AND UPON the Court noting that an anonymity order was made by the Court of Appeal on 6 October 2022 and that order continues to have effect.

Michaelmas Term
[2024] UKSC 32
On appeal from: [2023] NICA 14

JUDGMENT

CAO (Respondent) *v* Secretary of State for the Home Department (Appellant) (Northern Ireland)

before

Lord Lloyd-Jones
Lord Sales
Lord Hamblen
Lady Rose
Dame Siobhan Keegan

JUDGMENT GIVEN ON
23 October 2024

Heard on 5 and 6 June 2024

Appellant
Tony McGleenan KC
Philip Henry KC
(Instructed by Crown Solicitors Office (Belfast))

Respondent
Mark Mulholland KC
Erik Peters
Gordon Anthony
(Instructed by Wilson Nesbitt (Belfast))

LORD SALES AND DAME SIOBHAN KEEGAN (with whom Lord Lloyd-Jones, Lord Hamblen and Lady Rose agree):

1. Introduction

1. This appeal concerns the meaning and effect of section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55" and "the 2009 Act", respectively). This provision is concerned with safeguarding and promoting the welfare of children in the United Kingdom, including when decisions are made regarding their immigration status. The court also has to consider the interaction of section 55 with article 8 of the European Convention on Human Rights ("article 8" and "the ECHR", respectively), as given effect in domestic law by the Human Rights Act 1998 ("the HRA"), which is also concerned with the protection of children's welfare.

2. Section 55 provides in relevant part as follows:

> "**55. Duty regarding the welfare of children**
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official.

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

…

(6) In this section—

'children' means persons who are under the age of 18; …

(8) Section 21 of the UK Borders Act 2007 (c 30) (children) ceases to have effect."

3. The background to this provision was explained by Baroness Hale of Richmond in the leading decision of this court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 ("*ZH (Tanzania)*"), at para 23. When the United Kingdom acceded to the UN Convention on the Rights of the Child 1989 ("UNCRC") it originally entered a reservation concerning immigration matters. Article 3.1 of the UNCRC states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Outside the immigration field, section 11 of the Children Act 2004 placed a duty on a wide range of public bodies to make arrangements to carry out their functions having regard to the need to safeguard and promote the welfare of children, reflecting the substance of the obligation in article 3.1 of the UNCRC. Within that field, section 21 of the UK Borders Act 2007 provided for the Secretary of State to issue a code of practice for border officials to ensure that while children were in the United Kingdom they were "safe from harm". The reservation for immigration matters was lifted in 2008 and, as a result, section 55 of

the 2009 Act was enacted. At the same time, section 55(8) stated that section 21 of the 2007 Act ceased to have effect; the code of practice issued under it was superseded.

4. Section 11 of the Children Act 2004 is not replicated in the Children (Northern Ireland) Order 1995. However, the substance of section 11 is substantially mirrored in section 12 of the Safeguarding Board (Northern Ireland) Act 2011. Thus, in Northern Ireland a wide range of public bodies also have obligations to carry out their functions having regard to the need to safeguard and promote the welfare of children who are within this jurisdiction.

5. Section 55(1) places a specific duty upon the Secretary of State to make arrangements to ensure that any functions in relation to immigration are discharged having regard to the need to safeguard and promote the welfare of children. An ancillary duty is found in section 55(3) in that any person exercising immigration functions must have regard to any guidance given by the Secretary of State. This duty is directed to a range of officials, including the Secretary of State him- or herself, officials acting on behalf of the Secretary of State under the *Carltona* doctrine (*Carltona Ltd v Coms of Works* [1943] 2 All ER 560) and immigration officers.

6. When section 55 was brought into effect the Secretary of State issued guidance to the UK Border Agency pursuant to section 55(3): *Every Child Matters: Change for Children: Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children* (November 2009) ("the Guidance"). The Guidance explained (para 4) that section 55 is intended to achieve the same effect as section 11 of the Children Act 2004, which placed a similar duty on other public organisations. The Guidance was stated to be aimed at staff of the UK Border Agency and contractors when carrying out UK Border Agency functions: para 5. Due to administrative reorganisation within the Home Office, in 2013 the UK Border Agency ceased to exist as an executive agency of the Home Office and its relevant functions were absorbed into the Home Office's Immigration Enforcement section. It is common ground that the Guidance continues to apply to Home Office officials.

7. The introduction to the Guidance stated (para 6) that it was issued under section 55(3) and (5), which requires any person exercising immigration, asylum, nationality and customs functions to have regard to guidance given by the Secretary of State, and continued: "This means they must take this guidance into account and, if they decide to depart from it, have clear reasons for doing so."

8. Part 1 of the Guidance, entitled "Understanding the duty to make arrangements to safeguard and promote the welfare of children", included the following:

(i) The duty under section 55 requires the UK Border Agency "to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children" (para 1.3).

(ii) The UK Border Agency's contribution to safeguarding and promoting children's welfare would be "to identify and act on their concerns about the welfare of children with whom they come in contact" (para 1.6).

(iii) Key features at an organisational level for safeguarding and promoting the welfare of children comprise senior management commitment to the importance of this objective, making a statement of responsibilities available for all staff, a clear line of accountability within the organisation for work on this objective, taking account of this objective in service development, staff training, safe recruitment, effective inter-agency working and information sharing (para 1.9).

(iv) Under the heading "Work with individual children and their families", at para 1.14:

> "In order to safeguard and promote the welfare of individual children, the following should be taken into account, in addition to the relevant section of Part 2 of this guidance. The key features of an effective system are:
>
> - Children and young people are listened to and what they have to say is taken seriously and acted on; …
>
> - Where possible the wishes and feelings of the particular child are obtained and taken into account when deciding on action to be undertaken in relation to him or her."

(v) Para 1.13 stated:

> "The ways in which agencies work with or have contact with individual children and their families will differ depending on the functions of each agency. Some will focus on direct work with children and young people, whereas others will work with children and their families, and still others will work with adults with parenting responsibilities for children."

(vi) Para 1.15 said that the UK Border Agency should seek to reflect certain general principles underpinning work with children and their families "as appropriate", including (para 1.16) that the work should be "child centred", "supporting the achievement of the best possible outcomes for children and improving their wellbeing", "involve children and families, taking their wishes and feelings into account" and "informed by evidence". In relation to involvement of children and families, para 1.17(b) stated:

> "In order to appreciate the child's needs and how they make sense of their circumstances it is important to listen and take account of their wishes and feelings. It is also important to develop a co-operative constructive working relationship with parents and caregivers so that they recognise that they are being respected and are being kept informed. Where there is respect and honesty in relating to parents they are likely to feel more confident about providing vital information about their child, themselves and their circumstances."

9. Part 2 of the Guidance, entitled "The role of the UK Border Agency in relation to safeguarding and promoting the welfare of children", included the following:

(i) "The UK Border Agency's main contributions to safeguarding and promoting the welfare of children include:

(ii) Ensuring good treatment and good interactions with children throughout the immigration and customs process" (para 2.4).

(iii) "The UK Border Agency acknowledges the status and importance of the following: the [ECHR]" (para 2.6).

(iv) Para 2.7 stated:

> "The UK Border Agency must also act according to the following principles:
>
> - Every child matters even if they are someone subject to immigration control.
>
> - In accordance with the [UNCRC] the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children. …
>
> - Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree. In instances where parents and carers are present they will have primary responsibility for the children's concerns."

(v) More detailed guidance was provided in relation to the matters referred to in para 8(iii) above, such as training for UK Border Agency staff.

(vi) Under the heading, "Work with individual children", para 2.18 stated:

> "This guidance cannot cover all the different situations in which the UK Border Agency comes in contact with children. Staff need to be ready to use their judgement in how to apply the duty in particular situations … . In general, staff should seek to be as responsive as they reasonably can be to the needs of the children with whom they deal, whilst still carrying out their core functions."

10. Flowing from the above we make the obvious point that this is high level guidance which must be adapted by officials to the facts of a particular case when children are involved.

11. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

2. Factual Background and the Proceedings Below

12. The respondent is a national of Nigeria born in 1971. She arrived in the United Kingdom on 25 September 2018 with her son (then aged 16) and daughter (then aged 12), who are also nationals of Nigeria, and was granted entry on the basis of a visitor's visa. On 8 November 2018 she applied for asylum for herself and her children.

13. The basis for the asylum application was that (i) the respondent had experienced serious domestic violence at the hands of her husband both before and after their separation in 2013 and feared that she would be exposed to this again if she were returned to Nigeria and (ii) her husband's family expect her daughter to undergo female genital mutilation ("FGM") and he had been making efforts to take the daughter from her in order to subject her to that procedure. The respondent said that she learned that the procedure was scheduled to take place in October 2018, so to protect her daughter she tricked her husband into giving his consent for her to take her children on a holiday to the United Kingdom and came here. The respondent claimed that her husband would be able to track her and the children down were they returned to Nigeria.

