Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11154/2019 (P)

THE IMMIGRATION ACTS

Decided Without a Hearing under Rule 34	**Decision & Reasons Promulgated**
On 30 October 2020	**On 9 November 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

R K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Imamovic, instructed by Tann Law Solicitors (written submissions only)
For the Respondent: No representation and no submissions

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of Zimbabwe who was born on 6 March 1970. She came to the United Kingdom as a visitor on 24 December 2000. The appellant's leave as a visitor expired on 24 June 2001 and, thereafter, she overstayed.

3. On 17 February 2003, the appellant made an application for leave to remain outside the Rules on medical grounds. That application was refused on 20 November 2003.

4. On 16 February 2006, the appellant claimed asylum.

5. The basis of that claim was that she had been a member of the MDC in Zimbabwe where she had been an official and had attended meetings, rallies and demonstrations. She claimed that on 30 June 2000, she was assaulted and raped by war veterans and ZANU-PF youths and then handed over to the police where she was detained for two days during which time she was raped by a police officer. She was released after her husband paid a bribe of US $1,000. Her claim was that she was again arrested on 1 December 2000 after attending an MDC meeting, was released whilst enquiries were carried out by the CIO. She reported her ill-treatment to the police but was told that MDC members were not entitled to state protection. She was refused treatment by the hospital in Harare because she was not authorised by letter from the ZANU-PF. She left Zimbabwe on 24 December 2000 and travelled to the UK. The appellant was diagnosed subsequently in March 2002 as HIV positive.

6. On 3 August 2007, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

7. The appellant appealed to the First-tier Tribunal. On 9 October 2008, the First-tier Tribunal dismissed her appeal. The judge accepted that the appellant had been raped by ZANU-PF supporters in June 2000 and as a consequence had become HIV positive. The judge accepted that she had been detained at a police station for two days and a further day on 1 December 2000. However, the judge did not accept the core of her account as being credible. The judge found that a police report produced by the appellant was not genuine and had regard to the fact that she had delayed claiming asylum for almost six years despite, on her claim, being in close proximity to MDC supporters in the UK. The judge was not satisfied that she had been the victim of persecution and that she would be at risk on return to Zimbabwe because of her political opinion.

8. The appellant made further submissions on 13 January 2010 but these were withdrawn after she was granted indefinite leave to remain on 22 September 2010.

9. On 21 February 2014, the appellant was convicted at the Harrow Crown Court on two counts of theft and was sentenced to eighteen months' imprisonment on each count to run concurrently.

10. On 13 March 2014, the respondent issued a notice to the appellant of her liability to be deported on the basis of these offences. On 17 November 2014, a deportation order was signed against the appellant. On that date also, the respondent refused the appellant's international protection and human rights claims and certified them under s.94 and 94B of the Nationality, Immigration and Asylum Act 2002 respectively. The notification decision was subsequently withdrawn in the light of the Supreme Court's decision in R (Kiarie & Byndloss) v SSHD [2017] UKSC 42.

11. On 19 January 2015, further submissions were made. These submissions were rejected under para 353 of the Immigration Rules (HC 395) on 23 January 2015. That decision has subsequently been withdrawn.

12. Further submissions were made on 21 May 2014, 22 July 2014, 19 January 2015 and 25 April 2016. On 30 October 2019, the Secretary of State rejected the appellant's claims for asylum, humanitarian protection and under the ECHR contained within those further submissions.

The Appeal to the First-tier Tribunal

13. The appellant appealed to the First-tier Tribunal. In addition to what had been raised in her earlier appeal, the appellant relied upon what, she said, had happened to her in 2011 when she had returned to Zimbabwe in order to correct her Zimbabwe passport which had been issued to her with her name misspelt. She claimed that while she was in Zimbabwe she had been detained by the CIO on arrival at Harare Airport and had been beaten and mistreated. She had been questioned but was released after she paid a bribe of $500. She claims that she left Zimbabwe and a warrant or summons has been issued against her.

14. The appellant claims that she would be persecuted, as she has been in the past, if she returned to Zimbabwe and she also relies upon claimed political activity in the UK for the MDC, including involvement in meetings and demonstrations outside the Zimbabwe High Commission.

