IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004290
First-tier Tribunal No:
PA/55345/2021
IA/16161/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 26 January 2023

Decision & Reasons Promulgated
On the 13 February 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

EMILY FAMILONI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Adrian Berry, Counsel instructed by Birnberg Peirce Solicitors
For the Respondent: Ms Alex Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals to the Upper Tribunal from the decision of First-tier Tribunal Judge Kudhail promulgated on 7 July 2022 ("the Decision"). By the Decision, Judge Kudhail dismissed the appellant's appeal from the decision of the respondent to refuse to grant her leave to remain as an adult dependent relative; or, in the alternative, on the ground that there would be very significant obstacles to her re-integration into life and society in the country of return; or, in the further alternative, on the ground that the refusal of grant of leave to remain would have unjustifiably harsh consequences for the appellant and would represent a disproportionate interference with the family and private life which she had established in the UK since arriving in the UK on 24 January 2020 with leave to enter as a visitor.

Relevant Background

2. The appellant is a national of Nigeria, whose date of birth is 28 February 1948. She entered the UK as a visitor on 24 January 2020, and subsequently obtained a short extension on her visa due to Covid-19 travel restrictions. Before this extension had expired, the appellant applied for leave to remain on 29 July 2020.

3. In her application form, she said that she had visited the UK six times between 2010 and 2014 to support her daughter with her babies. When she got better and the babies were older, she returned to Nigeria to continue with her corner-shop retirement business and to look after her niece who was now grown up and had finished her education. She had become unwell about three years ago due to loneliness and eye complications. She had cataracts and aggressive glaucoma which left her left eye almost blind at 80%, and her right eye partially blind at 50%. Realising that this condition was not getting better, despite medical intervention in Nigeria, had made her get depressed. She could not run her corner-shop anymore, so she closed it down and stayed alone in her home.

4. Her niece finished university and started working in the city. Her health and well-being worsened and at this point her daughter and husband in the UK became concerned. They decided she should come to live with them on a long-term basis in the UK so that they could care for her.

5. She did not have any friends who lived in her vicinity any more. She had two childhood friends who now lived with their children. One of these friends lived in Lagos with her daughter. Her second daughter lived in Abuja, which was 8 hours' journey by road from where she lived in Akure.

6. When she came to the UK in January 2020, she had lost half her body-weight. She was depressed and had lost the will to live after living alone for almost three years, and she had started to struggle to look after herself

due to poor vision. She had begun recovering emotionally since she had come to the UK. Her sight was getting better because of better and more efficient medical intervention. She got on well with her grand-kids and was able to do little things with them when their mum and dad were working.

7. On 11 May 2021 the respondent gave her reasons for refusing the appellant's application. She had entered the UK in a temporary capacity as a visitor, and so she should not have had any legitimate expectation of being able to remain in the UK indefinitely because of the ties which she may have developed whilst she was here as a visitor. She had not made an application for entry clearance as an adult dependent relative, and as such she could not be considered under those Rules. It was not accepted that she would be unable to re-establish and maintain her family and private life in Nigeria, where she had a home to go to, and where she also had family, including her second daughter and her niece, and she had not provided evidence that they would be unable to support her if necessary.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. The hearing before Judge Kudhail took place at Taylor House on 16 June 2022. Both parties were legally represented, with Mr Leskin of Birnberg Peirce Solicitors appearing on behalf of the appellant, and Mr Eaton of Counsel appearing on behalf of the respondent.

9. In the Decision, the Judge gave an account of the hearing at paragraphs [19]-[24.] She recorded, among other things, that the appellant adopted her witness statement as her evidence in chief. The appellant's daughter adopted her statement, and Mr Leskin asked her a number of questions relating to each annotation she had made on the list of care-homes and hospitals in Nigeria which had been provided by the respondent. The appellant's son-in-law adopted his statement. There was very little cross-examination of any of the witnesses.

10. It was common ground that there were four disputed issues which the Tribunal was required to resolve. The first issue was whether the appellant, as a result of age, illness or disability, required long-term personal care to perform every-day tasks, so as to meet the requirement of E-ECDR.2.4. The Judge's discussion and findings on this issue are contained in paragraphs [26]-[38] of the Decision.

