Neutral Citation Number: [2014] EWCA Civ 450

Case No: C5/2012/2379

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Deputy Upper Tribunal Judge Juss
AA/12138/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 April 2014

Before :

LORD JUSTICE MOORE-BICK
LADY JUSTICE GLOSTER
and
LORD JUSTICE VOS

- -

Between :

JA (AFGHANISTAN)	**Appellant**
- and -	
SECRETARY of STATE for the HOME DEPARTMENT	**Respondent**

- -
- -

Mr. Becket Bedford and **Mr. Zane Malik** (instructed by **Sultan Lloyd**) for the **appellant**
Mr. Jonathan Hall (instructed by the **Treasury Solicitor**) for the **respondent**

Hearing date : 14th March 2014

- -

Judgment

Lord Justice Moore-Bick :

1. At about 6.00 p.m. on 7th October 2008 the appellant, JA, walked into the reception area of the UK Border Agency's offices in Solihull and sought help. He was aged about 14½ and spoke only the most basic English. According to the note of interview, he told the officer on duty that he had come from Afghanistan by way of various different countries and that he had come here because his father had been killed by the Taliban. He said that a friend of his father had taken him to Pakistan and arranged for him to travel to the United Kingdom where he would be safe. Social services were informed of his arrival. The note records that the officers were unable to screen him that day because of the lateness of the hour and the absence of any appropriate adult. A screening interview was arranged for 20th October 2008.

2. In the event the screening interview took place on 5th November 2008. An interpreter was made available, although it seems likely that he was at the other end of a telephone. It does not appear that a responsible adult was present to support the appellant. Some of the questions asked in the course of that interview have since come to assume particular importance and it will be necessary to refer to them in more detail at a later stage.

3. On 27th November 2008 the appellant produced a written statement in support of his claim for asylum. He gave details of the members of his family and their last known whereabouts and gave an account of the circumstances in which he had left Afghanistan. He described his father as a high-ranking officer in the Taliban who would hold meetings with other insurgents at his house. He described his father's involvement in drug trafficking. He also described an occasion on which government forces had come to the house while a meeting of insurgents was taking place. A battle ensued in the course of which two members of the government forces were killed. He said that as a result arrangements had been made for his mother to travel to Pakistan with the younger children, including himself; his father and his older brother remained in Afghanistan, but he did not know where they were. He said that he could not return safely to Afghanistan and had no family there to whom he could turn for support.

4. The appellant's asylum interview was held on 9th March 2009. On that occasion someone from social services was present to give him support and he also had the benefit of a legal adviser and an interpreter.

5. On 10th March 2009 the respondent rejected the appellant's claim for asylum and humanitarian protection. The decision-maker referred to various discrepancies between the accounts he had given, principally between the account he had given on his first contact with Border Agency officials and those which he had subsequently given in his screening interview and witness statement. Based on those discrepancies she was unwilling to accept that any of the events he had described had occurred and concluded that his account had been fabricated. Nonetheless, since the appellant had come here as an unaccompanied minor for whom adequate reception arrangements did not appear to exist in his own country, the Secretary of State granted him discretionary leave to remain until 23rd August 2011 when he would reach the age of 17½. The appellant did not appeal against that decision.

6. On 22nd July 2009 the appellant approached the Red Cross asking them to trace his father, whose name he gave, in English and Pushtu as "Malik Jan, also known as Abdul Malik". (In his screening interview he had given his father's name as "Abdul Maluk", but apparently he was known in the family as "Malik Jan". These discrepancies were later regarded an indication that he had attempted to mislead the Red Cross and thus as undermining his credibility.) He also gave the names of two village elders whom he thought might be able to provide information. However, in June 2010 the Red Cross informed the appellant that they had been unable to trace his father.

7. On 22nd August 2011 the appellant applied for further leave to remain and, in effect, renewed his claim for asylum and humanitarian protection. The respondent again rejected his claim for reasons similar to those given on the earlier occasion, but this time the appellant lodged an appeal to the First-tier Tribunal. For the purposes of the hearing the tribunal had access to the records of the appellant's screening and asylum interviews, but not, it seems, to the note of the initial interview with UK Border Agency officials on 7th October 2008. The judge also had before him the refusal letters and a witness statement made by the appellant in November 2011, with legal assistance, in which he dealt with some of the criticisms of his accounts made by the respondent in her original refusal letter dated 10th March 2009. The appellant himself gave evidence. However, once again his account was dismissed as incredible, partly because of discrepancies between his different statements.

