UT Neutral citation number: [2022] UKUT 218 (IAC)

Joseph (permission to appeal requirements)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 13 June 2022
Promulgated on 5 July 2022

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS SHERMA JOSEPH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr P. Deller, Senior Home Office Presenting Officer
For the Respondent: Mr E. Fripp, Counsel, instructed by TM Legal Services

1) *In its role as an appeal body from decisions of the First-tier Tribunal, the Upper Tribunal is a permission-based jurisdiction. The process of (in the case of parties) applying for and (in the case of judges) granting or refusing permission to appeal performs an essential regulatory function governing the work of the Upper Tribunal. As such, it is vital that a party seeking permission to appeal does all it can to assist the Tribunal in the performance of its functions and the furtherance of the overriding objective.*

2) *Where a representative makes an application for permission to appeal, the application should feature the name of the representative and should not be made solely under the generic name of the organisation or team making the application.*

3) *Applications for permission to appeal should be made by reference to the established principles governing errors of law. Judges considering applications for permission to appeal should resist attempts by appellants to dress up or re-package disagreements of fact as errors of law.*

4) *All permission to appeal decisions should feature brief reasons. That includes a decision to grant permission to appeal. It is a useful exercise in judicial self-restraint to say <u>why</u> it is thought that the grounds are arguable, particularly where the grounds of appeal challenge findings of fact reached by the judge below.*

DECISION AND REASONS

1. In its role as an appeal body from decisions of the First-tier Tribunal, the Upper Tribunal is a permission-based jurisdiction. An appeal may only be brought against a decision of the First-tier Tribunal with either the permission of that Tribunal, or directly from the Upper Tribunal: see section 11(3) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). It follows that the process for obtaining permission to appeal, and the basis upon which it may be granted, perform important regulatory functions.

2. While the right of appeal to the Upper Tribunal derives from primary legislation, the framework governing the exercise of that right of appeal is to be found in two different rules of procedure. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the FTT rules") and the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules") govern the FTT and UT respectively. As will be seen from the full title of the FTT Rules, their focus is proceedings in the Immigration and Asylum Chamber of the First-tier Tribunal ("the FTT"). By contrast, the UT Rules cover three chambers of the Upper Tribunal ("the UT"). The Upper Tribunal (Lands Chamber) has its own rules.

3. The Joint Presidential Guidance Note 2019 No. 1 *Permission to appeal to UTIAC* contains important guidance on many of the substantive and procedural considerations that are central to the task of any judge considering an application for permission to appeal to the Upper Tribunal (IAC), whether sitting in the First-tier Tribunal or the Upper Tribunal. This appeal gives rise to a number of additional points which are of primary

relevance to a party making an application for permission to appeal, although some of the guidance we give is directed at judges considering applications for permission to appeal.

Permission to appeal: the procedural framework

4. Under section 11(4) of the 2007 Act, permission to appeal (or, in Northern Ireland, leave) may be given by either the FTT or the UT, on an application by a party. The requirement to apply to the FTT before applying to the UT is not imposed by the 2007 Act, but rather by rules of procedure. By rule 33(1) of the FTT Rules, a party seeking permission to appeal to the UT must make a written application to "the Tribunal" for permission to appeal; that term is defined by rule 1(4) of those Rules to mean the First-tier Tribunal. The UT Rules make express provision requiring an application to be made to the FTT in the first instance; rule 21(2) of the UT Rules provides:

> "(2) A person may apply to the Upper Tribunal for permission to appeal to the Upper Tribunal against a decision of another tribunal only if—
>
> (a) they have made an application for permission to appeal to the tribunal which made the decision challenged; and
>
> (b) that application has been refused or has not been admitted or has been granted only on limited grounds."

5. The remainder of rule 33 of the FTT Rules governs the requirements in that Tribunal for an application for permission to appeal, providing, where relevant:

> "(2) Subject to paragraph (3), an application under paragraph (1) must be sent to the Tribunal so that it is received no later than 14 days after the date on which the party making the application was sent the written reasons for the decision.
>
> (3) Where an appellant is outside the United Kingdom, an application to the Tribunal under paragraph (1) must be sent to the Tribunal so that it is received no later than 28 days after the date on which the party making the application was sent the written reasons for the decision.
>
> (4) The time within which a party may apply for permission to appeal against an amended notice of decision runs from the date on which the party is sent the amended notice of decision.
>
> (5) An application under paragraph (1) must—
>
> (a) identify the decision of the Tribunal to which it relates;
>
> (b) identify the alleged error or errors of law in the decision; and
>
> (c) state the result the party making the application is seeking and include any application for an extension of time and the reasons why such an extension should be given."

6. The key requirements when making an application to the FTT for permission to appeal to the UT are thus to make the application within the prescribed time limits, to identify the decision under challenge, the alleged errors of law, and the result sought, as well as applying to extend time, if relevant. There is no prescribed form. The rule does not require the name of the person making the application to be provided, nor does it have to be signed.