14. By a decision letter dated 10 April 2019 ("the Decision Letter") the appellant Secretary of State refused the respondent's application. The Secretary of State referred to

certain inconsistencies in the respondent's account and to the fact that she had not made an asylum claim on a previous visit to the United Kingdom in 2012. The Secretary of State was not persuaded that there was a real risk of FGM for the respondent's daughter: on the respondent's account she had not discussed this with her husband for 12 years; FGM did not appear to be culturally important for her husband, as he had married the respondent who had not undergone FGM; the husband had signed a consent form to allow the respondent to take her daughter to the United Kingdom and paid for the trip despite the respondent's opposition to FGM for her daughter; and it was implausible that he would have told the respondent of his plans to subject the daughter to FGM in October 2018, given the respondent's resistance to the procedure. The Secretary of State also considered that state authorities in Nigeria would provide protection for the respondent and her daughter if they asked for help and that, in any event, internal relocation within Nigeria to Benin City or other large cities would be possible for them—where they would not be traced and would not be at risk. The respondent was well educated to degree level and had had a senior job in a bank between 1999 and 2016 and had started two businesses of her own, which indicated that she would be able to re-establish herself in this way. She had her own family support network who could assist her. In making these judgments, the Secretary of State took into account information about the situation in Nigeria contained in the up-to-date country guidance documents. In the Secretary of State's view, the respondent had not established that she was entitled to humanitarian protection and the return of the respondent and her children to Nigeria would not violate any of their Convention rights under the ECHR and the HRA.

15. A section towards the end of the Decision Letter was headed "Section 55 Consideration". It was stated that the Secretary of State had "taken into account the need to safeguard and promote the welfare of children in the United Kingdom in accordance with the Secretary of State's duty under section 55 of [the 2009 Act]". No specific reference was made to section 55(3), nor to the Guidance. However, the letter said that the Secretary of State had considered the impact of his decision on the wellbeing of the children, having regard to their best interests. Various factors were taken into account. In the limited time the children had been in the United Kingdom they had not created significant links here and it would not be unreasonable to expect them to reintegrate back into life in Nigeria. It was therefore considered that it would be in their best interests to be returned with the respondent to Nigeria as a family unit.

16. The respondent exercised her right of appeal to the First-tier Tribunal ("the FTT") under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002"). Such an appeal takes the form of a re-hearing of the case by the FTT, on the basis of evidence adduced in the FTT and with reference to country guidance information. The respondent was represented by counsel, Mr Beech. At this stage, the respondent made no complaint about the lack of reference in the Decision Letter to section 55(3) and the

Guidance. The respondent gave evidence at the hearing. The presenting officer for the Secretary of State was ill on the day of the hearing, but no objection was raised to the FTT proceeding in their absence.

17. In its decision promulgated on 25 February 2020, the FTT (Judge Grimes) considered whether the respondent had shown that there was a real risk of her or her children being persecuted for one of the reasons set out in the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") if returned to Nigeria, or that their rights under article 2 (right to life), article 3 (prohibition of torture, inhuman or degrading treatment) or article 8 (right to respect for private and family life) of the ECHR would be violated, noting that the burden of proof was on the respondent.

18. The FTT found that there were significant inconsistencies in the account given by the respondent. She was also vague about significant matters. She adduced as evidence a letter from the pastor of her church in Nigeria, but this did not support her account on important points. The FTT found that the respondent had been subject to domestic violence at the hands of her husband up to their separation in 2013 but not thereafter. The FTT found that the respondent was not at risk of domestic violence from her husband if returned to Nigeria.

19. As regards the threat of FGM in relation to the respondent's daughter upon return to Nigeria, the FTT again found that there were inconsistencies in the respondent's evidence which undermined her credibility. She did not have a good explanation why she did not claim asylum immediately upon her arrival in the United Kingdom in September 2018. Her account of how her husband came to give his consent for the children to come with her to the United Kingdom was not consistent with her account of the threat he posed to her daughter in relation to FGM. The respondent adduced written evidence from her solicitor that in 2016–2017 she had hidden her daughter with friends, but this was inconsistent with her oral evidence that her daughter was at boarding school in that period. The letter from the respondent's pastor did not refer to FGM at all. Upon reviewing all the evidence, the FTT was not satisfied that the respondent's husband wanted to subject his daughter to the FGM procedure.

20. The FTT went on to make further findings, having regard to relevant country guidance information in the form of the current Country Policy and Information Note entitled "Nigeria: Female Genital Mutilation (FGM)" 2007 ("the CPIN") and other aspects of the respondent's evidence. Based on the information in the CPIN the FTT found that the threat of FGM in relation to girls over the age of five was low, and the respondent's objection to the procedure was a significant protective factor. Even if there

was a threat to subject the respondent's daughter to FGM, the respondent would be able to seek protection from the police and it was likely that the police would provide such protection.

21. In addition, the FTT found that the respondent and her children could relocate in Nigeria to avoid any risk of FGM and it would be reasonable to expect them to do so. The respondent is well educated and had previously held employment at a bank and been self-employed, so she would be able to work again and provide for her family. She has good relations with her parents and siblings, who would be able to provide her with support in relocating, if needed.

22. For these reasons, the FTT found that the respondent had not established that she or her children had a well-founded fear of persecution in Nigeria. For the same reasons, the FTT found that they would not be at risk of treatment contrary to articles 2 or 3 of the ECHR if returned to Nigeria.

23. In the final paragraph of its decision (para 53) the FTT addressed article 8, as follows:

> "Mr Beech accepted at the hearing that there are no separate issues arising in relation to the appellant's [the respondent in the present appeal] private and family life which have not been considered in the context of the asylum claim. No submission was made that the appellant meets any of the requirements of the Immigration Rules in relation to her private or family life. The appellant and her family will return to Nigeria together and I find on the evidence before me that it is in the best interests of the children to remain with their mother. On the evidence and submissions before me no separate article 8 claim arises, and l am satisfied that the decision to refuse the appellant's application is proportionate to the respondent's [the Secretary of State] legitimate aim of the maintenance of an effective system of immigration control."

24. The respondent sought permission to appeal to the Upper Tribunal. At this stage also, no complaint was made about the fact that the Decision Letter did not refer to section 55(3) or the Guidance. The FTT refused permission to appeal and the Upper Tribunal did the same, on the grounds that the respondent was seeking to challenge findings of fact by the FTT which could not be said to be perverse or unlawful.

25. The respondent changed her legal team. Mr Erik Peters of counsel began acting for her. She brought judicial review proceedings to challenge the refusal of the Upper Tribunal to grant permission to appeal. For the first time, in the pre-action correspondence, the respondent complained that the Secretary of State had failed to comply with the Guidance and section 55(3). In the respondent's statement of case for her judicial review she complained that, among other things, the Upper Tribunal should have found that the FTT had erred in law by ignoring the Secretary of State's failure to comply with the Guidance and section 55(3) and in assessing the respondent's daughter's best interests without relevant evidence which the Secretary of State had a duty to obtain from the daughter pursuant to the Guidance and section 55(3). The respondent relied on the decision of the Northern Ireland Court of Appeal ("NICA") in *JG v Upper Tribunal, Immigration and Asylum Chamber* [2019] NICA 27; [2020] NI 699 ("*JG*"), to which we refer below.

26. In the event, the Upper Tribunal and the Secretary of State accepted that the judicial review claim should succeed and an order was made to quash the decision of the Upper Tribunal refusing permission to appeal against the decision of the FTT and to remit the respondent's application for permission to appeal to a different judge in the Upper Tribunal.

27. That application came before the Upper Tribunal (Upper Tribunal Judge Rintoul) for a "rolled up" hearing, ie to consider whether permission to appeal should be granted and, if it was, to consider the substantive merits of the appeal. By a decision promulgated on 25 March 2022 the Upper Tribunal granted permission to appeal but on consideration of the merits dismissed the appeal on the grounds that the FTT had made no error of law.

28. The Upper Tribunal dismissed various of the respondent's grounds of appeal which sought to challenge the factual findings made by the FTT. On the basis of the evidence heard by the FTT and the reasons given by it, the FTT had been entitled to make those findings.

29. Turning to section 55, the Upper Tribunal observed that no submission had been made to the FTT that the Secretary of State had failed to comply with her duty under section 55, even though the Decision Letter post-dated the judgment in *JG*. It was recorded at para 53 of the FTT's decision that the respondent's counsel had accepted that her case on article 8 of the ECHR (which the Upper Tribunal impliedly considered covered the issue of compliance with section 55) stood or fell with her asylum claim. The question whether there had or had not been compliance with section 55 was fact-sensitive and was not a pure issue of law. In those circumstances, it was not incumbent on the FTT

"to go looking for issues which the legally represented appellant [before the FTT] did not raise". Further, it had not been demonstrated that any arguable error by the FTT in this regard had been material. For these reasons the Upper Tribunal found that the FTT had not committed any arguable or material error of law and dismissed the appeal.

30. The respondent appealed to the NICA, with permission granted by that court. By a decision dated 23 February 2023 the NICA (McCloskey LJ, Horner LJ and Fowler J) allowed her appeal: [2023] NICA 14 ("*CAO*"). McCloskey LJ gave the sole substantive judgment, with which Horner LJ and Fowler J agreed. At this stage, the respondent was represented by Mr Mark Mulholland KC and Mr Peters.

