UT Neutral Citation Number: [2023] UKUT 164 (IAC)

TC (PS compliance - "issues-based" reasoning) Zimbabwe

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 26 May 2023
Promulgated on 14 June 2023

Before

THE HON. MR JUSTICE DOVE, UTIAC PRESIDENT
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)

JUDGE MELANIE PLIMMER, FTTIAC PRESIDENT
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TC
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr Pipe, Counsel

Order Regarding Anonymity: Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and members of his immediate family are granted anonymity.
No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and his family members. Failure to comply with this order could amount to a contempt of court.

1. *Practice Statement No 1 of 2022 ('the PS') emphasises the requirement on the part of both parties in the FTT to identify the issues in dispute and to focus on addressing the evidence and law relevant to those issues in a particularised yet concise manner. This is consistent with one of the main objectives of reform and a modern application of the overriding objective pursuant to rule 2 of the Tribunal Procedure (FTT)(Immigration and Asylum Chamber) Rules 2014. It ensures that there is an efficient and effective hearing, proportionate to the real issues in dispute.*

2. *A PS-compliant and focussed appeal skeleton argument ('ASA') often leads to a more focussed review, and in turn to a focussed and structured FTT decision on the issues in dispute. Reviews are pivotal to reform in the FTT. The PS makes it clear that they must be meaningful and pro-forma or standardised responses will be rejected. They provide the respondent with an important opportunity to review the relevant up to date evidence associated with the principal important controversial issues. It is to be expected that the FTT will be astute to ensure that the parties comply with the mandatory requirements of the PS, including the substantive contents of ASAs and reviews.*

3. *The identification of 'the principal important controversial issues' will lead to the kind of focussed and effective FTT decision required, addressing those matters, and only those matters, which need to be decided and concentrating on the material bearing upon those issues. The procedural architecture in the FTT, including the PS under the reformed process, is specifically designed to enable these principal important controversial issues to be identified and for the parties' preparation, as well as the hearing to focus upon them.*

4. *FTT decisions should begin by setting out the issues in dispute. This is clearly the proper approach to appeals under the online reform procedure where at each major stage there is a requirement to condense the parties' positions in a clear, coherent and concise 'issues-based' manner.*

5. *The need for procedural rigour at every stage of the proceedings applies with equal force when permission to appeal to the UT is sought and in the UT, including a focus on the principal important controversial issues in the appeal and compliance with directions. The requisite clear, coherent and concise 'issues-based' approach continues when a judge considers whether to grant permission to appeal. This means that the judge should consider whether a point relied upon within the grounds of appeal was raised for consideration as an issue in the appeal.*

6. *The reasons for the permission to appeal decision need to focus upon, in a laser-like fashion, those grounds which are arguable and those which are not. To secure procedural rigour in the UT and the efficient and effective use of Tribunal and party time in resolving the issues that are raised, it is necessary for the grant of permission to clearly set the agenda for the litigation for the future.*

DECISION AND REASONS

1. The SSHD has appealed against a decision of the First-tier Tribunal ('FTT') dated 5 December 2022, allowing TC's appeal on all grounds. In this decision we refer to the parties as they were before the FTT, i.e., TC as the appellant and the SSHD as the respondent.

2. We have maintained the anonymity order granted by the FTT because the appellant continues to rely upon his international protection claim. The importance of facilitating the discharge of the obligations of the United Kingdom ('UK') under the Refugee Convention outweighs the principle of open justice.

Background

3. The appellant is a national of Zimbabwe, who was born in 1990. He came to the UK in 2014, when he was 14, with indefinite leave to enter on the basis that his mother had been recognised as a refugee. The appellant was granted refugee status 'in line' with his mother.

4. The appellant commenced a relationship with his current partner in March 2018. They have a 2-year-old son, who was born in February 2021.

5. On 25 May 2018 the appellant was convicted of kidnapping and actual bodily harm. He received concurrent sentences of imprisonment of 42 months and 18 months respectively. Prior to this, he received three cautions between 2008 and 2017. In addition, on 23 February 2017 he was convicted of dangerous driving and on 5 May 2017 he was convicted of possession of a Class B drug and sentenced to six months imprisonment. Following this offence, the respondent wrote to the appellant on 17 May 2017 warning him that if he continued to offend, he may be liable to deportation.

6. The appellant was served with a decision to deport him dated 14 June 2018 and a letter dated 11 December 2018 informing him of the respondent's intention to exclude him from the Refugee Convention protection on the basis of his criminal offending pursuant to s.72 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). He was also issued an intention to cease his refugee status on 15 February 2019. In written representations the appellant outlined why he was not a danger to the community and why he continued to be entitled to refugee status. The UNHCR also explained why his refugee status should not cease in a letter dated 22 March 2019.

Refusal decision

7. In a decision dated 1 July 2022 ('the refusal decision'), the respondent *inter alia*:

   (i) certified that the s.72 presumption applies because the appellant was convicted of a particular serious crime (having been sentenced to a period of imprisonment of two years) and had not rebutted the presumption that he constitutes a danger to the community;
   (ii) revoked the appellant's refugee status under para 339A(v) of the Immigration Rules and Article 1C(5) of the Refugee Convention on the basis that he was no longer dependent upon his mother and the circumstances in Zimbabwe for a person like him (who did not have a significant MDC profile and came from an urban area) had fundamentally and durably changed, such that the circumstances in connection with which he had been recognised as a refugee ceased to exist;
   (iii) concluded that the appellant's medical condition did not meet the severity threshold to engage Article 3, ECHR and that he has sufficient links and access to support in Zimbabwe to obviate any contravention of Article 3;
   (iv) concluded that the appellant did not meet the requirements of para 399A of the Immigration Rules on the basis that he was not socially and culturally integrated in the UK and there would not be very significant obstacles to his integration there;
   (v) concluded that there would be no breach of Article 8, ECHR on the basis of the appellant's relationship with: a) his partner, because they were not in a genuine and subsisting relationship and in any event she could reasonably move to Zimbabwe to live with him, and; b) his son, because it was believed at the time that the appellant did not claim to have a family life with children;
   (vi) concluded that the appellant was unable to demonstrate evidence of a very strong Article 8 claim over and above the exceptions to outweigh the very significant public interest in deportation.

