



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-004160, UI-2022-004161  
First-tier Tribunal No: PA/54388/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 23 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE**

**Between**

**H O  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr G. Brown, Counsel instructed on behalf of the appellant.  
For the Respondent: Ms Z. Young, Senior Presenting Officer

**Heard at Phoenix House (Bradford) on 28 April 2023**  
**DECISION AND REASONS**

1. Pursuant to section 12 (2) (b) (ii) of the Tribunals, Courts and Enforcement Act 2007, this is the remaking of the decision of Judge of the First-tier Tribunal Turner promulgated on the 30 June 2022, following the decision dated 2 December 2022 of the Upper Tribunal setting aside the decision of the FtT (Judge Turner) having found a material error of law in her decision. This decision should be read alongside the decision of the Upper Tribunal promulgated on 2 December 2012.

Anonymity order:

2. The FTT Judge made an anonymity order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) upon the grounds that the appeal concerns sensitive medical evidence pertaining to the appellant's health and that he has made a protection claim. Neither party urged the Tribunal to revisit that direction. Unless

and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The background:

3. The factual background to the appeal is set out in the papers and is summarised in the decision of the FtT and also the Upper Tribunal.
4. The appellant is a citizen of Turkey. The history of the appellant is set out in the decision of the FtT, the decision letter and the evidence contained in the bundle. He applied for a Visa to the UK on 14 June 2017 which was refused on 20 June 2017. He left Turkey using his own passport on 2 June 2019 and travelled to Italy for work. He travelled to a number of places and also to the UK on 3 or 4 occasions on unknown dates. He last arrived in the UK on 4 September 2019 and made a claim for asylum.
5. The basis of his claim was that he feared return to Turkey as he feared he would be imprisoned by the authorities and suffer serious harm by members of the public due to accusations made against a member of his family who had been perceived to be involved with the organisation FETO. It was further raised on his behalf that he should be allowed to remain in the United Kingdom based on medical grounds based on his diagnosis of Hodgkin's lymphoma and based on his mental health.
6. The respondent refused his application in a decision letter dated 23 August 2021. It had been accepted on behalf of the respondent that the member of his family had been arrested and imprisoned but it was not accepted that the appellant was at risk of persecution or serious harm on return for the reasons set out in the decision letter. The respondent also did not accept that the appellant had come to the adverse attention of the authorities due to any allegations made towards his mother and FETO.
7. In relation to Article 8 of the ECHR, it was recorded that the appellant had no relevant partner or child in the UK for the purposes of appendix FM of the immigration rules and that his private life was considered under paragraph 276ADE (1) (vi) noting his age, and length of residence in the UK. It was not accepted that he would face very significant obstacles to reintegration to Turkey having spent most of his life there, retaining his language skills, that he was educated and had been employed in Turkey and also had family to support him on return.
8. As to his medical claim, the respondent took into account the medical evidence produced in the light of the CPIN Turkey: medical and healthcare provision, April 2021 and concluded that medical treatment would be available on return. It was noted that the treatment he had received for

Hodgkin's lymphoma had been successful. It was therefore not accepted that the decision to return to Turkey would breach Article 3 of the ECHR on medical grounds. The appellant's mental health was also considered at paragraphs [33-35] of the decision. It was concluded that the medical report did not indicate that he suffered with any major mental health illness requiring secondary mental health care.

The decision of the First-tier Tribunal:

9. The appellant appealed the decision, and it came before FtTJ Turner. In a decision promulgated on 30 June 2022, the FtTJ dismissed the appellant's appeal on asylum, humanitarian protection grounds and human rights grounds but purported to grant discretionary leave.
10. The FtTJ set out the issues at paragraph 44 of her decision as follows:
  - (1) whether the appellant had come to the adverse attention of the Turkish authorities;
  - (2) can the appellant access protection from the state on return and can he internally relocate?
  - (3) Does the restricted access to employment and medical services reach a threshold of very significant obstacles to reintegration in accordance with paragraph 276ADE of the Immigration Rules?
  - (4) Without prejudice to the above, whether the appellant's removal to Turkey will breach Article 3 ECHR on medical grounds, noting the evidence the appellant is immunosuppressed?
11. Dealing with the first issue identified, the FtTJ set out her findings on the facts and her assessment of the evidence between paragraphs [45 - 69] and at paragraphs [70 - 73], the FtTJ concluded that she was not satisfied that the appellant faced a real risk of persecution on return to Turkey and thus return to Turkey would not be contrary to the obligations of the United Kingdom under Article 33 of the Refugee Convention. For the same reasons, the FtTJ concluded that the appellant did not qualify for a grant of humanitarian protection as the FtTJ did not find that the appellant was a real risk of persecution on return; nor that the decision would breach his rights under Articles 2 and 3 on this basis ( see paragraph [77]). That part of the decision was not challenged in the grounds before the Upper Tribunal.
12. The FtTJ addressed the appellant's medical health in the context of Article 8 under the Rules (paragraph 276 ADE) and expressly found at paragraph [78] on her factual analysis carried out between paragraphs [74 - 77] that he would not face very significant obstacles to integration to Turkey. Within her assessment at paragraph [74], the FtTJ addressed the medical evidence in relation to the report of Dr Singh (consultant psychiatrist) but found that the appellant's mental health condition did not reach such a level that it led to very significant obstacles to integration to Turkey even if his condition did increase in severity on return and also noted the availability of healthcare in Turkey to address

any deterioration. The judge found that the appellant's mental health condition fell far short of the high threshold required by AM (Zimbabwe) for the purposes of Article 3 of the ECHR.

13. At paragraph [75], the FtTJ addressed the evidence from the Consultant dated 21 December 2021 regarding the previous diagnosis of Hodgkin's Lymphoma noting that the treatment had been successful and that the appellant now required only follow up until December 2022 to monitor his condition. The judge addressed the difference in standard of care as set out in the letter but found that the evidence indicated that the appellant has previously been treated for this condition whilst in Turkey. Paragraph [76] referred to the contents of the letter explaining that the appellant is immunosuppressed which would create a risk if the appellant were required to fly but the FtTJ found "the letter however fails to consider precautions that may be available to the appellant during any flight and does not provide any detail as to what the consequences would be of the appellant contracting Covid 19".
14. At paragraph [78] the FtTJ concluded "I must also apply these findings the appellant's claim that he would face very significant obstacles to reintegration to Turkey. I do not find that he would face such obstacles in relation to integration for the reasons set out above. He speaks Turkish, he is educated, he is aware of custom and culture in Turkey and has family support on return. He can access medical treatment if required on return." Those findings have not been challenged on behalf of the appellant.
15. At paragraph [79] the FtTJ set out conclusions on Article 3 of the ECHR and that at the present time, the judge did not find that his medical conditions met the threshold set out in AM (Zimbabwe) v SSHD [2020] UKSC 17. The judge concluded at paragraph [80] that the appellant was in remission in relation to the Hodgkin's lymphoma and given that he had access to medical treatment in Turkey in the past, there was no evidence to indicate that any such treatment cannot be accessed for the purpose of follow-up on return the judge stated "I do not accept that the decision to remove the appellant would indicate that the appellant would face a real risk of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or a significant reduction in life expectancy because of the absence of appropriate medical treatment or lack of access to such treatment."
16. At paragraphs [80-81] the FtTJ addressed the issue raised by the appellant relating to risk during the flight back to Turkey due to him being immunosuppressed and due to the ongoing Covid 19 pandemic. The judge considered whether discretionary leave should have been granted. The FtTJ concluded that "currently removal was not safe nor appropriate. The appellant has unfortunately failed to produce evidence to provide clarity on the implications of contracting Covid nor does the evidence consider what, if any, precautions can be taken. I did note however that the appellant is to be subject to review by a specialist until December

2022. Therefore, based on the medical evidence available, I find it is appropriate in this case to grant the appellant discretionary leave until he has attended his final review in December 2022". At paragraph [83], she stated "I make it clear that my conclusion is based solely on the viability of the appellant's safe return due to the present risk to him during the flight Turkey on account of the Covid pandemic in conjunction with his immunosuppression. Discretionary leave is unlikely to be appropriate once evidence is available to demonstrate that these risks are no longer present or can be addressed or mitigated to a reasonable level."

17. The FtTJ dismissed his appeal on all grounds (asylum, humanitarian protection, human rights Articles 2, 3, and 8 of the ECHR) but purported to grant discretionary leave.