31. McCloskey LJ referred to and applied previous judgments of his own, in particular those in *JO v Secretary of State for the Home Department* [2014] UKUT 517 (IAC); [2015] INLR 481 and *R (MK (Sierra Leone)) v Secretary of State for the Home Department* [2016] UKUT 231 (IAC) ("*MK (Sierra Leone)*"), when he was President of the Immigration and Asylum Chamber of the Upper Tribunal, and in *JG*, when he was a member of the NICA. We consider these cases below. At para 18 of his judgment in *CAO*, McCloskey LJ discussed the interaction of section 55 and article 8 of the ECHR, stating that (i) any decision taken without having regard to the need to safeguard and promote the welfare of any affected child will not be "in accordance with the law" as required by article 8(2) of the ECHR; (ii) under the article 8 jurisprudence of the European Court of Human Rights ("the European Court") national authorities are required to treat the best interests of any affected child as a "primary consideration"; and (iii) as explained in *MK (Sierra Leone)* (para 27) and in *JG* [2020] NI 699 (para 36), a breach of the duty contained in section 55(3) may contravene the procedural dimension of article 8, which complements the substantive rights which it protects.

32. McCloskey LJ analysed section 55, with particular reference to the duty in section 55(3) and the Guidance, and referred to case law bearing upon it. In particular, he considered the decision of the Upper Tribunal (Lane J and Mr Ockleton, the President and Vice-President of the Immigration and Asylum Chamber, respectively) in *Arturas v Secretary of State for the Home Department* [2021] UKUT 237 (IAC); [2021] Imm AR 1857 ("*Arturas*") and the decisions of the Court of Appeal of England and Wales in *AJ (India) v Secretary of State for the Home Department* [2011] EWCA Civ 1191; [2012] Imm AR 10 ("*AJ (India)*") and of the Court of Session (Inner House) in *ZG v Secretary of State for the Home Department* [2021] CSIH 16; [2022] SLT 466 ("*ZG*") which were analysed in *Arturas*.

33. The Upper Tribunal in *Arturas* doubted the analysis by McCloskey LJ in *JG*, and in *MK (Sierra Leone)* before that, and regarded it as inconsistent with the law as applicable in England and Wales (as set out in *AJ (India)*) and in Scotland (as set out in *ZG*). In those jurisdictions, according to the analysis in *Arturas*, a failure by the Secretary of State to comply with her duties under section 55(1) and (3) is highly unlikely to prevent the FTT, on an appeal under section 82 of the NIAA 2002, from reaching a lawful decision in a human rights appeal involving a child. However, *Arturas* was a case which originated in Northern Ireland, so in the event, following the approach set out in *Marshalls Clay Products Ltd v Caulfield* [2004] EWCA Civ 422; [2004] ICR 1502, the Upper Tribunal decided (para 129) that despite its doubts it was obliged to follow and apply the judgment of the NICA in *JG*.

34. In his judgment in *CAO*, McCloskey LJ explained why he adhered to the analysis and views he had already set out in *MK (Sierra Leone)* and *JG*, and did not agree with the analysis in *Arturas.* No doubt he was conscious that, in light of the differing approaches in the different jurisdictions, the issue of the effect on the lawfulness of a decision by the FTT on an appeal of a breach of section 55 by the Secretary of State might well have to be resolved by this court.

35. In McCloskey LJ's view, the omission of the Secretary of State to refer in the Decision Letter in terms to her duty under section 55(3) and to the Guidance meant that the inference had to be drawn that the Secretary of State had breached that duty. This had the consequence that the Secretary of State's decision was in breach of her duty under section 6(1) of the HRA to act compatibly with Convention rights, in that the decision violated article 8 because it was not "in accordance with the law"; the Secretary of State failed properly to treat the best interests of the respondent's daughter as a primary consideration; and her decision-making did not satisfy the procedural requirements implicit in article 8. This incompatibility with the article 8 rights of the respondent's daughter had not been remedied by either the FTT or the Upper Tribunal in their decisions, since neither of them had "engaged with the Secretary of State's breach of the section 55(3) duty"; and there was no basis for concluding that this breach of statutory duty had no material impact on the best interests assessment conducted by those tribunals in relation to the daughter: para 91.

36. The result of this analysis was that the FTT was found to have erred in law and the Upper Tribunal had erred in turn by failing to identify the FTT's error. The NICA therefore allowed the respondent's appeal and ordered that her appeal under section 82 of the NIAA 2002 be remitted to the FTT, with a different judge, to make a fresh decision.

3. The nature of appeals to the FTT and the issue for determination by the FTT

37. The respondent was able to appeal to the FTT by virtue of section 82 of the NIAA 2002. That provides in material part, when read with section 84 (setting out the relevant grounds of appeal), that a person may appeal to the FTT against a decision by the Secretary of State refusing a protection claim by that person (that is, a claim that the removal of that person would breach the United Kingdom's obligations under the 1951 Refugee Convention or to grant humanitarian protection) or refusing a human rights claim by that person (that is, a claim that the decision is unlawful under section 6 of the HRA, in that it is incompatible with any of the Convention rights under the ECHR as given effect in domestic law by the HRA). Section 86(2)(a) provides that the FTT "must determine" any matter raised as a ground of appeal.

38. This means that an appeal to the FTT is a full appeal in which the FTT is itself required to determine the merits of any such claim as made by the person appealing, on the basis of evidence adduced in the FTT itself and having regard to the circumstances applicable at the time of the hearing in the FTT: *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368 ("*Razgar*"), para 15 (considering provisions of the Immigration and Asylum Act 1999, the substance of which has been transposed into the relevant provisions of the NIAA 2002); *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 ("*Huang*"), para 11 (again considering provisions of the 1999 Act); *AJ (India)* (applying sections 82 and 84 of the NIAA 2002); *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, paras 8, 42, 43 and 50 (regarding the NIAA 2002); and *R (MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10; [2017] 1 WLR 771, para 59 (regarding the NIAA 2002). This is a jurisdiction which is different from judicial review or an appeal confined to an error of law, where the object is to check whether the original decision-maker has made an error of law in arriving at its decision on the basis of the evidence available to it and having regard to the circumstances applicable at the time of the original decision.

39. Since on an appeal the FTT looks at matters afresh on the basis of new evidence and makes its own decision it acts as an extension of the immigration decision-making process in human rights cases: see *Razgar*, para 15 (Lord Bingham of Cornhill), and *ZG*, para 35. The important point is that it acts as a new decision-maker and takes responsibility for its own determination regarding the breach or otherwise of rights under the 1951 Refugee Convention, the applicability of humanitarian protection and of lawfulness under section 6 of the HRA. Section 6(1) provides that "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right". This duty applies both to the Secretary of State and to the FTT itself, which is included in the

definition of public authority for the purposes of that provision: section 6(3)(a). Accordingly, when the FTT makes its own determination it is obliged to ensure that its determination complies with, among other things, the Convention rights of an appellant.

40. An appeal is available from the FTT to the Upper Tribunal only on a point of law: section 11 of the Tribunals, Courts and Enforcement Act 2007. Hence, on an appeal to the Upper Tribunal, the Upper Tribunal is concerned to check the lawfulness of the FTT's decision, not to supersede that decision by making a new determination of its own. On an appeal to the Court of Appeal, that court is likewise concerned to check whether the FTT has committed an error of law.

41. The appeal rights under sections 82 and 84 of the NIAA 2002 were originally wider than they are now. The legislation was amended with effect from 20 October 2014. It is not necessary to examine the changes in detail in this judgment, as it is common ground that after they took effect in 2014 it was no longer open to the FTT to allow an appeal and remit the case to the Secretary of State to take a fresh decision. The position is explained in the decision of the Upper Tribunal in *Charles (Human Rights Appeal: Scope)* [2018] UKUT 89 (IAC); [2018] Imm AR 911. At para 49 the Upper Tribunal explained that if the decision to refuse a human rights claim would violate section 6 of the HRA the FTT "must so find", and no purpose would be served, and it would be wrong, for the FTT to make any statement to the effect that a lawful decision remained to be made by the Secretary of State on that question. The FTT simply allows the appeal on human rights grounds and there is no human rights claim that remains outstanding for consideration by the Secretary of State. Remission to the Secretary of State to make a fresh decision on that question had been ruled out as a result of the legislative change. The tribunal pointed out, however, that where the FTT allowed an appeal on human rights grounds so that any removal order or decision falls away, the Secretary of State would still have to decide as a separate matter whether and, if so, what leave to enter or remain he or she should give to the appellant.

42. This legislative change is of significance both as providing the context to understand certain judicial statements made before 2014 and in terms of any order which it might be appropriate to make in the present case. At the same time as the legislative change took place, a revised version of the FTT's Procedure Rules was introduced: The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the FTT Procedure Rules"). These Rules equipped the FTT with the powers it would need to be able to resolve human rights issues for itself, with reference to all relevant evidence which might be required, without remission to the Secretary of State to consider the matter afresh and make a new decision.

43. In particular, rule 4(3)(d) provides that the FTT may "permit or require a party or another person to provide documents, information, evidence or submissions to the Tribunal or a party". This means that if the FTT hearing an appeal considers that it requires more information to determine whether a Convention right is engaged or would be breached, it can direct that relevant evidence be filed by one or both parties. It also means that the FTT can, if necessary, direct the Secretary of State to conduct further inquiries through his or her officials to obtain relevant information and then adduce evidence to inform the FTT about the fruits of those inquiries. This option may be important if information has to be obtained from a child in circumstances where it might be more appropriate for them to be questioned by trained officials in familiar surroundings, rather than in the more imposing, adversarial atmosphere of a tribunal hearing.