Appeal skeleton argument

8. The appellant has been represented by solicitors and Mr Pipe of Counsel throughout these proceedings. In compliance with directions, his solicitors provided an appeal skeleton argument

('ASA') dated 9 September 2022, prepared by Mr Pipe. The ASA complies with the requirements of the Practice Statement No 1 of 2022 ('the PS') in that it contain three sections: (i) a brief summary of the factual case; (ii) a schedule of issues; (iii) brief submissions on those issues which state why the appellant disagrees with the respondent's decision with sufficient detail to enable the reasons for the challenge to be understood [A.4 and A.5]. The ASA also complies with the requirements of [A.6] as it: is concise; is set out in numbered paragraphs; engages with the decision letter under challenge; does not include extensive quotations from documents or authorities; identifies the relevant evidence and principles of law to enable the basis of the challenge to be understood [A.6]. As the ASA refers to material not included in the respondent's bundle, the relevant material was provided in an indexed and paginated 326-page bundle at the same time [A.7].

9. The schedule of disputed issues in the ASA draws upon the issues in the refusal decision as follows:

(i) whether the appellant has rebutted the s.72 presumption that he is a danger to the community;
(ii) whether the respondent has established that cessation under 339A(v) applies;
(iii) whether the respondent's decision breaches Article 3;
(iv) whether Exception 1 applies;
(v) whether Exception 2 applies;
(vi) whether s.117(6) of the 2002 Act applies.

10. Applying either s.117C of the 2002 Act or paragraphs 398-399 of the Immigration Rules, this appellant is deemed to be a medium offender as he was not sentenced to a period of imprisonment of four years or more. S.117C(3) provides that the public interest requires the appellant's deportation unless Exception 1 (must be lawfully resident, socially and culturally integrated in the UK and there would be very significant obstacles to integration in returning country) or Exception 2 (effect of deportation on partner or qualifying child would be unduly harsh) applies.

Evidence relevant to the appellant's mental health

11. The ASA specifically cross-references to additional evidence in the appellant's bundle, including detailed evidence relevant to the appellant's mental health. It is necessary to set this out in some detail. The FTT(HESC)(Mental Health) decision dated 30 December 2021 ('the 2021 FTT mental health decision') provides an independent detailed insight into the appellant's mental health up to that point. Further detail and more up to date assessments are to be found in the following: a report dated 22 August 2022 from Mr Evans, the appellant's community psychiatric nurse; a report dated 31 August 2022 from Mr Gregory, a registered mental health nurse who had been working with the appellant since October 2020; a report dated 1 September 2022 from Ms Joliffe, a trainee clinical psychologist under the supervision of a lead clinical psychologist. We summarise the most relevant aspects of this evidence.

(i) The appellant reported to the 2021 FTT mental health panel that he had flashbacks to his time as member of the Zanu-PF youth in Zimbabwe (summarised as being a child soldier) and these occurred when he was serving his prison sentence. He was in contact with mental health services whilst in prison.
(ii) The appellant was released from prison on licence on 21 February 2020. He has been known to secondary psychiatric services since March 2020 when he was referred to psychological therapy due to symptoms of PTSD related to his time as a child soldier. Before this could be provided the appellant was detained under s.2 in June 2020 following an incident in which a neighbour and an emergency worker were assaulted. He was sectioned between July and September 2020 when he exhibited signs of acute mania. He was diagnosed with bipolar affective disorder with psychotic features.
(iii) The reports note that the appellant's bipolar disorder follows a clear pattern of typical relapse and remission. When unwell he presents with formal thought disorder, grandiose delusional beliefs, bizarre behaviours, serious violence to others and

aggression. This means that he is at increased risk of retaliatory violence due to his provocative behaviours and chaotic presentation.

(iv) The reports also describe the appellant as experiencing symptoms of trauma including hyper-arousal, hypervigilance nightmares and flashbacks, with an extensive trauma history starting in childhood, including his experience of being forced to work as a child solider and being exposed to atrocities and highly traumatic experiences.

(v) Upon his release the appellant was compliant with prescribed medication (Olanzapine and Sodium Valproate) and community treatment.

(vi) The appellant's mental health deteriorated in October 2021 when was asked to travel to Kenya for the funeral of his partner's mother. He was concerned about its proximity to Zimbabwe and the risk of being apprehended by security service.

(vii) He was assessed and reassessed following incidents of criminal damage and shortly after suffered a very severe relapse which led to him being sectioned again between December 2021 and January 2022. The reports note that the relapse occurred shortly after he was asked to travel to Kenya and despite compliance with antipsychotic medication.

(viii) Such was the extent of his delusional mind at the time that he was recorded as having been involved in over 28 aggressive and at times assaultive behaviour that involved intervention by nursing staff, including seclusion, to preserve his welfare and that of other patients.

(ix) The appellant needs considerable support in the community. This includes:

a) weekly psychology / therapy / CBT sessions to support him to cope with high levels of distress as a result of his psychosis which centre upon a fear that there is a conspiracy to set him up to provoke a relapse so that he then loses control of his mental state and commits an offence and is thus deported, resulting in him being tortured and killed by individuals working for the Zimbabwean government.

b) Two weekly meetings with a mental health nurse to explore symptoms, response to treatment and risks present.

c) Daily support from his partner albeit they do not live together.

(x) Ms Joliffe's report describes an increase in the appellant's paranoid thinking, nightmares, flashbacks and distress. Mr Evans also refers to the appellant experiencing regular flashbacks and nightmares relating to multiple traumas including his experiences as a child soldier.