The cross appeals brought by each party:

18. The Secretary of State ( "the respondent" before the FtT ) sought permission to appeal on 4 July 2022. It was submitted in the grounds that the FtTJ had materially erred in law by disposing of the appellant's appeal on an impermissible basis not provided for by Section 86 of the Nationality, Immigration and Asylum Act 2002 (as amended). It was noted that the judge had dismissed the appellant's appeal on both protection and human rights grounds, which were the only permissible grounds of appeal under Section 82 of the 2002 Act that applied and thus the FtTJ should have dismissed the appellant's appeal as the appellant failed on all permissible grounds. However the judge had erroneously allowed the appeal on the basis that discretionary leave should be granted to the appellant. That was not a disposable power within the FtTJ's remit to employ and that it is only with the power of the Secretary of State to grant discretionary leave to the appellant.
19. The appellant also sought permission to appeal on 12<sup>th</sup> of July 2022. Ground 1 was entitled "unlawful disposal of the appeal". The grounds set out that it was common ground between the parties that the appellant suffered from Hodgkin's lymphoma and the appellant argued this had made him clinically extremely vulnerable and immunocompromised. It had been argued that at the point of enforced return he would face an unacceptable high risk of contracting covid- 19 which for him could be very serious and potentially life-threatening.
20. The grounds referred to paragraphs 81 - 83 of the FtTJ's decision where it was stated that the judge found that the appellant faced an unacceptable risk of contracting Covid 19 at the point of enforced return by air. As a result the judge purported to dismiss the appellant's appeal but to grant him discretionary leave.
21. The grounds go on to state that was no issue was taken with those findings, but the Tribunal was not empowered to dispose of the appeal in this way as the only option to the Tribunal is either to allow or dismiss the

appeal. However on the basis of the findings between paragraphs 81 – 83, the Tribunal ought to have allowed the appeal on human rights grounds.

22. Under the heading “disposal,” the appellant sought permission to appeal to the Upper Tribunal and in the alternative, it was stated that as there was no challenge to the substance of the determination, the First-tier Tribunal may wish to simply amend paragraph 86 of the determination under its review powers at Tribunal Procedure Rule 35.
23. Permission to appeal was granted on both applications by FtTJ Landes on 28 July 2022. For the reasons given in her decision Judge Landes declined to exercise her review powers.
24. Following the grant of permission, the respondent filed a rule 24 response on 23 August 2022 responding to the grounds of appeal filed on behalf of the appellant and a challenge to the decision of the FtTJ.
25. Thus the matter was listed on the cross appeals of each party. Mr Greer, who represented the appellant before the FtT appeared on behalf of the appellant and Mr Diwnycz appeared on behalf of the respondent.
26. Mr Greer, who was then Counsel before the Upper Tribunal at the hearing in November 2022 raised a preliminary legal argument. This was addressed in the decision of the Upper Tribunal between paragraphs 20-39. It is unnecessary to set this out and the conclusions reached can be viewed in the written decision annexed to this decision set out at “Annex 1”.
27. Having determined the preliminary legal issue and the ambit of the cross appeals brought by both parties, the decision on error of law was set out at between paragraphs 40-66. Those paragraphs are replicated in “Annex 2” of this decision.
28. In light of those conclusions reached, the issue remained as to how the decision should be remade. This set out at paragraphs 66-70 as follows:

“66. I am therefore satisfied that the decision of the FtTJ involved the making of an error on a point of law that was material to the outcome. The question remains how to proceed. The written submissions on behalf of the respondent requested that a decision be substituted to dismiss the appeal on human right grounds (Article 3 and 8). Mr Greer submitted that if the respondent were correct in the written submissions and the findings at paragraphs [81 – 82] were to be set aside, it would be for the Upper Tribunal to determine the appeal afresh on human rights grounds (Articles 3 and 8 medical grounds) and that to bring finality to the litigation there should be a further hearing to assess the status of the evidence after what was considered by the previous judge and the medical experts to be the follow-up in December 2022 and that this would be the more proportionate response.

67. Mr Diwnycz also agreed that this would be a suitable way to proceed if the Upper Tribunal found a material error of law, notwithstanding what had been set out in the respondent's written submissions.
68. Having given careful consideration to this issue I accept Mr Greer submissions in this respect. On the face of the decision the appellant's appeal appeared to be allowed by the FtTJ on an erroneous basis and without jurisdiction. The FtTJ did however identify as a relevant and important date the appellant's medical assessment in December 2022 and that leave, if it was appropriate, was to be until he attended the review in December 2022. On the present chronology that date has been reached. The decision should therefore be remade after the appellant has been given an opportunity to provide further medical evidence on this issue as was contemplated by the FtTJ in her decision. The current evidence in respect of the appellant is dated September 2022 and thus does not set out the conclusions of the assessment that is to take place in December 2022 which both advocates accept is an important assessment. I recognise that there has been delay notably the time taken by the respondent to reach a decision on the appellant's claim and the ensuing impact that this has had on the appellant but in terms of fairness to the appellant he ought to be given the opportunity to provide the further evidence so that it can be assessed in accordance with the correct legal framework applicable. It should not require a lengthy adjournment, but time should be given to the treating clinician to provide an updated medical report following the December 2022 assessment and for the parties to consider the same. In order to assist the parties the guidance given in the decision of AM (Zimbabwe) should be followed and there should be evidence of the treating clinician as to the impact and consequences for the appellant's medical health. The issue of vaccination has been raised by the respondent and is therefore not an immaterial matter and should also be addressed.
69. The findings of fact made by the FtTJ have not been challenged in the appellant's grounds or during submissions and therefore shall be preserved findings. They are as follows;
- (1) the findings made on the asylum/protection claim at paragraphs 45 - 73, and paragraph 77;
  - (2) paragraph 74 and the finding made as to mental health and being able to access healthcare in Turkey for Hodgkin's lymphoma.
  - (3) Paragraph 78 and very significant obstacles to integration.
70. For those reasons, the decision of the FtTJ involved the making of a material error of law and whilst dismissing the appeal on human rights grounds,(Articles 3, and 8) that part of the decision shall be set aside to be remade by the Upper Tribunal. For the avoidance of doubt the decision dismissing the asylum appeal and humanitarian protection appeal at paragraphs 84 and 85 shall stand. Paragraph 87 granting discretionary leave is set aside as the parties agree. "

### The resumed hearing:

29. Directions for the resumed hearing were sent to the parties by the Tribunal (according to the CE file) on 18 January 2023, although they were originally sent with the decision of error of law dated 2 December 2022.

30. There is no consolidated bundle of documents, but a summary of the documents relied upon by the appellant as confirmed by the parties are as follows:
1. The original bundle that was before the FTT.
  2. Article entitled “improved survival of lymphoma patients with Covid-19 in the modern treatment and vaccination era” published 31 August 2022, taken from [www.mdpi.com](http://www.mdpi.com).
  3. Letter from consultant oncologist dated 6 September 2022;
  4. further letter from consultant oncologist dated 30 of January 2023;
  5. letter from consultant haematologist to GP dated 3 April 2023,
  6. letter from consultant oncologist dated 24 April 2023.
  7. Skeleton argument dated 22 April 2023.
31. The respondent relied upon the material that had been filed before the First-tier Tribunal and in addition provided a written skeleton argument dated 27 April 2023.
32. At the hearing, the appellant was represented by Mr Brown of Counsel and the respondent by Ms Young, Senior Presenting Officer. The appellant attended the hearing alongside the court interpreter who had been requested by the appellant’s solicitors. However the appellant stated that he did not need an interpreter for the hearing. Nonetheless the interpreter remained during the hearing to provide any help or assistance that the appellant might require.
33. It had previously been confirmed that no special measures were necessary for the hearing, and no application or submissions were made that the position had changed. Whilst no issues were raised with regard to the Joint Presidential Guidance Note the appellant was addressed with concern to ensure that he understood and was comfortable with the proceedings.
34. Mr Brown confirmed that no further witness statement had been filed and there was no intention to call the appellant to give oral evidence. However he stated that the appellant had handed to him a document from the Huffington Post dated 2013 which the appellant had referred to as a “leading case” and that the appellant wished to rely upon it. Mr Brown stated that the appellant would like to explain the significance of that document and following this the parties would then provide their respective submissions. There was no objection to this on behalf of the respondent nor on the part of the Tribunal.
35. In his oral evidence, the appellant stated that he had obtained the document from the Internet a couple of days ago and that it was a document dated 2013 from the Huffington Post that related to a report of an appeal on medical grounds. Mr Brown asked him to explain why it was important for his case. The appellant stated that the case was about a kidney transplant and that following this the lady concerned had a low immune system. He said that he had read her statement as it was on the



Internet, and it stated that she had come to the UK in 2004 as a student and had a health condition and transplant and that they tried to force her to leave the country but later she had a transplant. He stated that she had the same immunity issues as he had. He further stated that he had seen the letters from the doctors concerned and that wherever he went, even to the Tribunal building that doing so would give him an infection.

36. No further questions were asked of the appellant by either advocate and they proceeded to provide their submissions on the relevant issues which can be summarised as follows.

