Neutral Citation Number: [2024] EWCA Civ 1467

Case No: CA-2023-002616

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(ADMINISTRATIVE APPEALS CHAMBER)**
**JUDGE WEST**
**UA 20230001508 WP**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2024

**Before:**

**LORD JUSTICE PETER JACKSON**
**LORD JUSTICE MALES**
and
**LORD JUSTICE HOLGATE**

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**Between:**

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| **CHRISTOPHER McCALLA** | **Appellant** |
| **- and –** | |
| **SECRETARY OF STATE FOR DEFENCE** | **Respondent** |

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**Farhan Asghar** (instructed by **TSABI Limited**) for the **Appellant**
**William Hays** (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 7 November 2024

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# Approved Judgment

This judgment was handed down remotely at 10.00 am on 2 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Lord Justice Holgate:

## The issue

1. This is an appeal by Mr Christopher McCalla against the refusal of the Upper Tribunal (Administrative Appeals Chamber) ("the UT") on 4 December 2023 to set aside its decision dated 4 November 2023 to refuse permission to appeal to that tribunal from the decision on 6 September 2023 of the First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber) ("the FTT"). The FTT had dismissed the appellant's appeal against the decision of the respondent, the Secretary of State for Defence, on 2 March 2023 that the appellant's bilateral popliteal artery entrapment syndrome ("BPAES") in both calves had not been caused or made worse by his service in the army in 2003 to 2004, so as to entitle him to an award under the War Pensions Scheme.

2. In summary, rule 43 of The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008 No. 2698) ("the 2008 Rules") gives the UT power to set aside a decision which disposes of proceedings in the UT and to remake the decision if firstly, there has been a "procedural irregularity" in those proceedings and secondly, the UT considers that it is in the interests of justice to do so.

3. The appellant contended that the UT should set aside its decision made on 14 November 2023 refusing permission to appeal to that tribunal because he had obtained an expert medical report from Mr Harpaul Flora dated 25 November 2023 relevant to the question of causation.

4. The central issue in this appeal is whether the UT was wrong in law to decide that no procedural irregularity had taken place in relation to the application for permission to appeal and so, for that reason, the power under rule 43 to set aside its decision on that application was not engaged.

## Factual background

5. The appellant was born in 1981. He served in the army from 25 July 2003 to 8 November 2004. He suffered from non-freezing cold injuries during that period, as a result of which he was medically discharged from the army and awarded compensation at a 50% level of disability.

6. In 2019, following ultrasound scans, a consultant surgeon diagnosed BPAES in the right leg and said that it was also possibly present in the left leg.

7. On 8 June 2022 the appellant made a claim under the War Pensions Scheme in respect of two conditions, non-alcoholic fatty liver disease and bilateral BPAES.

8. On 2 March 2023 the respondent rejected the claim because there was no evidence that either condition had been caused or made worse by service in the army. The respondent decided to maintain the existing 50% level of payments for the non-freezing cold injuries which had been accepted.

9. Also in March 2023 the appellant was referred to Professor Loftus, a consultant vascular surgeon at St. George's Hospital, London and has since remained under

his care. The appellant had an MRI scan at the hospital in October 2023 and an operation on 7 November 2023 for release of the left popliteal entrapment.

10. Meanwhile, on 20 March 2023 the appellant appealed against the respondent's decision to the FTT. He made a personal statement in which he commented as a layman on some of the medical evidence, but he did not instruct an expert in support of his case.

11. The appeal was heard on 4 September 2023. The appellant attended with a representative. The respondent was not represented.

12. On 6 September 2023 the FTT issued its decision dismissing the appeal. They decided that the liver problems were caused by obesity and the BPAES was caused by enlarged calf muscles, but not related to service in the army.

13. On 18 September 2023The FTT issued its reasons for the decision. In para. 15 the tribunal explained that the appellant had misinterpreted medical evidence, specifically a report by Dr Pozos in 2015. In para. 16 the FTT said:

> "16. Mr McCalla told the Tribunal that he believed the entrapment syndrome was present whilst in service. His belief is not supported by the contemporaneous or subsequent medical evidence. Mr McCalla's evidence about not being given advice about weight loss was not supported by doc 16, which says he was given such advice, and was sent to Mr McCalla. Mr McCalla conceded that no clinician has linked the condition to military service. Again, the Tribunal uses its own expertise and prefers the medical advisor's opinion, rather than Mr McCalla's opinion, unsupported by any medical evidence"

The appellant was notified that he had 42 days from 18 September 2023 within which to appeal to the UT.