15. Judge Broe dismissed the appellant's appeal on all grounds. The judge accepted the findings made in the earlier appeal which, he concluded, he saw no reason to depart from (see para 59 of his determination). Further, the judge made an adverse credibility finding. He rejected her account of her return to Zimbabwe in 2011 and any risk that could arise from that. He did not accept that she had been detained at the airport or ill-treated or that there are any criminal proceedings or a warrant outstanding. In addition, as regards her reliance upon *sur place* activities, whilst the judge accepted her claimed activities, he concluded that she had not demonstrated that the authorities in Zimbabwe would be aware of her activities such that she would have a political profile to put her at risk on return to Zimbabwe.

16. Finally, having dismissed the appellant's appeal on asylum and humanitarian protection grounds, the judge also dismissed the appellant's appeal based upon her claim under Art 3 on health grounds and under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

17. The appellant sought permission to appeal to the Upper Tribunal on seven detailed grounds: challenging the judge's adverse findings in relation to the appellant's asylum claim (grounds (a)-(e)); his decision in respect of Art 3 and the appellant's health (ground (f)) and his decision in relation to Art 8 (ground (g)).

18. Permission was initially refused by the First-tier Tribunal (Judge Fisher) on 1 June 2020. However, on renewed application to the Upper Tribunal, UTJ Reeds granted permission on 1 July 2020. She did so primarily on the ground set out in ground (f), namely that the judge had wrongly failed to apply the Supreme Court's decision in AM (Zimbabwe) v SSHD [2020] UKSC 17 when dismissing the appellant's Art 3 claim on the basis of her HIV positive status and the implications for her health on return to Zimbabwe. As regards the other grounds, challenging the judge's assessment of the evidence and the evidence and decision in relation to the appellant's *sur place* claim and Art 8 of the ECHR, the judge noted that those grounds might not be as strong as the ground in relation to Art 3 but she nevertheless granted permission on all grounds as arguable.

19. In her decision granting permission, UTJ Reeds also issued directions in the light of the COVID-19 crisis provisionally proposing that the issues of whether the First-tier Tribunal had erred in law and, if so, whether the decision should be set aside, should be determined without a hearing. UTJ Reeds invited the parties to make submissions both on the substantive issues in the appeal and also on whether the error of law decision could be made without a hearing.

20. In response, the appellant's representatives refiled the appellant's grounds of appeal. They did not raise any objection to the error of law issue being determined without a hearing.

21. The respondent did not file a rule 24 response or any submissions in reply to UTJ Reeds directions.

22. In the light of the parties' submissions and the absence of any objection, and having regard to the interests of justice and the overriding objective of determining the appeal justly and fairly and the nature of the legal issues raised, I am satisfied that it is in the interests of justice to determine the error of law issue in this appeal without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) and para 4 of the *Amended General Pilot Practice Directions: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal* (14 September 2020) issued by (then) Vice Senior President and (now) Senior President of Tribunals, the Rt. Hon. Sir Keith Lindblom.

The Grounds of Appeal

23. The grounds of appeal are numbered (a) to (g). They are detailed and can be summarised as follows.

24. Ground (a): at paras 49 and 52, the judge found that in 2011 it was "highly unlikely" or "very unlikely" that the appellant would have been released, rather than been taken to court and that she would have been tried in her absence as she claimed. The ground contends that the judge reached a view on this matter of criminal procedure in Zimbabwe without any supporting evidence to substantiate his conclusion that the appellant's claim was implausible on these issues.

25. Ground (b): at paras 48-49 the judge took into account, in finding the appellant not to be credible in relation to the events she said occurred on return to Zimbabwe in 2011, that she had not raised certain matters in letters and other documents she prepared (without professional assistance) and had submitted to the Home Office. The grounds contend that the judge failed to have regard to the fact that these documents were not professionally prepared and the omissions or inconsistencies simply reflected her "unprofessional understanding of what it is necessary to include".