8. On 6th January 2012 the First-tier Tribunal gave the appellant permission to appeal to the Upper Tribunal on two grounds:

   (i) that the Immigration Judge had failed to take into account the respondent's failure to attempt to trace the appellant's family in breach of her duty under the Reception Directive (Directive 2003/09/EC) and regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005; and

   (ii) that the judge had unreasonably relied on inconsistencies between what the appellant had said in his asylum interview and what he had said in his screening interview, contrary to the principles to be derived from *R (Dirshe) v Secretary of State for the Home Department* [2005] EWCA Civ 421, [2005] 1 W.L.R. 2685.

9. The Upper Tribunal directed that there should be a hearing directed solely to the question whether the First-tier Tribunal had made an error of law in reaching its decision and indicated that it would, if appropriate, give directions later for re-making the decision. Following a hearing, at which the appellant was present but was not called to give evidence (not something which in those circumstances could properly be held against him), the tribunal published its decision, holding that the decision of the First-tier Tribunal was vitiated by the failure of the Secretary of State to attempt to trace the appellant's family and should be set aside. The tribunal did not deal with the second ground on which the appellant had obtained permission to appeal, but proceeded to re-make the decision in the following terms:

> "The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows.

> This appeal is allowed to the extent that the Secretary of State comply with [her] obligations under Regulation 6 of the Asylum Seekers (Recipient [sic] Conditions) Regulations 2005."

10. The appellant understood the effect of that order to be that the adverse findings about his credibility made both by the respondent and by the First-tier Tribunal were to be preserved, or at any rate that the respondent was not obliged to reconsider the reliability of his account when she made a fresh decision on his application for leave to remain. For understandable reasons he thought that his application would be seriously prejudiced if he was unable to require her to consider his evidence afresh, putting aside the inconsistencies which had previously been treated as undermining his credibility. He therefore sought and was granted permission to appeal to this court on the grounds that the Upper Tribunal should have dealt with his second ground of appeal (the so-called *Dirshe* point), but had failed to do so.

11. The appellant's grounds of appeal to this court identify two main points. The first is that the Upper Tribunal failed to determine whether the respondent's failure to make efforts to trace his family had been deliberate; the second was that it failed to decide the *Dirshe* point, the purpose of which was to challenge the adverse credibility findings. The Upper Tribunal plainly failed to deal with the *Dirshe* point at all. Why that should have been so is unclear. If, as Upper Tribunal Judge Macleman said when refusing permission to appeal to this court, the tribunal thought that the point had no substance, it should have said so and given its reasons. It seems that it simply overlooked the point. Whatever the reason, however, the fact remains that the tribunal did not deal with one limb of the appeal. As I have already pointed out, the *Dirshe* point relates to an important aspect of the case and unless it is clear that it could not affect the outcome, the tribunal's failure to consider it provides a sufficient reason for allowing the appeal.

12. Following the refusal on paper of permission to appeal, the appellant's counsel filed a statement in accordance with paragraph 16(1)(b) of Practice Direction 52C, in which, as sometimes happens, the argument was cast in wider terms to encompass a second line of argument based on the decision of this court in *R (AN, A child and FA, a child) v Secretary of State for the Home Department* [2012] EWCA Civ 1636. Permission to appeal was granted in general terms and the parties came to the hearing prepared to deal with both aspects of the argument. In those circumstances we proceeded on the basis that both were covered by the grounds of appeal. However, since they turn on different, albeit broadly similar, principles, it is necessary to consider them separately.