14. In the meantime, on 13 September 2023 the appellant had had a consultation with Mr Flora, a consultant vascular and general surgeon. The doctor also reviewed clinical records and various scans previously carried out. At that time, Mr Flora was unsure whether the appellant's BPAES was "functional", that is acquired, or anatomical.

15. However, in his report dated 25 November 2023 Mr Flora said that on 16 November he reviewed the MRI scan carried out at St. George's in October. That enabled him to say that the appellant's BPAES was a functional condition, "that is an acquired condition when individuals train their legs very heavily, such as the army activities described [by the appellant] during his time in service. This causes the calf muscles to grow and enlarge leading to a restriction of the popliteal artery on exercise causing these debilitating calf pains."

16. On 2 October 2023 the President of the War Pensions and Armed Forces Compensation Chamber, Judge Fiona Monk, refused the appellant's application for permission to appeal to the UT. She referred to the appellant's contention that the FTT had overlooked medical evidence which established that there was a link between his accepted condition of non-freezing cold injury and his BPAES. She

said that the tribunal had explained why the appellant's interpretation of the medical evidence before it could not be accepted. The President said that there was no arguable error of law in the FTT's reasoning and decision. The appellant's application simply amounted to a disagreement with the Tribunal's factual findings.

17. Having seen Mr Flora in consultation and the reasoned decisions of the FTT dated 18 September and 2 October 2023, the appellant made an application to the UT for permission to appeal on 9 October 2023. The application focused on the BPAES. In his grounds of appeal the appellant did not indicate that he might wish to rely upon fresh evidence arising from his consultation with Mr Flora. Instead the appellant gave his understanding of several medical opinions, which, he said, the FTT had failed to address.

18. On 14 November 2023 Judge West sitting in the UT refused permission to appeal. In summary, he said that such an appeal could only lie on a point of law and that there was no arguable error of law in the FTT's decision. That tribunal had explained in clear and concise language why the appellant's interpretation of the medical evidence could not be accepted. The judge was satisfied that the FTT had considered the appellant's case fairly and that the proposed grounds of appeal were no more than an attempt to re-argue the facts which had been for that tribunal to determine.

19. On 26 November 2023 the appellant applied to the UT under rule 43 of the 2008 Rules to set aside its decision refusing permission to appeal in relation to his BPAES, but not his liver disease. The application relied solely upon Mr Flora's report of the previous day. The appellant said:

> "My reason are because an important report from the vascular surgeon Mr Flora which details the nature of my injury and also confirms that the injury is related to my military service this was not available at the time because further tests needed to be done so that could be clarity. Hence, it was not sent to the tribunal
>
> If the report had been available to the tribunal at the time the original decision would have been different"

The only "further tests" drawn to our attention was the MRI scan carried out at St. George's Hospital in October 2023.

20. On 4 December 2013 Judge West refused the application to set aside the UT's decision refusing permission to appeal and also refused permission to appeal to the Court of Appeal from his decision under rule 43. The judge directed himself by reference to the decision of this court in *Plescan v Secretary of State for Work and Pensions* [2023] EWCA Civ 870; [2024] 1 WLR 530. He said that rule 43 is only concerned with procedural irregularities in the proceedings before the UT, not the FTT. It does not provide a means of challenging the UT's decision on whether or not to grant permission to appeal, or the reasons given for that decision.

21. The judge was satisfied that there had been no procedural irregularities in the proceedings in the UT. Specifically, he decided that there could be no criticism of the UT for not having taken into account a report which had not even been written when the appellant applied for permission to appeal to the UT or when the UT refused permission to appeal (para.5 of the decision).

22. Judge West went on to explain why, even if it were to be assumed that there had been a procedural irregularity in the UT, it would not be in the interests of justice to set aside the decision refusing permission to appeal. The application was no more than an attempt to relitigate that decision (para.11).

23. In *Plescan* it was held that a decision by the UT on an application to set aside its decision refusing permission to appeal to that tribunal is not an "excluded decision" for the purposes of s.13(8) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). The Court of Appeal therefore has jurisdiction to entertain an appeal from such a decision. In the present case Nugee LJ granted permission to appeal from the UT's decision dated 4 December 2023.