26. Ground (c): the judge erred in doubting the appellant's *sur place* activities, concluding that photographs were, in effect, posed and failed to give adequate reasons why that was so. Further, in rejecting her claimed activity in the UK with the Luton Branch of the MDC on the basis that there was no supporting evidence, the judge failed to have regard to the evidence given by an official of the Wolverhampton/Walsall Branch – and whose evidence the judge accepted – that she had also been involved with the MDC Branch in Luton.

27. Ground (d): the judge wrongly discounted the expert evidence simply on the basis that the expert referred to the burial ground where President Robert Mugabe was buried as "Heroes' Place" when it was known as "Heroes' Acre". It is also contended that the judge was wrong to discount the expert's evidence because in one section of the report (para 14) the expert refers to the appellant using the male pronoun (him). It is contended that the expert clearly identified the appellant as female and his expertise was not called into question otherwise.

28. Ground (e): the judge was factually wrong at para 66 and mixed up the addresses of the appellant with that of her friend (Mary) whose address had appeared upon the warrant when it was left with her.

29. Further, the judge failed properly to consider the appellant's *sur place* risk in finding that there was no evidence that the authorities would be aware of her activities. That, it is said, fails to have regard to the country guidance decisions which recognise the ability of the Zimbabwe intelligence service, the CIO to collate evidence from those demonstrating abroad (see HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 0094 at [95]-[102], [104], [132]-[134]. Further, the finding fails to take into account the appellant's evidence of the interest the CIO showed in her on her return in 2011.

30. Ground (f): the judge wrongly applied the high threshold in N v SSHD [2005] UKHL 31, rather than the less onerous test identified by the Supreme Court in AM (Zimbabwe), in determining whether a breach of Art 3 was established on health

grounds. The judge failed to give adequate reasons why the appellant, on the basis of the expert evidence, would not fall within the new test, given that one drug she required was not available and was not affordable and the expert evidence was that she would die in a period of twelve to eighteen months without treatment.

31. Ground (g): contends that given the appellant's circumstances, having spent nineteen years in the UK, that she is a member of the MDC and is receiving life saving treatment which is not available in Zimbabwe, the judge was wrong to find that there were "no significant obstacles" to her integration on return to Zimbabwe under para 276ADE.

Discussion

32. I propose to consider each of the grounds separately. As will become clear, I am satisfied that a number of the grounds are established and amount to material errors of law.

33. A number of the grounds challenge the judge's assessment of the evidence that led him to disbelieve the appellant in relation to the events she relied upon arising since the earlier appeal decision. In particular, whether she had established that she had returned to Zimbabwe in 2011 in order to correct a misspelling of her name in her passport issued by the Zimbabwe authorities and, whilst there, had been detained by the CIO, mistreated and questioned about MDC activities and had been subject to court proceedings which are outstanding.

34. Ground (a): At paras 49 and 52, the judge found, in effect, that aspects of the appellant's account concerning the appellant's release on bail (para 49) and she was convicted in her absence (para 52) were respectively "highly unlikely" and "very unlikely". In reaching that conclusion or those conclusions, the judge recognised in both paras that there was "no evidence of the Rules of criminal procedure in Zimbabwe" (para 49) or "no evidence of the procedure for trial in absence" (at para 52). The judge said this at paras 49 and 52 which I set out in full:

> "49. I note that she made no mention in 2014 or 2015 of being given the document, which I shall call a summons, requiring her to attend court to answer a very serious charge. She now says that after bribing the CIO they took her to Harare where they gave her a document and told her that she had to attend court at 3.30 that afternoon. There is no evidence of the Rules of criminal procedure in Zimbabwe but I find it highly unlikely that the CIO would release the Appellant on bail rather than take her on to court to seek a remand in custody. There is no evidence of the process for commencing proceedings on such a charge and in particular of the involvement of the public prosecutors or attorney general. ….
>
> 52. The third section [of a letter from a firm of attorneys in Harare] states that the appellant '*was convicted/remanded by the Magistrate on 14 December 2011 of/on a charge of C/S 25(1) of the Code and sentenced to/and released on bail but defaulted court*'. On the appellant's account she had not been placed on remand (which would have required an attendance at court). The warrant therefore appears to have been issued postconviction. There is no evidence of the procedure for trial in absence in such a serious matter and I find it very unlikely that she would have been convicted in her absence in such circumstances. I note that it is not signed. I have

> considered this document in the round and against the background of a use of a false document in her last appeal. This document purports to have been in existence for over eight years, it is inconsistent both internally and with the appellant's account and I find it's not genuine. Its use further undermines the appellant's credibility."