Dirshe

13. In *Dirshe* the appellant asked for the opportunity to record his asylum interview on tape. Permission was refused pursuant to the Secretary of State's blanket policy of not allowing recordings to be made of such interviews. This court held that the policy was unlawful, because what was said in the course of the asylum interview could be critical to any determination of the applicant's credibility. The test applied was the test of fairness at common law. Latham L.J., with whom Lord Phillips of Worth Matravers M.R. and Keene L.J. agreed, put the matter in this way:

> "13. In our view, the central issue which we have to determine is whether or not the procedure meets the appropriate standard of fairness required by the importance of the decision that has to be made. . . .
>
> 14. The interview is a critical part of the procedure for determining asylum decisions. It provides the applicant with an opportunity to expand on or explain his written account and for the Secretary of State, through the interviewing officer, to test that account and explore any apparent inconsistencies in that account. The interview could well be critical to any determination by either the Secretary of State or appellate authorities as to the credibility of the applicant. The record of the interview is created by the interviewing officer, who is acting on behalf of the Secretary of State. It follows that fairness requires that the procedure should give to the applicant an adequate opportunity to challenge its reliability or adequacy."

14. That decision was seized upon as providing support for the proposition that where an applicant for asylum asks to have his asylum interview recorded and his request is refused, the record of the interview is to be disregarded both by the Secretary of State and by any subsequent appeal tribunal. However, the decision does not go that far, as the Upper Tribunal pointed out in *MB v Secretary of State for the Home Department* [2012] UKUT 00019 (IAC). What the case actually decided was that a blanket policy of refusing to allow the recording of asylum interviews was unlawful.

15. Mr. Bedford for the appellant accepted the relatively narrow scope of the actual decision in *Dirshe*, but he submitted that, even so, the case stands as authority for the proposition that the importance of the decision which the Secretary of State has to make when dealing with a claim for asylum demands a high standard of procedural fairness at all stages, which in turn demands that the applicant should have a reasonable opportunity to verify independently the record of any interview which may have a bearing on the outcome of his claim. No sensible distinction can be drawn for this purpose, he submitted, between an asylum interview and a screening interview or between an asylum interview and the initial interview conducted when the applicant first comes into contact with the Border Agency. If there is a failure to comply with the proper standards of fairness, the record of interview is inadmissible. Alternatively, even if in subsequent proceedings it is admissible in the strict sense, to give it any significant weight would only reinforce the procedural unfairness.

16. Mr. Hall for the respondent submitted that the findings of the First-tier Tribunal in relation to the appellant's credibility were not open to serious challenge, given the number and nature of the discrepancies between his different accounts that had been identified. He submitted that if there had been a failure to meet the required standard of fairness in relation to any of the interviews, that did not render the record inadmissible and that it was for the Secretary of State and the tribunal to give the answers such weight as seemed appropriate. He pointed out that before the First-tier Tribunal the appellant had adopted the records of his screening and asylum

interviews, as well as what he had said in his statement of evidence and witness statements.

Procedural fairness

17. What is required in order to meet the common law requirement of procedural fairness varies in accordance with the nature of the process, the purpose for which it is undertaken and the importance to the parties of the outcome. In *Dirshe* the court recognised that the determination of an application for asylum is of great importance to the applicant and that the record of his asylum interview may be critical to the assessment of his credibility and thus to the success of his claim. It therefore insisted on a high standard of fairness. However, the asylum interview is not the only interview that may turn out to be critical, as this case demonstrates. The First-tier Tribunal's assessment of the appellant's credibility in paragraph 6 of its decision was based to a significant extent on discrepancies between what he was recorded as having said in his initial interview, screening interview and asylum interview. If an exercise of that kind is to be undertaken, particularly in relation to statements made by a boy of 14½ who speaks little English, it is surely important that he and those advising him should be able to check independently the accuracy of the record. It is fair to say that the discrepancies to which I have referred were not the only ones identified by the First-tier Tribunal, but they appear to have been regarded as important.

18. For the purposes of the appeal we were provided with a copy of the IS Minute Sheet which records what took place when the appellant presented himself at the offices of the UK Border Agency on 7th October 2008. It is not clear whether that document was available to the First-tier Tribunal, but it is interesting to note that the Secretary of State in her refusal letter of 10th March 2009 and the tribunal in paragraphs 6(b) and (c) of its decision both refer to an "arrest" and an "arresting officer" and do so in very similar terms, despite the fact that the IS Minute Sheet makes no reference to an arrest. Of greater importance for present purposes is the fact that there appears to have been no one else present when the relevant conversation took place. According to the note of the conversation, the appellant said that he had come to the United Kingdom because his father had been killed by the Taliban. That was quite different from what he said on all subsequent occasions when he was asked to explain why he had come here and it seems at least possible that the note reflects a misunderstanding.