(xi) Mr Evans concludes that if the appellant "*were to stop his medication or be unable to access his treatment then it is highly probable that he would relapse*".

(xii) Mr Gregory's report links the more severe impact upon the appellant's mental health to when he is confronted with issues that trigger a sense of existential threat, primarily associated with being placed at the mercy of organisations in Zimbabwe. He concludes that the appellant "*is very afraid of the prospect of being deported to Zimbabwe…and this has previously led to the onset of acute episodes of mania accompanied by erratic and aggressive behaviour which have only be successfully managed in hospital… there is a very high likelihood of relapse should he be informed at that he will be deported*".

(xiii) Ms Joliffe concludes that returning the appellant to Zimbabwe would be "*enormously triggering…and would lead to further exacerbation of psychotic symptoms and a significant relapse*" and without the intensive care the appellant receives and the support of his immediate family, he is "*at a high risk of relapse of a serious episode of psychosis if deported*".

12. The ASA also relied upon evidence from the appellant in his witness statement dated 6 September 2022, that he was forcibly recruited into Zanu-PF youth league in Zimbabwe and was traumatised as a result, which led to some of his mental health concerns.

13. The ASA referred to an OASys assessment dated 8 August 2022, said to place the appellant at a low risk of offending and a medium risk to the public.

Respondent's review

14. The respondent provided a review dated 22 September 2022. The PS mandates a "*meaningful*" review "*taking into account the ASA and appellant's bundle, providing the result of the review and particularising the grounds of refusal relied upon*" [A.8]. It is made clear at [A.9] that pro-forma or standardised responses will be rejected by the Tribunal and the review must engage with the submissions made and the evidence provided. The review in this case gets off to a poor start by including three pro-forma paragraphs in which it is said that the refusal letter continues to be relied upon, asserts that the review complies with the PS and the refusal letter "*as a whole alongside this document provides an overall view of the case and points in the ASA which are not specifically addressed should not be taken as accepted by the respondent".*

15. The review agrees with the ASA's formulation of the issues in dispute and the respondent's position is said to be set out in a counter-schedule. This gives consent for the new matter of the appellant's son to be relied upon but contends that the appellant does not reside with his son and partner, and contact can be maintained via modern technology. The author of the review makes no effort whatsoever to engage with the additional evidence particularised in the ASA and contained in the appellant's bundle.

16. The respondent's failure to engage with the mandatory requirements of the PS in undertaking this review, in particular by failing to engage with the issues raised by the evidence of the appellant's mental ill-health was an unacceptable departure from the requirements of procedural rigour. The PS emphasises the requirement on the part of both parties to identify the issues in dispute and to focus on addressing the evidence and law relevant to those issues in a particularised yet concise manner. This is consistent with one of the main objectives of reform and a modern application of the overriding objective pursuant to rule 2 of the Tribunal Procedure (FTT)(Immigration and Asylum Chamber) Rules 2014. It ensures that there is an efficient and effective hearing, proportionate to the real issues in dispute.

17. A PS-compliant and focussed ASA often leads to a more focussed review, and in turn to a focussed and structured decision on the issues in dispute. Reviews are pivotal to reform in the FTT. The PS makes it clear that they must be meaningful and pro-forma or standardised responses will be rejected. They provide the respondent with an important opportunity to review the relevant up to date evidence associated with the principal important controversial issues. It is to be expected that the FTT will be astute to ensure that the parties comply with the mandatory requirements of the PS, including the substantive contents of ASAs and reviews.

FTT

18. It is difficult to understand what happened at the hearing before the FTT because the unpaginated 44-page FTT decision makes no reference to this. There is thus no indication of who gave evidence or the submissions relied upon by the parties.

19. After setting out lengthy extracts of the documents, the FTT's reasons are primarily to be found in the last six pages of the decision. In summary, the FTT found in the appellant's favour on all grounds, concluding that: the appellant had rebutted the presumption that he continues to be a danger of the community; the appellant's refugee status should not cease; the appellant would suffer a serious, rapid and irreversible decline in his mental health upon deportation to Zimbabwe, where they would be inadequate treatment to obviate a real risk of Article 3 ill-treatment; the appellant established that he met Exceptions 1 and 2; such that his appeal should be allowed.

Appeal to the Upper Tribunal

20. The respondent applied for permission to appeal to the Upper Tribunal ('UT') by relying upon five grounds of appeal. Each ground of appeal was labelled "*material misdirection of law / lack of adequate reasoning*" and then followed by the topic raised by the ground of appeal as follows: s.72;

cessation; Article 3; Exception 1, and; Exception 2. The FTT granted permission to appeal in decision dated 29 December 2022.

21. In directions dated 3 May 2023, a UT lawyer directed a rule 24 notice from the appellant by 8 May and a skeleton argument and consolidated bundle from the respondent by 15 May. By the 19 May the UT had not received a rule 24 notice from the appellant or a skeleton argument and consolidated bundle from the respondent, and wrote to the parties accordingly. The appellant served a rule 24 notice the next day. The UT chased the respondent again on 22 May, and on the day before the hearing received a skeleton argument and consolidated bundle.

22. It is regrettable that directions were not complied with, which necessitated additional scarce resources being spent chasing the parties. We again take the opportunity to remind parties that the need for procedural rigour at every stage of the proceedings applies with equal force in the UT. Having said that, we would not wish in any way to be seen to be criticising the representatives before us in this case. The written and oral submissions presented by Ms Ahmed and Mr Pipe were comprehensive and helpful.

Error of law analysis

FTT decision

23. Before turning to each ground of appeal we wish to make some observations about the FTT decision in this case with a view to later on in this decision, giving general guidance on what is expected in what might be described as 'the age of reform'.