35. What the judge has done in both of these paragraphs is reach a view on the plausibility of the appellant's experience in criminal process in Zimbabwe in the absence of any evidence as to the criminal procedure or process in Zimbabwe. He has, in effect, shifted the burden of proof to the appellant to show that what he considers not to be plausible was in fact in accordance with Zimbabwe criminal procedure or process. That is an impermissible shift in the burden of proof and, given that criminal procedure and process can vary between jurisdiction, the judge was not entitled to assess the plausibility of what the appellant claimed happened to her, judged by his UK focused view as to how the criminal process would operate. The point is similar to that made by the Court of Appeal in HK v SSHD [2006] EWCA Civ 1037 in assessing the plausibility of an individual's account and the dangers of imposing a view external to that other country's cultures, social behaviours, etc. At [29] Neuberger LJ (as he then was) said this:

> "Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding Tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar."

36. Applied *mutatis mutandis*, that reasoning operates equally when assessing the criminal justice system in another country. In my judgment, the judge fell into that error in paras 49 and 52 of his determination. For these reasons, I accept to this extent, ground (a) relied upon by the appellant.

37. Ground (b) criticises the judge for taking into account that the appellant failed to mention in earlier statements and documents produced by her, for example that she had been raped and that she had been given the summons or warrant. The judge dealt with this at paras 44-49 of his determination. The grounds contend that the earlier documents were not professionally prepared. The judge was, no doubt, aware of that when he set out the documents at paras 45-47. Indeed, at para 48, he acknowledged the sensitivity of disclosing previous sexual violence but that the appellant had been able to discuss an earlier incident without any problems. The judge was, in my view, alive to the nature of the appellant's earlier statements. But those earlier statements or documents, whether or not professionally prepared, failed to disclose important and significant parts of the appellant's claim before the judge, including the sexual violence and also that she had been given a court document which she now relied upon to support her claim. In my judgment, the judge was entitled to take into account her failure to mention these matters earlier in 2014 and 2015. I would reject ground (b).

38. As regards grounds (c) and (e), these relate to her *sur place* claim and activities with the MDC in the UK. The appellant gave evidence of those activities, including taking part in demonstrations and relied on photographs of her at demonstrations, including near the Zimbabwe High Commission. The Chairman of the Wolverhampton/Walsall Branch of the MDC gave oral evidence before the judge, whose evidence the judge found "no reason to doubt" (see para 58). At para 57, despite the Chairman of the MDC Branch in Wolverhampton/Walsall attesting, not only to the appellant's activities with his branch but also referring to her earlier involvement with the Luton Branch, the judge nevertheless did not accept she was an MDC member at that time. He did accept her membership and activities with the MDC from February 2019 with the Wolverhampton and Walsall Branch. I am not persuaded that the judge was unable to reach his adverse finding on this, perhaps minor issue in the totality of her claim, for the reasons he gave at para 57, including that there was no documentary evidence to support her involvement with the Luton Branch and there had been no mention of it in a letter from the Chairman of the MDC in the UK and Ireland.

39. Where, however, I have concluded that ground (c) and (e) establish errors by the judge is in his consideration first, of the photographic evidence and secondly, in forming his view that her activities would not come to the attention of the Zimbabwe authorities so as to establish she had a political profile which could put her at risk on return. As regards both issues the judge dealt with this in para 58 as follows:

> "Whilst I have reservations about the appellant's motivation I see no reason to doubt the evidence of [the Chairman of the Wolverhampton and Walsall Branch of the MDC]. I accept that the appellant joined his branch in February of last year and that since then she has attended most of their meetings. There are also photographs of her at various demonstrations which I accept she attended. They are not photographs of demonstrations at which she can be seen but photographs designed to show her at demonstrations which brings into question their purpose. There is no evidence to show that the authorities in Zimbabwe would be aware of her attendance or that they would cause her to have a political profile. I accept that there may have been some consideration of her taking office in the branch but this is yet to take place."