The submissions on behalf of the appellant:

37. Mr Brown properly highlighted that all present at the hearing would have every empathy for the appellant in the light of his medical history and that the submissions made on behalf of the appellant were succinctly set out in the skeleton argument dated 22 April 2023. He submitted that the parameters of the hearing -related to whether the AM (Zimbabwe) risk arises on the facts of this case due to the appellant's immunosuppression and that based on the medical evidence presented, the threshold identified in AM (Zimbabwe) is met.
38. Mr Brown referred to the skeleton argument and the reference made to the medical evidence dated 6 September 2022 from the consultant oncologist. The letter noted that it was her expectation that the appellant would remain immunosuppressed indefinitely. The letter did say that there was no specific contraindication to flying however clearly air travel at the current time carried with it an increased risk of contracting Covid 19 which the appellant would remain at high risk of adverse consequences as a result of his haematological malignancy and recent autograft. The letter went on to state that there were limited means to mitigate the risk other than standard advice around hygiene and mask wearing.
39. Mr Brown submitted that there were further letters from the oncologist dated 26 January 2023 (typed 30 January 2023) and 30<sup>th</sup> of March 2023. Dealing with the first letter the consultant confirmed that "by and large" the appellant's situation had unchanged from the September 2022 letter, that his Hodgkin's lymphoma remains in remission and that he will continue to have regular clinical reviews. Regular follow-up can maintain his health and quality-of-life should any problems be identified. The letter also set out that the appellant would remain immunosuppressed indefinitely and consequently the risk of severe infection resulting from Covid 19 remains. Mr Brown noted that the letter also stated that it was extremely difficult to quantify the extent to which the appellant would remain at risk of severe Covid 19 and that sensible precautions could be used in environments where the appellant has an increased risk of catching Covid 19 such as on flights and this could include facemasks.

40. Mr Brown submitted that he was not seeking to reopen findings of fact made as to availability of medical treatment in Turkey, but the letter referred to ongoing follow-ups and expressed uncertainty as to the treatment available. He submitted that without a follow-up there was a risk of significant deterioration in the appellant's outlook and quality-of-life.
41. By reference to the later letter of 30 March 2023 from the consultant haematologist that they plan to routinely review the appellant again in 3 months' time.
42. The skeleton argument at paragraph 6 set out that the medical evidence and consider the precautions that could be taken on a flight and the impact on vaccinations at the risk of severe infection resulting from Covid 19 remained for the appellant.
43. Mr Brown referred to paragraph 7 of the skeleton argument that related to the article from the journal.
44. In summary, the skeleton argument and the submissions made by Mr Brown acknowledged the treatment for Hodgkin's lymphoma is available in Turkey but the risk to the appellant's health arises primarily during travel from the UK to Turkey when his risk of contracting Covid increases.
45. Thus Mr Brown submitted that the appellant had provided evidence "capable of demonstrating that there are substantial grounds for believing" that, if removed, he will be exposed to a real risk of subjection to treatment contrary to Article 3 as set out in the first limb of the test in AM (Zimbabwe) and as the appellant is immunosuppressed removal would expose him to an increased risk of catching Covid and the severe infection that could cause, and that he would need medical follow-up.
46. Mr Brown further submitted that what has not been evidenced were any steps the Secretary of State might take to mitigate any significant risk which might be raised and that without being told of those steps the appellant should not face removal as it would lead to a rapid deterioration in his health. He therefore invited the Tribunal to allow the appeal on Article 3 grounds.

The submissions on behalf of the respondent:

47. Ms Young in behalf of the respondent relied upon her skeleton argument dated 27 April 2023.
48. It is submitted that it is for the appellant to adduce evidence capable of satisfying the test set out in AM (Zimbabwe) and that upon review of the medical evidence submitted on behalf of the appellant, the Secretary of State would submit that the medical evidence is not capable of meeting the test within AM (Zimbabwe).

49. It is submitted that in order for there to be a breach of Article 3, the test to be satisfied is as follows:

1. There are **substantial grounds** for believing that:
  - a. The individual would face a **real risk** of being exposed to:
    - i. a **serious, rapid and irreversible decline** in their state of health **resulting in intense suffering; or**
    - ii. a **significant reduction in life expectancy**.  
*The Supreme Court noted that ‘significant’ in this context means **substantial**. Lord Wilson added that what amounts to a substantial reduction in life expectancy will depend on the circumstances of the case, comparing a 74 year old and a 24 year old who both have a life expectancy normal for their respective ages – if their life expectancies were to be reduced to just two years it might well be significant for the 24 year old but not the 74 year old; and*
  - b. The serious, rapid and irreversible decline in health leading to intense suffering or the substantial reduction in life expectancy must be **as a result of**:
    - i. the **absence of appropriate treatment** in the **receiving** country; or
    - ii. the **lack of access to such treatment**.

50. As set out in the skeleton argument at paragraph 8, it is accepted by the appellant that there is a preserved finding that treatment for Hodgkin’s lymphoma is available in Turkey. The appellant’s case is focused upon the alleged risk to the appellant during travel from the UK to Turkey. It is submitted that the letter dated 30 March 2023 from the haematologist, does not refer to the issue of travel and whether the appellant would be at risk from COVID-19.

51. It is further submitted that the letter from the appellant’s consultant oncologist dated 30 January 2023, confirms that HO continues to undergo his COVID-19 vaccine and states it is difficult to quantify the extent to which HO will remain at risk of severe COVID-19. Dr K Spencer goes on further to state: *“sensible precautions should be used in environments where HO has an increased risk of catching COVID-19 such as on flights and this could include face masks.”* Thus it is submitted the letter does not address what the consequences would be if the appellant contracted COVID-19. In her oral submissions Ms Young submitted that as a result the primary threshold is not met.

52. Furthermore, the evidence of the consultant oncologist does not state HO is unfit to fly and refers to the sensible precautions that should be used if HO was to fly. It is submitted that this evidence does not establish that HO would be at such a risk if he were to fly from the UK to Turkey in order to engage Article 3 medical grounds.

53. The Secretary of State also highlights the preserved findings at [74], [77] and [78] of the FTT determination and that the FtT found on the evidence that there was treatment available to the appellant on return to Turkey for lymphoma. Whilst the case on behalf of the appellant centred around the risk to the appellant while flying, the medical evidence did not establish a prima facie case therefore the appeal should be dismissed. When asked what the position would be if a prima facie case were met, she submitted that she could not speculate about what precautions could be taken but that it would be ensured that the appellant would be in an appropriately safe environment.

The submissions in reply:

54. Mr Brown by way of reply submitted that it would be the uncertainty of the environment and that whilst it is said that the respondent would provide a safe environment, there is no undertaking to say that that will happen to guard against any risk. By way of example it would have been simple to say that the appellant will be flying in a well-ventilated plane, but the Secretary of State has not provided any evidence about this and thus there remains an uncertainty and that the appellant contract Covid-19 and that this is the issue that remains.

55. By reference to the article that the appellant had provided at the outset of the proceedings Mr Brown observed that the decision concerned a different set of circumstances and different law that was applicable at the time.

56. At the conclusion of the submissions of the advocates, the appellant indicated that he wanted to say something. He reminded the Tribunal of his medical history that he had cancer and had had operations and that this appeal was about human rights and that he was worried about catching a virus as he continues to be immunosuppressed.

57. At the conclusion of the hearing I indicated to the appellant and to the advocates present that I would reserve my decision by way of a written decision. I give my thanks to the assistance received from both advocates in determining this appeal and pay regard to the way in which they have put forward each of their respective positions.

58. The appeal concerns the issue of medical issues pertaining to the appellant and they have been advanced by reference to Article 3 of the ECHR and no separate claim or argument has been advanced under Article 8 at the hearing. I have given careful consideration to the evidence placed before the Tribunal and I shall refer to the evidence and submissions so far as necessary to explain my findings and reasons.

The legal framework:

59. Article 3 ECHR provides:  
“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
60. I observe that Article 3 concerns an absolute right and that a minimum level of severity must be shown to meet the high threshold established by the Article. The burden of proof is on the person challenging removal to show substantial grounds that they face a real risk of treatment breaching Article 3. Whether the minimum level of severity is met by an appellant is relative and depends on all the circumstances of the case.
61. Both advocates have cited the decision of the Supreme Court in AM(Zimbabwe) (appellant) v SSHD (respondent) [2020]UKSC 17. I have not been taken to any specific parts of that decision during the legal submissions made by the advocates, but it is a well-known decision and forms the basis of the decision reached.
62. It is not necessary to set out in detail the factual circumstances of that appeal. The appellant in AM (Zimbabwe) was settled in the UK when a deportation order was made against him because of very serious criminal offences. He was also HIV+ and claimed that he would be unable to access the appropriate antiretroviral therapy in Zimbabwe which is causing to become prey to opportunistic infections and which, if untreated, would lead to death.
63. In their decision, the Supreme Court analysed a number of judgements and also the decision of the Grand Chamber in Paposhvili v Belgium [2017] Imm AR 867, which gave an expanded interpretation of Article 3 of the ECHR in the context of medical treatment cases and concluded that the pronouncement about the procedural requirements of Article 3 of the ECHR were not merely clarification and that the Grand Chamber had modified the early approach set out in N v United Kingdom (2008) 47 EHRR.
64. In the decision of the Grand Chamber in Paposhvili at paragraph 183, the European Court of Human Rights found that an issue under Article 3 of the ECHR may arise in..” Situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.”

65. In AM (Zimbabwe), the Supreme Court explained the test to be applied in health cases under Art 3 based upon the Strasburg decision in Paposhvili at [183] of the latter's decision. It is clear that there are, two limbs to the test - one based upon a significant reduction in life expectancy and the other on a "serious, rapid and irreversible" decline in health resulting in "intense suffering". The UT helpful summarised the position on remittal of the appeal from the Supreme Court in AM (Art 3; health case) Zimbabwe [\[2022\] UKUT 131 \(IAC\)](#) (Foster J and Plimmer and Smith UTJs) as set out in the judicial headnote 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.