24. The FTT decision contains very lengthy citations from the refusal letter, the legislation and authorities (pages 2-8). The sentencing remarks are set out verbatim (pages 8-12). This is immediately followed by the entirety of the appellant's witness statement, followed by the statement of his partner (pages 12-25). There are then very lengthy extracts quoted from the reports on the appellant's mental health (pages 26-28). There is then a brief reference to the OASys report in a paragraph of two sentences. A very lengthy extract from the review is included (pages 29-30) followed by 10 pages reproducing the entire ASA (pages 30-39). The FTT's reasons are primarily to be found in the last six pages of the decision (pages 39-44). Such large-scale verbatim extracts from documents have no place in a FTT decision. This is an appeal, like the majority of other FTT appeals, that demanded a clear and concise identification of the relevant issues in dispute, followed by summaries of the law and evidence particularly relevant to those issues. Unfortunately, this did not occur in this case.

Adequate reasons

25. In approaching submissions reliant upon inadequate reasoning, it is helpful to bear firmly in mind the observations of Lord Brown of Eaton under Heywood in South Bucks County Council v Porter [2004] UKHL 33; [2004] 1 WLR 1953. Whilst a case about the duty to give reasons in the decisions of planning inspectors, it appears to us to provide appropriate legal parameters for decisions in the FTT. Lord Brown's observations were as follows:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in dispute, not to every material consideration…Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware

> of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

26. These observations in the context of public law decision-making are consonant with the authorities in relation to the requirement for reasons in civil court judgments: see for instance Simetra Global Assets Limited v Ikon Finance Ltd & Others [2019] EWCA Civ 1413 at [39-47]. One of the key principles contained in these authorities is the need for the identification of 'the principal controversial issues' (or as Males LJ put it in [46] of Simetra Global Assets, 'the building blocks') engaged in the decision-making required for the particular case. That identification will lead to the kind of focussed and effective decision required, addressing those matters, and only those matters, which need to be decided and concentrating on the material bearing upon those issues. The procedural architecture in the FTT, including the PS under the reformed process, is specifically designed to enable these principal controversial issues to be identified and for the parties' preparation, as well as the hearing to focus upon them.

27. We have appended to this decision some further principles which can be distilled from the authorities in relation to the giving of reasons as well as the subsequent scrutiny of reasons on appeal which will hopefully provide assistance in this context.

Grounds of appeal

Ground 1 – S.72

28. Ms Ahmed invited us to conclude that the FTT did not provide adequate reasons in support of the conclusion that the appellant displaced the presumption that he is a danger to the community of the UK for the purposes of s.72 of the 2002 Act. She submitted that the reasoning offered was inadequate because the FTT unduly focussed upon the matters in the appellant's favour without addressing the factors undermining those, such as the appellant's denial of the index offence, the OASys assessment and the appellant's escalation in offending up to the index offence.

29. Whilst this ground could and should have been more clearly pleaded, we are satisfied that the essence of the ground is made out: the FTT gave inadequate reasoning for the conclusion that the appellant was not a danger to the community given the nature and extent of the evidence available. This is not because the FTT did not say enough – the reasoning on this issue is detailed and takes up some two pages. We acknowledge that the FTT must be taken to have been aware of the appellant's denial of the index offence and the contents of the OASys – these are referred to in terms at [40], [45] and [46] of the decision. The FTT must also be taken to be aware of the appellant's escalation in offending – this is clear from the sentencing remarks, which have been included in full. The FTT quite properly directed itself to the very serious nature of the appellant's offending at [45] and [52] and took into account the mental health evidence at [47] and [48], to the effect that the risk of reoffending was low if the appellant continued to remain mentally well.

30. The FTT listed the reasons for the conclusion that the appellant rebutted the presumption at [53A-F] as follows:

> "*A. The expert reports all concur that provided the appellant is achieving and stable on his treatment regime there will be a low risk of offending.*
> *B. The appellant has a settled managed treatment regime with which he is compliant.*
> *C. The appellant has significant motivation and impetus to maintain compliance with his treatment.*
> *D. There is no history of significant violent offending.*
> *E. The appellant now has in place a system to monitor and check his mental health and has a system to achieve help if he needs it.*
> *F. The appellant is no longer using illicit substances."*

31. We accept Ms Ahmed's submission that each of these reasons on their own and when read together, fail to explain how the evidence in support of the respondent's case has been brought into account. It is a one-sided, exclusively positive view of the evidence on risk, which needed to be explained by reference to all the evidence, in order for the respondent to understand why she lost on this issue. Contrary to [A] above, Mr Gregory's report is not so unequivocal. Rather, Mr Gregory predicts a low chance of reoffending if the appellant remains mentally well and continues to be intensely supported. Mr Gregory makes it clear that the last two incidents requiring police intervention subsequent to the index offence occurred within the context of the appellant being acutely unwell, notwithstanding his compliance with the support and treatment available to him. The OASys report also made a clear link between a decline in the appellant's mental health and an increased risk of offending (pages 23/62 and 45/62). The low-risk predictor in the OASys must be approached with that caveat in mind, and should not be viewed in isolation from the remainder of the rounded assessment within the report. As Ms Ahmed submitted, MA (Pakistan) v SSHD [2014] EWCA Civ 163 at [18-20] provides a reminder of the caution that must be exercised when approaching OASys risk scores. In this context we note the low risk was still assessed as including probabilities of proven offending ranging between 22-49%. It is also unclear whether the author of the OASys had the full ambit of the appellant's mental health history available to the FTT.

32. The FTT has not engaged with the evidence that suggests that at the time the appellant was so mentally unwell that he had to be sectioned in late 2021, he was on a settled managed treatment regime with which he was compliant, at a time when he also had significant motivation and impetus to maintain compliance and there was a system in place to monitor and check that mental health, which therefore required further reasoning beyond [B], [C] and [E] above. That system and the appellant's compliance with the system at the relevant time is detailed in Mr Gregory's report and the 2021 FTT mental health decision.