44. We were referred to observations about the approach to be adopted by an FTT in the pre-2014 decision in *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550; [2014] 1 WLR 998 ("*SS (Nigeria)*"). In that case the claimant was an unlawful immigrant who had a child in the United Kingdom with a British citizen and was then found guilty of criminal offences and sentenced to concurrent terms of imprisonment for three years. The Secretary of State proposed to deport the claimant; the FTT allowed his appeal on the ground that deportation would constitute a disproportionate interference with the article 8 rights of the claimant, his partner and their child; but the Upper Tribunal allowed the Secretary of State's appeal on the grounds that their interests were outweighed by the public interest in deportation, having regard to the seriousness of the claimant's offences and the absence of evidence that the child would suffer emotional or psychological harm in consequence of the claimant's removal. The claimant appealed to the Court of Appeal on the ground that the Upper Tribunal had failed to discover and evaluate the best interests of the child, having regard to section 55 and the Guidance. The appeal was dismissed. Laws LJ referred to *ZH (Tanzania)* and the Guidance and said:

> "34. The concrete proposition which I think [counsel for the claimant] draws from the guidance, and some of the learning, is that in determining an article 8 claim where a child's rights are affected, the child's best interests must be properly gone into: that is to say they must be treated as a primary consideration, and the court or tribunal must be armed—if necessary by its own initiative—with the facts required for a careful examination of those interests, and where in truth they lie. [Counsel for the claimant] submits that was not done in this case.

> 35. While in very general terms I would not quarrel with this proposition (though I consider that the circumstances in which the tribunal should exercise an inquisitorial function on its own initiative will be extremely rare), its practical bite must plainly depend on the nature of the case in hand. It is necessary to consider the deportation of foreign criminals as a particular class of case; and, of course, the circumstances of this case itself."

45. Mann J, sitting as a member of Court of Appeal in *SS (Nigeria)*, made comments to similar effect in a short judgment agreeing with Laws LJ:

> "62. In this appeal counsel for the claimant placed considerable emphasis on the need for the tribunal to satisfy itself as to the interests of the child in such a way as suggested an inquisitorial procedure. I agree with Laws LJ that the circumstances in which the tribunal will require further inquiries to be made, or evidence to be obtained, are likely to be extremely rare. In the vast majority of cases the tribunal will expect the relevant interests of the child to be drawn to the attention of the decision-maker by the individual concerned. The decision-maker would then make such additional inquiries as might appear to him or her to be appropriate. The scope for the tribunal to require, much less indulge in, further inquiries of its own seems to me to be extremely limited, almost to the extent that I find it hard to imagine when, or how, it could do so."

46. These observations regarding the limited, or even non-existent, scope for a FTT to adopt an inquisitorial role must now be qualified. They made sense when the FTT was able to allow an appeal by making an order to remit the case for further consideration by the Secretary of State, since in those circumstances the Secretary of State as decision-maker would have his or her own responsibility to make any further inquiries necessary to determine the best interests of a child if that had not been examined sufficiently previously. However, since the legislative changes in 2014 the responsibility to consider the best interests of a child is now placed firmly on the FTT itself. If in the course of an appeal it finds that it does not have the information necessary to do that properly, it is required to exercise its powers under rule 4(3)(d) to ensure that additional material bearing on that question is obtained and brought before it. Whether it is necessary to do this will depend on the circumstances of the particular case, but a FTT should not be deterred by reference to these statements in *SS (Nigeria)* from exercising its powers to

take on an inquisitorial role to some degree and acquire further information where that is appropriate. This is likely to be particularly apt when considering the interests of children. As explained in *Huang* [2007] 2 AC 167, para 15, "[t]he first task of the appellate immigration authority [now, the FTT] is to establish the relevant facts" relevant to the individual's claim for protection, which may have changed since the original decision. Thus, whilst the original decision is relevant, the FTT exercises its own independent jurisdiction and is not a reviewing court.

47. Having said this, however, where an appeal is brought to the FTT, as here, by a parent seeking to rely on the best interests of their child in order to say that the child's removal from the United Kingdom would be in breach of their Convention rights, the burden is on the appellant to make good that case and in ordinary circumstances the FTT will be entitled to assume that the parent has adduced all the relevant evidence which is sought to be relied upon which bears on that issue. It is not incumbent on the FTT to cast about, or to order inquiries to be made, to see whether any evidence has been omitted or overlooked. That is especially so where the parent and child are represented by a lawyer, as the respondent was in this case. This is the basis for the statement of the Upper Tribunal in this case set out at para 29 above.

48. Although this is the general position, there may nonetheless be circumstances where, even though a point has not been taken, it is obvious that it requires examination in order to reach a proper conclusion regarding the best interests of a child affected by the decision. For example, if a decision affected a child and no attempt at all had been made to consider their best interests, that would be an obvious omission and the FTT would be bound to investigate to make sure that proper consideration was given to that issue: compare *R v Secretary of State for the Home Department, Ex p Robinson* [1998] QB 929, 945G–946D (Lord Woolf MR) and *R (Maguire) v Blackpool and Fylde Senior Coroner* [2023] UKSC 20; [2023] 3 WLR 103, paras 141–142. Since in a human rights appeal the FTT is the new primary decision-maker, whose decision supersedes that of the Secretary of State, it is subject to a form of the usual public law duty on a decision-maker to make such inquiries as it may consider to be necessary to inform itself about relevant matters (taking into account the responsibility on the parties in this context to present all the evidence they wish to rely upon in support of their case and the usual justified expectation that they will have done that) and will commit an error of law if, being on notice of a vital gap in the evidence, it irrationally fails to make relevant inquiries to address that: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B (Lord Diplock); *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37, paras 35–36 (Laws LJ).

4. Requirements under article 8

(i) The best interests of a child are a primary consideration

49. In *ZH (Tanzania)* [2011] 2 AC 166 Baroness Hale explained (paras 21–28) that the European Court in its case law interpreting the rights contained in the ECHR has held that the best interests of a child must be treated as a primary consideration in relation to decisions affecting that child, thereby aligning the interpretation of the Convention rights with article 3.1 of the UNCRC. In particular, in relation to decisions involving a child's rights under article 8, as a matter of interpretation of that provision, the best interests of the child are to be treated as a primary consideration: see, in particular, *Neulinger v Switzerland* (2010) 54 EHRR 31, GC. This affects the balancing exercise in determining whether a decision involves an interference with a child's private life or family life interests which is proportionate to a legitimate aim identified in article 8(2).

50. Baroness Hale also considered (at paras 34–37) the issue of "consulting the children" in terms which allow for flexibility depending on the factual circumstances. The main principle emerging from these passages is that of the need for decision-makers to be fully informed about everything bearing on a child's best interests in order properly to assess what those interests are. In this way best quality decision-making will ensue. Whilst they are distinct, the potential nexus between article 8 considerations and the matters referred to in the Guidance is unmistakable.

51. Lord Hodge, writing for the Supreme Court, summed up the position in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; [2013] 1 WLR 3690 ("*Zoumbas*"), at para 10:

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 of the Convention; (2) in making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration; (3) although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant; (4) while different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to

> avoid the risk that the best interests of a child might be undervalued when other important considerations were in play; (5) it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations; (6) to that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and (7) a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

(ii) The "in accordance with the law" requirement

52. In order for an interference with the right to respect for private and family life to be capable of being justified under article 8(2), it must be "in accordance with the law". In *ZH (Tanzania)* Baroness Hale (with whom the other members of the court agreed) referred to the duty on the Secretary of State in section 55(1) and said (para 24):

> "[Counsel for the Secretary of State] acknowledges that this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be 'in accordance with the law' for the purpose of article 8(2). Both the Secretary of State and the tribunal will therefore have to address this in their decisions."

53. As the Upper Tribunal correctly noted in *Arturas* [2021] Imm AR 1857, para 115, this statement was obiter, since the reasoning leading to the outcome in *ZH (Tanzania)* [2011] 2 AC 166 was concerned with application of the proportionality test inherent in the rubric "necessary in a democratic society" in article 8(2): see *ZH (Tanzania)*, paras 13, 29 and 33. The concession made by the Secretary of State in *ZH (Tanzania)*, recorded at para 13, went only to the issue of proportionality; and the concession recorded in the first sentence of para 24 went only to the scope of application of section 55. Neither extended to the reasoning which followed in para 24. The Supreme Court heard no argument on the "in accordance with law" issue. With respect, we consider that the

reasoning in para 24 of *ZH (Tanzania)* cannot be sustained. The Upper Tribunal in *Arturas* was right to doubt it and it should no longer be relied upon.

