



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/02636/2015**

Appeal Numbers:

AA/13171/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 17 October 2018**

**Decision & Reasons
Promulgated
On 22 May 2019**

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE O'CONNOR**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**NF
KKA**

(ANONYMITY DIRECTIONS MADE)

Respondents

Representation:

For the SSHD: Ms M Bayoumi, instructed by the Government Legal Department

For NF: Ms A Weston QC, instructed by Luqmani Thompson & Partners
For KKA: Ms R Chapman, instructed by Birnberg Pierce & Partners

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, NF and KKA (the respondents herein) are granted anonymity. No report of these proceedings shall directly or indirectly identify the respondents or any of

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their family members. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Introduction

1. NF is the husband of KKA and both are nationals of Kenya. These appeals are brought before the Upper Tribunal by the Secretary of State for the Home Department (“SSHD”) challenging decisions of the First-tier Tribunal (“FtT”) allowing the appeals of NF and KKA.
2. The SSHD accepted before the FtT that removing NF and KKA to Kenya would lead to a breach of Article 3 ECHR.
3. The central issue in NF’s appeal before the FtT was whether he should be excluded from the protection of the Refugee Convention by application of Article 1F(c) thereof. The FtT found in NF’s favour on this issue, concluding that he “is a refugee”.
4. The issues before the FtT in KKA’s appeal were (i) whether the requirements of Article 1A(2) of the Refugee Convention were met and (ii) whether she should be excluded from a grant of Humanitarian Protection pursuant to application of paragraph 339D(iii) of the Immigration Rules. The FtT found for KKA on both issues and allowed her appeal on Refugee Convention grounds.
5. The appeals before the Upper Tribunal centre on the approach by the FtT to application of Article 1F(c) of the Refugee Convention (in relation to NF) and paragraph 339D(iii) of the Immigration Rules (in relation to KKA). For this reason, consideration of the appeals by the Upper Tribunal was stayed pending a decision from the Court of Appeal in Youssef & N2 v SSHD [2018] EWCA Civ 933, which was handed down on 26 April 2018, and the writing of this judgment was delayed with the intention of being able to take into account the decision of the Upper Tribunal on that remitted appeal.

Factual Background

6. NF entered the United Kingdom on 6 October 2007 with leave to enter to study aerospace engineering. His leave was subsequently extended so as to expire on 15 December 2012. KKA was granted leave in line with her husband.
7. On 4 December 2011 both were stopped at Heathrow airport on returning to the UK from Kenya. A property search revealed an iPod containing images of armed persons with flags associated with Al

Shabaab, and also included photographs featuring both male and female 'terrorists' training on a beach with weapons. None of the photos said to feature Al Shabaab also featured either NF or KKA. The iPod also contained a large number of audio files that suggested to the interviewing officer that NF had an "*extremist mindset*". It is said that some of the audio files were produced directly by Al Qaeda and were considered to be motivational in nature and designed to encourage/glorify suicide operations, giving advice on conducting Jihad.

8. NF stated in interview that he had downloaded these photographs from the internet approximately four months earlier because he was curious about why so many Somali people were coming over the border into Kenya and he thought Al Shabaab were responsible for this migration. The Kenyan Army were fighting against Al Shabaab and he was "*very keen on events*" involving his country. He had downloaded the speeches of Dr Omar Bakri in 2008. Dr Bakri was a "visiting Sheikh" who had given a talk about understanding prayer. NF had "curiosity about this person". KKA stated that the iPod in her husband's possession had been found by him in Africa and that anything found on this iPod was not her husband's responsibility.
9. It was later discovered that on the day NF and KKA returned home after being released from the airport, NF deleted many thousands of files from a computer registered to KKA's name. KKA asserted that she said she had never used this computer.
10. On 17 April 2012, the police searched the family residence. Detective Sergeant Anthony Horrocks, of the North West Counter-Terrorism Unit, and his team seized various electronic devices including KKA's mobile telephone, NF's mobile telephone, KKA's laptop, the iPod previously examined at Heathrow Airport and a digital hard drive. The material discovered on these devices was described by Detective Sergeant Horrocks, as seeking to "*glorify, explain, justify or otherwise encourage acts of terrorism*".
11. NF was charged on three counts of possessing information useful to terrorism contrary to section 58(1)(b) of the Terrorism Act 2000:

Count 1 - Possessing a document referred to as "*Inspire 2*", which contained instructions that were used by others recently to make the pressure cooker bombs that were detonated in the Boston, USA attacks. It also contained practical instructions on encrypting sensitive terrorist information. Encryption software had been downloaded and used by NF as per these instructions.