40. As regards the former point, the judge did not explain why the photographs, which include pictures showing the appellant, were photographs that had, so to speak, been posed rather than showing her being genuinely involved in demonstrations.

41. Further, the judge did not engage with the relevant material concerning the potential for surveillance by the Zimbabwe authorities, including of those taking part in demonstrations. In context of politically repressive regimes, it may not take much to conclude they have 'the means and inclination' to monitor and identify those they perceive as political opponents, including in demonstrations outside their Embassies (see YB(Eritrea) v SSHD [2008] EWCA Civ 360 at [18] per Sedley LJ). In HS, the AIT noted evidence concerning infiltration by CIO into organisations in the UK and the collation of information about activists. At [104] the AIT said this:

> "We consider it significant that the regime has invested considerable resources in seeking to infiltrate groups in the United Kingdom to identify those who support the opposition

> or who are 'activists in the country'. This does indicate that it distinguishes those people from Zimbabweans present in the United Kingdom generally. It is noteworthy it has not been suggested that those carrying out that function in the United Kingdom are collating information about those who have made an asylum claim, but that they are concerned to identify those considered to be activists."

42. The appellant relies upon HS and, in particular passages such as at [104] that indicate the risk of being identified by the Zimbabwe authorities monitoring activists in the UK. I do not say that the judge was bound to find that, given the appellant's activities in the UK, she would have come to the attention of the Zimbabwe authorities. The judge was, however, required to grapple with the evidence before reaching a conclusion that the authorities would not be aware of her activities. It was not the case that there was "no evidence" that could support such a contention.

43. For that reason, I am satisfied that grounds (c) and (e) are made out to that extent.

44. Ground (d) relates to the judge's finding at paras 61-63 that he should give "little weight" to the expert evidence. At para 61, the judge said this:

> "I have given careful consideration to the report prepared by Mr John Birchal who says he has a arrange of contacts in Zimbabwe allowing him to examine issues with a range of different individuals. It contains a great deal of background evidence on Zimbabwe and I note that in his introduction to the political situation in Zimbabwe he refers to the funeral of Robert Mugabe. He said that '*his funeral etc. was quite well attended but his family would not allow his remains to be buried in "Heroes' Place", somewhere the State wants those who fought for freedom to lie*'. The burial ground to which he refers is called National Heroes' Acre and generally known as Heroes' Acre. It has never been known as Heroes' Place and this casts doubt on Mr Birchal's expertise on Zimbabwe."

45. I accept the appellant's submission that in this paragraph the judge has placed undue, and unsustainable, weight upon a minor linguistic difference in the description of the burial ground where Robert Mugabe's funeral took place. In itself, it cannot bear the weight which leads to a discounting which gives "little weight" to the expert's opinion.

46. Then at para 62, the judge went on to quote a section from the expert's report at para 14 headed "Author's Comments" in which he refers to the appellant using the male pronoun of "him". However, as is also clear from the quotation set out at para 62, the expert refers to the appellant using her surname and the prefix "Ms". Clearly, the expert wrongly used the male pronoun (him) but equally it cannot be said that the expert misunderstood whom he was writing a report about. He named the appellant and stated her gender correctly. Plainly something has gone wrong in the transcription of the passage in the report but the judge was not, in my judgment, justified in reaching the following conclusion in para 63 when he said:

> "this appears to refer to someone other than this Appellant and casts doubt on the report as a whole."

47. That, in my judgment, is a criticism too far and an improper basis upon which to doubt that the expert was referring to anyone other than the appellant in his report.

48. For these reasons, ground (d) is made out.

49. In my judgment, the grounds that I have found made out result in material errors of law in the judge reaching his adverse credibility finding and also in his rejection of the appellant's claim based upon her *sur place* activities in the UK.