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

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

2. The first question is relatively straightforward issue and will generally require clear and cogent medical evidence from treating physicians in the UK.

3. The second question is multi-layered. In relation to (2)[ii][a] above, it is insufficient for P to merely establish that his or her condition will worsen upon removal or that there would be serious and detrimental effects. What is required is "intense suffering". The nature and extent of the evidence that is necessary will depend on the particular facts of the case. Generally speaking, whilst medical experts based in the UK may be able to assist in this assessment, many cases are likely to turn on the availability of and access to treatment in the receiving state. Such evidence is more likely to be found 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 the receiving state. 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.

4. 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 become of relevance - see [135] of Savran."

66. It is therefore necessary to consider the relevant medical evidence that has been provided.

A summary of the medical evidence:

67. The evidence relating to Hodgkin's lymphoma is contained in a number of reports and can be summarised as follows. The appellant provided a summary of his previous medical health condition to his doctors in the UK and that he had been diagnosed with Hodgkin's lymphoma in 2008 and that he was treated with chemotherapy and radiotherapy when in Turkey. The appellant had a relapse in 2010. He stated that he had noted some problems in respect of the right side of his neck for 4 years, but which the appellant reported had been thoroughly investigated in Turkey. He took a "wait and watch approach" in respect of the lymph nodes ( see report p30AB).
68. In 2013 the appellant went to Malta to study and by the end of 2014 he went to university in Poland. Thereafter in 2017 he went to Italy to work and then came to the UK in 2019 and made a claim for asylum.
69. In or about August 2020, the appellant went to his general practitioner and reported that he had noticed significant enlargement of his lymph nodes and the general practitioner referred him to the Department of haematology (see letter dated 3/9/20 p30AB).
70. In December 2020, the appellant was treated by the lymphoma team for a relapsed Hodgkin's lymphoma with BEAM autologous stem cell and was undergoing follow-up with the lymphoma team ( see p32AB).
71. In August 2021 he was described as experiencing a number of symptoms which were being investigated but it is stated that none of the symptoms were currently related to relapsed lymphoma (see letter dated 3/8/2021). The main problems were weight loss and anxiety symptoms, and the contributing factor was the protracted decision-making process which impacted on his physical and mental health.
72. By December 2021, the treating clinician reported that the appellant had no evidence of active Hodgkin's lymphoma and remained in remission. The letter records that the autologous stem cell transplant was an intensive treatment resulting in significant and prolonged immunosuppression, and which required regular follow-up for a two-year period from the point of delivery. The two-year period was to continue until December 2022. It was stated that beyond this point the appellant would remain under lifelong follow-up for his autologous stem cell transplant. The letter stated that the appellant continued to be immunosuppressed and on this basis the clinician would strongly advise against flying given the risks associated with this for covid 19. The letter refers to an enquiry made by the appellant's solicitors about the monitoring of relapsed Hodgkin's lymphoma, and it was said that the standard of care available differs markedly, but it was unclear if the available follow-up would be sufficient. As such follow-up will be better delivered in x in the UK ( see letter p38AB dated 16/12/21).

73. In a letter dated 6 September 2022, it is recorded that when last seen, the appellant was doing well and had no evidence of recurrence of his previously relapsed Hodgkin lymphoma. His recovery from the transplant had been in line with their expectations and it was stated that he would continue with intensive follow up until December 2022 and thereafter remain under regular clinical review. Their expectation was that the appellant would remain immunosuppressed indefinitely. The letter further stated that there was “no specific contraindication to flying however air travel at the current time carries with it an increased risk of contracting covid -19 which (the appellant) will remain at high risk of adverse consequences as a result of his haematological malignancy and recent autograft. There are limited means to mitigate this risk other than standard advice about hygiene and mask wearing.”
74. A letter dated 26 January 2023 (typed 30 January 2023) from the consultant oncologist confirmed that the appellant’s position was unchanged from the previous letter provided in September 2022. It confirmed the appellant’s Hodgkin’s lymphoma remained in remission and that the appellant would continue to have regular clinical reviews on a 4 monthly basis which would reduce from 2 years down to 6 monthly. The appellant was described as “remains well and clinically stable currently.” The purpose of the clinical reviews were to provide a means to assess evidence of his lymphoma becoming more active again and would improve the chance of treating the appellant. It would also monitor for later effects including those affecting the bone marrow following his autograft.
75. The letter went on to state that the appellant would remain immunosuppressed indefinitely and the risk of severe infection resulting from Covid 19 remained. Reference is made to him continuing to undergo his Covid 19 vaccine which will undoubtedly help his Covid 19 risk, but it was extremely difficult to quantify the extent to which the appellant would remain at risk of severe Covid 19 and that sensible precautions should be used in environments where the appellant has increased risk of catching Covid 19 such as on flights and this could include facemasks. It is further stated that it is extremely difficult to be confident of the consequences for his health were the appellant to leave the UK and he required regular ongoing follow-up, and it was unclear that this would be available elsewhere.
76. The letter was obtained from a consultant haematologist dated 30 March 2023 (typed 3 April 2023). It set out the telephone review that had been undertaken at the haematology clinic on 30 March 2023. Reference is made to a concern raised by the appellant about some lymph nodes in his left axilla that he thought were getting larger. It is recorded that “a recent ultrasound scan of these have shown that there are 2 morphologically normal reactive lymph nodes at this site and no concern the cancer recurrence”. It records that his immunoglobulins remain low after 3 previous rounds of treatment and his full blood count parameters



are entirely normal. It records that there are no concerns at present and he will be reviewed again in 3 months' time.

77. The last letter from the clinical oncologist is dated 20 April 2023 (typed 24<sup>th</sup> of April 2023). It referred to the ultrasound scan that was carried out as set out in the letter from the haematologist as summarised above. The oncologist confirmed that the ultrasound did not show any evidence of recurrence of Hodgkin lymphoma. Confirmation was given that blood tests demonstrate that he is persistently immunosuppressed and therefore the risks associated with travel remained increased. The letter confirmed there were no further changes letter.

#### Discussion:

78. The applicable legal test as summarised earlier in this decision and has confirmed recently by the Upper Tribunal in its decision of AM (Zimbabwe).
79. As stated above, the first question identified is a “relatively straightforward issue” and will require clear and cogent medical evidence from the treating physicians in the UK. Having considered the medical evidence including that which was previously before the FtTJ, it demonstrates that the appellant was diagnosed with Hodgkin’s lymphoma when living in Turkey in 2008. It also demonstrates that he was able to access the required treatment by way of chemotherapy and radiotherapy. The appellant underwent a relapse in 2010 however the appellant’s evidence to the clinicians was that it was thoroughly investigated in Turkey. Following this the appellant travelled outside of Turkey to live in a number of different countries both for the purposes of study and for employment before arriving in the UK in 2019.
80. In or about August 2020, and after 10 years in remission, the appellant reported an enlargement of the lymph nodes and was subsequently treated for a relapsed Hodgkin’s lymphoma with stem cell treatment. Since the stem cell treatment he has been in remission and is cancer free. This is accepted in the appellant’s skeleton argument (see paragraph 1). Nonetheless the evidence demonstrates that the appellant remains immunosuppressed indefinitely as a result of his previous treatment.
81. As to the ongoing treatment, it is identified in the documents that the appellant has not been prescribed any medication for Hodgkin’s Lymphoma and will remain subject to review on a 4 monthly basis which will reduce to 6 monthly. The purpose of the review is to assess evidence of any lymphoma becoming active.

82. Neither advocate in their respective submissions addressed the first question outlined in the UT decision of AM (Zimbabwe). The evidence demonstrates that the appellant has no current Hodgkin's lymphoma and is in remission. However, in light of the medical evidence as summarised above, I proceed on the basis that appellant has established that he has a serious condition and that whilst he is in remission and there is no evidence of Hodgkin's lymphoma, the appellant remains immunosuppressed indefinitely.
83. Turning to the next question on whether the evidence adduced is "capable of demonstrating" that "substantial grounds have been shown for believing" that as "a seriously ill person", he or she "would face a real risk":
- [i] "on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,
  - [ii] of being exposed.
    - [a] to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or
    - [b] to a significant reduction in life expectancy"?
84. As identified above this is a multi-layered question. The guidance given makes it plain that firstly it is not sufficient for an appellant to show that he or she is seriously ill but have to show "by clear and cogent medical evidence and treating physicians in the UK" that, due to lack of access to treatment in the country of return, he or she will face consequences which will either lead to the high threshold of decline in health "resulting in intense suffering" or will lead to "a significant reduction in life expectancy." It is also clear from the guidance that it is not sufficient for an appellant to show that his or her condition will worsen and that the evidence needs to show the deterioration reaches a high threshold implicit in Article 3 of the ECHR.
85. As to the issue of availability of medical treatment in Turkey, this was an issue properly explored during the hearing before the FtTJ. The skeleton argument ("ASA") submitted on behalf of the appellant for that hearing accepted that there was medical treatment available in Turkey (see paragraph 21 of the ASA). This was consistent with the evidence from the respondent set out in the decision letter between paragraphs 78 - 79 which demonstrated the availability and accessibility of treatment for Hodgkin's lymphoma and that there was an advanced system for the treatment of cancer in Turkey.
86. The evidential position taken by the respondent was also consistent with the evidence of the appellant's country expert (see report dated 12/1/2022) and expressly the information set out between paragraphs 36

- 37 (p 47AB) which confirmed that treatment for Hodgkin's lymphoma would be available in Turkey as was treatment for relapsed Hodgkin's lymphoma and any ongoing treatment needed following a stem cell transplant including treatment for any complications that may arise. The report also identified a large number of hospitals and clinics in Turkey which offered such treatments although, though not invariably, concentrated in large urban areas such as Istanbul, and Ankara and Izmir.