Count 2 - Possessing a document referred to as "*39 Ways to Serve and Participate in Jihad*", the details of which are set out in the FtT's decision.

Count 3 - possession a document referred to as "*Physical Planning*".

12. KKA was not charged with a criminal offence, although her telephone was found to contain a contacts list which included an entry relating to a "*a convicted terrorist*" and another relating to "*a leading figure in Muslims Against Crusaders*". KKA was also said to be in contact with (i) the wife of a leading member of Supporters of Taweed, such person having himself been convicted of supporting proscribed organisations, and (ii) Ruksana Begum, a person who received a 12 month sentence for possessing documentation useful for terrorism and who's brothers are respectively serving sentences of 16 and 12 years imprisonment for engaging in conduct in preparation for a terrorist act.
13. NF pleaded not guilty to all three counts on the indictment but was convicted on 14 March 2013 at the Central Criminal Court on Count 2. NF was acquitted on Counts 1 and 3 of the indictment. In respect of Count 2, NF was sentenced to nine months' imprisonment and recommended for deportation. In sentencing, the judge commented:

"You have been convicted by the jury of one count of possessing a record containing information likely to be useful to a person committing or preparing an act of terrorism. The material in question consisted of a version of *39 Ways to Serve and Participate in Jihad*, best described in my view as a terrorists manual. It is available over the net which is how you got it and it is right to say you are not the first person to be convicted in the courts of this country for possession or versions of it. ...

It was, as far as you are concerned, part of a very substantial quantity of material that you had downloaded and stored on your computer and external hard drive. I make clear, however, that despite the volume this is not put forward and never has been put forward as a specimen charge, although there was other material of an encouraging to Jihad nature which of course is not an offence under the section. ...

... Parliament has determined that such is the need to protect the public or sections of it anywhere in the world from acts of terrorism that even possessing material that may help those contemplating terrorism in a practical way should be against the law and those doing it should be punished, in particular in order to deter others. There remains the question of deportation in your case since the sentence is one of less than twelve months and I have considered whether or not I should make such a recommendation. In my view such is the need to

protect the public that looking at all the circumstances of your conduct it is proper to make that recommendation.”

14. On 24 April 2013, NF was served with a ‘notice of decision to deport’, but this decision was withdrawn on 7 June 2013 in order to allow the SSHD to consider NF’s asylum claim. A subsequent negative decision was also withdrawn, and both NF and KKA were given 6-months discretionary leave (pursuant to the SSHD’s Restrictive Leave policy) - it being acknowledged by the SSHD that each would be at risk of ill treatment if returned to Kenya.
15. On 2 November 2015, the SSHD made a decision excluding NF from Refugee Convention protection. On the same date a decision was made in relation to KKA refusing her Refugee Convention claim and excluding her from a grant of Humanitarian Protection. NF and KKA appealed these decisions to the FtT.

Legal Background

16. Article 1F(c) of the Refugee Convention provides:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

...

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

17. Paragraph 339D of the Immigration Rules states that a person will not be eligible for a grant of humanitarian protection in circumstances where:

“(ii) there are serious reasons for considering that he is guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such act;

(iii) there are serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom”.

18. In Al-Sirri v Secretary of State for the Home Department [2012] UKSC 54 the Supreme Court stated, when considering Article 1F(c):

“16. ... The article should be interpreted restrictively and applied with caution. There should be a high threshold ‘defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security’. And there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character.”