54. The difficulty with the reasoning in *ZH (Tanzania)*, para 24, is that the duty in section 55(1) is imposed on the Secretary of State and the duty in section 55(3) is imposed on the persons exercising the functions identified in subsection (2), namely the Secretary of State (including officials acting on his behalf in accordance with the *Carltona* principle), immigration officers and designated customs officials. They are not duties imposed on the FTT. Instead, the FTT is subject to a duty under section 6 of the HRA to decide an appeal in a way which is compatible with Convention rights, which in the case of a child relying on rights under article 8 requires it to treat the interests of the child as a primary consideration. We consider the relationship between these three duties at paras 59-69 below; but the relevant points to make here are that where the FTT determines an appeal it becomes the relevant decision-maker, superseding the Secretary of State, and if the FTT does not refer to or seek to apply section 55 in its own decision-making, it has not failed to act in accordance with the law so far as its own decision is concerned. Its legal duty is to comply with article 8, including by having regard to the best interests of the child as a primary consideration. If the FTT has done that and, as in the present case, has not committed any other error of law, then its decision (which becomes the relevant determinative decision affecting an appellant's Convention rights) is "in accordance with the law" within the meaning of article 8(2) and cannot be impugned on the basis that it is not.

55. We should also mention that there may be some doubt about exactly what is involved in the "in accordance with the law" requirement in article 8(2) in the present context. We did not hear submissions on this point. In *Gillan v United Kingdom* (2010) 50 EHRR 45, para 76, the European Court said that those words "require the impugned measure to have some basis in domestic law and to be compatible with the rule of law", meaning that the law "must be adequately accessible and foreseeable"; see also *AB v HM Advocate* [2017] UKSC 25, para 25, and *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931, paras 49–53. As the Upper Tribunal pointed out in *Arturas*, para 115, section 55 satisfies the requirements of accessibility and foreseeability. What is less clear is whether a decision which fails to comply with the domestic law duties in section 55 in some respect thereby automatically fails to comply with the "in accordance with the law" requirement. The Upper Tribunal in *Arturas*, at para 115, rejected such an approach, maintaining that it was inconsistent with the decision in *AJ (India)*. But we doubt that this is correct. The decision in *AJ (India)* is considered below. It focuses on the lawfulness of the decision of the FTT, which clearly was "in accordance with the law" as it applied to the FTT: see para 54 above. However, in general the various requirements in the ECHR that measures affecting Convention rights should be "lawful" (eg in article 5) or "in accordance with the law" (article 8(2)) or "prescribed

by law" (articles 9–11) are taken to mean, among other things, that they have in fact been taken in compliance with national law: see eg *Winterwerp v Netherlands* (1979) 2 EHRR 387, paras 45–46 (article 5; the rubric "in accordance with a procedure prescribed by law" states the need for compliance with domestic law; and "where, as here, the Convention refers directly back to [domestic] law … disregard of the domestic law entails breach of the Convention"); *Lukanov v Bulgaria* (1997) 24 EHRR 121, para 41 ("Where the Convention refers directly back to domestic law, as in article 5, compliance with such law is an integral part of the obligations of the Contracting States …"); *Amuur v France* (1996) 22 EHRR 533, para 50 (on article 5, but indicating that the same approach applies under articles 8–11); *Olsson v Sweden (No 1)* (1988) 11 EHRR 259, para 61(b) (article 8; "The phrase 'in accordance with the law' does not *merely* refer back to domestic law but also relates to the quality of the law", emphasis supplied); *Shopov v Bulgaria*, judgment of 2 September 2010, paras 46–47 (article 8); and see *Harris, O'Boyle and Warbrick*, *Law of the European Convention on Human Rights*, 5th ed (2023), pp 310–311 (on article 5), pp 589–590 (on article 9), and p 699 (on article 11). So, at any rate without hearing argument on the point, we would not endorse this part of the Upper Tribunal's reasoning in *Arturas*.

(iii) The implied procedural obligation in article 8

56. In relation to certain decisions affecting article 8 rights, the European Court has held that there is an implied procedural obligation to give the affected person a fair opportunity to participate in the decision-making process: see eg *W v United Kingdom* (1987) 10 EHRR 29 and *Neulinger v Switzerland*, above, paras 138–141. In this case, article 8 as it applied to the Secretary of State at the first stage of decision-making required that the respondent should have a fair opportunity to present her case, and that of her children whose interests she represented, to the Secretary of State's officials; and article 8 as it applied to the FTT at the stage of decision-making by that tribunal on her appeal—at which point the FTT's decision-making superseded that of the Secretary of State—required that the respondent should have a fair opportunity to present her and her children's case to the tribunal.

57. In *MK (Sierra Leone)*, para 27, and *JG*, para 36, McCloskey LJ held that breach of the section 55(3) duty by the Secretary of State engages and contravenes the procedural dimension of article 8, from which it follows that the decision of the FTT on an appeal would be unlawful and vulnerable to appeal. In *CAO* [2023] NICA 14, para 79 he said that such a breach of duty constitutes a prima facie violation of the procedural dimension of article 8 and went on to say that this was not satisfactorily remedied by the FTT. We respectfully disagree with both ways of putting this point.

58. There are issues, which we examine in detail below, whether this procedural obligation under article 8 was satisfied by the Secretary of State (in relation to her decision-making) and by the FTT (in relation to its decision-making) in the present case. As we explain below, the outcome on this appeal depends upon what happened at the decision-making stage involving the FTT. In our view, it is clear that the respondent had a fair opportunity to present her case, and that of her children, on her appeal to the FTT. So, there has been no relevant breach of the article 8 procedural obligation, even if the Secretary of State failed to comply with that obligation as it applied to her. Although it is not a critical point for determination of the appeal, we would add that the respondent and her children had a fair opportunity to be involved in the earlier stage of decision-making by the Secretary of State, so there was no infringement of their procedural rights under article 8 at that stage either.

5. The relationship between section 55 and article 8

59. As explained above, where a measure is adopted by a public authority which affects the private life or family life interests of a child, it is required under article 8 that the best interests of the child feature as a primary consideration in the decision-making process. As a public authority, the Secretary of State (and his or her officials) are obliged pursuant to section 6(1) of the HRA to act compatibly with the child's Convention rights, including by treating the child's best interests as a primary consideration. That obligation applies regardless of the operation of section 55. The FTT, which is also a public authority, is itself subject to the same obligation in relation to its own decision-making on an appeal.

60. Section 55 is a provision which operates in support of that overarching obligation under article 8. The same is true of section 11 of the Children Act 2004 in relation to the various public bodies to which it applies and was previously true of the code of practice issued under section 21 of the UK Borders Act 2007.

61. A court or tribunal can be expected to understand, and if necessary inform itself, about the content and implications of its obligation to comply with article 8 in a case involving a child. That is not necessarily the case in relation to civil servants and others working in the large bureaucratic organisations covered by section 11 of the Children Act 2004 and section 55. Section 55 is directed at ensuring that the welfare and best interests of a child are kept in mind by civil servants of various descriptions who are the decision-makers within the scope of section 55(2). That may be done in two ways: (i) by the Secretary of State making arrangements under section 55(1), which do not necessarily have to include the giving of guidance (an example would be making arrangements for

the training of officials to try to ensure that they take these matters into consideration); and (ii) by the Secretary of State giving guidance in relation to these matters, so as to engage the obligation under section 55(3) of persons within the scope of subsection (2) to have regard to that guidance when exercising relevant functions. The Secretary of State has issued the Guidance in order to engage such obligations under section 55(3).

62. Section 55(1) and (3) do not, according to their terms, apply to the FTT. There is no basis on which the FTT can be said to be subject to the duties set out in them. Section 55(1) imposes a duty on the Secretary of State to make arrangements in relation to matters in which the FTT has no role to play. Section 55(3) imposes a duty on the Secretary of State and various officials in relation to functions exercised by them, not on the FTT in relation to its functions.

63. Since the FTT is obliged by article 8 and section 6 of the HRA to treat the best interests of a child who is affected by its decision as a primary consideration, its decision-making will in practical terms cover the matters to which section 55 is directed. But that is very different from saying that the FTT is itself subject to any duty under section 55(1) or (3). The FTT may validly consider how those exercising immigration functions have addressed the best interests of the child utilising the Guidance when assessing the evidence adduced before it. However, there is no need for the FTT to be subject to the duties in section 55 in order to ensure that its decision-making is properly directed to consideration of the best interests of the child.

64. With respect, therefore, we cannot agree with Baroness Hale's obiter comment in *ZH (Tanzania)* [2011] 2 AC 166, para 24, which implies (without saying in terms) that the FTT itself has to comply with either of the duties in section 55(1) or (3). Pill LJ interpreted it in that way in *AJ (India)* [2012] Imm AR 10, para 24, where he said that Baroness Hale "plainly contemplated that the tribunal must consider section 55". However, at para 28 he also said that it appeared from *ZH (Tanzania)*, para 33, that Baroness Hale "has incorporated the section 55 test within the proportionality assessment under article 8". Whilst there is an undoubted overlap in terms of the relevant considerations in play, the proper view, in our judgment, is that the FTT is subject to a duty to comply with article 8, which imports an obligation to treat the best interests of the child as a primary consideration, and is not separately subject to any duty under section 55(1) or (3). Also, since the FTT is required to make its own determination under article 8 and is required in doing so to have regard to the best interests of a child as a primary consideration on the basis of fresh and up-to-date evidence, its decision supersedes the decision of the Secretary of State and becomes the relevant operative decision which is determinative of what happens to the child.