87. At page 37, the report referred to doctors who specialised in cancer treatment reporting that in addition to patients in Turkey, they also had patients who travelled to Turkey from other hospitals for cancer treatment.
88. The issue set out in the ASA at paragraph 22 was not the availability but the accessibility of the treatment in terms of cost. The FtTJ resolved the issue of availability and accessibility of treatment in her decision at paragraphs 74 - 78 and also by reference to any necessary treatment of any mental health problems. The FtTJ found that on the appellant's own evidence, he had been able to access medical treatment in Turkey previously using his mother's health insurance and that his evidence was that his mother was "getting her rights back" following her release which indicated her rights to access medical care (see paragraph 74 of the FtTJ's decision). In the alternative, the FtTJ found that if this is not the case, the appellant had other family relatives in Turkey (his aunt) who may be able to assist and that the appellant, based on his past history, had a reasonable prospect of securing employment for himself which would also allow him to secure healthcare or the ability to pay privately. The evidence in the expert report referred to state hospitals as well as private facilities.
89. Thus the FtTJ considered that the appellant could access medical treatment in Turkey (see factual findings made at paragraph 74, 75 and 78). The grounds before the Upper Tribunal did not challenge those findings of fact made on the evidence and they remain preserved findings.
90. The FtTJ also consider the issues of treatment for reviews or for follow-up treatment in light of his medical condition being in remission and addressed this at paragraph 80 of her decision. The FtTJ found that the appellant had access to medical treatment in the past and that there was no evidence to indicate that such treatment could not be accessed for the purposes of follow-up or review on return.
91. Mr Brown in his submissions referred to the medical evidence (letter dated 16/12/21) and that the appellant's ongoing reviews would be better delivered in the UK than Turkey (as set out at paragraph 3 of the skeleton argument). In the most recent letter dated January 2023, the consultant oncologist stated that she did not know if follow-up would be available elsewhere. In her letters there is no reference to knowledge of treatment available outside of the UK.

92. When addressing the issue of follow up /review, the evidence has not changed since the factual findings made by the FtTJ concerning the availability and accessibility of medical treatment and the likelihood of follow-up treatment or review in Turkey. Whilst the clinicians in the UK are unclear about what would be available, the history and chronology demonstrates that the appellant has been able to access treatment previously in Turkey which included review and follow-up there. The country expert also referenced the availability of review and follow-up treatment that would be available as required. The appellant's medical records and any letters from his clinicians in the UK could be made available to their counterparts in Turkey. In this regard I note that the appellant was asked by his doctor in the UK about previous treatment in Turkey, and the appellant said that he would provide some paperwork for them. It is difficult to envisage circumstances in which a clinician in the UK would not provide a copy of medical records to another treating physician to assist in any ongoing review or follow-up which might be necessary.
93. When applying the second multi-layered test, it identifies that many cases turn on the availability and access to treatment in the receiving State and that the evidence is likely to come from clinicians directly involved in providing relevant treatment in the country concerned, that is, Turkey. I would accept that the appellant is anxious about his medical past history and that he would prefer to have the continuity of care that he has experienced in the UK. I would also accept that he is anxious about his medical health generally, but the evidence does not demonstrate that there is either a lack of availability of review or follow-up in Turkey for his condition or that it would be insufficient to ensure that he is properly monitored and looked after.
94. The real focus of the appellant's appeal is that relating to his immunosuppression and the consequent alleged risk to the appellant during travel from the UK. Mr Brown on behalf of the appellant argues that the medical evidence submitted is sufficient to demonstrate a breach of Article 3 on this basis and is meeting the necessary threshold identified in AM (Zimbabwe).
95. Having considered the medical evidence and the submissions made on behalf the appellant, it has not been demonstrated that the evidence meets the threshold necessary for a breach of Article 3 as set out in the guidance as summarised above. There is no dispute that the appellant remains immunosuppressed due to his stem cell transplant. However whilst the letter produced in December 2021 strongly advises against flying in light of the risk of contracting Covid 19, the subsequent letter in September 2022 states that there is "no specific contraindication to flying". The most recent letter from the haematologist does not refer to any issues arising from travel at all and the most recent letter from the appellant's oncologist provides details of the "sensible precautions" that "should be used in an environment where (the appellant) has an

increased risk of catching Covid 19 such as on flights and this could include facemasks.” Whilst Mr Brown submits that the respondent has not referred to steps taken which might mitigate any risk of catching Covid 19, the evidence advanced on behalf of the appellant provides a recognition of the available methods and outlines them as “ sensible precautions”. Furthermore the medical evidence also refers to the appellant having undergone vaccination as a proper means taken to mitigate or minimise any risk of contracting Covid 19 or ensuring that any effects are not as severe.

96. I also accept the submission made by Ms Young on behalf the respondent that the medical evidence does not address what the risk would be of contracting Covid 19 or what the consequences would be or that they could not be met by the provision of medical treatment which has been shown to be available in Turkey.
97. In this context the skeleton argument at paragraph 7 refers to the article from the journal “Improved survival of Lymphoma patients with Covid -19 in the Modern Treatment and Vaccination Era” published on a website [www.mdpi.com](http://www.mdpi.com) published on 31 August 2022 and asserts that the risk will be significant. Beyond that set out in the skeleton argument I was not addressed upon the specific contents of the report.
98. I have taken into account the contents of the article but there are a number of matters that affect the weight I can attach to the article. Firstly this is not evidence that emanates from the treating clinicians, nor has it been explained by any clinician how the information in the article applies to the particular circumstances of this appellant and whether the participants in the study were in remission or not. Secondly, no explanation or evidence was led as to the nature of the journal where the article was published. Thirdly, by reference to the methodology, it appears to be based on a retrospective single centre study (see page 3) and those eligible are those who had a diagnosis of lymphoma or CLL and had developed Covid 19 infection between 1 December 2021 - 31 January 2022 during the omicron surge in the United States. The median age of the participants was said to be 66 years of age and also had other identifiable diseases present (see table 1).
99. The overall conclusion of the single study was at the 66 people in the study experienced Covid 19 differently from the general population. Those with Lymphoma are at a greater risk of complications from Covid 19 infection. However the study identified that the rates of those in the study who were at risk of Covid 19 were comparatively lower when considering pre-intervention Covid 19. This is a reference to the period prior to when vaccinations were available and the consequential monoclonal antibody and anti-viral treatment available ( see page 5). The summary states that there is limited data existing on Covid 19 outcomes in lymphoma patients since the use of Covid 19 vaccines and treatments and that the summary demonstrates rates were much lower when compared to the rates earlier in the pandemic and prior to the

introduction of the Covid 19 vaccines and treatment. Having considered the contents of the article, I do not consider that it provides any assistance in determining the issues on this appeal. As set out above it is a limited study and pays no regard to this particular appellant's circumstances or condition and thus the evidence from the appellant's clinicians is the relevant material to address. Similarly whilst the appellant has sought to rely upon a short precis from the Huffington Post dated 2013, where an appellant had been successful in an appeal on medical grounds, as Mr Brown stated the contents of the press report relates to an appeal in different factual circumstances and with different legal principles and therefore does not assist in addressing the issues of the present appeal. Each case is fact sensitive.

100. In summary there is no dispute that the medical evidence demonstrates that the appellant is immunosuppressed and will be so indefinitely and there remains a risk of contracting Covid 19 as with other infections. This is because those who are immunosuppressed have a reduced ability to fight infections and other diseases. There has been no evidence that the appellant has contracted any infection since his treatment in December 2020 and during the pandemic. Whilst the thrust of the appellant's case is the risk of contracting Covid 19 whilst flying, which is for a limited duration, the medical evidence does not state that the appellant is unfit to fly but does set out what are described as "sensible precautions" that should be used in the environments where the appellant would have an increased risk of catching Covid 19 and expressly identifies flights. The sensible precautions include the use of facemasks and being vaccinated. The appellant has demonstrably proved his ability to take sensible precautions as he has no history of catching Covid -19 even during the prolonged pandemic period. The medical evidence also does not provide any quantification of what the risk of contracting Covid 19 would be on a flight, as opposed to living in the UK, travelling on public transport, going into shops and socialising with others. Nor does it provide any consideration of what treatment would be available in the country of return to counteract this.