11. As set out in paragraphs [10] and [27], the case put forward by Mr Leskin was that the appellant was partially sighted and was unable to manage on her own. She had had eye operations to try and rectify and stabilise her eyesight. The current situation was set out by her Consultant Ophthalmic Surgeon, Mr Kulkarni. He said that her eyesight would make her eligible to be formally registered as severely sight impaired. She was at increased risk of falls due to her limited visual fields. She required support to ensure that she was safe at home and when she ventured outdoors. Mr Leskin submitted that the practical effect of the sight impairment suffered by the

appellant was set out in the witness statements, particularly those of KVF (her daughter in the UK), SS (who was the carer for her grand-daughter), and by the appellant herself in her witness statement. He submitted that it was clear from these statements that the appellant required long-term personal care to perform everyday tasks.

12. The Judge addressed this case by reference of the witness statements, before moving on to address the medical evidence provided by Mr Kulkarni in a letter dated 9 February 2022, and by a Specsavers Optician in a report dated 14 June 2022. The Judge commented on the evidence of the witnesses as follows:

> 29. The appellant in her statement recounts that in 2018 she fell two times in Nigeria and thus had a fear of attending gatherings. She describes how she ran a small shop which she had to close at the end of 2019, as her sight deteriorated and she could not manage it. She refers to her daughter in Nigeria who she claims does not have the space, capacity or close proximity to look after her. It is claimed she now does not have a good relationship with this daughter. She also refers to a niece who lives in Lagos, who cannot assist her due to the 4.5 hour distance. She refers to still having a pension. The appellant came as a visitor and it is not claimed she is dependent on her UK based daughter. The appellant does not in any of her evidence refer to what difficulties her eyesight has on completing day to day activities such as dressing, cooking, washing or cleaning. Her statement refers to playing with her grandchildren and to her daughter taking her to church on a Sunday. There is no evidence from the appellant of what her carer, daughter, grandchildren or son-in-law do to support her perform day to day activities. I find this damaging as it is a key issue in this appeal. Further, the appellant's daughter and Ms Sanni's statements sets out a number of tasks, which the appellant has not mentioned at all. I have considered that she is elderly, but this I find is mitigated by the fact she is legally represented. I also find the fact she claims to have had two falls in 2018 but managed to run a shop until the end of 2019, inconsistent with the claim that possible falls implies she cannot perform daily tasks without support.
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> 30. Ms Kehinde Victoria Familoni (KVF), the appellant's UK based daughter and sponsor gave oral evidence and provided a statement. She has been living in the UK since 2005 and she confirms that she has a sister in Nigeria. She too explains why the sister cannot look after the appellant, as she lives far away, has her own family unit and is studying. KVF states that her sister has not seen her mother for over 3 years "*when she lives in the same country is really not good.*" She refers to the possibility of finding a carer in Nigeria and discounts this on the basis that it would be difficult to find someone trustworthy. She then recounts a number of negative outcomes of employing a carer in Nigeria such as theft, exploitation and abuse. At paragraph 10, she sets out what assistance she gives her mother such as ensuring she takes her medicine, helping her climb stairs, taking her to medical appointments, washing, ironing and cooking. She refers to the fact she has a childminder who also assists whilst she is at work. Whilst I accept that KVF may undertake these tasks, the evidence before me