65. It should be emphasised that by virtue of section 55(3) the relevant officials are under a clear and distinct statutory duty to have regard to the Guidance when exercising their relevant functions. However, it appears that officials do not refer (or do not routinely refer) to section 55(3) or to the Guidance in decision letters written on behalf of the Secretary of State in immigration cases. The question then arises whether they have complied with that duty. It is a theme in McCloskey LJ's judgments, in particular in *MK (Sierra Leone)*, *JG* and *CAO*, that he is concerned that the absence of specific reference to section 55(3) and the Guidance indicates that the Secretary of State (that is, under the *Carltona* principle, the Secretary of State's officials) has in practice been failing to comply with that duty across the board: see *MK (Sierra Leone)* [2016] UKUT 231 (IAC), para 20; *JG* [2020] NI 699, para 22; *CAO* [2023] NICA 14, paras 73–76 and 81.

66. It is right to point out that it would be quite wrong for the Secretary of State and her officials to disregard their duty under section 55(3) and instead rely on decision-making by the FTT to make good that omission. It would be wrong in principle if the Secretary of State (through his or her officials) adopted such a practice, in defiance of the duty placed on them by Parliament. Also, it would mean that in the cases where no appeal is taken to the FTT, individual children would be affected by decisions taken by those officials in breach of the statutory duty under section 55(3) where that defective decision-making was not superseded by a later decision of the FTT.

67. However, we are not persuaded on the material before us that there has been such a wholesale disregard of their statutory duty by the Secretary of State and his or her officials. That depends on what section 55(3) actually requires of them, which we consider below. If it does not require that express reference be made in decision letters to section 55(3) or the Guidance, but rather that there be substantive compliance with the Guidance, as the Secretary of State contends and as we conclude below, that inference cannot be drawn if decision letters in fact show that regard has been given to the welfare and best interests of affected children. In this area substance prevails over form. It would of course be invidious if a decision was regarded as presumptively lawful on account of express mention of the Guidance (even if the substance of the reasoning showed that this was mere lip-service) yet unlawful without such express mention where substantively the decision is unimpeachable.

68. In those cases which proceed on appeal to the FTT, as in this case, the FTT's function is to act as primary decision-maker in assessing the best interests of a child for the purposes of its analysis of rights under article 8, not to review the decision-making at an earlier stage by the Secretary of State. So one would not expect there to be any close analysis of whether the Secretary of State and his or her officials have complied with section 55(3) or not. It is a matter which does not call for investigation. As a result, there

is no evidence before the court in the present proceedings from the official who wrote the Decision Letter to say whether they did or did not in fact have regard to the Guidance when taking the decision. It was not necessary, and would have been a distraction, for such evidence to be adduced on the appeal to the FTT. It is not the function of the FTT on an appeal under section 82 of the NIAA 2002 to attempt to fulfil some form of disciplinary role in relation to compliance by the Secretary of State with section 55(3). In a human rights case the FTT's function is to decide for itself whether removal of the child in question is compatible with their rights under article 8.

69. We would point out, however, that this does not mean that the Secretary of State and his or her officials can disregard the duty under section 55(3) with impunity. If they fail to comply with the Guidance in investigating the circumstances of the child, they may fail to identify relevant information about the child's best interests and this could lead to the Secretary of State losing the appeal before the FTT or having to incur additional expense in complying with directions issued by the FTT under rule 4(3)(d) of the FTT Procedure Rules: see para 43 above. Also, if it emerged that the Secretary of State and his or her officials might have a practice of ignoring their duty under section 55(3), it would be open to complainants to seek to challenge that practice by bringing judicial review proceedings in the usual way. If appropriate, a mandatory order could be made to compel the Secretary of State to comply with the duty. (This is not to encourage judicial review proceedings in this area: if the only complaint was that there had been non-compliance with the duty in an individual case, then ordinarily the appeal to the FTT would be a suitable alternative remedy which should be pursued rather than judicial review of the Secretary of State.)

6. Interpretation of the Guidance and compliance with section 55(3)

(i) Compliance with section 55(3)

70. In *MK (Sierra Leone*) [2016] UKUT 231 (IAC), para 21, the Upper Tribunal said that where there is no mention of the Guidance in a decision letter the question is whether it can, nevertheless, be inferred from the content of the letter that the decision-maker had regard to it. The Upper Tribunal concluded that in the absence of allusion to the principles or tests set out in the Guidance no such inference could be drawn. We were told that in light of this approach, in cases in Northern Ireland the Secretary of State has adopted a practice of conceding that there has been a breach of the duty in section 55(3) where a decision letter does not in terms refer to the Guidance or clearly refer to the principles or tests set out in it: see eg *JG*, paras 26 and 34. In *JG*, para 34, the NICA observed that such concessions were properly made. In both *JG* (paras 19 and 36–37) and *CAO* (paras 42–

44 and 52, 59, 62, 68 and 72) the NICA made extensive reference to *MK (Sierra Leone*) with the intention of endorsing the approach set out in it.

71. The practical effect of the approach which has been adopted in these cases is illustrated by the decision of Scoffield J, after *JG* and before *CAO*, in *In the Matter of an Application by JR137 for Leave to Apply for Judicial Review* [2021] NIQB 13 ("*JR137*"). This was an application for judicial review of a decision of the Upper Tribunal which had refused permission to appeal from a decision of the FTT in a case in which both the Secretary of State and the FTT had plainly treated the best interests of a child affected by the relevant immigration decision as a primary consideration (para 43), albeit the conclusion arrived at was that the child should be required to leave the United Kingdom since it was in their best interests to remain part of a family unit with their parent, whose application for asylum was dismissed and who was to be removed. The Secretary of State's decision letter dealt in some detail with section 55 (in terms of the need to safeguard and promote the child's welfare) and made an explicit determination of the best interests of the child, but did not refer to the Guidance so as to satisfy the approach to section 55(3) adopted in *MK (Sierra Leone)* and *JG*. The judge found that the FTT had investigated and determined the child's best interests in its article 8 analysis, but it did not refer to the Guidance: para 39. Following *JG*, the judge said that "an additional question is whether the FTT judge also adequately addressed the requirements of the section 55(3) duty" (ibid); he held that there was "no detailed engagement with what might separately be required by the section 55(3) obligation at any point" (para 43), and on that basis granted leave to apply for judicial review in respect of the Upper Tribunal's refusal of permission to appeal.

72. It is fair to say that this decision indicates that something has gone awry with the analysis. The FTT had complied with the only relevant obligation to which it was subject in relation to the interests of the child, namely that arising under article 8 and section 6 of the HRA to treat the interests of the child as a paramount consideration for the purposes of its proportionality analysis; there was no other valid ground of objection to the lawfulness of its decision. The FTT was not subject to any duty under section 55(3). There were no good grounds for an appeal to the Upper Tribunal, yet still Scoffield J considered that he was bound by the reasoning in *JG* to quash the decision of the Upper Tribunal to that effect and compel it to consider the grant of permission to appeal again: para 53.

73. More broadly, *JR137* illustrates a problem with the approach in *MK (Sierra Leone)*, *JG* and *CAO* to determining whether the duty under section 55(3) has been complied with at the level of decision-making by the Secretary of State and his or her officials. As a matter of substance, the Secretary of State's decision letter showed that regard had been had to the need to safeguard and promote the welfare of the child, which

is the object of the Guidance, yet because no explicit reference had been made to the Guidance the inference was drawn, following *JG*, that no regard had been given to the Guidance as required by section 55(3) when the decision was taken. Scoffield J seems to have been uncomfortable with that conclusion but regarded himself as bound by *JG* to reach it. He observed (para 58), "[i]f a view were to have emerged in the tribunals that the requirements of section 55(3) have been misinterpreted or over-played in the line of authority terminating in *JG*— … that should be addressed head-on in a reasoned decision capable of further appeal". The present appeal presents an opportunity to consider that question.

74. The Court of Appeal of England and Wales reached a different conclusion on that question in *AJ (India)*. The case concerned an immigration decision by the Secretary of State to refuse to grant leave to remain and instead to order the removal of a family unit including a child. The individuals appealed pursuant to section 82 of the NIAA 2002 to the Asylum and Immigration Tribunal (which has now been replaced by the FTT), but the tribunal dismissed the appeal. In its decision the tribunal gave proper consideration to the best interests of the child as part of its analysis under article 8, but it did not refer at all to section 55. As we have noted (para 64 above), the Court of Appeal assumed (incorrectly: see paras 62-63 above) that section 55(3) did apply to the tribunal and therefore had to consider whether the failure of the tribunal to refer to the Guidance in its decision showed that its decision was unlawful: see para 25, for the argument of the appellant. The Secretary of State submitted that it is the substance not the form that matters and that if it was clear that the interests of the child had been treated as a primary consideration, the absence of a reference to section 55 by the tribunal was not fatal: para 34.

75. The Court of Appeal accepted the Secretary of State's submission: paras 35–45 (per Pill LJ, with whom the other judges agreed) and para 52 (per Sir Mark Potter). Pill LJ referred to the analogy presented by section 71(1) of the Race Relations Act 1976 ("the RRA"), as amended by the Race Relations Amendment Act 2000, which imposes a duty on specified bodies in carrying out their functions to have "due regard" to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. We agree that this provision provides a good analogy. No significance attaches to the use of the phrase have "due regard to" in section 71(1) as compared to the phrase "have regard to" in section 55(3) approach, since in the latter case it is obvious that the quality of regard required is that which is appropriate or due to be given in the circumstances of the particular case.