19. The screening interview and the use subsequently made of parts of it, also give some cause for concern. The answers the appellant gave to a number of questions were relied on heavily as undermining his credibility. The first of those (Question 4.3) was:

> "What are the names and date of birth for the rest of your family?"

The answer, as recorded by the interviewer, was:

> "Father: Abdul Maluk – AFG – lives in Helmand, I don't know his age.
>
> Mother: Bibi Jana – AFG – She came with me to Pak.

> Sister: Halima – 15-16 yrs old, AFG, lives with my mother.
>
> Brother: Raias – 13 yrs old, AFG, lives with my mother.
>
> Brother: Gulabudin – 20-21 yrs old, AFG, lives with my mother."

For some reason that was understood by both the Secretary of State and the tribunal as a statement that both the appellant's parents were currently living in Afghanistan, but it was clearly nothing of the kind, particularly when read in the context of the rest of the interview.

20. Question 5.1 was:

> "When did you leave your country of origin and which countries did you travel through before arriving in the United Kingdom?"

The appellant's reply, as recorded, was:

> "I left AFG about 6 months ago. I went to PAK in a small car with my mother, sister and younger brother. I stayed in QUATA [Quetta] for about a week. I left QUATA with two other people and came all the way to the UK. I stopped in unknown places, I didn't know their languages. I entered the UK in the back of a lorry . . ."

21. In response to Question 11.1:

> "'What was your reason for coming to the UK?"

he said:

> "Because my father killed someone and my family was scared because the dead man's family will want revenge on us."

22. When asked to explain why he could not return to his home country he said:

> "I will be killed, because my father killed two people, one from the Afghan government and another [who] was involved in drug trafficking."

23. The Secretary of State and the First-tier Tribunal relied on those and other statements made in the course of the appellant's screening interview as a basis for concluding that he was not a credible witness. However, although matters of credibility are for the tribunal, particularly when it has seen the appellant give evidence, I am not persuaded that the Upper Tribunal would necessarily come to the same conclusion after an independent, and perhaps more open-minded, examination of the evidence. That is all the more so if it were to disregard what the appellant said in his initial interview and screening interview. In those circumstances it becomes necessary to consider whether the records of those interviews should properly have been admitted in evidence or, if admitted, accorded any significant weight.

24. In the absence of a statutory provision of the kind to be found in section 78 of the Police and Criminal Evidence Act 1984, I do not think that in proceedings of this kind the tribunal has the power to exclude relevant evidence. It does, however, have an obligation to consider with care how much weight is to be attached to it, having regard to the circumstances in which it came into existence. That is particularly important when considering the significance to be attached to answers given in the course of an interview and recorded only by the person asking questions on behalf of the Secretary of State. Such evidence may be entirely reliable, but there is obviously room for mistakes and misunderstandings, even when the person being questioned speaks English fluently. The possibility of error becomes greater when the person being interviewed requires the services of an interpreter, particularly if the interpreter is not physically present. It becomes greater still if the person being interviewed is vulnerable by reason of age or infirmity. The written word acquires a degree of certainty which the spoken word may not command. The "anxious scrutiny" which all claimants for asylum are entitled to expect begins with a careful consideration of the weight that should properly be attached to answers given in their interviews. In the present case the decision-maker would need to bear in mind the age and background of the applicant, his limited command of English and the circumstances under which the initial interview and screening interview took place.

25. In my view the common law principle of fairness which underpins the decision in *Dirshe* requires the tribunal to consider with care the extent to which reliance can properly be placed on answers given by the appellant in his initial and screening interviews and, as I have already indicated, I do not think that it is a foregone conclusion that the Upper Tribunal would decide that they could properly be given the degree of weight which the First-tier Tribunal gave them. In those circumstances the Upper Tribunal's failure to deal with this ground of appeal requires that the matter be remitted in order to enable it to do so.

26. That provides sufficient grounds for allowing the appeal, but since the approach to be adopted to the interviewing of minors formed a significant part of the argument and may also be relevant to the reconsideration of the appeal by the Upper Tribunal, I think it right to express my views on it.