> does not point to the fact the appellant is unable to do them. I do not have evidence that the appellant is unable to decipher what medication to take, or when to take it, as I have not been provided with evidence that she has any cognitive issues or that her sight is so bad that she cannot read. In fact the evidence I have provided states she can read. I have not been provided with examples by KVF why she is unable to do her own washing, or cooking, given she has some vision. I am unable from this evidence to understand how her limited vision impacts her abilities to conduct these tasks, as this detail was not provided. I find this damaging.
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> 31. Mr Dare Faleye, is the son-in-law of the appellant. He gave oral evidence and provided a short statement. This again contains very little by way of examples of the appellant's day to day needs. DF does however refer to the appellant's sight effecting her ability to navigate her way around the kitchen and operate a microwave/gas cooker. I attach some weight to the latter.
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> 32. Ms Sherifat Sanni, is the sponsor's childminder. She sets out a number of day to day tasks she assists the appellant with such as washing, laundry and cooking. In her evidence she does set out how the appellant's vision affects her abilities to perform the tasks, e.g distinguishing colours and ability to see if food is burning. She did not attend to give oral evidence and was thus not available for cross examination. From her account she is the main carer assisting with day to day tasks thus her evidence is key. Mr Leskin, did not seek an adjournment to allow this witness to attend. Accordingly I was asked by Mr Eaton to attach little weight to this evidence. Additionally I note, I have no identity documents supporting the statement and thus I have no way of verifying the writer's identity. Accordingly, I attach little weight to this evidence.

13. At paragraph [38], the Judge sad that having considered all the above evidence in the round (including the two medical reports), she was not satisfied that the appellant required long-term personal care to perform everyday tasks. She accepted that the appellant was at risk of falls, but she was not satisfied that her age and visual impairment limited her ability to do everyday tasks.

14. At paragraphs [39]-[43], the Judge addressed the second disputed issue, which was whether the appellant was unable, even with the practical and financial help from the sponsor, to obtain the required level of care in Nigeria, as required by E-ECDR.2.5. The Judge said:

> 39. With regards to E-ECDR 2.5, the respondent states that the appellant's can seek alternative care from her family in Nigeria and/ or obtain care from external agencies. The appellant and KVF's evidence was that she has a daughter (EF) in Nigeria but she is unable to care for her mother. Emily has provided a statement [33/CB] and explains why she is unable to care for her mother. It is unclear from the evidence before this Tribunal, why the appellant could not go to live closer to this daughter and continue to be financially supported by her pension and KVF. It is unclear why it is assumed that EF has to make

> the trips to support her mother. I accept the distances makes long term regular care/ support prohibitive but I have not been provided with reasons why the appellant can make the journey to travel to the UK and live here but cannot travel internally in Nigeria and live close to [EF], her other daughter. I do not accept the account of EF, that she is studying and has a bigger family to look after, as I have been provided with limited details about this and no other supporting evidence. I do not accept that given the appellant has visual impairments, that her only child in Nigeria would not make contact with her for 3 years, particularly as there is no evidence of any disagreements. I find the account of EF not being available has been concocted to fit the narrative that there is no care available to the appellant in Nigeria.
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> 40. Additionally, the respondent in her review provided a list of care providers in Nigeria [p75/CB]. KVGF in her evidence went through each provider and explained why they were unsuitable and/ or unable to care for her mother. In oral evidence KVF referred to the fact that some of the care homes were based in Lagos and could not arrange care in Akare as it was a 4 hour drive. She also stated some were in River state which was 10 hours' drive. Whilst I accept that these providers were homecare services, providing care in a particular locality, it is unclear to me why the appellant could not relocate to Lagos and benefit from this. From the evidence it has been claimed that she was living without support and alone in Akare. Further, the appellant in her evidence states that she has a Niece who lives in Lagos, thus she has family who can also assist in the locality.

15. At paragraph [43], the Judge held that the objective evidence established that whilst the care system in Nigeria was not of a similar standard to that in the UK, there was a care system in existence. Considering all the evidence in the round, she did not accept that there was no other person in Nigeria who could reasonably provide the level of care/support required by the appellant in Nigeria.

16. At paragraphs [44]-[53], the Judge gave her reasons for finding that there would not be very significant obstacles to the appellant reintegrating into life and society in Nigeria. At paragraphs [54]-[63], the Judge gave her reasons for finding that requiring the appellant to return to Nigeria would not be disproportionate.