33. The FTT's bald reasoning at [D] that there is no history of significant violent offending does not engage with the escalation in offending to the 2018 index offence or the appellant's use of violence when acutely unwell as particularised in the 2021 FTT mental health decision. In addition, whilst the FTT was clearly aware of the appellant's denial of the index offence, there is no explanation as to the role this played in the reasoning provided.

34. We are satisfied that the FTT has not engaged with the principal controversial issues arising under this important subject – whether the appellant is a danger to the community. Whilst the FTT noted much of the relevant evidence, there was a failure to explain how those matters undermining the appellant's case were resolved. When viewed against the key evidence in the case, the FTT has provided inadequate reasons for its conclusion. Ground 1 goes beyond mere disagreement as contended by Mr Pipe and has been made out by the respondent.

Ground 2 – cessation

35. Ground 2 has not been clearly pleaded but sufficiently raises two key points we address in turn.

36. First, the FTT has not given adequate reasons for finding that the circumstances which justified the grant of refugee status have ceased to exist and there are no other circumstances which would now give rise to a well-founded fear of persecution. Ms Ahmed reminded us of the guidance on the approach to cessation in PS (Cessation principles) Zimbabwe [2021] UKUT 00283 (IAC); [2022] Imm AR 49 and SSHD v JS (Uganda) [2019] EWCA Civ 1670; [2020] Imm AR 258. The latter makes it clear at [159] and [174] that the word "circumstances" in Art 1C(5) i.e., "*the circumstances in connection with which he has been recognised as a refugee have ceased to exist*", is broad and general. It covers both relationship and risk for derivative refugees.

37. In our view the FTT has not engaged with the specific circumstances of the appellant's mother which led to the appellant's refugee status in line with her: she was an MDC member and accused of being a spy for the UK. The plight for MDC members in Zimbabwe has changed over time as summarised at

[28-31] and [75] of PS (supra), albeit care must be taken when considering the durability and significance of that change – see [81] and [88-95] of PS. Nonetheless, the applicable country guidance changed with CM (*EM* country guidance; disclosure) Zimbabwe [2013] UKUT 59 (IAC): MDC members are considered in general to not be at risk in high density areas of Harare unless they have a significant MDC profile. The FTT did not address the appellant's / his mother's area of origin in Zimbabwe (accepted to be a high-density area of Harare but not a rural area) or the significance of her profile. Instead, the FTT assumed risk based upon a significant absence at [60] without addressing the proposed area of return and / or the significance of the mother's profile, as required by CM and the CPIN on Zimbabwe at 2.4.20 (quoted by the FTT at [59]). Such an approach does not follow the guidance at headnote 2 of PS.

38. Second, ground 2 asserts that FTT has not provided adequate reasons in support of the conclusion that the appellant was involved in the Zanu-PF youth. This is a point that was clearly articulated in the ASA, the appellant's statement and the evidence from those treating him for his mental health. The OASys also records the appellant's claims in this regard. Notwithstanding this, the respondent's review entirely omits any reference to this. It has not been suggested that this was addressed by the respondent's representative before the FTT. It is within this context that the FTT's comment at [56], that there was no sensible challenge to that claim, must be viewed.

39. The failure of the respondent to identify this issue in the review, and therefore identify that it was a principal controversial issue in the appeal, puts the respondent in real difficulty in seeking to advance it in the context of this appeal. As observed in Lata (FtT: principal controversial issues) [2023] UKUT 163 (IAC) at [28] and [33], a FTT decision cannot be alleged to contain an error of law on the basis that there was failure to take account of a point that was never raised for consideration as an issue in the appeal, unless the point is *Robinson* obvious. Since we have already concluded that there was an error of law in relation to the first point raised, there is no need to address this issue in any event. We would, however, simply observe in relation to whether this point provides the appellant with a well-founded fear that the appellant claims to have fled in 2004 when he was 14, nearly 20 years ago. Although at [60] the FTT referred to objective material that the appellant is at risk in Zimbabwe by reason of his lengthy absence and fleeing the Zanu-PF youth, the FTT has not cited any material to support the well-foundedness of such fears. The paragraph before refers to those who return after a significant absence to a rural area, not as in this appellant's case, to Harare.

40. We are satisfied that the respondent has made out ground 2.

Ground 3 – Article 3

41. Ground 3 contends that the appellant's case does not meet the high Article 3 threshold and that, contrary to the findings of the FTT, section 5 of the respondent's *CPIN Zimbabwe: Medical treatment and healthcare* demonstrates that adequate treatment is available to the appellant in Zimbabwe, albeit not at the level he receives in the UK. Section 5 of the CPIN spans six pages. The grounds make no attempt to particularise which paragraphs in the CPIN are relied upon or the nature of the treatment available in Zimbabwe. The respondent's review offers no assistance on the topic either – it merely states that the relevant Article 3 threshold has not been met.

42. In AM (Art 3; health cases) Zimbabwe [2022] UKUT 00131 (IAC); [2022] Imm AR 1021, the UT panel gave guidance on the two questions in Article 3 health cases in relation to the initial threshold test following AM (Zimbabwe) v SSHD [2020] UKSC 17; [2020] Imm AR 1167 and Savran v Denmark (application no. 57467/15). These two questions were broken down as follows:

> "(1) Has the person (P) discharged the burden of establishing that he or she is "*a seriously ill person*"?
> (2) Has P 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 to*

(a) *a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or*
(b) *a significant reduction in life expectancy*"?"

43. There was ample evidence to support the FTT's conclusions at [69] and [70] that this appellant is a seriously ill person and it is not in dispute.

44. The second question is multi-layered. Whilst the FTT has not approached the question in the same order suggested in AM (Zimbabwe) (UT) (supra), we are satisfied that each aspect has been adequately addressed. The FTT spent over two pages summarising the proper approach to Article 3 health cases by quoting extensively from Paposhvilli v Belgium [2017] Imm AR 867 and AM (Zimbabwe) (SC) (supra), and properly directed itself to the burden resting upon the appellant to adduce the evidence to establish a prima facie case – see the appropriate self-directions at [21], [25] and [26] of the FTT's decision. Whilst we accept that a more concise and 'user-friendly' summary of the relevant law is to be found in AM (Zimbabwe) (UT), Ms Ahmed accepted that the FTT's failure to refer to this authority does not constitute an error of law.

