OUTER HOUSE, COURT OF SESSION

[2020] CSOH 108

P1197/19

OPINION OF LADY CARMICHAEL

In the cause

DXL

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Ballantyne; Drummond Miller LLP
Respondent: MacGregor; Office of the Advocate General

23 December 2020

Introduction

[1] The petitioner seeks reduction of a decision of the Upper Tribunal ("UT") to refuse permission to appeal against a decision of the First-tier Tribunal ("FtT"). The petitioner is a national of Vietnam. He claims that he is a victim of human trafficking.

[2] The petitioner pleads that his date of birth was assessed by the Home Office as 17 May 1999. He has not proposed a different date of birth in these proceedings. He claimed to have become homeless when he was 10 years of age, and to have lived on the streets in Vinh City. He said he was trafficked to France in late 2015. He was held along with others in a house in a forest area for about 6 weeks, and then taken with them to the

United Kingdom by lorry, where the group was locked up in a four storey house and made to grow cannabis. They were regularly beaten. When the petitioner and a friend tried to escape they were caught. The group, including the petitioner, were moved to another house, and thereafter the petitioner was moved to work alone in a warehouse. He escaped through the roof and claimed asylum. He was apprehended by police in a hotel room, where cannabis was found also.

[3] The National Referral Mechanism ("NRM") refused the petitioner's trafficking claim. The respondent refused the petitioner's claim for asylum, and he appealed, unsuccessfully, to the FtT. The FtT judge did not regard the petitioner's account as credible. The FtT refused permission to appeal by decision dated 2 September 2019.

[4] The UT then refused permission to appeal in a decision dated 1 October 2019.

The law

[5] There was little dispute as to the legal principles that I should apply. The second appeals test had already been considered by the Lord Ordinary who granted permission to proceed, and I should not revisit the matter: *SA* v *Secretary of State for the Home Department* 2019 SC 451, paragraph 28. The focus in the application for the judicial review must be on the decision of the UT: *SA*, paragraphs 15, 17. Both the FtT and UT were specialist tribunals, and their decisions required to be respected save where they had clearly misdirected themselves in law: *Eba* v *Advocate General for Scotland* 2012 SC (UKSC) 1, paragraphs 45, 47; *MA (Somalia)* v *Secretary of State for the Home Department* [2011] 2 All ER 65, paragraph 43; *AH (Sudan)* v *Secretary of State for the Home Department* 2008 1 AC 678, paragraph 30.

[6] Where a challenge was based on a failure to give reasons, in some cases quite minimal explanation might suffice; reasons could be stated briefly, and the level of detail required would be dictated by the issues requiring determination. The informed reader should be left in no real or substantial doubt as to why the decision was taken: *Stefan* v *General Medical Council* 1999 1 WLR 1293, p1201F; *South Bucks District Council* v *Porter (No 2)* [2004] 1 WLR 1953, paragraph 36.

[7] The respondent submitted that I should have regard to the following in the UT Guidance Note 2011 No 1: Permission to appeal to UTIAC (cited in *CW & Others* v *Secretary of State for the Home Department* [2016] CSOH 163, paragraph 33). The petitioner submitted that it was merely guidance and of no legal effect:

> "29. There is a limit to what is required if grounds are overlengthy, rambling, incoherent and imprecise, but there should be some attempt to respond to the case as presented. What is called for is not description of the grounds, but evaluation."

I consider that the paragraph just quoted is concise and generally sound guidance to those making decisions about permission to appeal. The decision maker must endeavour to discern the substance of the grounds, engage with it, and respond to it. Sections of the Guidance Note were cited with approval by McCloskey J, the chamber President, in *Nixon (permission to appeal: grounds)* [2014] UKUT 00368 (IAC). In addition, he gave the following guidance, at paragraphs 6 and 7:

> "6. … It is axiomatic that every application for permission to appeal to the Upper Tribunal should identify, clearly and with all necessary particulars, the error/s of law for which the moving party contends. This must be effected in terms which are recognisable and comprehensible. A properly compiled application for permission to appeal will convey at once to the Judge concerned the error/s of law said to have been committed. It should not be necessary for the permission Judge to hunt and mine in order to understand the basis and thrust of the application. While in some cases it will be possible for the permission Judge to engage in a degree of interpretation and/or making inferences for this purpose, this should never be assumed by the applicant and cannot operate as a substitute for a properly and thoroughly compiled application. These are elementary requirements and standards.

> 7. As ever in law context is, of course, everything. While high standards will always be expected of the representatives of a party applying for permission to appeal, some adjustment may be appropriate in the case of an unrepresented party. This is a reflection of both reality and individual context. […]"

[8] McCloskey J went on to emphasise the need for judges to produce a reasoned decision in relation to all the grounds of appeal presented by a party, but said, at paragraph 11:

> "Given the pressures on Tribunals to process large volumes of cases efficiently and expeditiously, in circumstances where there has been a notable recent increase in applications for permission to appeal to UTIAC, this is unacceptable. Furthermore, it is inimical to the overriding objective enshrined in rule 2(1) of the 2008 Rules. This provides, inter alia, that the Upper Tribunal must be enabled to process cases in a manner which avoids delay. Poorly compiled applications for permission to appeal can have other undesirable consequences. These include undermining the important value of legal certainty and unfairness to the other party. Henceforth, applicants can expect unsatisfactory applications for permission to appeal to be dealt with brusquely and robustly."