7. The remainder of rule 21 of the UT Rules provides, where relevant:

> "(3) An application for permission to appeal must be made in writing and received by the Upper Tribunal no later than—
>
> […]
>
> (aa) in an asylum case or an immigration case where the appellant is in the United Kingdom at the time that the application is made, 14 days after the date on which notice of the First-tier Tribunal's refusal of permission was sent to the appellant; or
>
> (b) otherwise, a month after the date on which the tribunal that made the decision under challenge sent notice of its refusal of permission to appeal, or refusal to admit the application for permission to appeal, to the appellant.
>
> (4) The application must state—
>
> (a) the name and address of the appellant;
>
> (b) the name and address of the representative (if any) of the appellant;
>
> (c) an address where documents for the appellant may be sent or delivered;
>
> (d) details (including the full reference) of the decision challenged;
>
> (e) the grounds on which the appellant relies; and
>
> (f) whether the appellant wants the application to be dealt with at a hearing.
>
> (5) The appellant must provide with the application a copy of—
>
> (a) any written record of the decision being challenged;
>
> (b) any separate written statement of reasons for that decision; and
>
> (c) if the application is for permission to appeal against a decision of another tribunal, the notice of refusal of permission to appeal, or notice of refusal to admit the application for permission to appeal, from that other tribunal.

(6) If the appellant provides the application to the Upper Tribunal later than the time required by paragraph (3) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—

(a) the application must include a request for an extension of time and the reason why the application was not provided in time; and

(b) unless the Upper Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Upper Tribunal must not admit the application.

(7) If the appellant makes an application to the Upper Tribunal for permission to appeal against the decision of another tribunal, and that other tribunal refused to admit the appellant's application for permission to appeal because the application for permission or for a written statement of reasons was not made in time—

(a) the application to the Upper Tribunal for permission to appeal must include the reason why the application to the other tribunal for permission to appeal or for a written statement of reasons, as the case may be, was not made in time; and

(b) the Upper Tribunal must only admit the application if the Upper Tribunal considers that it is in the interests of justice for it to do so."

8. While many features of the process at FTT and UT level correspond, an application made to the UT features a number of additional procedural requirements that do not attach to an application made to the FTT. For example, rule 21(4) of the UT Rules requires an appellant to provide details including the name and address of the appellant, the name an address of their representative (if any), an address for service of the documents, and whether the appellant wants the application to be dealt with at a hearing. Those are not details that are required in relation to an application made to the FTT. One explanation for the procedural distinction between the two tiers may be that, by definition, the FTT, being the originating jurisdiction for the appeal, will already be seized of the proceedings and the essential identifying information concerning the parties. It will therefore generally not be necessary to mandate the provision of essential details about the parties or their representative to that tribunal in the course of making an application for permission to appeal to the FTT. As a matter of good practice, we consider that a party should provide such details (and most do). We return to this theme below.

9. Where an application is granted by the FTT, that tribunal will already be seized of the proceedings, and the existing, live proceedings are transferred to the UT. That, of course, contrasts with an application for permission renewed to the UT, where the UT will not already be seized of the proceedings, and will not already have any information concerning the identity of the parties, or the decision under challenge etc. The application for permission to appeal, if granted, becomes the conduit through which the proceedings commence at UT level. As such, the information that accompanies the application to the UT provides the procedural foundation for the

onward appeal proceedings in the UT, necessitating the provision of sufficient information concerning the identity of the parties than would otherwise be the case in the event of an application to the FTT. Absent a direction to the contrary, an application for permission to appeal that is granted by either the FTT or the UT stands as the required "notice of appeal": see rules 23(1A) and 22(2)(b) of the UT Rules respectively. An application for permission to appeal is thus an application of procedural and substantive significance.

10. The impact of the minor differences at FTT and UT level outlined above is unlikely to be of any great moment. But there are some respects in which, bearing in mind the overriding objective of both tribunals and the duty of to cooperate with the Upper Tribunal to which an applicant for permission to appeal will become subject if the application is granted (see rule 2(4) of the UT Rules), it will generally be helpful if more than the bare minimum required by rule 33(5) is provided. We consider that it will generally be helpful for a person applying for permission to appeal to the FTT to state their name, even if the application is being submitted by a representative on behalf of a party to the proceedings. This applies equally whether the applicant for permission to appeal is the appellant before the FTT or the Secretary of State. Where the application is made, for example, by a firm of solicitors, it will nevertheless be helpful for the solicitor with responsibility for the conduct of the matter to append their name to the application, rather than merely providing the identity of their firm. Where the application for permission to appeal is made by or on behalf of the Secretary of State, it should identify the author of the grounds, or another person willing and able expressly to take responsibility for them.

11. We consider this to be good practice for the following reasons. Where a representative states their name on an application for permission to appeal, in addition to this being an approach that is helpful in providing an immediate point of contact between tribunal and representative, the public linkage of that individual with the application may result in greater ownership of, and responsibility for, the contents of the application. In turn, we hope, that may have a positive impact on the quality of the grounds of appeal, and of any ensuing judicial decision concerning permission to appeal.