19. In Youssef, the Court of Appeal, in dismissing the applicant's first two grounds, rejected the contention that the Upper Tribunal had erred in finding that individual responsibility for acts falling within Article 1F(c) can arise solely by way of implicit or explicit encouragement of such acts, in the absence of evidence that the offence has been committed or attempted. In the considering the third ground, in which it was asserted that the Upper Tribunal had erred in its consideration of whether the applicant's own activities of publishing speeches and sermons was sufficient to engage article 1F(c), Irwin LJ, with whom McCombe and Rafferty LJ agreed, summarised the guidance to be drawn from Al-Sirri in the following terms:

"83. ... There is a high threshold before Article 1F(c) is triggered. The activity must be capable of affecting international peace and security. However, the Court concluded that 'inducing terror in the civilian population or putting such extreme pressures upon a government will also have the international repercussions referred to ...'. That is clearly an issue for specific consideration by the relevant court or tribunal. Finally, the question whether such international repercussions may be established by a person plotting in one country to destabilise another is a question of fact. The question is whether the 'resulting acts have the requisite serious effect'. In short, do the relevant acts have the necessary character and the necessary gravity?

84. In considering that guidance it is worth bearing in mind that the decision in Al-Sirri pre-dated the 2014 Security Council Resolution. I have set out the relevant terms of the Resolution in paragraph 41 above. The terms of the Resolution underscore the State's obligation to 'prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts' and 'to ensure ... that refugee status is not abused by the ... facilitators of terrorist acts', in all cases acting 'in conformity with ... international refugee law'. This Resolution is very direct in its call to action.

85. It may be helpful to consider separately the quality of the acts in question, and their gravity or severity. To adopt an illustration which arose in argument, it is easy to conceive an immature 18 year old going online from his suburban bedroom, and using the most lurid terms in calling for international jihad. The nature or quality of this would, it seems to me, satisfy the requirements of Article 1F(c). It would represent active encouragement or incitement of international terror. However, it would be unlikely, without more, to be grave enough in its impact to satisfy the approach laid down in Al-Sirri. That might well require more: evidence of wide international readership, of large-scale repetition or re-tweeting, or citation by those who were moved to join an armed struggle, for example.

86. It is obviously right, for the reasons given by the Supreme Court in Al-Sirri, that careful consideration is given to the gravity or impact of any acts relied on. This is the answer to the Appellant's arguments

as to the vital importance of protection of refugees, and that such protection should not be lost for 'mere speech'. Freedom of speech is a qualified right under the United Nations Convention, as under the ECHR or the European Charter."

Decision and Discussion - NF

20. In a decision promulgated on the 26 October 2016, the FtT made the following findings of fact, which have not been the subject of challenge:

- (i) NF accepted that he had an "*extremist mindset*" [28];
- (ii) NF had in his possession all of the items that he was charged with possessing, notwithstanding that he was acquitted on counts 1 and 3 of the indictment that he faced at the Central Criminal Court [54].
- (iii) NF did not provide a credible explanation as to why he had the material stored on his computer [53];
- (iv) There was no evidence that NF had been a member of any terrorist group [54];
- (v) There was no evidence that NF had incited others to terrorism, and he had not been charged with participating in terrorism or inciting it [54];
- (vi) The mass of evidence accumulated against NF did not disclose a case to pursue these more serious charges [54];
- (vii) NF was someone with an obsessive interest in Islamic terrorism and possibly he still has that interest [54];
- (viii) NF has developed sympathies with Al Shabaab in Kenya [54];
- (ix) It is a matter of speculation whether he would have joined Al Shabaab upon return to Kenya on completion of his studies [54];
- (x) NF has been in contact with known extremists [64].

