wirral Metropolitan Borough Council* [2019] EWCA Civ 737 [2019] PTSR 1794 at paragraph 47). The judicial review grounds, as is good practice, included: “Such further or other relief as the Court sees fit” (other common formulations include ‘such further or other relief as is necessary to give effect to the judgment of the Court’). I have to focus on what is necessary, and proportionate, to do justice in this case. The key question is whether the agreed paragraph 3 of the Order goes far enough. Three points made by Ms Kilroy QC, in my judgment, have particular resonance and Mr O’Brien is right not to have taken issue with any of them.

- (1) The first relates to what was said in this case when interim relief was sought. In refusing interim relief, Andrews J accepted that if the claim succeeded and “*the procedure turns out to be unfair...there may then have to be reconsideration of these appeals*” (interim relief judgment 2 July 2020 [2020] EWHC 2056 (Admin) at paragraph 24).
- (2) The second relates to the practical position of those affected. Ms Kilroy QC submits:

Given that the appeal to the Upper Tribunal (UT) is in practice for most individuals the last avenue of appeal ..., a significant percentage of the many individuals whose protection and human rights appeals were refused by the UT following paper determination in the 8 months since 23 March 2020 will have become ‘Appeals Rights Exhausted’ (ARE) and lost their protection against removal contained in section 78 of the Nationality Immigration and Asylum Act 2002. Some individuals may already have been removed from the UK in circumstances where they have not had a fair hearing of their appeal. Others may be at risk of imminent removal. Many will also, following the conclusion of the appeals process, be without legal representation, or easy access to representation, and some will be in detention in prisons or in removal centres. An unknown proportion were litigants in person from the start It is clearly essential to ensure these individuals are promptly and accessibly informed of this Judgment and Order, of the potential it has consequences for them and of the need to seek legal advice, so they can realistically benefit from the principle of open justice, the rule of law ..., and they can have access to a process whereby the fairness of their appeal can be assessed before they are removed from the UK, in potential breach of their fundamental rights, and the UK’s international obligations. It cannot reasonably be assumed that individuals whose appeals were determined on the papers will become aware of this Judgment otherwise.

- (3) The third relates to the way in which this case engages the public interest. Ms Kilroy QC submits (cross-references are to this judgment):

In this case the Claimant has brought a claim for the express purpose of protecting the ‘interests of those individuals and families involved in UTIAC substantive appeals’ (see §1.4 above). Its standing to do so on this basis was not contested (see §1.4 above). The acceptance of the Claimant’s standing, the grant of permission, and the grant of a cost-capping order ... all confirm that this is a claim which the Court has allowed to proceed because a judgment on the issues it raised was accepted to be in the public interest ... It is in the public interest in large part due to its impact on the interests of individuals involved in substantive appeals but also because it involved procedural fairness and thus the rule of law. Further the Claimant sought interim relief expressly to protect the interests of those individuals pending the outcome of the claim ... That application failed, not because those interests did not require protection or because the Court did not have jurisdiction to grant the relief, but because the judge concluded the balance of convenience lay against it. In reaching her conclusion on the balance of convenience Andrews J assumed it would be possible to take corrective action after Judgment if the claim succeeded (see [2020] EWHC 2056 paragraphs 23-24) ... [W]ithout [orders such as are sought] there is a real risk that those directly affected by the Judgment may not become aware of it until it is too late, and the public interest for which permission was granted will be seriously undermined.

I am persuaded, based on these submissions, that – in principle and subject to the points below as to precedent and proportionality – this Court should ensure that appropriate steps are taken so that those who are affected will come to know what has been decided. I am not satisfied that paragraph 3 of the Order goes far enough to be sure that this is achieved.