101. Therefore standing back and looking at the evidence holistically and applying the applicable legal test as I must, for those reasons the evidence has not been shown as capable of meeting the high threshold test identified in AM (Zimbabwe) and that the evidence has not been shown to be "capable of demonstrating that there are substantial grounds for believing" that, if removed, he would be exposed to a real risk of subjection to treatment contrary to Article 3. The Supreme Court at paragraph 32 of its decision observed that the threshold is a demanding one and the evidence of an appellant must be capable of demonstrating "substantial " grounds for believing this meets the threshold because of a "real" risk of subjection to "inhuman" treatment equating as it does with the Article 3 threshold and the burden of demonstrating that it has been met lies on the appellant. For the reasons set out above, it has not been demonstrated on the evidence available

that any risk identified due to flying would lead to consequences which would meet the Article 3 threshold. Further, it has not been shown that there are substantial grounds for believing that he would face a real risk of being exposed to either a serious, rapid or irreversible decline in his state of health resulting in intense suffering or the significant reduction in life expectancy as a result of either the absence of treatment or lack of access to such treatment based on the available evidence. The risk of flying and contracting Covid -19 is not such that it demonstrates a breach of Article 3. No separate submissions were advanced on Article 8 in the skeleton argument or at the hearing. Consequently the appeal is dismissed on human rights grounds.

102. I understand that the decision reached will be a disappointment for the appellant and he will understandably be anxious about the outcome. It will always be open to the appellant in the light of any fresh evidence or change in circumstances for a fresh claim or submissions to be made to the Secretary of State, who is under a duty to consider any such claims that are made.

**Notice of Decision:**

The decision of the FtTJ involved the making of a material error of law (but for the avoidance of doubt the decision dismissing the asylum appeal and humanitarian protection appeal at paragraphs 84 and 85 of the FtTJ were not challenged and shall stand). Paragraph 87 granting discretionary leave is set aside as the parties agreed.

The appeal is remade as follows: the appeal is dismissed on human rights grounds.

**Upper Tribunal Judge Reeds  
Upper Tribunal Judge Reeds**

2 May 2023

### ANNEX 1 : Preliminary issue

#### Preliminary issue:

- “20. Mr Greer raised a preliminary argument. In light of the procedural history set out above Mr Greer on behalf of the appellant raised a procedural issue relating to the contents of the rule 24 response. He submits that in the rule 24 response dated 23 August 2022 the Secretary of State appeared to challenge the FtTJ’s findings between paragraphs 81 – 83. He submits the reference made at paragraph 6 of the rule 24 response to the decision in SSH D v Devani [2021] EWCA Civ 612 (“Devani”) is unclear and that if the respondent mean to suggest that the decision of Devani entitled the respondent to advance new grounds of appeal by right this is misguided.
21. In a written skeleton argument he submits that whether to permit the challenge is a matter of the Tribunal’s discretion applying the decision in Devani at paragraph [36]. He submits that the matters raised in the rule 24 response disclosed no arguable error of law and permission to appeal on the points ought not to be granted.
22. In his oral submissions is admitted that the present appeal fell into a “Devani case” where the Tribunal meant to allow the appeal and the findings of the FtTJ entitled the appellant to succeed on human rights grounds. Mr Greer further submitted that if he were correct about the FtTJ’s intention, the appeal should be remade on “human rights grounds.”
23. He submitted the question whether to entertain the factual challenge remained a question of the Tribunal’s discretion and that there was no authority that the Upper Tribunal is obliged to consider these grounds. Thus he submitted it fell to the upper Tribunal’s discretion.
24. In his later oral submissions he stated that the primary appeal was that of the respondent, but it was not a case where the respondent got the exact outcome but nonetheless the respondent should have raised it in the original grounds of appeal. Therefore when considering the point of discretion the Upper Tribunal should be slowed to entertain a cross appeal not brought sooner and therefore the Upper Tribunal should not entertain the additional grounds as set out in rule 24 response.
25. Mr Diwnycz made no reply to the legal point raised and sought to rely on the rule 24 response.

#### Decision on the preliminary point:

26. The answer to the question is not entirely straightforward however the answer I think lies in the procedural chronology and by reference to the decision in Devani.
27. As set out above, both parties sought permission to appeal. The first party to appeal was the Secretary of State on 4 July 2022. The appellant also sought permission to appeal on 12 July 2022 without having seen the grounds of the respondent, but in essence agreed with what the respondent and set out in the grounds that the FtTJ had no power to dispose of the appeal by granting discretionary leave. However as the appellant took no issue with the Tribunal’s



findings at paragraph 81 – 83 reference was made to the FtT amending the decision at paragraph 86 under its review powers under rule 35.

28. Thus this was not a case where only one party appealed but both parties sought permission to appeal, and permission was granted to both parties by FtTJ Landes on 28<sup>th</sup> of July 2022.
29. When granting permission Judge Landes considered the respondent's grounds and that she was right to say that the FtTJ had no power to grant discretionary leave and therefore Judge Landes granted permission to the respondent. When considering the application for permission to appeal on behalf of the appellant Judge Landes referred to the invitation to amend the decision under rule 35 as there was no challenge to the substance of the determination but stated "I cannot say that positively". The FtTJ then went on to refer to the findings of the FtTJ and concluded that "in other words there could be a challenge the judge's conclusions on the basis that they were not adequately reasoned." Therefore the FtTJ considered it was appropriate to grant permission to appeal rather than to review under rule 35.
30. The decision in Devani can be briefly summarised. The appeal concerned a Kenyan businessman facing extradition to his own country in order to face prosecution for alleged fraud. Mr Devani sought to resist this on the ground that he would be detained in prison conditions which violated Article 3 ECHR. The Divisional Court rejected this claim on the basis of assurances provided by the Kenyan government. Mr Devani then made a protection claim to the Secretary of State, still relying on the prison conditions issue. The claim was refused. On appeal, the First-tier Tribunal purported to reject all grounds put forward, namely that the refusal was contrary to the United Kingdom's obligations under the Refugee Convention and that it breached Mr Devani's rights under the ECHR, specifically Articles 3 and 8. However, the substance of the judge's reasoning was to the effect that she in fact intended to allow the appeal on Article 3 grounds only. Believing that he could not rely on the so-called "slip rule" in order to correct this error, Mr Devani appealed to the Upper Tribunal on the basis that it should substitute that aspect of the judge's decision (or "order") relating to Article 3. The Secretary of State was unhappy with the judge's reasoning on Article 3, but neither lodged an appeal nor provided a response under rule 24. Her position was that she could not pursue an appeal as the ostensible "winner" before the First-tier Tribunal. Instead, there was an attempt to challenge the judge's reasoning at the hearing before the Upper Tribunal. The Deputy Upper Tribunal Judge declined to consider this challenge raised by the presenting officer to challenge the FtTJ's reasoning. The Secretary of State appealed to the Court of Appeal who set out the UTJ's reasoning for declining to consider the challenge based on the position of the respondent having not sought permission to appeal, had failed to provide a rule 24 response and furthermore had not served the skeleton argument.
31. At paragraph [27] the Court considers section 11 (2) of the Tribunal, Courts and Enforcement Act 2007 and interpreted the provision as intending to confer a right of appeal only against some aspect of the actual order of the FtTJ and that the phrase "any party" must be read as referring to a party who has in this sense lost.
32. Thus when considering "outcomes" the right to appeal under Section 11 (2) of the 2007 Act lies against an aspect of the "order" or the determination of the

specific ground relied on including where applicable different Articles of the ECHR ( UT's decision in Binaku ).

33. The Court of Appeal found that contrary to the UTJ's decision, there had been no failure on the part of the respondent to appeal as they were ostensibly the winning party (at paragraph [27]). As a failure to provide rule 24 response, the court found that on a purposive construction the effect of rule 24 is that in a case where a respondent wishes to rely on a ground on which they were unsuccessful below they are under an obligation to provide a response. The court also found that rule 24 applied to the situation in Devani (at [33]).
34. As to the importance of a rule 24 response having been filed before the deadline, the court considered that in the interests of fairness and in accordance with the overriding objective it was for the Secretary of State to put Mr Devani and the Tribunal on notice and in advance of the hearing that if Mr Devani succeeded in showing that the FtTJ intended to allow the appeal she would argue that the intended decision was wrong. The notice would appropriately be given by providing a rule 24 response but that it would also be acceptable for it to be put in correspondence or a skeleton argument.
35. Thus the Court of Appeal considered the UTJ was right to find that the respondent had not given proper notice of the challenge made to the FtTJ's reasoning. However the court found that the Upper Tribunal was not necessarily entitled to disregard the challenge and whether to permit the challenge, notwithstanding the failure was a matter for his discretion.
36. Ultimately the Court of Appeal reached the conclusion that the discretion was wrongly exercised for the reasons set out at paragraph 36 and concluded that the UT J was wrong not to consider the respondent's challenge to the FtTJ's findings.
37. Turning to the submissions made by Mr Greer, the procedural history in this appeal is entirely different to that of Devani; here both parties have appealed and the FtTJ granted permission identifying that the paragraphs relied on by the appellant there could be a challenge to the conclusions on the basis of the reasoning and therefore made it plain that this was an issue that required permission to be granted rather than a review of the decision. The effect of the grant and the observation made must have made it plain to the appellant's legal advisors that the reasoning may be the subject of challenge. Furthermore the respondent properly raised the issue in a rule 24 response. This was not, as Mr Greer referred to as seeking to add to the grounds of challenge, but the respondent was seeking to provide an answer in its response to the appellant's grounds that the FtTJ intended to allow the appeal. That was entirely permissible and in accordance with the decision of Devani and was the correct way in which to raise the issue in relation to the reasoning. Thus the respondent was not seeking to add or to amend the grounds but was responding to the appellant's grounds by way of rule 24 response which was an approach approved of in Devani. This is consistent with the overriding objective and fairness in setting out in advance of the hearing the position of the respondent who gave notice to the appellant.
38. Therefore the respondent was entitled to raise the issue in rule 24 response.