76. As explained by Pill LJ, the case law on section 71(1) of the RRA shows that explicit reference to section 71 is not required, provided the decision-maker has in substance had due regard to the relevant need. He cited (at paras 35, 36) the judgment of

Dyson LJ in *Baker v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809 ("*Baker*"), paras 36–37, where he said:

> "I do not accept that the failure of an inspector [in a planning appeal] to make explicit reference to section 71(1) is determinative of the question whether he has performed his duty under the statute. So to hold would be to sacrifice substance to form. …
>
> The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has *not* been performed. The form of words suggested by Mr Drabble to which I have referred above may not of itself be sufficient to show that the duty has been performed. To see whether the duty has been performed, it is necessary to turn to the substance of the decision and its reasoning." (Emphasis in original.)

77. Pill LJ applied the same approach in relation to compliance with the duty in section 55(3). Failure to refer to the Guidance did not demonstrate that the decision-maker (the tribunal) had not had regard to it. Instead, "what matters is the substance of the attention given to the 'overall wellbeing'… of the child": para 43. The tribunal had given careful and sufficient consideration to the best interests of the child and so had, as a matter of substance, had regard to the matters to be brought into consideration according to the Guidance. It was relevant that the child (aged two) was too young to be consulted, as might be required under the Guidance with older children: para 44. The court tested the matter by reference to whether regard had been had to the substantive issues outlined in the Guidance. On the basis that there was such regard, it was not fatal that the decision letter did not refer to the Guidance, nor that the decision-maker might even not have had it in mind when taking the decision.

78. There are other examples of statutory provisions which impose a duty to have regard to some matter where the same approach of focusing on the consideration of the substance of that matter has been adopted. Mr McGleenan KC, for the Secretary of State, particularly relied on section 149 of the Equality Act 2010, which imposes a duty on public authorities, commonly called the public sector equality duty, to have due regard to

the need to eliminate discrimination, harassment and so forth and to advance equality of opportunity and foster good relations between certain groups. In the leading case in this court, the analogy with section 71(1) of the RRA was accepted, Dyson LJ's analysis in *Baker* was approved and the same approach was adopted: *Hotak v Southwark London Borough Council* [2015] UKSC 30; [2016] AC 811 ("*Hotak*"), paras 72–79 (per Lord Neuberger of Abbotsbury, for the majority). See also *R (Jewish Rights Watch Ltd) v Leicester City Council* [2018] EWCA Civ 1551; [2019] PTSR 488 ("*Jewish Rights Watch*"), following *Hotak* and adopting the same substance over form approach.

79. In our judgment, the analogy with section 71(1) of the RRA and with the public sector equality duty is apt. The authorities on these similar "have regard" duties show that, in accordance with Parliament's intention in enacting them, what is important in terms of compliance is that the decision-maker does indeed have regard to the substance of the matters to which the duty refers. This is the proper approach in relation to section 55(3). In *ZG* [2022] SLT 466 the Inner House of the Court of Session rightly followed this substance over form approach in relation to that provision: para 32. As we explain below, according to this approach there was compliance by the Secretary of State with her duty under section 55(3) in this case.

80. A particular feature of the Guidance should be noted. It refers both to matters regarding the focus or content of decisions on the merits (namely, that the need to safeguard and promote the welfare of a child should be brought into account) and to matters of procedure (in particular, by encouraging engagement with the child or their family in appropriate cases). The child in *AJ (India)* was too young to be consulted, so this procedural dimension of the Guidance was not significant. Nor, as we explain below, is it significant in this case. But it might well be significant in other cases, in which case a failure to follow the Guidance without good reason (cf para 6 of the Introduction: para 7 above) could indicate that proper regard has not been given to that part of it, applying the *Baker*-type substance over form approach. However, if a decision-maker has in mind that the best interests of the child are to be treated as a primary consideration (as required by article 8), it seems likely that common sense would usually lead them to engage with a child and their family in an appropriate way to gather the information required to make the relevant assessment so as to comply in substance with that procedural aspect of the Guidance.

81. For the reasons given in this section, we consider that the case law which has developed in Northern Ireland from *MK (Sierra Leone)* to *JG*, and implicitly endorsed in *CAO*, which appears to place greater emphasis on the form of decision letters and whether they refer explicitly to the Guidance or its contents, by contrast with the substance of the matters considered in them, is in error.

82. But it is right to conclude this section by pointing out that the authorities indicate that where a "have regard" duty applies, it is good practice for the decision-maker to refer to the duty and the matters to which it calls attention in terms, in order to demonstrate that the duty has indeed been complied with and put the question beyond doubt: see *Baker*, para 38, and *Jewish Rights Watch*, paras 30 and 36. Accordingly, it would be desirable and not unduly burdensome for the Secretary of State and his or her officials to include reference to the Guidance in their decision letters, even though it is not fatal as a matter of law if they do not. This would dispel any notion that children's rights are not properly considered in the immigration context as they should be. It also follows that if there is to be any departure from the Guidance in a particular case, it would be desirable for those decision-makers to explain this and the reasons why. It is to be hoped that this judgment will serve to improve practice by reiterating the point that the duty to consider the best interests of children in the immigration context must be substantively complied with by the Secretary of State and other relevant officials.

(ii) Interpretation of the Guidance

83. In the present case the NICA did not focus distinctly on the interpretation of the Guidance, because its approach was to assume that the absence of reference to it in the Decision Letter showed that the Secretary of State had breached her duty under section 55(3) to have regard to it. However, in this court Mr Mulholland submitted that there had been a failure to follow the procedure set out in the Guidance, because the respondent's daughter was not interviewed to determine her views about return to Nigeria and the prospect of her being subjected to FGM. Mr Mulholland also relied on statements by Baroness Hale in *ZH (Tanzania)* [2011] 2 AC 166, paras 34–37 (referred to at para 50 above), in which she emphasised the potential value of speaking to a child to understand their perspective, and on principles (5) and (6) set out in *Zoumbas*, para 10 (para 51 above). In *ZH (Tanzania)*, para 37, Baroness Hale said, "the immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so".

84. In our view, however, there was no failure of compliance with the Guidance by the Secretary of State, according to its proper interpretation on the facts of this case. Nor do *ZH (Tanzania)* or *Zoumbas* indicate that there is a legal requirement in every case that the immigration authorities must interview a child. In some cases, a child who is affected by a decision may be an important source of information relevant to assessing what their best interests might be, which means that in an appropriate case they should be asked about matters affecting them. The overarching imperative is that the immigration authorities should properly inform themselves about the child's circumstances in order to

understand the child's best interests; but it may often be possible for them to do that without interviewing the child in person.

85. There is obviously a range of different cases to consider in this sphere. The case of a settled family unit fleeing persecution together is one scenario where the best interests determination may be relatively straightforward, as there is no issue of children's separation from parents and no conflict between the child's views and that of the parent(s). Of course, officials have to make an assessment of this because where there is a perceived conflict between the interests of a child and its parents a procedure should be available as appropriate to establish some separate representation for the child through the use of a guardian.

86. The capacities of any child viewed in light of their age and maturity must also be taken into consideration when the child's best interests are at stake. It is well known across family and immigration law that babies and very young children's interests will usually coincide with those of their parents unless there is some "red flag" such as potential trafficking or where child protection issues are in play.

87. When babies or young children are involved it will be both impractical and unnecessary to consider an interview. In cases of older children or children who clearly want to express their own views, further steps may be required which may involve the need for an interview.

88. Cases which involve unaccompanied minors or potential trafficking will obviously require great care, not least because of the risks involved to children and the forms of support required. Also, where health or disability issues are apparent different considerations arise. These cases may necessitate expert advice. It is for officials, properly trained, to assess reasonably the risks based on the information that presents itself. In addition, officials may face situations where to interview children may cause stress or damage to them and therefore should be avoided, with reliance being placed on other sources of information. The Guidance is sufficiently flexible to cover all of the above as it provides indications for officials as to how to respond when such circumstances arise.

89. The Guidance is intended to provide direction for practical decision-making as to the best interests of children in an area involving hundreds of cases each year. It cannot be interpreted to require procedural steps to be taken which have no practical bearing on the matter which arises for determination by a decision by the relevant immigration official. Further, the Guidance is drafted to give direction at a high level of abstraction, as is suitable to cover the very wide range of cases in which the immigration authorities

may encounter children in their work, rather than to provide detailed and specific instructions to case-workers. As Laws LJ put it in *SS (Nigeria)*, para 33, much of the Guidance is "in relatively general terms". This means that it leaves a good deal to the judgment of immigration officials when deciding how to give effect to its directions on the ground. It supplies a fairly broad set of parameters within which they should orientate their approach to decision-making in relation to a child, but with a considerable element of discretion for them to adapt to the particular circumstances of a specific case. The question whether appropriate regard has been had to the Guidance in any case will depend upon an assessment by the relevant immigration official as to how the broad directions it gives should be applied in those particular circumstances, and the Guidance itself emphasises the need for the exercise of judgment by officials (see para 2.18, para 9(v) above).

90. The lawfulness of such an assessment is subject to the usual public law rationality test, in the same way that the application of a policy set by a minister is: see *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765, paras 124–131. However, we should add that the importance of determining the best interests of a child for the purpose of decision-making in this area means that the rationality test may be relatively constrained, in the sense that anxious scrutiny of the child's circumstances is required to ensure that the decision-maker can be sufficiently confident that they have determined what their best interests are.