- 8.7 I deal next with precedent. Mr O’Brien submitted that: “*an order requiring notification not simply of a particular public authority but a very large number of potentially affected third parties is without precedent in the reported cases*”. Mr O’Brien added: “*The Defendant understands that even in the case of R (Detention Action) v First-tier Tribunal [2015] 1 WLR 5341 (where the result of the litigation was that all the relevant immigration appeals had been decided by an unfair process) the Court of Appeal did not order a remedy of the kind proposed by the Claimant*”. This was a powerful submission. Mr O’Brien’s reference to *Detention Action* is a compelling one because it was a judicial review challenge by a non-governmental organisation protecting the interests of those affected by an approach to hearings of appeals in the context of basic requirements of common law fairness. Yet, says Mr O’Brien, the Court of Appeal did not consider steps from within the FTT to notify those affected to be appropriate. In my judgment, based on materials provided by Ms Kilroy QC, the *Detention Action* illustration is a strong parallel, but it does not assist Mr O’Brien. The Court of Appeal decided that case on 29 July 2015, upholding the judgment of this Court (Nicol J) on 12 June 2015 which held (in essence) that the fast-track rules for asylum appeal decision-making were incompatible with basic requirements of common law procedural fairness. At a hearing on 17 June 2015, Sullivan LJ referred to “*the prospect of the first tier tribunal ... having to go back and look at all of the cases which it unlawfully considered under an unlawful process*”, as well as the prospect of those affected “*seeking permission to appeal on the basis that [they] have been tried by an unfair process*”. What happened next was the SSHD – the other party to all of the appeals and an interested party in the *Detention Action* case – wrote to those awaiting a fast-track appeal. The Home Office letter stated:

DETENTION ACTION JUDGMENT

You may be aware of a challenge brought by the Non-Governmental Organisation, Detention Action against the lawfulness of the Detained Fast Track (DFT) process. As part of this challenge the High Court has ruled that the Fast Track Rules (FTR), which govern the conduct of appeals within the Fast Track process, were enacted unlawfully and should not

continue to apply. However the High Court has granted a stay on its judgement. It is our understanding that, as a result of the stay, the First-tier and Upper Tribunal are continuing to process appeals under the Fast Track Rules pending a decision by the Court of Appeal.

In the meantime Detention Action has challenged this stay and has been given permission to appeal to the Court of Appeal. Whilst the stay on the High Court's judgement will remain in place until the Court of Appeal makes a ruling, it has been decided that, until then, no removal action will take place in your case.

In light of this development, and as part of the ongoing active management of your case, your detention has been reviewed in line with general detention criteria taking account of your individual circumstances. Your claim for asylum has already been refused and you are appealing against this decision. [CASE SPECIFIC CONSIDERATION UNDER CHAPTER 55]. Your continued detention is therefore deemed appropriate and lawful.

If you have not yet taken legal advice on your position, you are strongly advised to do so now.

After the Court of Appeal's judgment (29 July 2015) the President of the FTT (Immigration and Asylum Chamber) on 4 August 2015 (in eight appeals including AA/09953/2014) decided to use the tribunal's power to set aside its previous determination on grounds of procedural irregularity and in the interests of justice, and annexed a "draft letter which further appellants and/or their representatives may wish to use" inviting a similar course in other cases. In my judgment, the precedent of the *Detention Action* case in fact exemplifies a recognition of the importance of proactive communicative steps to ensure that the outcome of judicial review, brought by a non-governmental organisation regarding appeal procedures and procedural fairness, is brought to the attention of those affected. Nobody in that case thought that publication of the judgment and order on a website was enough. The fact that the Court of Appeal did not make an order for practical action in no sense means *Detention Action* stands as a precedent against this Court doing so, where satisfied that steps being put forward do not go far enough.

- 8.8 I deal finally with proportionality. I accept that proportionality and practicality are extremely important considerations. Mr O'Brien's submissions tell me that there have been "over 300" paper determinations in the relevant period. He submits that the Claimant's real concern must be "*about individuals who have lost their appeals, or were unsuccessful in appeals brought by the SSHD*". He reminds me that the SSHD can be taken to be aware of these proceedings. He says that brings the relevant number down by approximately half. I accept those submissions. Ms Kilroy QC's formulation was too broad – although it was also, in my judgment, in one sense too narrow: it is necessary to consider those in respect of whom pipeline appeals have been identified for paper determination but not yet determined. I proceed on the basis that the numbers are, in aggregate, over 150 cases. Mr O'Brien points out that many appellants may have legal representatives and some appellants will have consented, or failed to object, to paper determination. These are not, in my judgment, indicia of lack of proportionality in ensuring that the notification of the outcome of this judicial review (the purpose of the agreed paragraph 3 of the Order) is effective and inclusive of all those who may be detrimentally affected. I do not accept Mr O'Brien's submission that for this Court in this case to require notification entails a "logic" that any judgment of any court which may affect any third parties is required to be communicated to them all. Nor can I accept that ensuring notification in this case, to the extent I have identified, is something the Court should refuse on grounds that it is "extremely onerous" or sets a "deeply problematic