12. As well as commencing proceedings in the UT, applications for, and grants of, for permission to appeal have other consequences of significance. An in-time application will elongate the period for which an appeal under Part 5 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") is pending, for the purposes of section 104 of that Act. In turn, that may extend a person's leave under section 3C of the Immigration Act 1971, even where the appeal is dismissed upon its final determination. Alternatively, where the appeal was allowed and the appeal is brought by the Secretary of State, it may prolong the period for which the appellant before the FTT has to wait before their successful appeal is implemented. The speedy resolution of appeal proceedings, regardless of whether the appeal to the UT is brought by the appellant before the FTT or the Secretary of State, is a matter of considerable public interest. As such, a commensurate level of significance attaches to the process, and the

transparency, with which such an application is made, regardless of the party making it.

Appeals on points of law only

13. It is also essential for an application for permission to appeal to be pleaded by reference to an arguable error of law, not a disagreement of fact or weight. The right of appeal to the Upper Tribunal is on any "point of law" arising from a decision made by the First-tier Tribunal, other than an excluded decision: section 11(1) of the 2007 Act. There are many reported authorities, in this jurisdiction and from further afield, addressing the need for grounds of appeal to be pleaded properly and succinctly, and by reference to an arguable error of law. Maintaining the distinction between errors of law and disagreements of fact is essential; it reflects the jurisdictional delimitation between the first-instance role of the FTT and the appellate role of the UT, and reflects the institutional competence of the FTT as the primary fact-finding tribunal. The distinction, however, is often blurred, with unhelpful consequences. As Warby LJ put it in *AE (Iraq) v Secretary of State for the Home Department* [2021] EWCA Civ 948; [2021] Imm AR 1499 at [32]:

> "Commonly, the suggestion on appeal is that the FTT has misdirected itself in law. But it is not an error of law to make a finding of fact which the appellate tribunal might not make, or to draw an inference or reach a conclusion with which the UT disagrees. The temptation to dress up or re-package disagreement as a finding that there has been an error of law must be resisted."

14. Warby LJ recalled the judgment of Floyd LJ in *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095 at [19]:

> "…although 'error of law' is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter."

By the same token, those observations apply not only to this Tribunal when discharging its role under section 11(1) of the 2007 Act, but to an unsuccessful party before the FTT considering whether to make an application for permission to appeal and, moreover, to a judge considering the application.

15. Where an application for permission to appeal challenges the findings of fact reached by a judge of the First-tier Tribunal, permission judges should be live to the very real appellate constraints to which the UT, as any appellate court, is subject when examining the findings of fact reached below. We address some further relevant authorities on this issue below.

This appeal: matters arising from the application for, grounds of, and permission to appeal

16. These proceedings are an appeal brought by the Secretary of State. The application for permission to appeal to the UT did not identify the author of the grounds, either in Part A of the form headed *Applicant's details*, or under Part D, where there was a box

entitled *Applicant's/Solicitor's signature*. The box was left blank, save for the letter '*x*'. The closest the application got to identifying the author of the grounds and the name of the applicant was in the box *Full Name* in Part A, which simply featured the words, "Specialist Appeals Team on behalf of the Secretary of State/Entry Clearance Officer". The address was a PO Box with an EC4 postcode. Save for the fact it is clear that the appeal was brought by the Secretary of State, it is difficult to envisage a more anonymous way for appeal proceedings to be commenced.

17. While this was not an express breach of a requirement of rule 33 of the FTT Rules as such, we consider that it is hardly an approach that may be said to have been adopted in the spirit of full cooperation with the Tribunal and with the other party, the respondent to these proceedings. The form used by the Secretary of State (which differs from that which is publicly available to all parties seeking to appeal from the FTT (IAC) to the UT) also misstated the time limit for appealing, putting it at five days, rather than 14, although nothing turns on that error here.

18. In addition, while at just over half a page the grounds of appeal in the present matter have the benefit of brevity, such brevity should not come at the expense of substantive content, articulated by reference to the established jurisprudence concerning an error of law. Although the main written ground of appeal advanced by the Secretary of State through her anonymous representative was under the rubric "making a material misdirection/lack of adequate reasoning", as we set out below in more detail, paragraph 1 of the application is little more than a series of disagreements of fact and weight. The second and third paragraphs are immaterial to the operative reasons the appeal was allowed, and plainly stood or fell with the primary contention at the heart of the grounds.

19. Permission to appeal was granted to the Secretary of State in this matter by First-tier Tribunal Judge Boyes, in these terms:

> "2. The grounds assert that the judge erred in allowing the case pursuant to article 3 and in the article 8 assessment.
>
> 3. Having considered the grounds and the judgment, the grounds are clearly arguable and permission is granted on all grounds raised."

20. In *Nixon (permission to appeal: grounds)* [2014] UKUT 368 (IAC), this Tribunal was concerned with applications for, and grants of, permission to appeal under the predecessor rules to the FTT Rules, the Asylum and Immigration Tribunal (Procedure) Rules 2005. The underlying primary legislation was the same: the 2007 Act. The tribunal said at [12]:

> "The nebulous terms of the application for permission to appeal in the present case are reflected in the grant of permission. The former had a contagious effect on the latter."