45. The FTT has not restricted its analysis to considering whether the appellant's condition will worsen upon removal and concluded that this is one of the rare cases that satisfies Article 3. The FTT directly asked itself whether the appellant will "*suffer a serious, rapid and irreversible decline in his mental health resulting in intense suffering*" at [71], having already directed itself to the "*very high*" threshold to be met at [22]. The FTT answered this in the affirmative, by making express reference to the specific mental health evidence available: Ms Joliffe's conclusion that the appellant is at high risk of a serious episode of psychosis if deported and Mr Gregory's opinion that there is a very high risk of relapse if deported. This reasoning should not be considered in isolation but in the context of the specific evidence concerning this appellant's mental health, the main features of which are summarised above.

46. The FTT was entitled to accept the appellant's mental health decline in Zimbabwe would result in intense suffering. Indeed, the evidence points in one direction for this appellant: when he relapses to a serious episode of psychosis and becomes acutely mentally unwell he is subject to 'intense suffering'. The 2021 FTT mental health decision clearly described the significant nature and extent of the appellant's suffering when he is acutely unwell and the time, intensive care, support and treatment necessary to reverse the relapse. It is well-established that suffering associated with a deterioration in an already existing mental illness involving a relapse into psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning, could, in principle, fall within the scope of Article 3 – see Bensaid v UK (App no 44599/98) at [37], albeit whether the serious and detrimental effects are sufficient to result in intense suffering depends upon the strength of the evidence, in particular evidence of harm to self – see Savran (supra) at [143-144].

47. As Ms Ahmed pointed out, the fact that there is a real risk of relapse into psychosis in Zimbabwe such that the appellant will face intense suffering, is not the end of the matter. After all, he has faced significant mental health decline in the UK, even when compliant with medication and supported by mental health professionals. The Court observed in Bensaid at [38] that the applicant faced the risk of relapse even if he stayed in the UK given his long-term illness requiring constant management. For this appellant's deportation to breach Article 3, his mental health decline resulting in intense suffering must be "*on account of*" or caused by the absence of appropriate treatment in Zimbabwe or the lack of access to such treatment. The FTT explicitly and accurately directed itself to the need to address causation at [72]:

> "The serious rapid and irreversible decline in health leading to intense suffering and / or the significant reduction in life expectancy must be as a result of either the absence of appropriate treatment in the receiving country or the lack of access to such treatment." (our emphasis)

48. The FTT found the appropriate mental health treatment for this appellant was not available in Zimbabwe in these terms:

> "73. Is there appropriate treatment in Zimbabwe for this appellant? I find that there is not. The CPIN dated April 2021 shows a significant shortfall in the level of care one would need to provide to this appellant to prevent his relapse or treat him properly. Firstly, the medication that the appellant currently takes and is prescribed is not available in Zimbabwe. There is no evidence that anything which is available is a sufficient or appropriate substitute. It is for the Respondent to lead this evidence and they have failed to do so.
>
> 74. Secondly, the appellant has a system of care which is robust, reliable and meeting of his demands in terms of his Mental health. The appellant would not, I am satisfied, receive anywhere near the required level of care in Zimbabwe simply for the fact that such care does not exist and there is not the available systems to treat him. This is not an appellant suffering from mild depression or mild anxiety (not that they are not of themselves difficult) but this is a man with significant and serious mental health problems.
>
> 75. The availability of hospitals treatment is severely lacking in Zimbabwe, the funding for the same is severely lacking and the availability of appropriate medically trained staff with sufficient experience and skill to properly treat the appellant is severely lacking.
>
> 76. I have no hesitation in finding that on account of the appellant's significant and serious mental health problems he would suffer intense suffering which would be both serious and irreversible (irreversible in the sense that there would be no appropriate treatment available). This would be as a result of the appellant not having access to the appropriate and correct medical treatment."

49. Ms Ahmed submitted that the FTT was not entitled to find an absence of treatment on the information available to it. She pointed to an absence of evidence in reports by reputable organisations and/or clinicians and/or country experts with contemporary knowledge of or expertise in medical treatment and related country conditions in Zimbabwe. We note the guidance in AM (Zimbabwe) (UT) that clinicians directly involved in providing relevant treatment and services in the country of return and with knowledge of treatment options in the public and private sectors, are likely to be particularly helpful. However, the panel also highlighted that the nature and extent of the evidence as to the availability of and access to treatment in the receiving state that is necessary, will depend on the particular facts of the case. In this case the appellant relied upon the respondent's CPIN. There was no dispute that the appellant's prescribed medication is unavailable in Zimbabwe. This includes the anti-psychotic, Olanzapine. Mr Pipe took us to Annex A of the CPIN, which he said he also did before the FTT. This provides a list of the available medication in Zimbabwe. It does not include the appellant's medication. Ms Ahmed drew our attention to AM (Zimbabwe) (UT) and the panel's careful and detailed consideration of alternative ARV medication in Zimbabwe to treat HIV from [123]. This must be viewed in the context of that case, wherein a consideration of the suitability of alternative available ARV medication was a key issue in dispute.