Interviewing minors

27. In *R (AN (A child) and FA (A child)) v Secretary of State for the Home Department* [2012] EWCA Civ 1636 the court was concerned with two Afghan asylum-seekers aged 15 and 14 respectively. AN was found concealed in a lorry at Dover; FA was found by the police walking on the hard shoulder of the M20. Both were given a period of rest and some food before being subjected to a brief interview. In each case the boy was interviewed using a telephone interpreter, but in neither case was any responsible adult present. After they had been interviewed they were both referred to the local social services. About a fortnight later AN had an asylum screening interview and about two weeks after that a full asylum interview. It is not clear whether FA had a screening interview, but it is likely that he did, and in due course he had an asylum interview. In each case the person conducting the asylum interview put to the applicant inconsistencies between what he had said in the course of his initial interview and what he had said in his later interviews and in each case those inconsistencies played a part in the Secretary of State's decision to reject the claim. It

can be seen, therefore, that the cases bore many similarities to that of the present appellant.

28. In paragraph 38 of her judgment Black L.J. drew attention to the fact that the immigration system contains a number of provisions designed to safeguard the interests of children. She drew attention, in particular, to the provisions of Directive 2005/85/EC (the "Procedure Directive"), article 17 of which requires Member States to ensure that a person be available to represent, advise and assist an unaccompanied minor in connection with the asylum interview and to be present at it in order to take an active role. These requirements are reflected in the UK Border Agency Code of Practice, and Rules 352 and 352ZA of the Immigration Rules, to which she also drew attention. Rule 352ZA is of particular relevance to this case. It provides as follows:

> "The Secretary of State shall as soon as possible after an unaccompanied child makes an application for asylum take measures to ensure that a representative represents and/or assists the unaccompanied child with respect to the examination of the application and ensure that the representative is given the opportunity to inform the unaccompanied child about the meaning and possible consequences of the interview and, where appropriate, how to prepare himself for the interview. The representative shall have the right to be present at the interview and ask questions and make comments in the interview, within the framework set by the interviewer."

29. In paragraphs 54 – 58 of her judgment Black L.J. also drew attention to Home Office guidance, published in 2009 but accepted as providing a good indication of the proper approach to interviewing children, which stated that care should be taken to avoid asking children interviewed in the absence of a responsible adult to explain why they are afraid of being returned to their home countries. It also recommends those making decisions about asylum not to rely on details or information obtained from interviews where no responsible adult or legal representative was present unless those details or information have been raised with the applicant during the substantive asylum interview in the presence of a responsible adult or legal representative and the applicant has been given an opportunity to provide an explanation.

30. Clearly it is necessary for welfare purposes that Border Agency officials should be free to ask some questions of children when they first encounter them, but the guidance suggests that they should not be designed to probe any claim for asylum. In that case Black L.J. was satisfied that the initial interviews were concerned with why and how the children had come to this country and were therefore directed to the question of asylum, rather than merely enquiring into their welfare. No convincing explanation had been given of the need to undertake interviews of that kind at that time and the disadvantages of doing so were magnified by the absence of a responsible adult. Black L.J. acknowledged that the presence of a responsible adult at an initial interview, or even at a screening interview, was not expressly required by any of the rules or guidance, but she considered that the provisions of paragraphs 352 and 352ZA were sufficient to indicate the kind of safeguards that were called for. She expressed the view in paragraph 108 that if an interview is carried out without the independent support for the child that it is recognised he requires, his asylum position must be protected by alternative means, namely, by regulating the extent to which the

Secretary of State can rely on his answers in so far as they bear on his claim for asylum.

31. Although she was attracted by the suggestion that statements made by a child which have a bearing on his claim for asylum should not be admissible in evidence, if made in the absence of a responsible adult, Black L.J. did not go that far and concluded in paragraph 125 that their influence should depend on the weight to be attached to them in the light of the circumstances under which they were made. However, she did express the view in paragraph 126 that

> "Where there has been a clear breach of the principles set out in the various provisions governing questioning about asylum to which I have referred earlier in this judgment, it ought at the very least to be exceedingly difficult to persuade the court to admit material that has been thereby obtained; some breaches will inevitably rule out reliance on the material as was the case with FA's answers following his indication that he was claiming asylum."

32. Elias L.J. disagreed. Although he too considered that answers given to questioning which contravened the codes were admissible, he considered that the approach taken by Black L.J. to the question of their admissibility was too restrictive.