21. The FTT Rules and the UT Rules make express provision for reasons to be given in an application for permission to appeal only when permission is refused: see rule 34(4)(a)

of the FTT Rules and rule 22(1) of the UT Rules. However, the need for judges to give reasons for decisions is a foundational principle of natural justice. To avoid a grant of permission to appeal being infected by poorly pleaded grounds, the permission judge should briefly state the reasons for granting permission, especially where the grounds of appeal challenge findings of fact reached by the FTT. It is good practice to do so, concentrates the mind, and is a helpful exercise in self-restraint. Giving reasons, even briefly, will require the permission judge to focus on the established appellate restraint to which the UT, in common with all appellate courts and tribunals, is subject when reviewing findings of fact reached by a trial judge. Where, notwithstanding the appellate restraint in relation to findings of fact, a permission judge considers that the findings of fact reached by the judge below arguably involve the making of an error of law, it will be helpful for the tribunal dealing with the substantive appeal to know in precise terms why the permission judge took that view.

22. We can deal briefly with any procedural defect in an application for permission to appeal. The FTT Rules and the UT Rules each make provision for remedying procedural defects: see rules 6 and 7 respectively. See *SA (Non-compliance with rule 21(4)) Bangladesh* [2022] UKUT 00132 (IAC) in relation to curing defects in applications for permission to appeal made to the UT, including where the grounds of appeal are omitted, contrary to rule 21(4)(e) of the UT Rules. In most cases, it will only be where there is an omission as striking as the grounds of appeal not being included that the need to cure procedural defects arises. The impact of a minor procedural defect, though unfortunate, is unlikely to render the permission decision, or any eventual appeal, void: see rule 6(1) of the FTT Rules and rule 7(1) of the UT Rules.

23. In conclusion, to summarise:

    1) In its role as an appeal body from decisions of the First-tier Tribunal, the Upper Tribunal is a permission-based jurisdiction. The process of (in the case of parties) applying for and (in the case of judges) granting or refusing permission to appeal performs an essential regulatory function governing the work of the Upper Tribunal. As such, it is vital that a party seeking permission to appeal does all it can to assist the Tribunal in the performance of its functions and the furtherance of the overriding objective.

    2) Where a representative makes an application for permission to appeal, the application should feature the name of the representative and should not be made solely under the generic name of the organisation or team making the application.

    3) Applications for permission to appeal should made by reference to the established principles governing errors of law. Judges considering applications for permission to appeal should be resist attempts by appellants to dress up or re-package disagreements of fact as errors of law.

    4) All permission to appeal decisions should feature brief reasons. That includes a decision to grant permission to appeal. It is a useful exercise in judicial self-

restraint to say *why* it is thought that the grounds are arguable, particularly where the grounds of appeal challenge findings of fact reached by the judge below.

24. We conclude this part of our analysis by underlining that, although these proceedings are an appeal by the Secretary of State, the above observations apply equally to applications for permission to appeal made by an appellant before the FTT.

FACTUAL BACKGROUND

25. Against that background, we turn now to the facts of the appeal. The Secretary of State appeals against a decision of First-tier Tribunal Judge Beg ("the judge") promulgated on 2 September 2021 allowing an appeal by the appellant, a citizen of Trinidad and Tobago born in December 1961, on Article 3 ECHR and Article 8 ECHR grounds. For ease of reference, we will refer to the appellant before the FTT as "the appellant", unless otherwise stated.

26. The appellant arrived in the United Kingdom in November 2007 with a visit visa. She overstayed upon the expiration of her visa on 9 May 2008. She tried, unsuccessfully, to regularise her status by an application submitted on 28 September 2012, which was refused in circumstances that did not attract a right of appeal. She was refused permission to bring judicial review proceedings against that decision by Upper Tribunal Judge Allen by an order dated 23 October 2014, and ordered to pay the Secretary of State's costs of £400. On 13 September 2019, the appellant made a human rights claim based on her family, private life and health conditions. The application as refused by the Secretary of State by a decision dated 6 November 2019, and it was that refusal decision that was under appeal before the judge below.

27. The appellant's human rights claim was based primarily on her health conditions arising from her then recent kidney transplant and her continuing need to take immunosuppressant medication in order to avoid end-stage kidney failure and life long dialysis.

28. The Secretary of State refused the appellant's claim on suitability grounds. She failed to meet the suitability requirements of paragraph S-LTR.4.4. of Appendix FM of the Immigration Rules on account of having not met her litigation debt to the Home Office of £400, pursuant to the order of Upper Tribunal Judge Allen. The application also fell to be refused under paragraph S-LTR.4.5, due to the appellant's unpaid debt to the Barts Health NHS Trust, for £2,831. In any event, the appellant did not meet the private life provisions of the rules, and her health conditions were not such that she met the high threshold for leave to remain on Article 3 ECHR grounds, as she did not meet the test in *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] Imm AR 353. The refusal letter set out summaries of the health provision available in Trinidad and Tobago; the country has a functioning healthcare system which would be capable of providing the appellant with the assistance she needed. The letter acknowledged that the treatment available may not be free at the point of delivery but that, of itself, did not make her circumstances exceptional such that she was entitled to

leave to remain on the basis of Article 3. The difference in treatment between that she enjoys in this country and the prospective treatment available to her in Trinidad and Tobago would not be sufficient to cause serious harm to her physical and moral integrity.