21. In concluding that NF is not excluded from the Refugee Convention pursuant to Article 1F(c), the FtT said:

[59] ... The question I have to ask in this appeal is whether the appellant's possession of all of this material at the time when he must have had the "mindset" of a terrorist or at the very least a sympathiser with these groups, when viewed with his association with "known extremists" was enough to constitute "serious reasons" for believing that the appellant's conduct was capable of constituting an act or acts contrary to the purposes of the UN. This begs the question whether the possession of this material and the appellant's "mindset" at the time he collected all of this and his association with "known extremists" and sympathy with Islamic terrorism is enough to meet this test. I have had difficulty notwithstanding the serious concern anyone would have about someone downloading and storing all of this when in contact with known extremists, in elevating the appellant's

conduct to a level that could properly be called an act or acts contrary to the purposes of the UN. The totality of the evidence before me suggests that this appellant was of a mindset that would have helped explain any act of terrorism committed by the appellant had the appellant so behaved. **The problem faced by the respondent in this appeal is that the appellant has not taken this disturbing interest further into the realms of terrorism or incitement to terrorism.** If he had then Article 1F(c) would certainly apply. ... [emphasis added]

[65] ... Notwithstanding the volume of evidence to show that the appellant possessed what Detective Sergeant Horrocks has described as a “terrorist mindset” there is a paucity of evidence to show that the appellant has actually committed any criminal offence, other than the three counts on the indictment that he was charged with. I have taken as my starting point in this analysis that I am satisfied on the balance of probabilities that the appellant had committed all three of the offences charged in the indictment at his trial, not just count 2 of the indictment that he was convicted on. But having reached that conclusion and having taken into account the disturbing evidence that the appellant has been in contact with known extremists in the United Kingdom, I find that it is not enough to meet the threshold of Article 1F(c) set out above by the Supreme Court in **Al-Sirri v SSHD**. Therefore the appellant’s appeal against the Secretary of State’s decision that he is excluded from protection of the Refugee Convention under Article 1F(c) is allowed. It is already conceded by the respondent that in these circumstances he is a refugee by reason of being at risk upon return to Kenya by reason of his imputed political opinion as an Islamist extremist.”

22. The core of the SSHD’s challenge to the FtT decision is summarised thus in the grounds of appeal:

“The respondent contends that the IJ strayed into material error when he considered that the threshold in Article 1F was not met on the basis that the appellant had not committed or incited acts of terrorism. On the basis of the findings of fact he made at paragraphs 53, 54 and 59 of the Decision, the proper application of the relevant test can only lead to one conclusion – namely that exclusion is justified.”

23. Permission was subsequently granted for the SSHD to amend his grounds so as to rely upon the Court of Appeal’s decision in Youssef. The substance of the challenge, nevertheless, remained the same.
24. At the hearing, Ms Bayoumi maintained that the FtT erred in concluding that the acts relied upon by the SSHD could not in principle engage Article 1F(c) on the basis that they were not in themselves completed or attempted terrorist acts, nor could they be shown to have led to specific completed or attempted terrorist acts by others. She further submitted that the “*huge volume*” of extremist material held by NF, NF’s extremist mindset, the type of material

collected by NF which included a manual on how to serve and participate in Jihad, the number of devices used by NF to collect/store the material, and his continued actions after having been detained at the airport, provided ample justification for NF's exclusion pursuant to Article 1F(c). We did not call on counsel for NF or KKA

25. Taking the issues in turn, we first determine whether the FtT's decision contains an error of law. The focus of the SSHD's attention in this regard is the penultimate sentence of paragraph 59 of the FtT's decision (set out above) which, it is said, runs contrary to the *ratio* of the Supreme Court's decision in Al-Sirri and the Court of Appeal's decision in Youssef. Support is drawn for this submission from the terms of paragraph 63 of the FtT's decision, in which the FtT conclude that NF's possession of the extremist material "*...does not overcome the absence of reliable evidence that [NF] has been involved in terrorism. Not even indirectly and innocently. There is no evidence that [NF] has been involved in any terrorist act.*"
26. We reject this submission. When the penultimate sentence of paragraph 59 is analysed in the context of that paragraph as a whole it is clear that it does not bear the interpretation Ms Bayoumi seeks to place on it. When read in its proper context the sentence is clearly intended to convey no more than a finding which rules out the possibility of the SSHD succeeding on the basis that NF had committed a terrorist act or incited others to do so, because the facts do not establish as much. Contrary to Ms Bayoumi's contention it does not close the door on the possibility of the SSHD demonstrating the applicability of article 1F(c) on an alternative basis.
27. This interpretation is re-enforced by the three pages of reasoning which follow paragraph 59. Subsequently the FtT lawfully directs itself on multiple occasions, including setting out the core analysis and conclusion of the Supreme court in Al-Sirri:

"There should be a high threshold defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives and the implications for international peace and security. And there should be serious reasons for considering that persons concerned bore individual responsibility for acts of that character."
28. We take the same approach to paragraph 61 of the FtT's decision. The observations therein must be read in the context of the decision as a whole. Significantly, the SSHD did not assert before the FtT that NF had completed or attempted terrorist acts, or that his acts had led to specific or attempted terrorist acts by others. If the FtT had intended to treat the existence of such matters as a pre-requisite to the application of article 1F(c) there would have been no need for it

to have undertaken such a detailed consideration to other aspects of the NF circumstances. It could simply have relied upon the absence of evidence of a commission or incitement of a terrorist act as being determinative of the appeal.

29. When the FtT's decision is read as a whole we are driven to conclude that it did not reach its conclusion on the basis *"that the threshold in Article 1F was not met on the basis that the appellant had not committed or incited acts of terrorism"* but rather it applied its mind to the relevant matters identified in Youssef and Al-Sirri and reached a conclusion on the evidence as a whole which was open to it.
30. In any event, if we are wrong in our analysis of the approach taken by the FtT we find that the asserted error in its decision is not one which is capable of affecting the outcome of the appeal.
31. On the basis of the findings of fact made by the FtT, which were largely not in dispute and have not been the subject of challenge by either party, we conclude that there was no lawful basis upon which the FtT could have found that the SSHD had made out his case under Article 1F(c).
32. The activity of NF relied upon by the SSHD must be such that it is capable of affecting international peace and security (Youssef at [83]). At the hearing we invited Ms Bayoumi to draw attention to evidence before the FtT that could support the contention that NF's actions were capable of affecting international peace and security. Unsurprisingly she accepted that there was none. There was no evidence before the FtT that there had been any outwardly-facing exposition by NF of his beliefs or mindset at any time. There was also no evidence of NF inciting or encouraging others to follow his extremist beliefs; indeed, there was no evidence that NF had even discussed his beliefs or mindset with anyone other than his wife and the Home Office employees dealing with his case.
33. Whilst NF was a hoarder of extremist material and he had extremist thoughts and beliefs, Article 1F(c) is not triggered by an individual's potential to undertake activity which attacks the basis of the international communities' existence and threatens international peace and security, but by the undertaking of an activity which has the potential to attack the basis of the international communities' existence and threatens international peace and security. On the evidence available to the FtT no rational person could conclude that NF had undertaken such an activity.
34. For these reasons we dismiss the SSHD's appeal against the FtT's decision in NF's case.

Decision and Discussion - KKA

35. In his decision letter of 2 November 2015, the SSHD concluded that KKA did not meet the requirements of Article 1A(2) of the Refugee Convention (the inclusionary provision) and, consequently, was not a refugee. The FtT concluded that KKA did meet the requirements of Article 1A(2) - a finding which is not the subject of challenge by the SSHD.
36. The SSHD did not assert in her decision letter of the 2 November 2015 that KKA should be excluded from the Refugee Convention, as was correctly observed by the FtT at [20] of its decision, nor was this issue pursued by the SSHD before the FtT. Consequently, the FtT allowed KKA's appeal on Refugee Convention grounds. No challenge is brought to the FtT's decision that KKA is entitled to the protection of the Refugee Convention.
37. During the course of its decision the FtT made findings in relation to the humanitarian protection ground, in particular concluding that it had not been established that KKA fell to be excluded from such protection pursuant to paragraph 339D of the Immigration Rules. However, nowhere in the FtT's determination can an explicit decision be found on the issue of whether the appeal should be allowed or dismissed on the humanitarian protection ground. Although the FtT observed at [33] that the appeal would be allowed "*if it could be said that the respondent was correct to refuse Refugee Convention protection on the ground that there was no risk of persecution...for a convention reason*", this is wholly unsatisfactory. The FtT was required to state definitively whether it allowed or dismissed the appeal and it failed to do so.
38. The answer though is clear. The appeal brought on humanitarian protection grounds must be dismissed as a consequence of the operation of paragraph 339C(ii) of the Immigration Rules, i.e. because KKA qualifies as a refugee.
39. Nevertheless, despite it being clear that KKA's appeal must be dismissed, insofar as it is brought on humanitarian grounds, and that any appeal to the Upper Tribunal in relation to such ground is entirely academic as a consequence of the unchallenged decision of the FtT to allow KKA's appeal on Refugee Convention grounds, the SSHD persisted with appeal. For the sake of completion, we deal with the appeal as pursued.
40. In a decision promulgated on 9 November 2016, the FtT made the following findings of fact [28]:
 - (i) KKA is not a witness of truth;