The Reasons for the Grant of Permission to Appeal

17. The application for permission to appeal was settled by Mr Leskin, and on 4 November 2022 Upper Tribunal Judge Jackson granted the appellant permission to appeal on all three of the grounds advanced by Mr Leskin. Judge Jackson's reasons were as follows:

> The grounds of appeal are that the First-tier Tribunal erred in law in (i) its assessment of whether there are very significant obstacles to reintegration into Nigeria, in particular failing to consider the impact of having to relocate to Lagos as a person registered as severely sight-restricted to obtain home care and without an express consideration of the difficulties the appellant would face and/or inadequate reasons for

> why these do not amount to very significant obstacles; (ii) failing to consider as part of the proportionality balancing exercise, the difficulties the appellant would face on removal; and (iii) making adverse credibility findings pursuant to an unfair hearing as the witness evidence was not challenged by the respondent and they were not given an opportunity to respond to any concerns as to the evidence.
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> The grounds are all arguable. There is arguably a lack of express consideration by the Tribunal of the prospects of integration for a person who it seems, has been acknowledged to need assistance at least outside of the home due to the risk of falls, if not more and a lack of consideration of the appellant's private life connections in the United Kingdom and difficulties on return to Nigeria when making the final proportionality assessment. The third ground as to a fairness of proceedings is much weaker, given that the burden is on the appellant to establish their claim, however I do not exclude it from the grant of permission.

The Rule 24 Response

18. On 12 December 2022, Andy McVeety of the Specialist Appeals Team filed a Rule 24 response on behalf of the respondent. He submitted that the grounds of appeal amounted to no more than a disagreement with the findings of the Judge which were reasonably open to her. He noted that the grounds of appeal did not appear to challenge the findings of the Judge in respect of the supporting medical evidence regarding the alleged extent of the appellant's disabilities. At paragraphs [35]-[37] the Judge rejected the supporting medical evidence, finding that the evidence did not support the alleged level of disability the appellant claimed. Such a finding was clearly open to the Judge to make on the available evidence.

The Hearing in the Upper Tribunal

19. At the hearing before me to determine whether an error of law was made out, Mr Berry developed the case advanced in the grounds of appeal. Ms Everett adopted the Rule 24 response. After hearing from Mr Berry in reply, I reserved my decision.

Discussion

Ground 3

20. It is convenient to begin with Ground 3, as this relates to passages in the Decision which precede the impugned findings on Rule 276ADE(1)(vi) and proportionality. There are four passages in the Decision where it is said that the Judge has made unfair criticisms of the evidence of the witnesses of fact: these are in paragraphs [29], [30], [33] and [39].

21. As noted earlier, the Judge recorded in her decision that there was very little cross-examination of the witnesses who gave oral evidence. In the grounds of appeal, Mr Leskin goes further, and says that Mr Eaton did not

ask any witness any question other than one question of the appellant, which was the distance from Akure to Lagos. This was because Mr Eaton had declared at the beginning of the hearing that "*the evidence is not exaggerated*". His case was that the medical evidence was not sufficient to show that the appellant required long-term personal care to carry out everyday tasks, and that the witness statement evidence of the appellant and her witnesses did not show that there was not an appropriate service to meet the needs of the appellant in Nigeria.

22. I consider it is likely that Mr Eaton's case was also that the witness statement evidence, taken at its highest, did not establish that the appellant required long-term personal care to perform every day tasks. It is for that reason he conceded that it was not exaggerated, as it did not go beyond what was indicated by the medical evidence, and it is also for that reason that, as recorded by the Judge in the Decision at [20], Mr Eaton raised the issue of a new practice direction that stated (a) a witness statement should be capable of standing as the totality of evidence in chief of the person giving that statement and (b) that only in exceptional circumstances and with the leave of the Tribunal, will a witness be permitted to provide additional evidence in chief. Mr Eaton raised a specific objection to Mr Leskin asking supplementary questions of KVF, when she had already made a supplementary statement. However, as is recorded in [21], Mr Leskin volunteered that he had not been aware of the practice direction, and he had been intending to ask supplementary questions relating to the medical evidence and the appellant's everyday needs that were *"insufficiently addressed"* in the witness statements.

23. The outcome was, as recorded in [22], that the Judge only permitted Mr Leskin to ask supplementary questions about KVF's annotations on the documents about care homes and care facilities in Nigeria.