50. In any event, and perhaps more importantly, the FTT clearly accepted that there would be an absence of the vital community mental health services relied upon by the appellant to prevent a psychotic relapse, given the significance and seriousness of his mental health problems. Ms Ahmed was unable to take us to any evidence inconsistent with the FTT's conclusion that there would be no community mental health treatment available to this appellant, which on the evidence of the professionals was vital to maintain his fragile mental health. We note that the respondent's own Zimbabwe country expert in PS, Dr Chitiyo, accepted that the appellant in that case would be "*most unlikely to be able to access any social care or mental health treatment, given the very poor state of those facilities*" in Zimbabwe – see [108] of PS. The CPIN describes the mental health treatment available in Zimbabwe, but this tends to be centred around a few government-run, hugely under-resourced institutions. By way of example, 5.1.12 of the CPIN quotes from the US State Department report for 2020 in which it was observed that "*residents in these government-run institutions received cursory screening, and most waited for at least one year for a full medical review*".

51. We do not accept Ms Ahmed's submission that the FTT engaged in unwarranted speculation in the manner warned against in Bensaid. The FTT's conclusions on Article 3 are adequately based upon the evidence before it, including the appellant's dependence upon medication and mental health community support in the UK, which would be absent in Zimbabwe, and; the professionals' consistent

assessment of likely impact of deportation to Zimbabwe upon the appellant, in the light of his own intense subjective beliefs (whether or not they are well-founded) regarding the Zimbabwean security agencies' interest in him – a significant relapse in his mental health. By contrast, in Bensaid the evidence indicated that there was reasonable access to Olanzapine and hospital treatment, and the appellant's claims that in practice these would be difficult to access, was speculative. In addition, the applicant in Bensaid did not rely upon evidence contained within the mental health professionals' reports in this case, to the effect that deportation alone to the country of origin was sufficient to trigger a relapse in the light of past perceived trauma. Mr Bensaid's case was a more nuanced one – he would not be able to access treatment, in the event his schizophrenia deteriorated in Zimbabwe.

52. Ms Ahmed also submitted that the FTT misdirected itself in law at [73] in purporting to place the burden of proof upon the respondent when the initial burden falls on the appellant to make out a prima facie case. The FTT clearly found the appellant's medication was not available in Zimbabwe – that was not in dispute. We note headnote 4 of AM (Zimbabwe) (UT) - it is only after the threshold test has been met and thus Article 3 is applicable, that the returning state's obligations summarised at [130] of Savran (supra) become of relevance. We set out the relevant parts of [130] of Savran for completeness (our emphasis):

> (a) it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3;
>
> (b) where such evidence is adduced, it is for the returning State to dispel any doubts raised by it, and to subject the alleged risk to close scrutiny by considering the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances…;
>
> (c) the returning State must verify on a case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3;
>
> (d) the returning State must also consider the extent to which the applicant will actually have access to the treatment, including with reference to its cost, the existence of a social and family network, and the distance to be travelled in order to have access to the required care; and
>
> (e) where, after the relevant information has been examined, serious doubts persist regarding the impact of removal on the applicant – on account of the general situation in the receiving country and/or their individual situation – the returning State must obtain individual and sufficient assurances from the receiving State, as a precondition for removal…"

53. We are satisfied that the FTT's reference to the respondent leading evidence on alternative medication is probably a reflection of what often occurs in these types of appeals in practice. As here, the appellant relies upon evidence that he requires anti-psychotic medication, which the CPIN confirms to be unavailable in Zimbabwe. In many cases, the respondent seeks to adduce additional evidence on available medication, by providing a '*MedCOI, response to information request*' (see the footnotes to Annex A of the CPIN). This did not happen in this case. The FTT was entitled to conclude that the appellant displaced the burden upon him given the evidence he led regarding the absence of medication and community mental health treatment in Zimbabwe.

54. When the FTT decision is read as a whole, we are satisfied that it properly directed itself to and applied the correct burden of proof. The FTT was clearly aware that the burden lay on the appellant to adduce evidence capable of establishing a prima facie Article 3 case, and was satisfied that this burden was displaced by him. The appellant having adduced that evidence, it was for the respondent to dispel any doubts raised by it. The respondent's review manifestly demonstrates that the respondent did not raise any particularised concerns about the appellant's prima facie case.

55. We are not satisfied that the FTT has erred in law in its consideration of Article 3.

Ground 4 – Exception 1

56. Ms Ahmed acknowledged that ground 4 is contingent upon ground 3. She conceded that if we dismiss the respondent's appeal on Article 3 grounds, the challenge based upon the contention that the FTT erred in law in concluding that there would be very significant obstacles to the appellant's integration to Zimbabwe falls away. Ms Ahmed was correct to make such a sensible and practical concession.

57. It follows that we do not accept that there was any material error of law as alleged in ground 4.

Ground 5 – Exception 2 / unduly harsh

58. Whilst the FTT set out s.117C (which contains the wording of Exception 2), there is no indication within the decision that there was a self-direction to the elevated standard required by the 'unduly harsh' concept – see HA (Iraq) v SSHD [2022] UKSC 22; [2022] Imm AR 1516 at [41] and [44] as applied recently in Sicwebu v SSHD [2023] EWCA Civ 550 at [27]. We accept that the FTT has not applied the unduly harsh test to the facts and circumstances of this case. The FTT failed to give adequate reasons why the effect of deportation on this two-year-old child would meet the elevated threshold. The reasons provided go no more than stating the relationship is close, they depend upon one another and the father is the carer when the mother works.

59. We are satisfied that the respondent has made out ground 5.

Structured "issues-based" concise decision-making

FTT substantive decisions

60. In his 20 May 2021 speech, *Judgment-Writing: A Personal Perspective,* Lord Burrows described the 3 Cs (clarity, coherence and conciseness) as essential for a good judgment. Clarity and coherence will be best achieved through the identification of the principal controversial issues in the case, as set out above. A concise decision is difficult to achieve when the issues are not carefully narrowed at an early stage, and then reflected in the ASA and review. The PS is designed to ensure that the procedural architecture is in place to ensure that the legal principles governing the quality and content of determinations are satisfied. Legal officers have been trained to ensure the PS is complied with by the parties and are supported by judges in this. If the issues have not been clearly and specifically narrowed before the substantive hearing, they must be clarified and where possible narrowed at the beginning of the hearing and before the evidence commences. In addition, both parties must be encouraged to make their submissions in a disciplined and structured way by addressing the relevant evidence and law applicable to each issue.