- (ii) KKA knew that NF was storing material of an extremist nature on the computer and that he had an obsessive interest in that material;
- (iii) KKA shared NF's interest in the extremist material although her interest did not go as deep as NFs;
- (iv) KKA has had contact with those persons identified in paragraph 12 above, although it does not follow that KKA was involved in any criminal activity.

41. The SSHD's challenge to the FtT's decision in KKA's appeal was brought on substantially the same basis as the challenge to the decision in NF's appeal:

"That the FtT failed to properly apply the test for exclusion, and wrongly found that there was no basis to exclude the appellant from humanitarian protection given she did not actually participate in any criminal acts. The respondent submits that the IJ strayed into material error when he considered that the threshold for exclusion was not met on the basis that the appellant had not participated in actual criminal acts. On the basis of the findings of fact he made at paragraphs 28 and 31 of the determination ..., the proper application of the relevant tests can only lead to one conclusion - namely that exclusion is justified."

42. As in NF's appeal, permission was subsequently granted for the SSHD to amend his grounds so as to rely on the Court of Appeal's decision in Youssef, but the substance of the challenge remained the same.

43. Turning to the reasons provided by the FtT, insofar as they relate to the application of the exclusionary provisions in paragraph 339D of the Rules:

"[31] I approach the question as to whether the appellant would be excluded from humanitarian protection as though she was excluded from refugee status under Article 1F(c), applying the case law and approach to the issues in the decision I made in her husband's appeal. It is unnecessary to repeat all that again here. The parties are referred to the decision I have made in the appellant's husband's appeal where I found that the respondent could not exclude the appellant's husband from exclusion under Article 1F(c). And I make the same findings in respect of this appellant whose culpability, if culpability is the correct word, is less than her husbands ... This requires an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his/her mental state and possible grounds for rejecting individual responsibility. ...there be a high threshold "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security". ...The acts that this appellant has been engaged in amount to the tacit acceptance or approval of her husband's obsessive interest in extremist materials

and the storage of that material on electronic devices which they shared. She has been in contact with known extremists: but her contact with these people without more does not establish any act to fall within these definitions. Neither does the tacit approval of her husband storing materials of this kind on electronic devices which they shared, neither does approving of and supporting Islamic terrorism without actual participation in criminal acts. It follows, to take matters shortly, that the respondent's evidence against this appellant fails to meet this high threshold also, the threshold in paragraph 339D."

44. Whilst we accept that the FtT could have expressed itself in clearer terms, we conclude that when read as a whole the FtT's reasoning cannot bear the interpretation Ms Bayoumi seeks to place upon it. The FtT lawfully directed itself to the appropriate consideration, and then considered the facts of the case in accordance with its direction.
45. In any event, for the same reasons we identified in our decision in NF's case, on the unchallenged findings of fact made by the FtT, KKA has not undertaken any activity which is capable of engaging Article 1F(c) i.e. which attacks the basis of the international communities' existence and threatens international peace and security.
46. For these reasons we dismiss the SSHD's appeal against the FtT's decision in KKA's case.

Notice of Decision

The SSHD's appeals are dismissed. The decisions of the FtT are to stand.

Signed:

Mark O'Connor

Upper Tribunal Judge O'Connor