91. Two features of the present case are important. First, the Secretary of State's Decision Letter was predicated on the fundamental idea that to subject the respondent's daughter to FGM would clearly be contrary to her best interests and to her wishes. It can safely be presumed in this case that in alignment with the views of her mother the child would not want to return to Nigeria if she were to face a risk of FGM. Thus, in the absence of any conflict on this core issue, the Secretary of State did not need to interview the daughter to reach that conclusion. It was in fact the starting point for the Secretary of State's consideration of the best interests of the daughter. Clearly, therefore, the Secretary of State did not act contrary to the requirements of the Guidance in omitting to interview the daughter: as mentioned above, the Guidance does not require pointless procedures to be followed where they have no bearing on the decision to be taken. (We would add that there may well have been positive reasons why it would have been contrary to the daughter's best interests to interview her about her father's alleged wish to subject her to FGM, but that is not something on which we have any evidence or on which we need to speculate.)

92. Secondly, the fourth bullet point in para 2.7 of the Guidance (para 9(iii) above) is plainly also pertinent, both as supporting the general approach set out in para 91 above

and as it bears on the particular circumstances of this case. As stated in that bullet point, "[i]n instances where parents and carers are present they will have primary responsibility for the children's concerns". That was the situation which presented itself to the Secretary of State. The respondent was active in emphasising to the Secretary of State that FGM would be contrary to her daughter's best interests and there was no indication that there was any basis to question the respondent's ability to speak on behalf of her daughter in that regard.

93. Mr Mulholland contended that in light of the daughter's age she should have been interviewed in any event given that any decision on asylum would affect her. We do not agree. In a case affecting a child arising under the Children Act 1989 the welfare checklist set out in section 1 of that Act is applicable, which requires the ascertainable wishes and feelings of the child to be specifically considered. That is in the context of contested family arrangements (in private law cases) or when it is contemplated that a child may be separated from its parents by being taken into care (in public law cases). In *R (Tinizaray) v Secretary of State for the Home Department* [2011] EWHC 1850 (Admin) it was suggested that the welfare checklist should be utilised in the asylum context, but subsequent appellate authority held that this was unnecessary and not appropriate: *SS (Nigeria),* para 55; *R (AA (Iran)) v Upper Tribunal (Immigration and Asylum Chamber)* [2013] EWCA Civ 1523, para 16.

94. We are also aware of jurisprudence in the field of child abduction proceedings pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (1980) in relation to hearing the voice of the child. Suffice to say that in this area of law there is a presumption that a child should be heard unless it is inappropriate to do so following from *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 AC 619. Of course, this is to ensure that a child's views are presented to a court independent of the abducting parent. However, we are not dealing with the type of contested court proceedings between warring parents which form the subject matter in *Re D (a Child)* and related child abduction cases. Rather, we are concerned with an entirely different context which requires a bespoke approach to be taken in line with the relevant legislation and Guidance.

95. In the light of this discussion, we do not accept the respondent's submission that there was non-compliance with the Guidance on the part of the Secretary of State. As was the case in *AJ (India)*, there were sound reasons why the procedural aspect of the Guidance did not require that the respondent's daughter be interviewed, so there was no failure to comply with the substance of that aspect of the Guidance. There was no "red flag" or conflict of interests between mother and daughter on the FGM issue which required a further step to be taken by way of additional interview of the daughter as Mr

Mulholland submits. There was no failure to comply with the substance of the Guidance as regards the merits of the decision to be taken, because the Decision Letter made it plain that the daughter's best interests were treated as a primary consideration. The Secretary of State made a detailed assessment in relation to the risk of FGM, establishing that there was no significant risk, and determined that the daughter's best interests were to return to Nigeria with the respondent as a family unit. The Secretary of State took all the steps required to assess the best interests of the respondent's daughter in relation to the FGM issue in a manner which was sufficient for the decision regarding her and the respondent's immigration status.

96. Therefore, the basis for the NICA's decision and its order falls away. There was no breach by the relevant officials of their duty under section 55(3) on the facts of this case. However, it is important to explain the analysis which would apply if there had been a substantive failure by the Secretary of State to comply with the Guidance, since even if there had been such a failure the NICA's decision would still have been erroneous.

(iii) The effect of a breach of the section 55(3) duty by the Secretary of State

97. Where there is an appeal to the FTT, the FTT's decision is a fresh determination which supersedes the decision of the Secretary of State. The FTT's decision becomes the operative decision: para 64 above. Breach by officials of the Secretary of State of the duty in section 55(3) when they take their decision does not give rise to any unlawfulness in the decision of the FTT. Such a breach may have only a limited and indirect effect on the FTT, in that it may have the effect that the FTT is not presented by the Secretary of State with full evidence pertaining to the best interests of the child in question so that the FTT has to consider using its powers under rule 4 of the FTT Procedure Rules: paras 43 and 46 above. But provided that the FTT makes its own proper and lawful determination in relation to the child's rights under article 8, there will be no good grounds for an appeal against its decision. The fact that there might have been a breach of the section 55(3) duty by the Secretary of State at an earlier stage is then irrelevant and cannot afford grounds for an appeal against the FTT's decision.

98. We have derived assistance from the decision of the Inner House of the Court of Session (Lords Woolman, Pentland and Doherty) in *ZG*. In that case, the Secretary of State decided that an individual and his seven-year-old daughter should be deported to China, making no reference in the decision letter to section 55(3) or the Guidance. The individual appealed unsuccessfully to the FTT under section 82 of the NIAA 2002. The FTT made its own determination of the article 8 rights and best interests of the daughter. The Inner House was unsure whether there had been a substantive failure by the Secretary

of State to comply with the Guidance, but for the purposes of analysis it assumed that there had been: para 32. As they pointed out (para 33), if the FTT had exercised a judicial review jurisdiction the issue would have been whether the breach of duty was material and ought to lead to the Secretary of State's decision being set aside; however, the FTT's jurisdiction "was not a judicial review jurisdiction and that was not the issue". Instead, the Inner House correctly observed that the FTT had to make its own determination on the basis of the Convention rights of the individual and his daughter: para 35 (see para 38 above). They pointed out (para 36) that in such circumstances the critical question for the FTT will not be whether the Secretary of State has breached her duties under section 55(1) and (3), but whether the interference with the child's rights under article 8 is justified, treating the best interests of the child as a primary consideration, and that the evidence adduced in the FTT enables it to address that question. Although there might have been a problem in relation to the fact-finding by the Secretary of State, there was none in relation to the FTT's decision. It had properly examined the best interests of the child in line with the guidance in *Zoumbas*, para 10, and had made a lawful determination in light of the child's article 8 rights: para 38. As the Inner House said (para 38), "even if [the Secretary of State] breached section 55, the breach was superseded by the FTT's full consideration of [the child's] best interests, its treatment of them as a primary consideration, and its proportionality assessment."

99. We agree with this analysis by the Inner House.

7. Determination of the appeal in the light of these principles

100. In our view, there was substantive compliance with the Guidance and therefore there was no breach of the section 55(3) duty by the Secretary of State when she issued the Decision Letter: paras 83-95 above. The Secretary of State was not required by the Guidance to interview the respondent's daughter. However, this is not the critical issue in this appeal. The Secretary of State's decision was superseded by the decision of the FTT. The issue in the appeal is whether there was any error of law by the FTT.

101. The FTT properly directed itself and sought to apply article 8, treating the best interests of the respondent's daughter as a primary consideration. The FTT was entitled to make its determination on the basis of the evidence and submissions put forward by the respondent and her lawyer. In the circumstances, the FTT had no obligation to go behind or beyond the case presented by them. In particular, there was no obligation on the FTT to insist on hearing evidence from the respondent's daughter or to exercise its power under rule 4(3)(d) of the FTT Procedure Rules to require the Secretary of State to conduct an interview with her.

102. The FTT dismissed the appeal on three separate grounds: (i) the evidence did not establish that there was a current risk of the respondent being exposed to domestic violence if returned to Nigeria, nor did it establish that her husband wished to subject their daughter to FGM; (ii) even if there were any such risks, the state authorities in Nigeria would provide adequate protection against them; and (iii) in any event, internal relocation was a viable and effective route for protection which was available to the respondent and her children.

103. The Upper Tribunal found that each of those grounds were based on findings properly made by the FTT and that they disclosed no error of law. In our view, the Upper Tribunal was plainly correct about this.

104. There was no breach of article 8 by the FTT. It correctly treated the best interests of the respondent's daughter as a primary consideration. By its own fair procedure, it satisfied the procedural aspect of article 8. Its decision was "in accordance with the law" within the meaning of article 8(2). It is unnecessary and inappropriate to go further, to ask whether any error of law was material or not.

105. For these reasons, we would allow the Secretary of State's appeal and restore the order of the Upper Tribunal, by which the respondent's appeal from the decision of the FTT was dismissed.

106. As a post-script, we note that several years have passed since the FTT's decision was made. Circumstances may have changed in material ways which bear upon the article 8 rights of the respondent and her children as they currently apply. If that is the case, the proper route forward is for them to make a fresh human rights claim to the Secretary of State.