24. In light of the concession made by Mr Eaton, as reported by Mr Leskin, I accept that the Judge could not, in her discussion of the witness statements that had been adopted by the witnesses who were tendered for cross-examination, fairly find that their contents were exaggerated, still less concocted. I also accept that the same constraint applied to witnesses who did not give oral evidence, such as EF, insofar as their evidence was mirrored by the evidence of the witnesses who did give oral evidence.

25. Accordingly, I accept that in paragraph [39] it was not open to the Judge to find in the final sentence that EF's account had been concocted to fit the narrative that there was no care available to the appellant in Nigeria, when those parts of her account which were mirrored by the evidence of the appellant and KVF had not been challenged in cross-examination. I also consider that the finding of concoction is unsustainable for another reason, which is that it is based on a complete mischaracterisation of EF's account. EF did not say that she had not been in contact with her mother for three years, only that she had not gone to visit her mother for three years due to the distance that she had to travel. EF said that she had remained in

telephonic contact with her mother, and she did not assert that there had been disagreements between them, whereas the appellant did. In short, the finding of concoction is perverse.

26. However, I am not persuaded that there was any unfairness in the other impugned passages. The concession made by Mr Eaton did not mean that it was not open to the Judge to conduct a critical analysis of the witness statement evidence in which she teased out the respects in which the evidence of KVF and other care givers did not precisely reflect the evidence of the appellant so as to draw a distinction between the support which the appellant was said to receive and the support that the appellant herself claimed to receive and/or strictly required. Mr Leskin had volunteered to the Judge that in his view the witness statements were deficient, and so it is not a reasonable ground of complaint that the Judge identified the respects in which she regarded the witness statement evidence as being deficient.

27. Mr Leskin says in the grounds of appeal that the appellant's witness statement would have had to have been extremely long to cover every issue that the Judge might have a concern about and the normal procedure is that this would be covered by cross-examination by the Secretary of State's representatives or from questions for clarification purposes from the Judge. However, when preparing the case for the hearing, Mr Leskin would not have known whether there would be a legal representative appearing on behalf of the respondent, or, if there was, what line that representative was going to take at the hearing. He also could not assume that he would be permitted to ask supplementary questions of any witness to make good any perceived deficiency in the signed statement of the witness, rather than that the contents of their witness statement would have to stand as the entirety of their evidence in chief.

28. For the above reasons, there is no unfairness in the Judge's discussion at paragraphs [29] and {30].

29. The third impugned passage is at paragraph [33], where the Judge said that she was, at Mr Eaton's invitation, attaching little weight to the evidence of SS, as she did not attend to give oral evidence, and was thus not available for cross-examination. Mr Mr Leskin does not claim to have protested at the time that Mr Eaton's invitation to the Judge to attach little weight to SS' witness statement was inconsistent with the concession he had made at the beginning of the hearing, and I am not persuaded that it was inconsistent. For the above reason, there is no unfairness in the Judge's discussion at [33].

30. The first three impugned passages relate to the first issue in dispute. At paragraph [35], the Judge recited the opinion of the Consultant that, as a result of a marked constriction of the appellant's peripheral visual field, the impact upon her day-to-day living and activities was that she was at increased risk of falls due to her limited visual fields: *"She is able to read,*

watch TV and undertake other usual activities, but requires support to ensure that she is safe at home and when she ventures outdoors."

31. In the light of this assessment, it was open to the Judge to find that the evidence from the witnesses of fact did not establish a greater degree of disability than was indicated by the professional assessment of the Consultant. There is no challenge to the Judge's conclusion that the appellant did not make out her case that she required long-term personal care to perform everyday tasks.

32. The fourth impugned passage relates to the second disputed issue, which is whether appropriate care was available for the appellant in Nigeria. There is no challenge to the reasons given in paragraphs [40]-[43] for the conclusion that the appellant does not meet the requirements of E-ECDR.2.5. There is also no error of law challenge to the majority of paragraph [39], in which the Judge reasoned that it was open to the appellant to travel internally in Nigeria so as to take up residence close to EF in Abuja. So, while I accept that the Judge erred in law in her finding in the final sentence of paragraph [39], I do not consider that this error is material to the conclusion reached on the second disputed issue.

Ground 1

33. Ground 1 is that the Judge gave inadequate reasons for finding that there would not be very significant obstacles to her integration.