61. It follows from what has been set out above that FTT decisions should begin by setting out the issues in dispute. This is clearly the proper approach to appeals under the online reform procedure where at each major stage there is a requirement to condense the parties' positions in a clear, coherent and concise 'issues-based' manner. Had the FTT in the instant case outlined the issues in dispute, the focus upon the applicable law and the relevant evidence would have been more concise and particularised. This approach reduces the risk of making errors of law. We can illustrate this by reference to the FTT's approach to whether the appellant is a danger to the community. The FTT quoted verbatim from the relevant reports, sentencing remarks and the ASA without identifying and summarising the main evidence relevant to the issue. This led to an inadequately reasoned decision on the issue, despite a very lengthy decision.

Permission to appeal decisions

62. There is no doubt that there is a clear need for procedural rigour in the consideration of applications for permission to appeal to the UT. That is not simply because it is a specific provision of the relevant Rules, but also because it is part of the process of ensuring the achievement of the overriding

objective, which is a fundamental principle underpinning the provisions of the Rules. The requisite clear, coherent and concise 'issues-based' approach continues when a judge considers whether to grant permission to appeal. This means that the judge should consider whether a point relied upon within the grounds of appeal was raised for consideration as an issue in the appeal or is otherwise *Robinson* obvious. As explained in Lata (supra) at [33] the reformed procedures are specifically designed to ensure that the parties identify the issues and they are comprehensively addressed before the FTT, not that proceedings before the IAC are some form of rolling reconsideration by either party of its position.

63. There should be no underlying ambiguity in the grant or refusal of permission. It is not helpful to merely summarise the grounds of appeal and then only address some. Where a judge considers a ground to be unarguable and another arguable they should say so, and give concise reasons – see Joseph (permission to appeal requirements) [2022] UKUT 218 (IAC); [2022] Imm AR 1360.

64. When the order provides that permission to appeal is granted, the reasons for that grant should be concise, crisp, clear and focussed. This provides the parties with an understanding of what is the point upon which argument for the UT is being granted. Where permission is granted on a limited basis, and for identified grounds only, that must be specified in the heading, so that it is clear when it comes to an error of law hearing what the parties are preparing to argue. It is most unhelpful if that phrase is used and then the reasons for the decision undermine it by being unclear as to, for instance, in cases where there are several grounds of appeal, which of those grounds are being granted permission and which are not. This is another dimension of identifying the principal controversial issues which require to be resolved to determine the appeal, applying the same legal principles which have been set out above, on this occasion for the proceedings in the UT.

65. Whilst sometimes it may be that a judge granting permission to appeal would provide some indication of their view as to the relative strength of grounds, strictly speaking, that is of no assistance at all. A ground is either arguable or it is not. What the reasons for the decision need to focus upon, in a laser-like fashion, is those grounds which are arguable and those which are not. To secure procedural rigour in the UT and the efficient and effective use of Tribunal and party time in resolving the issues that are raised, it is necessary for the grant of permission to clearly set the agenda for the litigation for the future.

Disposal

66. We have decided that this case should be retained in the UT, having applied the guidance in Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC) and AEB v SSHD [2022] EWCA Civ 1512. We note the general principle is that the case will be retained within the UT for the remaking of the decision. The exceptions to this general principle set out in paragraph 7(2)(a) and (b) of the relevant *Practice Statement*, requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the FTT. Whilst there will need to be further fact-finding in this case, this will be limited to the appellant's asylum claim and Article 8 claim (if pursued) on relatively narrow and straightforward factual issues.

Decision

67. We allow the respondent's appeal on grounds 1, 2 and 5 but dismiss the respondent's appeal on grounds 3 and 4.

Judge Melanie Plimmer

President of the First-tier Tribunal

Immigration and Asylum Chamber

14 June 2023

Appendix

The following principles can be derived from the authorities in relation to the giving of reasons by the FTT and their subsequent scrutiny on appeal in the UT.

(1) Reasons can be briefly stated and concision is to be encouraged but FTT decisions must be careful decisions, reflecting the overarching task to determine matters relevant to fundamental human rights and /or international protection.

(2) The evidence relevant to the issues in dispute must be carefully scrutinised but there is no need to set out the entire *interstices* of the evidence presented or analyse every nuance between the parties.

(3) The reasons for a decision must be intelligible and adequate in the sense that they must enable the reader to understand why the matter was decided as it was, and what conclusions were reached on the 'principal important controversial issues'.

(4) It is not necessary to deal expressly with every point, but enough must be said to show that care has been taken in relation to each 'principal important controversial issue' and that the evidence as a whole has been carefully considered.

(5) The best way to demonstrate the exercise of the necessary care is to make use of 'the building blocks of the reasoned judicial process' by identifying the 'principal important controversial issues' which need to be decided, giving the appropriate self-directions in law on those issues, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected.

(6) Where there is apparently compelling evidence contrary to the conclusion which the judge proposes to reach that must be addressed.

(7) Where the parties agree on matters, there is no need for this to be rehearsed in any detail within the decision: the reasons must focus upon the issues that continue to be in dispute.

(8) The reasons need refer only to the main issues and evidence in dispute, not to every material consideration or factor which weighed with the judge in their appraisal of the evidence. But the resolution of those issues vital to the judge's conclusion should be identified and the manner in which they resolved them, explained.

(9) The reasoning should enable the losing party to understand why they have lost.

(10) The degree of particularity required depends on the nature of the issues falling for decision and the nature of the relevant evidence, including the extent to which it is disputed.

(11) The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law but inferences as to insufficiency of reasons will not readily be drawn.

(12) Experienced judges are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so.

(13) Appellate restraint should be exercised when the reasons a FTT gives for its decision are being examined; it should not be assumed too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.