**The compensation scheme**

24. The appellant's claim was made under the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 2006 (SI 2006 No. 606) ("the 2006 Order"). Part II provides for awards in respect of the disablement of a member of the armed forces which is "due to service" before 6 April 2005.

25. Part IV deals with making a claim. Part V deals with the adjudication of claims. Article 41 deals with claims made more than 7 years after the termination of service. By art. 41(1) the relevant disablement shall be "accepted as due to service" provided it is certified that the disablement is due to an injury which:

> "(i) is attributable to service before 6 April 2005, or
>
> (ii) existed before or arose during such service and has been and remains aggravated thereby."

26. By art. 43(a) a decision of a relevant tribunal under the 2007 Act that the conditions in art. 41(1) are satisfied is treated as being a certificate. In addition art. 43(b) identifies persons who may issue a certificate, including a medical officer appointed or recognised by the Secretary of State.

27. In the appellant's case there was no certificate that the BPAES satisfied either of the conditions in art. 41(1). Article 41(5) provides:

> "Where, upon reliable evidence, a reasonable doubt exists whether the conditions set out in [Art. 41(1)] are fulfilled, the benefit of that reasonable doubt shall be given to the claimant."

28. It is common ground that where a claimant can point to "reliable evidence" which establishes a reasonable doubt about whether a relevant condition has a service cause, the claim for compensation may only be refused if, taking into account any other relevant material, the decision-maker is satisfied beyond a reasonable doubt that the disablement was not so caused. In the present case the FTT found that the

appellant had failed "to raise a reasonable doubt that his two conditions are related to service" and so his appeal was dismissed (para.18 of the decision).

## The 2007 Act and the Procedure Rules

29. Section 11 of the 2007 Act confers a right of appeal to the UT on any point of law arising from a decision made by a FTT (other than an excluded decision as defined in s.11(8)). The right may only be exercised with the permission of the FTT or the UT.

30. A point of law can include a factual finding by the FTT unsupported by any evidence or one to which no reasonable tribunal could come on the evidence before it (*Edwards v Bairstow* [1956] AC 14). Potentially it could also include a mistake of fact by the FTT giving rise to unfairness where the criteria laid down in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044 are satisfied.

31. Under rule 15(2)(a) of the 2008 Rules the UT may admit evidence irrespective of whether it was available to a previous decision-maker, having regard to the overriding objective in rule 2 "to deal with cases fairly and justly." In exercising that jurisdiction, the practice of the UT is to have regard to the principles in *Ladd v Marshall* [1954] 1 WLR 1489 on the admission of fresh evidence in an appeal, but not as strict rules (*Kyriakos Karoulla t/a Brockley's Rock v HMRC* [2018] UKUT 0255 (TCC) at [20]).

32. Section 13 of the 2007 Act confers a right of appeal to the Court of Appeal on any point of law arising from a decision made by the UT (other than an excluded decision as defined in s.13(8)). That right may only be exercised with the permission of the UT or the Court of Appeal. But the determination by the UT of an application for permission to appeal to that tribunal is an excluded decision (s.13(8)(c)) and so cannot be the subject of any further appeal to the Court of Appeal.

33. Section 10 of the 2007 Act gives the UT power to review a decision it has made "on a matter in a case" and *inter alia* to set that decision aside. But that power may not be exercised in relation to an excluded decision for the purposes of s.13(1). Accordingly, the UT's power of review under s.10 does not apply to a decision by the UT on whether to grant permission to appeal to that tribunal. Even where the power under s.10 is available, a decision by the UT refusing to review an earlier decision it has made is also an excluded decision (see s.13(8)(d)(i)) and cannot be the subject of an appeal to the Court of Appeal (*Samuda v Secretary of State for Work and Pensions* [2014] EWCA Civ 1; [2014] 3 All ER 201).