29. The judge heard the appeal on 13 August 2021. The evidence before her included a letter from a Magdi Yacoub. It was not clear whether he was *the* Professor Sir Magdi Yacoub, Professor of Cardiothoracic Surgery at the National Heart and Lung Institute. The identity and eminence of the Magdi Yacoub who signed the letter was therefore an issue of dispute before the judge, although the extent of the appellant's health conditions were not disputed so nothing turned on the precise identity of the author. The presenting officer accepted that Mr Yacoub's letter accurately described the appellant's health conditions, and the judge had other medical evidence before her in any event. Magdi Yacoub's letter was on headed letter paper from Barts Health NHS Trust Renal Medicine and Transplantation Department. In his letter dated 17 June 2021 Mr Yacoub wrote that appellant had had end stage kidney disease and had received a kidney transplant in June 2019. Following the transplant, she developed a number of viral infections, and her body subsequently rejected the transplanted kidney. It was functioning at around 20% of its normal level at the time of the letter. It stated that the appellant receives a heavy dose of immunosuppression medication to prevent further rejection. She was being monitored on a weekly basis. The letter said that if the appellant were to be denied the medication she currently receives, her body would almost certainly reject the transplanted kidney in its entirety and she would develop end-stage kidney disease once again, and would require long-term dialysis treatment. Dr Yacoub said that if those facilities were not available in the appellant's home country, it would substantially affect her life expectancy.

30. The judge heard evidence from the appellant and two of her friends, Grace McIntosh and Catherine Adams-Jervis. The judge did not find the appellant to be a credible witness. She rejected her evidence that she had been unaware of the litigation debt to the Home Office and the money she owed to the NHS. The judge found that the appellant did not have any family members in the UK. The appellant's appeal could not succeed under the rules, the judge found, as the appellant failed the suitability criteria.

31. The appellant and her witnesses had given evidence about the healthcare provision in Trinidad and Tobago. It was common ground that there was minimal documentary evidence before the judge about the precise level of healthcare provision for the appellant's conditions in Trinidad and Tobago. A theme that emerged from the evidence of the witnesses was at the very least a perception on their part that only wealthy people would be able to afford treatment of the sort required by the appellant.

32. Having directed herself concerning the authorities on Article 3 ECHR and health claims from [22] to [30], the judge reached the following findings at [32]:

> "I find that whilst there is treatment available in Trinidad and Tobago, the appellant given the precarious nature of her health, is unlikely to be able to find or retain employment. There is no clear documentary evidence about her ability

> to access appropriate medication and whether she would have to pay for the prescription. I also bear in mind that she has very little support in her home country. Her brother Denzil lives in Trinidad and Tobago although the appellant claimed in her evidence that she is not in contact with him and they have not spoken for about 20 years."

33. At [33], having briefly summarised the evidence concerning the appellant's brother in Trinidad and Tobago, the judge said, "I find that even if the appellant is in contact with her brother, it does not follow that he would be willing to look after her in the event that she develops and-stage kidney disease. His circumstances are unknown." The judge then reviewed the evidence concerning the support the appellant may receive from friends in this country. At [36] the judge said:

> "there is no [evidence] that she has retained contacts with any close friends in Trinidad and Tobago who would be able to care for her if she requires it."

At [37], she held:

> "I find that there is on a balance of probabilities, a real risk that in the absence of appropriate treatment in Trinidad and Tobago or a lack of such treatment, the appellant will be exposed to a serious, rapid and irreversible decline in her state of health resulting in intense suffering and a significant reduction in life expectancy."

34. That finding must be viewed alongside [43]:

> "…in considering the evidence in the round, on the basis of the appellant's serious and precarious ill-health and for reasons I have given in detail, I find that the appellant meets the high threshold of Article 3 because she has no home to return to in Trinidad and Tobago and given her lack of employment, may not be able to access rejection medication which in turn will result in inhuman or degrading treatment which will adversely affect her life expectancy."

35. The judge went on to find that, in light of the appellant's health conditions, her Article 8 ECHR private life rights would be subject to a disproportionate interference by her removal. Since the appellant was unable to meet the suitability criteria in the rules, the judge allowed the appeal outside the rules on the grounds of Articles 3 and 8 ECHR.