precedent” or would be “*disproportionate relief*”. These are individuals whose cases have been within the care of the tribunal system, whose cases have been determined, and whose contact details are held within the system. They are cases which have continued to be dealt with, with the PGN maintained, after pre-action correspondence (1 May 2020), the commencement of this claim (18 June 2020) and the grant of permission for judicial review (6 August 2020). What is needed in this case, in my judgment, is a letter, which can be short, communicating what has happened and where the judgment and order can be found and referring to the appropriateness of legal advice (the phrase used by the Home Office in the *Detention Action* letter was excellent and I have adopted it). That is proactive action, as were the steps by the SSHD and the President of the FTT in the context of *Detention Action*. It is needed, in order to ensure that justice is practical, effective and inclusive. That is as far as I am going to go. I am satisfied that it is entirely appropriate to leave latitude to the Defendant to consider how best to achieve the outcome. I can think of a number of ways it might be achieved: one option would be for UTIAC to deal with the matter; another would be for the Claimant to write a letter which is then sent by UTIAC to those affected; another option could involve the Home Office (as in *Detention Action*). These are all matters for the Defendant to consider, not for this Court to prescribe. As a consequence of allowing for that appropriate latitude, I will however also provide a mechanism for the Claimant and this Court to be informed and approachable (through liberty to apply) if either party considers there is some remaining matter needing ironing out. For all these reasons, I will include paragraphs 4-6 within the Order (§8.9 below). They accept Ms Kilroy QC’s submissions as to why the agreed paragraph 3 of the Order does not, in the circumstances of this case, go far enough. But they are more tailored, and allow the Defendant greater latitude, than did the order which Ms Kilroy QC asked this Court to make.

8.9 For those reasons, I communicated to the parties that I was proposing to order as follows:

4. In all cases of a UTIAC substantive appeal (as described in paragraph 2.10 of the Judgment) where, between 23 March 2020 and the date of this Order either (a) the appeal has been determined without a hearing and in favour of the Secretary of State for the Home Department (“SSHD”) or (b) a UTIAC Judge has decided that the appeal will be determined without a hearing, the Defendant shall ensure that there is brought to the attention of the person who is party to the appeal (and who is not the SSHD), in writing: (i) the Judgment (ii) this Order (iii) the statement: “If you have not taken legal advice on your position, you are strongly advised to do so now”. 5. The Defendant shall by 4pm on Friday 27 November 2020 file and serve a letter stating by what means and in what time-frame he is approaching the discharge of paragraph 4 of this Order. 6. Liberty to the parties to apply on notice in writing for further order or directions regarding the discharge of paragraphs 4 and 5 of this Order.

8.10 Having received my reasons (§§8.6-8.8 above) giving my ruling on the disputed point (§8.5 above), and having received the draft of the order which I was proposing (§8.9 above), the Defendant through Mr O’Brien did two things. The first was, correctly, to point out that the word “*ensure*” (§8.9 above) was inappropriate as it was not an outcome that the Defendant was in a position to achieve and did not reflect the appropriate degree of latitude which I had described: appropriate wording would be “*shall use all reasonable endeavours to bring to the attention ...*”. Ms Kilroy QC did not oppose that revision and I was quite satisfied that the Defendant was right about this improved wording. The second was, very properly, to state that the Defendant was “*naturally prepared to undertake to use all reasonable endeavours to achieve the result envisaged by paragraph 4 of the [draft] order, which is a realistic and appropriate requirement of him*”. Ms

Kilroy QC made some observations but was ultimately neutral as to whether the Court should make an agreed order (as with paragraph 3 of the Order) or accept an undertaking. I was quite satisfied that the appropriate course was to accept a further undertaking, offered in response to reasons circulated by the Court (cf. §8.3 above). I therefore made the Order in the terms I have set out (§8.2 above).