34. Section 22 and sched. 5 of the 2007 Act authorises the making of procedural rules for the FTT and UT.

35. Part 1 of sched. 5 contains specific provisions for the content of the procedural rules. Under the heading "correction of errors and setting-aside of decisions on procedural grounds" para.15(2) provides:

> "(2) Rules may make provision for the setting aside of a decision in proceedings before the First-tier Tribunal or Upper Tribunal –
>
> (a) where a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party to the proceedings or a party's representative,
>
> (b) where a document relating to the proceedings was not sent to the First-tier Tribunal or Upper Tribunal at an appropriate time,
>
> (c) where a party to the proceedings, or a party's representative, was not present at a hearing related to the proceedings, or
>
> (d) where there has been any other procedural irregularity in the proceedings."

This provision enables such rules to be made for both the FTT and UT.

36. Rule 43 of the 2008 Rules provides so far as is relevant:

> "43.—(1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
>
> (a) the Upper Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings."

**The appellant's submissions**

37. Mr Farhan Asghar was instructed to appear on behalf of the appellant not long before the hearing of this appeal. His written and oral submissions were helpful

and clear, advancing the submissions which could properly be made on behalf of the appellant.

38. Mr Asghar submitted that the UT erred in law in rejecting the application to set aside the refusal of permission because Mr Flora's report did not exist when the application for permission to appeal was made or determined, and so the condition in rule 43(2)(b) was not satisfied. He submitted that, on the contrary, the report was "a document relating to the proceedings … not sent to the Upper Tribunal at the appropriate time." The document did not have to be in existence at the time when the application for permission to appeal to the UT was made or determined.

39. Mr Asghar contended that his construction of rule 43(2)(b) was supported by other provisions in the 2008 Rules. In rule 1(2) of the 2008 Rules, "document" is defined as follows:

> " 'document' means anything in which information is recorded in any form, and an obligation under these Rules or any practice direction or direction to provide or allow access to a document or a copy of a document for any purpose means, unless the Upper Tribunal directs otherwise, an obligation to provide or allow access to such document or copy in a legible form or in a form which can be readily made into a legible form."

He said that this definition contains no temporal limitation.

40. Mr Asghar submitted that rule 43(2)(b) should be read alongside rule 15 which gives the UT power to admit evidence, even if it was not available to a previous decision-maker, for example, the FTT.

41. He submitted that when enacting para.15(2)(b) of sched. 5 to the 2007 Act, Parliament should be taken to have been aware of the legal principles in the case law for the admission of fresh evidence on an appeal, including *Ladd v Marshall.* Accordingly, "document" in that provision includes, for example, a document which did not exist when a matter was heard and determined by the FTT, but which would satisfy the principles for the admission of fresh evidence on an appeal to the UT. That analysis applies equally to the use of the word "document" in rule 43(2)(b) of the 2008 Rules.

42. Mr Asghar recognised that, on the appellant's case, rule 43(2)(b) could be open to abuse. Parties would be able to rely upon that sub-paragraph to apply to set aside a decision, for example a decision refusing permission to appeal, by creating a new document subsequently. But he said that any such abuse could adequately be controlled by firstly, the judicial principles restricting the admissibility of fresh evidence and secondly, the need for an application to pass the additional "interests of justice" test in rule 43(1)(a).

43. Mr Asghar also submitted that the UT made a further error of law in the application of the "interests of justice" test (see [22] above). Firstly, he said that it is trite law that a decision can be set aside on an appeal based on fresh evidence, having regard to the principles in *Ladd v Marshall* (see *Kyriakos Karoulla*). He

submitted that in the present case, at the very least, the application for permission to appeal to the UT could have been decided differently if the report by Mr Flora had been taken into account (para.34 of the appellant's skeleton). Secondly the UT could have granted permission to appeal if the Flora report had been before it, on the basis of *E v Secretary of State for the Home Department*. Even though there was no fault on the part of the FTT, its decision on the causation issue involved a mistake of fact amounting to an error of law (paras.35 to 36 of the appellant's skeleton argument).

**Discussion**

44. In *Plescan* this court settled a number of points on the scope of rule 43 of the 2008 Rules.

45. The UT may set aside a decision which "disposes of proceedings" and re-make the decision. "Proceedings" includes an application for permission to appeal to the UT against a decision of the FTT. Accordingly, an application may be made to set aside a decision by the UT refusing permission to appeal to that tribunal ([15]).

46. The power to set aside is exercisable only in limited circumstances. An applicant must show that there was a procedural error in the proceedings in the UT dealing with his application for permission to appeal *and* that it is in the interests of justice to set aside that decision. Rule 43 does not enable the applicant to challenge the UT's decision to refuse permission to appeal or the reasons on which that decision was based (*Plescan* at [16]). It is concerned with how the UT handled the application for permission to appeal (*ibid*).