34. At paragraph [49] the Judge held that the appellant had a place to live or finances were available to assist her in relocating to where EF lived. She had options with regard to available accommodation. At paragraph [50] the Judge observed that the appellant had lived in Nigeria until the age of 72 and she spoke languages commonly spoken in Nigeria, so there was no language barrier. At paragraph [51], she said that there were care providers, which had been considered above.

35. The availability of care providers had been considered at paragraphs [39] to [43]. In Ground 1, Mr Leskin refers back to paragraph [40] where the Judge said that she did not see why the appellant could not relocate to Lagos to live close to her niece and also to benefit from domiciliary care in that area. Mr Leskin submits that to require an elderly woman who is severely sight restricted to relocate to a place four hours away where she knows no-one, apart from her niece, but where she can have a carer "for a few hours a day", but where she would otherwise be living alone, must amount to very significant obstacles. He further submits that if she were to relocate in the way she suggested then she would remain at home with her carer, and would therefore not be able to participate in society and build up any relationships other than with her carer.

36. As the Judge highlighted in [48], Mr Leskin conceded that the appellant had not had much engagement with life in the UK, beyond her interaction with her family, the childminder and her attendance at church. The

proposition advanced by the Judge did not preclude the appellant from engaging with society in Lagos, including attending a local church (where she could make new friends), going shopping with her carer, visiting neighbours with her carer, and being accompanied by her carer to visit her niece. The Judge did not impose a limit on the number of hours each day that the appellant would be supported by a carer, and there was no limit from a financial perspective. It was not KVF's evidence that she could only afford to fund a carer for a few hours a day.

37. I find there is no merit in the argument that the Judge failed to apply the Kamara test, which she rehearsed at [46]. The test does not require that the appellant should immediately on return be able to build up a variety of human relationships to give substance to her private or family life, but only that she should be able to do so within a reasonable time.

38. I find that there is also no merit in the argument that it was incumbent on the Judge to identify the obstacles the appellant would face in order to explain why they were not very significant. It is implicit in the Judge's discussion that she recognised (a) that the appellant was going to be lonely in her home in Akure, as there were no relatives living close by, and (b) that it might be difficult to secure a carer for her in Akure, as no local care service had yet been identified. It was for that reason that the Judge postulated that internal relocation to a place near to the niece's home in Lagos or the second daughter's home in Abuja was a reasonable solution to these difficulties, as this would solve the problem of loneliness and of access to appropriate care and support.

Ground 2

39. Ground 2 is that the Judge erred in law in not carrying out the balancing exercise on proportionality appropriately, as she failed to weigh in the balance the difficulties that the appellant would face in Nigeria.

40. The Judge acknowledged that the appellant had established family life in the UK as she had a level of dependency which went beyond normal emotional ties. She also accepted that the proposed interference was of sufficient gravity to engage Article 8(1) on both family and private life grounds. In her balancing sheet exercise, one of the factors she identified as militating in favour of the appellant's removal was the fact that she did not meet the requirements of the Rules.

41. The Judge did not include in the list of factors militating against the appellant's removal the difficulties that she would face in Nigeria. But I do not consider that the Judge erred in law in this omission, or that the omission was material to the outcome of the proportionality assessment.

42. As the obstacles to integration that the appellant was going to face were not very significant, for the reasons which the Judge had given earlier in her discussion, it was open to the Judge not to attach weight to the fact that the appellant was probably going to have to relocate from her home

in Akure, where she said she had been lonely and isolated before she came and where she said she was going to be lonely and isolated on her return, to somewhere else in Nigeria where she would not be lonely and isolated, and where she would have access to appropriate care and support.

43. In order to succeed in an Article 8 claim outside the rules, the appellant needed to show that the maintenance of the refusal decision would have unjustifiably harsh consequences for her such as to render the proposed interference a disproportionate one. At paragraph [62] the Judge found against the appellant on this issue, and her conclusion was reasonably open to her for the reasons which she gave.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity direction, and nor do 1.

Signed Andrew Monson Date 8 February 2023

Deputy Upper Tribunal Judge Monson