Grounds of appeal

36. Under the heading "making a material misdirection/lack of adequate reasoning", the grounds of appeal state that the appellant's case "does not meet" the high threshold to establish a breach under Article 3 of the ECHR. The appellant "has not provided evidence" capable of demonstrating that there are substantial grounds for believing that the appellant would be subject to treatment contrary to Article 3 of the European Convention on Human Rights ("the EHCR"). Ms Adams-Jervis' evidence had been that she would provide some financial support to the appellant. The appellant is able to look after herself at the moment. There was no documentary evidence before the judge. The appellant was not a credible witness, yet the judge accepted her evidence regarding her brother. In light of those findings, there was a lack of adequate

reasoning for a finding that Article 3 had been breached. Paragraphs 2 and 3 of the grounds of appeal contend that judge's consequential reasoning concerning Article 8 was in error. In light of the criticisms of the judge's Article 3 findings, the grounds stated that paragraph 276ADE of the Immigration Rules was not met, and the appellant "has not demonstrated this to the balance of probabilities"

Submissions

37. While recognising that, on one view, the grounds could be viewed as straying towards the territory of disagreement of fact, Mr Deller submitted that treatment would be available for the appellant's condition in Trinidad and Tobago. The judge failed to engage in the sequential analysis required by *Paposhvili* and *Savran*, as articulated by *AM (Zimbabwe)*, both in the Supreme Court and in the remitted decision of this Tribunal. The judge's lengthy recitation of the Article 3 caselaw featured a number of dated cases, and it was only when she reached the end of her self-direction that the judge approached the judgment of the SC in *AM (Zimbabwe)*, suggesting that she may not have had the central test in mind. The central question was whether the treatment that was available in Trinidad and Tobago would be accessible to the appellant. There was absence of evidence on that point. The judge was wrong simply to "tag on" Article 8 as an adjunct to Article 3.

38. For the appellant, Mr Frisk submitted that, properly understood, the grounds of appeal were a series of disagreements of fact and weight. There was no error of law.

The law

39. Article 3 ECHR provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

40. In the context of health-based human rights claims, the leading authorities from the European Court of Human Rights are *Paposhvili v Belgium* [2016] ECHR 1113; [2017] Imm AR 867 and *Savran v Denmark* 7 December 2021 (application no. 57467/15). The leading domestic consideration of *Paposhvili* is *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17; [2020] Imm AR 1167 ("*AM (Zimbabwe) (SC)*"), which remitted the appeal to this tribunal to be reheard: see *AM (Art 3; health cases) Zimbabwe* [2022] UKUT 00131 (IAC) ("*AM (Zimbabwe) (UT)*"), promulgated on 22 March 2022.

41. There are many authorities on the approach of an appellate tribunal or court to reviewing a first instance judge's findings of fact. We have set out above the need to "resist the temptation" to characterise disagreements of fact as errors of law, as it was put by Warby LJ in *AE (Iraq)*. The constraints to which appellate tribunals and courts are subject in relation to appeals against findings of fact were recently (re)summarised by the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ 464 in these terms, per Lewison LJ:

"2. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

Duty to give reasons

42. A failure to give sufficient reasons may amount to an error of law. The duty to give reasons is well established. There is authority specific to the issue from this tribunal: see, for example, *MK (duty to give reasons) Pakistan* [2013] UKUT 641 (IAC). There is also higher authority from elsewhere covering the point. In *Flannery v Halifax Estate Agencies Ltd* [1999] EWCA Civ 811, [2000] 1 WLR 377 at 381 Henry LJ set out the underlying rationale behind the duty to give reasons:

> "…a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not…"

43. In *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605, the Court of Appeal surveyed the domestic and Strasbourg authorities on the issue. We highlight just two extracts from the judgment. Lord Phillips MR (as he then was) held:

> "19. [The duty to give reasons] does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

Lord Phillips made two concluding observations about the duty to give reasons, in light of his discussion of the principle, and its application to the individual cases that were before the Court. The observations were as follows:

> "118. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the Judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision."

DISCUSSION

44. We announced our decision to dismiss the Secretary of State's appeal at the hearing, with reasons to follow, which we now give.

Preliminary observations

45. Although the grounds of appeal are drafted under the rubric of a reasons-based challenge, the terminology of the grounds adopts the language of disagreement. Paragraph 1 recalls the high threshold for Article 3 medical cases and states, with emphasis added:

> "it is respectfully submitted that the appellant's case *does not meet this threshold*."

The grounds continue:

> "…it is submitted that the appellant *has not provided evidence* capable of demonstrating that there are 'substantial' grounds for believing that they would be exposed to a real risk of being subject to 'inhuman' treatment contrary to Article 3."

46. Paragraph 2, concerning Article 8, is parasitic upon the general criticisms of the judge's Article 3 findings. It states:

> "It is respectfully submitted that the SSHD therefore relies on the above grounds to state that the requirements of paragraph 276ADE *are not met* and the appellant *has not demonstrated* this to the balance of probabilities." (emphases added)

47. In our judgment, "does not meet", "has not provided evidence", and "the requirements… are not met" are the language of disagreement, not of an error of law. It is rarely appropriate simply to use the language of disagreement in grounds of appeal that seek to demonstrate an arguable error of law. Where grounds seek to demonstrate that no reasonable judge could have reached the finding(s) that the judge reached, or that there was no evidence to support the findings found, those contentions should be identified expressly. But it is important not to attempt to re-package disagreements as errors of law, or reasons or rationality-based challenges. Simply peppering a series of disagreements of fact and weight with well-established terminology relating to the error of law jurisdiction will not have the effect of bringing such disagreements into error of law territory.