33. Maurice Kay L.J. expressed his conclusions as follows:

> "183. All this leads me to the conclusion that a modicum of questioning of a fit and well minor at the outset and before referral is permissible but that it should be limited to the subjects to which I have referred. Although I would exclude questions about asylum, it may be that the answers to some permissible questions (for example, in relation to suspected trafficking) could have relevance to a later asylum claim.
>
> *(2) Admissibility / weight*
>
> 184. I agree that answers given at the outset do not attract a blanket prohibition on subsequent admissibility and that the issue is one of weight, which will require scrupulous assessment. As the preceding judgments reveal, once an application for asylum has been intimated – as it may be spontaneously – the applicant has the protection of paragraph 6.2 of *Processing Asylum Applications from Children*. This acknowledgement of the risk of the potential unreliability of answers given at that stage by an asylum seeking minor in the absence of a responsible adult or legal representative is a matter which ought properly to be taken into account when considering what weight, if any, should be accorded to the answers of a minor who has not yet claimed asylum."

34. The decision is of importance in the present case for two reasons. First, it is authority for the proposition that a failure to observe the proper procedures when interviewing children does not render their answers inadmissible; it affects the weight to be attached to the evidence, but does not prevent the decision-maker from taking it into account altogether. Secondly, it is authority for the proposition that the decision-maker should exercise a considerable degree of caution before relying on answers given in the course of interviews of children that have not been conducted in the presence of a legal representative or responsible adult. Given the age of the present appellant at the time of the interviews, the second of those principles is clearly of some relevance in this case. It does not appear that the First-tier Tribunal was asked to give any thought to considerations of this kind and since its decision pre-dates by twelve months the judgment in *AN and FA*, it did not have the benefit of the guidance it affords. Nonetheless, if the matter is remitted to the Upper Tribunal it will be able to take into account the principles to be derived from it. If the Upper Tribunal adheres to its decision to re-make the decision it will no doubt wish to make it clear whether the answers given in those interviews are to be given any weight, and if so, how much and why.

The Upper Tribunal's order

35. The jurisdiction of the Upper Tribunal on hearing an appeal from the First-tier Tribunal is governed by section 12 of the Tribunals, Courts and Enforcement Act 2007. Subsections (1) and (2) of that section provide that if the Upper Tribunal finds that the decision of the First-tier Tribunal under appeal involved an error of law, it may remake the decision and for that purpose may make any decision which the First-tier Tribunal could itself make. The jurisdiction of the First-tier Tribunal in a matter of this kind is governed by sections 86 and 87 of the Nationality, Immigration and Asylum Act 2002. By section 86(3) and (5) it must allow the appeal in so far as it thinks that the decision against which the appeal is brought was not in accordance with the law; otherwise it must dismiss it. If the tribunal allows the appeal, it may give directions for the purpose of giving effect to its decision: section 87.

36. In re-making the decision in the present case the Upper Tribunal purported to allow the appeal to the limited extent of requiring the Secretary of State to comply with her obligations under Regulation 6 of the Asylum Seekers Reception Conditions Regulations 2005. However, by the time the order was made on 18th June 2012 those obligations had already expired, because the appellant reached the age of majority in February that year. The tribunal should, therefore, have considered for itself, in accordance with the guidance given in the case of *KA (Afghanistan) v Secretary of State for the Home Department* [2012] EWCA Civ 1014, [2013] 1 W.L.R. 615, whether the appellant had been prejudiced by the failure of the Secretary of State to perform her obligations under the regulations. However, if, as I propose, the matter is remitted to the Upper Tribunal to enable it to consider the outstanding ground of appeal, its order will be set aside and it will have the opportunity to reconsider that aspect of the matter as well.

Conclusion

37. The failure of the tribunal to deal with the appellant's challenge to the use against him of the answers given in his initial and asylum interviews goes to the heart of its decision. Moreover, for the reasons I have given, I do not think that it was appropriate

in this case for the tribunal to remit the matter to the Secretary of State, even if it had the power to do so. I would therefore allow the appeal, set aside the order below and remit the matter to a different constitution of the Upper Tribunal for reconsideration as a whole in the light of the views expressed by this court.

Lady Justice Gloster :

38. I agree.

Lord Justice Vos :

39. I also agree.