50. Turning now to ground (f), the judge dealt with the appellant's health claim based upon her HIV positive status at paras 67-68 as follows:

> "67. I have given careful consideration to the appellant's health. She is HIV positive and has had the benefit of treatment in this country. She provided a letter dated 31 January 2020 from her consultant who described her condition, co morbidities and medication. In his view, although his expertise on the issue is not made clear, one of her medications would not be available in Zimbabwe and she would not be able to afford to buy it privately. If the treatment is withdrawn it's extremely likely that she would die in twelve to eighteen months.
>
> 68. With the exception of that one drug it is not suggested that medication is unavailable in Zimbabwe. If her consultant is right, and I note again there is no evidence of his expertise on medical services in Zimbabwe, the issue is one of affordability. I have had regard to the findings in Paposhvili v Belgium (No. 41738/10). I find at the outset taking her case at its highest that I am not satisfied that her health is such that the threshold set in N v SSHD (2003) EWCA Civ 1396 is met so as to engage Article 3."

51. Leaving aside that the judge referred to the Court of Appeal's decision in the N case, rather than the decision of the House of Lords, it is plain that the judge failed to recognise that the Supreme Court in AM (Zimbabwe) had modified the test to be applied under Art 3 in a health case, in accordance with Paposhvili as a result of which the threshold in N is no longer the law. The applicable test is now a different one. Article 3 is no longer limited to so-called "deathbed cases", but includes cases where an individual's circumstances are such that there is a real risk of "serious, rapid and irreversible decline in the person's state of health resulting in intense suffering or to a substantial reduction in life expectancy" (see [31] of AM (Zimbabwe)). As regards a "significant" reduction in life expectancy, at [31] Lord Wilson noted that what was "significant" had to consider the significance for the individual concerned, hence he said:

> "Take a person aged 74, with an expectancy of life normal for that age. Were that person's expectation to be reduced to, say, two years, the reduction might well – in this context – not be significant. But compare that person with one aged 24 with an expectancy of life normal for that age. Were his or her expectancy to be reduced to two years, the reduction might well be significant."

52. In this appeal, it was that test and the approach set out by the Supreme Court in AM (Zimbabwe) that the judge had to apply. There was evidence that without treatment the appellant's life expectancy would be 12-18 months. It was for the judge to decide whether that was "significant" so as to fall within the revised approach set out by the Supreme Court in applying Art 3. The judge did not do this and fell into error as a result. In addition, as the Supreme Court made plain in AM (Zimbabwe), the circumstances of the individual in their own country, and whether treatment would

be available to them, is to be assessed as a practical matter having regard to both availability and, if relevant, affordability of that treatment (see [23(d)]).

53. For these reasons, ground (f) is made out. I am satisfied that the judge materially erred in law in dismissing the appellant's appeal under Art 3 based upon health reasons.

54. That then leaves ground (g) and the challenge to Art 8. In itself, the judge's assessment of Art 8 does not disclose any demonstrable material error of law. However, the assessment is based upon factual findings which, as a result of my conclusions above, are unsustainable. In order to determine whether there are very significant obstacles to the appellant's integration in Zimbabwe under para 276ADE(vi) of the Rules and whether there would be "unjustifiably harsh consequences" sufficient to outweigh the public interest, findings must be made based upon the appellant's circumstances both in the UK and in Zimbabwe. Given that the judge's adverse credibility findings are unsustainable and his conclusion in relation to the appellant's health claim is unsustainable, his assessment of Art 8 also cannot be sustained. The Art 8 assessment needs to be made on sustainable findings as to the appellant's circumstances.

55. Consequently, I am satisfied that the Art 8 claim needs to be reconsidered by a judge in the light of findings yet to be made in relation to the appellant's circumstances both in the UK and in Zimbabwe.

56. For the reasons I have given, the judge's decision to dismiss the appellant's appeal involved material errors of law.

Decision

57. The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. The decision cannot stand and is set aside.

58. In the light of the material errors of law I have identified, none of the judge's findings can be preserved. The appeal needs to be reheard *de novo*. For these reasons, having regard to the nature and extent of fact-finding required and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Broe.

Signed

Andrew Grubb

Judge of the Upper Tribunal
3 November 2020