Findings open to the judge on the evidence before her

48. The grounds of appeal did not challenge the judge's self-direction on the law concerning Article 3 ECHR in health cases. Although Mr Deller was mildly critical of the fact the judge did not address *AM (Zimbabwe) (SC)* until the end of her self-directions as to the law, we consider this to be a criticism of form over substance. The judge traced the development of the law relating to Article 3 health claims, and culminated her analysis by addressing *AM (Zimbabwe) (SC)*. It may not have been an error to have omitted citation of the earlier authorities, but it was certainly not an error for the judge to have included them.

49. It was accepted by the Secretary of State before the First-tier Tribunal that the letter from Magdi Yacoub accurately summarised the appellant's health and her prognosis: see [21]. It was clear from that letter that, if the appellant did not receive immunosuppressant medication in Trinidad and Tobago, she would again experience end-stage kidney failure, and require long-term dialysis. In the absence of such treatment, her life would be considerably shorter. In our judgment, the judge was entitled to conclude that, if the appellant did not receive the treatment she currently enjoys upon her return to Trinidad and Tobago, she would indeed be subjected to a significant reduction in her life expectancy, and to intense suffering.

50. There was, therefore, an established and direct causal link between the prospect of the appellant no longer receiving medication for her condition and the likely onset of intense suffering and a significant reduction in her life expectancy. The central question, as identified by the judge at [36], was whether suitable treatment would be available to the appellant in Trinidad and Tobago. If she did not receive the necessary immunosuppressant treatment, she would suffer end stage kidney failure and would require long-term dialysis. Without dialysis, her life would expectancy would be considerably reduced. The judge was entitled to find that the appellant was a "seriously ill person" within the meaning of [183] of *Paposhvili*, as quoted at [22] of *AM (Zimbabwe) (SC)*.

51. The next question for the judge was multi-layered. It was distilled to the following constituent elements at [23] of *AM (Zimbabwe) (UT)*:

"Has the applicant adduced evidence 'capable of demonstrating' that 'substantial grounds have been shown for believing' that as 'a seriously ill person', he or she 'would face a real risk':

[i] on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,

[ii] of being exposed

[a] to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or

[b] to a significant reduction in life expectancy"?

52. The issue for the FTT under [i] related to the accessibility of treatment in Trinidad and Tobago to a woman in the appellant's circumstances. The judge accepted that the treatment was available there, but found that the appellant's health meant that she would be unable to find or retain employment: [32]. The judge reached a number of additional findings of fact going to her inability to access the treatment:

1) The appellant would not receive assistance from her brother upon her return to Trinidad and Tobago, and even if the appellant were in contact with him, it did not follow that he would be willing to look after her in the event that she developed end-stage kidney disease: [33].

2) She would receive only limited support from her network in the UK; Ms Adams-Jervis would "try" to provide some financial assistance on a personal basis, and could not say whether her church community would continue to support the appellant in Trinidad and Tobago: [34].

3) There was no evidence that the appellant had retained contacts with any close friends in Trinidad and Tobago who would be able to care for her: [36].

53. Aside from a critical remark in the grounds that, having found the appellant to lack credibility in relation to her debts to the Home Office and the NHS, the judge gave insufficient reasons for accepting the appellant's evidence relating to her brother in Trinidad and Tobago, the grounds of appeal, and the submissions of Mr Deller before us, did not engage with the detail of those findings. In our judgment, it was open to the judge, having heard the whole sea of evidence, including that of the appellant and two other witnesses in person, to reach findings of fact concerning the appellant's brother, her employment prospects, and the limited remitted support she would be likely to receive from her friends in this country. It is not the role of this tribunal to engage in "island hopping" of the sort we would have to delve into were we to attempt to revisit these findings. It is nothing to the point that the judge found the appellant to lack credibility concerning her litigation and NHS debts, but accepted other parts of her evidence. People lie for a variety of reasons. Some evidence will feature mistruths alongside truths. The impact of such lies is a matter of weight. Working out what to accept and what to reject is the paradigm example of a first instance judge's role in

considering the evidence, and reaching findings of fact. Those findings are not "plainly wrong" and the judge's reasoning was sufficient; the reader of the decision is able to know the basis upon which the appellant was successful and the Secretary of State was the losing party. It matters not if we would have reached different findings. The judge's findings were open to her for the reasons she gave.

54. The judge recognised that there were evidential deficiencies in the appellant's Article 3 case; she said at [32], "there is no clear documentary evidence about her ability to access appropriate medication and whether she would have to pay for the prescription." All witnesses had been cross-examined on their understanding of the health provision in Trinidad and Tobago, but there was no expert evidence as to the precise position concerning the accessibility of the available treatment to the appellant. In light of the emphasis on the need for an appellant to prove their case, it might be said that that finding precluded the judge from being able to reach her overall conclusion that the appellant's removal would breach Article 3. Certainly, as this Tribunal recently held in *AM (Zimbabwe) (UT)* at [21(4)], having outlined the key passages in *AM (Zimbabwe) (SC)* and *Savran* concerning the burden upon appellants to establish a breach of Article 3:

> "(4) Two important points emerge from this: first, it is for the applicant to adduce the requisite evidence - this is an application of the basic principle that "if you allege a breach of your rights, it is for you to demonstrate it"; second, the test represents a threshold which in the words of Lord Wilson in this case, is a "not undemanding" one. Whether the minimum level of severity is met is relative and depends on all the circumstances of the case."