39. Even if I were wrong, Mr Greer submits that it is a matter of discretion (applying the decision of Devani at paragraph 36). If it is necessary to apply discretion to this issue, I would conclude that it should be properly exercised in favour of the respondent. The appellant has been on notice of the issues raised by the timely service of rule 24 response on 23 August 2022. The contents came as no surprise given the grant permission and Mr Greer has been able to set out his competing submissions in his skeleton argument and also his oral submissions. The appellant has not been at any disadvantage. It is therefore a matter that can properly be raised and thus discretion should be exercised to consider the matters raised in the Rule 24 response.”

## ANNEX 2 “ Decision on error of law”

### Discussion on error of law:

40. Dealing with the issue raised by both parties in their respective applications for permission to appeal, they are in agreement that the FtTJ erred in law by purporting to allow the appeal by granting discretionary leave to the appellant as set out in her decision at paragraph [82] and in the notice of decision at paragraph [87]. There can be no dispute that by purporting to allow the appeal by granting discretionary leave the decision of the FtTJ involve the making of an error on a point of law. The judge plainly failed to appreciate the limits of the FtTJ’s jurisdiction. As set out in the decision of Charles (human rights appeal: scope) [2018] UKUT 89 (IAC), it is the function of every appellate Tribunal or court to resolve appeals normally by allowing or dismissing them, unless directed otherwise by statute. Whilst the new statutory language is “to determine,” this encompasses the 2 basic options of either allowing or dismissing an appeal ( at [23]). This there was no jurisdiction to allow the appeal by granting discretionary leave.
41. Both advocates proceeded to give their submissions on error of law. It is not necessary to set out those submissions as I intend to address those issues in the body of the decision. The respondent did however provide a rule 24 response upon which Mr Diwnycz relied and formed the basis of his case.
42. Mr Greer provided a skeleton argument and also oral submissions. On behalf of the appellant he submitted that the error was not material on the basis of his submission that it was clear from a fair reading of the decision how and why the appellant fell within the discretionary leave policy, which was a relevant consideration. In this context he cites the decision of SF and others(guidance, post-2014 Act) [2017] UKUT 120 (IAC) (at paragraph 8 of his skeleton argument).
43. In his oral submissions Mr Greer argued that paragraph 81 was clear and that the FtTJ accepted the evidence of risk on the basis of the appellant being immunosuppressed and therefore considered that as a result the appellant should be granted discretionary leave applying the decision in SF (as cited). He further pointed to paragraph 82 of the decision and that based on the medical evidence the appellant should be granted discretionary leave until December 2022 when he will be the subject of a review by specialists as indicated in the sentence “therefore based on the medical evidence available, I find that it is appropriate in this case to grant the appellant discretionary leave until he has attended his final review in December 2022”. Thus he submitted while situation of leave was a matter for the Secretary of State it was clear that as a result of the appellant’s medical condition he should be granted discretionary leave until the results of the review in December 2022.
44. There are a number of issues arising from this submission. Firstly, the FtTJ did not give reasons or provide any analysis as to why the appellant fell within the discretionary leave policy. Nor did the FtTJ identify this in her decision. Furthermore when Mr Greer was asked to identify which part of the discretionary leave policy the FtTJ purported to apply and upon which he based the submission set out in the skeleton argument that it was a relevant consideration, he accepted that the policy had not been before the Tribunal and

had not been in evidence. Nor could he point to any part of the discretionary leave policy that would apply to the appellant's circumstances in the way referred to by the FtTJ.

45. Mr Greer's submission was that the FtTJ was plainly referring to Article 3 of the ECHR when stating that discretionary leave should be granted. In this context I would observe that generally a grant of discretionary leave could be made on matters relating to human rights grounds based on Article 8 and thus the application of "discretion". Article 3 by way of comparison is an absolute right therefore would not require an exercise of discretion in the same way.
46. I am not satisfied that Mr Greer's argument that the FtTJ's error was not material because the appellant could fall within a discretionary leave policy is made out. It has not been demonstrated on behalf of the appellant that the policy identified operated in the appellant's favour.
47. Mr Greer further submits that the FtTJ did not materially err in law as it is clear from the FtTJ's factual findings at paragraphs 81 - 82 that based on the medical evidence due to the appellant being immunosuppressed and due to the covid-19 pandemic that the FtTJ plainly meant that she allowed the appeal on human rights grounds and that the reference at paragraph 86 in the notice of decision "the human rights articles 2, 3 and 8 of the ECHR are dismissed" is erroneous. In his oral submissions he referred to the appeal and that it could have been allowed on Article 8 grounds
48. The only ground upon which the decision of the respondent can be challenged is that the decision is unlawful under Section 6 of the Human Rights Act 1998. Section 6(1) of the HRA 1988 provides that it is "unlawful for a public authority to act in a way which is incompatible with Convention rights." The task of the FtTJ in a human rights appeal is to decide whether such removal or requirement would violate any provisions of the ECHR. This would usually entail consideration of Articles 2, 3 and Article 8. From the decision of the FtTJ it is wholly unclear if, as Mr Greer submits the FtTJ intended to allow the appeal on "human rights grounds" what Article of the ECHR such a decision was based on. As set out in the written submissions of the respondent it is important to consider the other parts of the decision of the FtTJ.
49. The FtTJ addressed the appellant's medical health in the context of Article 8 under the Rules (paragraph 276 ADE) and expressly found at paragraph [78] on her factual analysis carried out between paragraphs [74 - 77] that he would not face very significant obstacles to integration to Turkey. Within her assessment at paragraph [74], the FtTJ addressed the medical evidence in relation to the report of Dr Singh (consultant psychiatrist) but found that the appellant's mental health condition did not reach such a level that it led to very significant obstacles to integration to Turkey even if his condition did increase in severity on return and also noted the availability of healthcare in Turkey to address any deterioration. The judge found that the appellant's mental health condition fell far short of the high threshold required by AM (Zimbabwe) for the purposes of Article 3 of the ECHR.
50. At paragraph [75], the FtTJ addressed the evidence from the Consultant Oncologist regarding the previous diagnosis of Hodgkin's Lymphoma noting that the treatment had been successful and that the appellant now required only follow up until December 2022 to monitor his condition. The judge addressed the difference in standard of care as set out in the letter but found that the

evidence indicated that the appellant has previously been treated for this condition whilst in Turkey. Paragraph [76] referred to the contents of the letter explaining that the appellant is immunosuppressed which would create a risk if the appellant were required to fly but noted “the letter however fails to consider precautions that may be available to the appellant during any flight and does not provide any detail as to what the consequences would be of the appellant contracting Covid 19”.

51. At paragraph [78] the FtTJ concluded “I must also apply these findings the appellant’s claim that he would face very significant obstacles to reintegration to Turkey. I do not find that he would face such obstacles in relation to integration for the reasons set out above. He speaks Turkish, he is educated, he is aware of custom and culture in Turkey and has family support on return. He can access medical treatment if required on return.” Those findings have not been challenged on behalf of the appellant.
52. If the FtTJ did intend to allow the appeal on Article 8 grounds, as submitted on behalf of the respondent a structured assessment of Article 8 would be required involving an assessment of proportionality including the public interest considerations under section 117. I observe that the skeleton argument (amended ASA) in the appellant’s bundle set out a schedule of issues. There is no reference in the schedule of issues to Article 8 and the references made in relation to the appellant’s medical health is expressed in Article 3 terms.
53. I therefore conclude that the FtTJ could not have intended to allow the appeal on Article 8 grounds and if she purported to do so, she erred in law by failing to carry out a proportionality assessment.
54. Mr Greer submits that if the FtTJ did not intend to allow the appeal on Article 8 grounds, the FtTJ must have intended to allow the appeal on Article 3 grounds based on the findings made at paragraphs [81 - 82].
55. Again it is instructive to look at the decision of the FtTJ. The judge addressed the medical evidence between paragraphs [74 - 83]. No issue is taken with the factual analysis made by the FtTJ which deals with the issue of the appellant’s mental health. The FtTJ accurately summarised the report of Dr Singh at paragraph [74] and was entitled to reach the conclusion that the appellant’s mental health condition did not reach the high threshold for a breach of Article 3, nor would it create very significant obstacles to his integration to Turkey.
56. A further finding made at paragraphs [74 - 75] and again has not been challenged is the FtTJ’s finding that the appellant would be able to access treatment in Turkey for both his mental health and also in relation to his previous diagnosis of Hodgkin’s Lymphoma. As set out in the respondent’s decision letter, medical treatment was available for the appellant in Turkey, and this was also the evidence set out in the expert report provided on behalf of the appellant at paragraph 36. The expert report noted the decision letter of 23 August 2021 and that treatment for Hodgkin’s Lymphoma was available in Turkey as was treatment for relapsed Hodgkinson’s Lymphoma and ongoing treatment needed following a stem cell transplant including treatment for complications that may arise. The expert referred to a large number of hospitals and clinics in the country offering such treatment although concentrated in large urban areas. Whilst the expert identified that they may be problems accessing treatment due to financial means, the FtTJ also addressed this aspect of the evidence at paragraph [74] by reaching a finding of fact that the

appellant's evidence was that he had previously accessed medical treatment in Turkey using his mother's health insurance and that his evidence was that she had been given her rights back following her release indicating her rights to accessing medical care. If that was not the case the judge found that the appellant had his aunt or in the alternative there was a reasonable prospect of the appellant securing employment.