47. The heading to para.15 of sched. 5 to the 2007 Act, the provision authorising the making of the 2008 Rules, makes it plain that para.15(2) is dealing with the "setting-aside of decisions on procedural grounds." It is also apparent from the language of rule 43(2)(d), "any other procedural irregularity in the proceedings", that any matter said to fall within rule 43(2)(a), (b) and (c) must involve a procedural irregularity in the proceedings in the UT.

48. A decision of the UT not to set aside a refusal of permission to appeal does not merge with, or become part of, the earlier refusal of permission to appeal. They are separate decisions reached pursuant to separate processes (*Plescan* at [22]).

49. In the concluding section of his judgment, Lewis LJ said this at [29]:

> "……. section 13 of the Act confers jurisdiction on the Court of Appeal to consider an appeal against a decision of the Upper Tribunal refusing to set aside its earlier decision refusing permission to appeal to the Upper Tribunal against a decision of the First-tier Tribunal. Any such appeal would, however, have to be based on arguable grounds that the Upper Tribunal erred in considering that it was not in the interests of justice or in finding that there was no procedural error or irregularity in the proceedings in the Upper Tribunal as specified in rule 43. The appeal would not be an appeal against the refusal of

> permission. It would be an appeal against the refusal to set aside."

50. Ms Plescan had indicated that she would seek to rely on fresh evidence in support of her application for permission to appeal to the Court of Appeal against the UT's decision not to set aside its refusal of permission to appeal to that tribunal. Lewis LJ responded that any appeal in the Court of Appeal could only deal with the procedure followed by the UT when refusing that permission to appeal, and not with any challenge to the findings or reasons of the FTT or the procedure followed in the FTT ([30]).

51. The decision in *Plescan* was followed by the Inner House of the Court of Session when refusing leave to appeal against a decision by the UT under rule 43 of the 2008 Rules not to set aside an earlier refusal of permission to appeal from the FTT (*LM v Advocate General for Scotland* [2024] CSIH 28; [2024] SLT 1083). Lord Pentland stated that rule 43 is a procedural rule designed to provide a safeguard for proceedings in the UT. It is not engaged where criticisms are made of a decision of, or procedure followed by, the FTT ([27]).

52. Rule 43(2)(b) can therefore only apply to a document which relates to the proceedings disposed of by the decision which the applicant asks to be set aside: in this case the application for permission to appeal to the UT. In addition, the applicant must show that there was a procedural irregularity in the proceedings in the Upper Tribunal because the document was not sent to the Upper Tribunal at an appropriate time.

53. The 2008 Rules do not define which is meant by "an appropriate time", but in this instance it must refer to a time appropriate to the determination of an application for permission to appeal. That would have to be, at the very least, some time before the application was refused. Thereafter, that refusal cannot be the subject of a review by the UT under s.10 of the 2007 Act or an appeal to the Court of Appeal under s.13.

54. But a document could only have been "sent" to the UT at "an appropriate time", i.e. before the determination of the application for permission to appeal, if it existed at that time. The report by Mr Flora did not come into existence before the refusal of permission to an appeal. The reasoning of Judge West at para.5 of his decision on the rule 43 application was therefore correct. The definition of "document" in rule 1(2) is consistent with the plain meaning of rule 43(2)(b).

55. There was no procedural error in the handling of the application for permission to appeal in the UT up to the decision to refuse on 14 November 2023. For example, the appellant did not indicate to the UT that he was expecting to receive a medical report, nor did he ask the UT to defer consideration of his application until he was in a position to be able to submit a report, which the tribunal then disregarded. The UT was not asked to consider exercising its power under rule 15(2)(a) of the 2008 Rules when determining the application for permission to appeal. Instead, simply by relying upon the subsequent production of a document, the report by Mr Flora, the appellant seeks to create an *ex post facto* error in the earlier procedure leading to the refusal of his application for permission to appeal, where no procedural error had previously occurred.

56. For the reasons sets out above, rule 43(2)(b) does not enable an unsuccessful applicant for permission to appeal to rely upon a document he creates or obtains after that refusal of permission to appeal (or other decision sought to be set aside). Accordingly, in my judgment the appeal must fail. But the appeal also fails for other reasons.