55. This Tribunal in *AM (Zimbabwe) (UT)* held at [26] that evidence of the sort usually needed to establish the prospect of the required serious, rapid and irreversible decline resulting in intense suffering or a significant reduction in life expectancy would most helpfully be found in reports provided by reputable organisations, or clinicians and/or country experts with contemporary knowledge or expertise of medical evidence in the country in question. There was, of course, no evidence of that sort in these proceedings, as the judge recognised.

56. Mr Deller submitted that the refusal letter highlighted a number of background materials concerning the availability of treatment for kidney problems in Trinidad and Tobago, demonstrating that it was not open to the judge to reach the conclusions she did concerning the medical provision likely to await the appellant.

57. The issue before the judge was not the existence of appropriate treatment, but its affordability and therefore its accessibility to the appellant. That was a point that was brushed aside by the refusal letter in the following terms, at page 7:

> "You have stated in an interview with the Home Office in July 2018 that you cannot return to your country of origin as the medical bills will be too high. The Secretary of State has also given careful consideration to the fact that medical treatment may not be free at the point of delivery in Trinidad and Tobago and that you may not be able to afford to pay for treatment there. However this does

> not, in itself, make your circumstances exceptional and does not entitle you to remain in the United Kingdom, and the Secretary of State is therefore satisfied that this decision does not represent a breach of Article 3."

58. In our judgment, the materials in the refusal letter do not address the affordability, and, therefore, the accessibility to the appellant, of the appropriate treatment in Trinidad and Tobago. It would have been a misdirection of law for the judge to adopt the dismissive approach of the refusal letter to the affordability of medical treatment. The question for our consideration is whether, in the light of the mixed state of the evidence, the judge was nevertheless entitled to conclude that the appellant would not be able to access appropriate treatment upon her prospective return.

59. In this respect, the nature of an Article 3 claim is relevant. As this Tribunal said in *AM (Zimbabwe) (UT)* at [27]:

> "…we note the observation in *Paposhvili* (at [186]), as applied in *Savran* (at [146]) that 'a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear *proof* of their claim that they would be exposed to proscribed treatment'." (Emphasis supplied)

60. The judge's observation at [32] that "there is no clear documentary evidence about her ability to access appropriate medication" was therefore consistent with the Strasbourg Court's approach in *Paposhvili*, and of this Tribunal in *AM (Zimbabwe) (UT)*. The absence of "clear proof" (or "no clear documentary evidence", as the judge put it at [32]) is not necessarily a barrier to an Article 3 claim succeeding, still less does it mean the judge reached findings that no reasonable judge could reach. The judge did have some evidence, of course; the views of the witnesses, whose evidence corresponded with the approach taken by the Secretary of State in the refusal letter in its acceptance of the lack of affordability of some treatment. The judge was entitled to place some weight on the evidence of the witnesses in that respect, especially since it was consistent with the apparent concession contained in the refusal letter that the appellant may well have been unable to afford the medical treatment that would otherwise be available to her.

61. Drawing this analysis together, therefore, while not all judges would have reached the conclusions reached by the judge concerning Article 3, the findings she reached were open to her and the reasons she gave for reaching those findings were sufficient.

62. We can deal briefly with the remaining grounds of appeal. Since the appeal was legitimately allowed on Article 3 grounds, if the judge did err by additionally allowing it on Article 8 grounds, the error was immaterial. The ground of appeal to the First-tier Tribunal was generated by the Secretary of State's refusal of the appellant's "human rights claim". The definition of that term in section 113(1) of the 2002 Act does not differentiate between different provisions of the European Convention on Human Rights. The same is true of the right of appeal conferred on a person whose human rights claim has been refused: see section 82(1)(b) of the 2002 Act, and the available ground of appeal, under section 84(1)(c) of the 2002 Act.

63. As we conclude, we adopt the terminology of Lewison LJ in dismissing the appeal in *Volpi* [65]:

> "This appeal demonstrates many features of appeals against findings of fact:
>
> i) It seeks to retry the case afresh.
>
> ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called 'island hopping').
>
> iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.
>
> iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence."

64. The appeal is dismissed.

Conclusion

65. As we conclude, we convey our considerable gratitude to Mr Deller and Mr Fripp, who provided us with considerable assistance, and whose written and oral arguments were commendable, as was the evident cooperation with which they each approached their task. Mr Fripp's contribution was all the more impressive, given the lateness of his instructions to act for the appellant.

Notice of Decision

The appeal is dismissed.

The decision of Judge Beg did not involve the making of an error of law such that it must be set aside.

No anonymity direction is made.

Signed *Stephen H Smith* Date 29 June 2022

Upper Tribunal Judge Stephen Smith