57. At paragraph [75] the FtTJ found that on the medical evidence supplied the appellant's medical condition of Hodgkinson's Lymphoma had been successful based on the evidence of the Consultant Oncologist dated 21/12/21 and that the appellant was in remission. The FtTJ also rejected the contents of the letter where it referred to the different standard of care in Turkey. The FtTJ found that on the evidence the appellant had previously been treated for his condition in Turkey. That finding was entirely consistent with the letter dated 3/9/20 (page 30 AB) and the description of treatment he had in Turkey given by the appellant as also relayed to Dr Singh.
58. As to the alternative aspect of Article 3 advanced on behalf of the appellant that is based on the evidence in the letter from the Consultant that the appellant is immunosuppressed which along with the risk of contracting Covid would create a risk if required to fly from the United Kingdom. In this respect the FtTJ set out the lack of supporting evidence in the letter stating, "the letter however fails to consider the precautions that may be available to the appellant during any flight and does not provide any detail as to what the consequences would be for the appellant contracting Covid 19."
59. The FtTJ then set out a summary of the decision of AM (Zimbabwe) which appears to be taken from the appellant skeleton argument at [79]. The FtTJ concluded at [80] that the appellant was in remission in relation to Hodgkinson's Lymphoma and given his access medical treatment in Turkey in the past, there was no evidence to indicate that such treatment could not be accessed for the purpose of follow-up on return. The judge went on to state "I do not accept that the decision to remove the appellant would indicate that the appellant would face a real risk of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or a significant reduction in life expectancy because of the absence of appropriate medical treatment or lack of access to such treatment." That is the correct test applicable, and the judge found that he could not meet that threshold. The findings as to the availability and accessibility of medical treatment have not been challenged and are supported by the evidence.
60. Against that background, the FtTJ's findings or analysis at paragraphs [81 - 82] relied upon by Mr Greer are wholly contradictory, unclear and lack reasoning. As the respondent submits, the attempt to allow the appeal due to a perceived risk during flight to Turkey lacked any proper reasoning. The FtTJ had already found at paragraph [76] that the evidence of the treating clinician was lacking in its quantification of risk and also at paragraph [82] the FtTJ had expressly found that the appellant "did not fall within any of the rules or criteria for a grant of leave on any other basis." The judge also stated, "the appellant has unfortunately failed to produce evidence to provide clarity on the implications of contracting Covid nor does the evidence consider what, if any, precautions can be taken." On any reading of those paragraphs, the FtTJ plainly considered the evidence to be inadequate to satisfy the relevant test.

61. The respondent's submission that in the light of the evidence the FtTJ was in error in allowing the appeal due to a perceived risk during the flight to Turkey was in effect reversing the burden of proof. There was no assessment of the consequences of the appellant contracting Covid for someone who was in remission and in particular the FtTJ did not apply the correct test in AM (Zimbabwe) at paragraphs [81 - 82] as it is for the appellant to adduce evidence capable of demonstrating substantial grounds for believing that he or she would be exposed to a real risk of (a) declining health resulting from intense suffering or significant reduction in life expectancy. It is only if after the threshold test is met and Article 3 is applicable that the returning State's obligations listed in paragraphs [187 - 91] of the decision in Paposhvili summarised at paragraph [130] in Savran become relevant.
62. When reaching the decision as a whole, it is not tolerably clear on what basis the FtTJ purported to allow the appeal given that she dismissed the appeal on all human rights grounds and in the light of her contradictory assessment of the evidence relating to risk.
63. Whilst Mr Greer submits that if there was any error it was immaterial based on evidence now provided consisting of a letter dated 6/9/2022 and email 15/9/22 and article from a medical journal, the evidence states that there is no specific contradiction to flying. However it also states that air travel at the current time carries with it an "increased risk of contracting Covid 19 and the appellant will remain at high risk of adverse consequences from as a result of his haematological malignancy and recent autograft." The letter, even taken with the email of the 15<sup>th</sup>/9/22 which states that the adverse consequences are "hospital, long Covid or ultimately risk of death", does not address the test set out in AM (Zimbabwe) as set out above with any clarity.
64. Mr Greer sought to rely on an article relating to a recent study entitled "Improved survival of lymphoma patients with Covid- 19 in the modern treatment and vaccination era". However, the article does not set out the point he seeks to make, and it was unclear from that study whether it was based on patients who are in remission or not.
65. In conclusion it is simply not possible to assess upon what basis the FtTJ purported to allow the appeal on the basis of discretionary leave yet dismissing the appeal on human rights grounds 2, 3 and 8 and in light of the contradictory nature of the findings made as to the criticisms of the evidence advanced on behalf of the appellant. It is therefore not as Mr Greer submits, tolerably clear if she meant to allow the appeal on Article 3 grounds as he submitted.
66. I am therefore satisfied that the decision of the FtTJ involved the making of an error on a point of law that was material to the outcome. The question remains how to proceed. The written submissions on behalf of the respondent requested that a decision be substituted to dismiss the appeal on human right grounds (Article 3 and 8). Mr Greer submitted that if the respondent were correct in the written submissions and the findings at paragraphs [81 - 82] were to be set aside, it would be for the Upper Tribunal to determine the appeal afresh on human rights grounds (Articles 3 and 8 medical grounds) and that to bring finality to the litigation there should be a further hearing to assess the status of the evidence after what was considered by the previous judge and the medical experts to be the follow-up in December 2022 and that this would be the more proportionate response.



67. Mr Diwnycz also agreed that this would be a suitable way to proceed if the Upper Tribunal found a material error of law, notwithstanding what had been set out in the respondent's written submissions.
68. Having given careful consideration to this issue I accept Mr Greer submissions in this respect. On the face of the decision the appellant's appeal appeared to be allowed by the FtTJ on an erroneous basis and without jurisdiction. The FtTJ did however identify as a relevant and important date the appellant's medical assessment in December 2022 and that leave, if it was appropriate, was to be until he attended the review in December 2022. On the present chronology that date has been reached. The decision should therefore be remade after the appellant has been given an opportunity to provide further medical evidence on this issue as was contemplated by the FtTJ in her decision. The current evidence in respect of the appellant is dated September 2022 and thus does not set out the conclusions of the assessment that is to take place in December 2022 which both advocates accept is an important assessment. I recognise that there has been delay notably the time taken by the respondent to reach a decision on the appellant's claim and the ensuing impact that this has had on the appellant but in terms of fairness to the appellant he ought to be given the opportunity to provide the further evidence so that it can be assessed in accordance with the correct legal framework applicable. It should not require a lengthy adjournment, but time should be given to the treating clinician to provide an updated medical report following the December 2022 assessment and for the parties to consider the same. In order to assist the parties the guidance given in the decision of AM (Zimbabwe) should be followed and there should be evidence of the treating clinician as to the impact and consequences for the appellant's medical health. The issue of vaccination has been raised by the respondent and is therefore not an immaterial matter and should also be addressed.
69. The findings of fact made by the FtTJ have not been challenged in the appellant's grounds or during submissions and therefore shall be preserved findings. They are as follows;
- (4) the findings made on the asylum/protection claim at paragraphs 45 – 73, and paragraph 77;
  - (5) paragraph 74 and the finding made as to mental health and being able to access healthcare in Turkey for Hodgkin's lymphoma.
  - (6) Paragraph 78 and very significant obstacles to integration.
70. For those reasons, the decision of the FtTJ involved the making of a material error of law and whilst dismissing the appeal on human rights grounds, (Articles 3, and 8) that part of the decision shall be set aside to be remade by the Upper Tribunal. For the avoidance of doubt the decision dismissing the asylum appeal and humanitarian protection appeal at paragraphs 84 and 85 shall stand. Paragraph 87 granting discretionary leave is set aside as the parties agree.

Notice of decision:

The decision of the FtTJ involved the making of a material error of law and whilst dismissing the appeal on human rights grounds, Articles 3 and 8, that part of the decision shall be set aside to be remade by the Upper Tribunal.

1. For the avoidance of doubt the decision dismissing the asylum appeal and humanitarian protection appeal at paragraphs 84 and 85 shall stand.
2. Paragraph 87 granting discretionary leave is set aside as the parties agree”.