57. In his report Mr Flora gives his opinion that the appellant suffers from BPAES which could have been resulted from service in the army. Although that view differs from the conclusions of the FTT, that does not mean that there was any procedural irregularity in the handling of the application for permission to appeal in the UT.

58. Merely to say that the report should have been treated in the rule 43 application as admissible fresh evidence takes the matter no further forward. It simply begs the question for what purpose could the report have been used if it had been available when the application for permission to appeal was being determined?

59. An appeal to the UT can only be made on a point of law. The only legal error now alleged by the appellant is a factual mistake by the FTT on the issue of causation, applying the principles in *E v Secretary of State for the Home Department*. But in terms that is a challenge to the findings of the FTT, as paras.35 to 36 of the Appellant's Skeleton rightly accept. Similarly, the appellant's case in the present appeal involves a challenge to the merits of the decision of the UT on 14 November 2023 to refuse permission to appeal from the FTT. Neither line of argument can be pursued in an application under rule 43 to set aside a refusal of permission to appeal, or in an appeal against a decision refusing such an application (see *Plescan*).

60. As Judge West pointed out in para.12 of his reasons for refusing the rule 43 application, under the 2007 Act the Court of Appeal has no jurisdiction to hear an appeal from the UT's refusal of permission to appeal from the FTT (s.13), nor can the UT review that refusal (s.10). Accordingly, rule 43, which only serves to correct procedural irregularities in the UT where it is in the interests of justice to do so, cannot be used by a disappointed party to circumvent those provisions.

61. The appellant sought to rely upon a number of authorities where a court or tribunal had set aside an earlier decision relying on fresh evidence (*Kyriakos Karoulla*; *Atkins v Co-operative Group Limited* [2016] EWHC 80 (QB); *MM v Secretary of State for the Home Department* [2014] UKUT 00105 (IAC)). However, in those cases the fresh evidence was admitted *on an appeal* to show that the decision of the tribunal or judge below should be set aside or varied. In each matter permission to appeal had been granted. The cases did not relate to a jurisdiction for setting aside a decision made by the same tribunal on grounds restricted to procedural irregularity in the process leading to that decision and where no challenge can be made to the substantive decision or procedure adopted by an inferior tribunal. These decisions do not provide any assistance on the issues in this appeal.

62. For these additional reasons, I consider that the appeal must fail.

63. Because the appellant's case on rule 43(1)(b) and (2) fails, I do not consider it necessary or appropriate to address ground 2 on the "interests of justice" test in

rule 43(1)(a).

64. However, I should mention two further matters. First, although this appeal has only been concerned with the appellant's inappropriate attempt to use rule 43 to undermine the factual findings of the FTT, there was some discussion about other cases which may properly fall within rule 43(2)(d). For example, in order to support an application under rule 43 to set aside a decision which is said to have been tainted by impropriety or procedural unfairness, it may be necessary to rely upon evidence which came into existence after that decision, such as a witness statement (see e.g. *R v Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584, 595G-596A). In addition, in some situations it may be possible for a party to rely upon the parallel provision for setting aside a decision of the FTT on grounds of procedural irregularity in that tribunal (rule 35 of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (SI 2008 No. 2686)). However, such issues do not arise in the present case and need not be considered further here.

65. Second, Mr William Hays, who made helpful submissions on behalf of the respondent, pointed out that his client has the power to review a decision that has been upheld by the FTT if satisfied that there has subsequently been a relevant change of circumstances (para.44(3)) of the 2006 Order). I agree with Mr Asghar that the possible availability of that power has no bearing upon the proper interpretation and applications of rule 43 of the 2008 Rules.

66. After the hearing of this appeal was concluded, the appellant sent two emails to the court referring to medical evidence which was before the FTT. He says in effect that that material should have led the FTT to come to the same conclusion as was reached by Mr Flora in his November 2023 report. Plainly, that is a direct challenge to the FTT's decision. For the reasons I have set out above, such a challenge is impermissible, whether in an application under rule 43 to set aside the UT's refusal of permission to appeal from the FTT, or in an appeal to this court against that decision of the UT.

67. For these reasons, I would dismiss the appeal.

**Lord Justice Males**

68. I agree.

**Lord Justice Peter Jackson**

69. I also agree.