[9] The grounds of appeal in this case bear to have been drafted by a professional representative. They are framed in a way that is very unlikely to assist a judge who is trying to discern whether a point of law has been raised and whether a ground of appeal is arguable. The grounds of appeal presented to the UT extend to four pages. The first ground of appeal contains 11 subparagraphs. They incorporate "brevitatis causa" the grounds presented to the FtT, which extend to ten pages and 13 numbered paragraphs. The judge who considered the application for permission to the FtT correctly observed that it was difficult to determine what the arguable error of law was that was being alleged, beyond a general assertion that the judge had failed to take into account all the evidence and that she had failed to give adequate reasons for her decision.

[10] I mention this because some of the grounds advanced at the substantive hearing were not grounds advanced to the FtT or the UT. The reasons produced by the UT are brief

in response to very lengthy grounds, but in my view represent a proper engagement with the task of discerning what the case presented was, and deciding it.

[11] For reduction to follow, any error of law on the part of the UT must be material: *South Bucks*, paragraph 36; *AA (AP) Petitioner* v *Secretary of State for the Home Department* 2020 SLT 309, paragraph 2. An error will be material if there is a real possibility that, had it not occurred, the outcome would have been different: *HMD* v *Upper Tribunal* CSOH 84 at paragraph 49.

[12] It was for the FtT to assess the weight to be accorded to all of the evidence, including any expert report: for *Judicial Review of Decisions of Stirling Council* [2015] CSOH 162, paragraph 34. A specialist tribunal should consider the evidence in the round before reaching conclusions on the facts. Expert evidence should not be "neutralised" simply because a claimant was disbelieved: *TF (Iran)* v *Secretary of State for the Home Department* 2019 SC 81, paragraphs 49, 50.

[13] Even if a person were disbelieved as to a claimed history of persecution, he might be found at risk of future persecution: Macdonald's Immigration Law & Practice 9th Ed at 12.179, citing *Daoud* v *Secretary of State for the Home Department* [2005] EWCA 755.

[14] Those charged with making decisions regarding claims for asylum should exercise anxious scrutiny, as that expression was explained by Carnwath LJ in *R (YH)* v *Secretary of State for the Home Department* [2010] 4 All ER 448 at paragraph 24. The issue of required to be considered on all of the available evidence in the round, applying the lower standard of proof *ES (s82 NIA 2002; negative NRM) Albania* [2018] UKUT 00335 (IAC). I was not referred to *MS (Pakistan)* v *Secretary of State for the Home Department* [2020] UKSC 9, but note that that case now puts beyond doubt the proposition that the tribunal is not bound by an adverse decision by the NRM and requires to determine for itself the relevant factual issues before it.

Decision

[15] The petitioner advanced six grounds of challenge to the decision of the UT at the substantive hearing. I deal with each in turn.

(i) The FtT judge's approach to the expert report

[16] The petitioner's first challenge is in relation to a matter mentioned in the first paragraph of the grounds of appeal presented to the FtT. That first paragraph covers the better part of three sides of A4. It contains a good deal of narrative as to the content of the FtT's decision, what is said to have occurred at the hearing, and the content of an expert report that was before the FtT. Counsel accepted that the grounds were lengthy, and that discerning the nature of the errors of law which they sought to identify might take some effort, but submitted that the central issue in each of the grounds could be detected.

[17] The part of that paragraph on which the petitioner now relies is on page 3 of the Grounds of Appeal, and is in the following terms:

> "It is submitted that the First-tier Tribunal Judge at paragraphs 14 and 15 has materially erred in law by expecting the expert to in effect to adopt the role of the Court by engaging in a forensic examination of all the credibility issues."

[18] At paragraphs 14 and 15 of her decision, the FtT judge makes a number of comments about a report by Dr Tran Thi Lan Anh. She refers to an absence in that report of any reference to the possibility that the petitioner might have obtained information about the situation of street children in Vietnam and about trafficking routes from Vietnam from sources other than personal experience. She refers to an absence from the report of any comment on the matters which the NRM and the respondent had regarded as bearing adversely on the petitioner's credibility.

[19] Dr Tran was asked:

> "From your examination of the evidence given by the [petitioner] in his specific circumstances, do you consider that his account could be plausible in that he has been the victim of human trafficking?"

[20] Dr Tran set out country information which she regarded as relevant to street children and the risks they faced:

> "… I think the [petitioner's] statement on his life on the street in Vietnam and how he and his friends became involved in trafficking is a highly consistent claim in line with the country information. I fully respect that it is for the court to assess credibility of an appellant. His account on these matters and the level of detail though provided by the appellant particularly in his asylum interviews, on issues such as street life in Vietnam, his detail of how the traffickers in Vietnam enticed him and his friends, his journey from Vietnam, and how the treatment changed for the worse when he was handed over to another trafficker in France, and then deteriorated after this to being forced into a lengthy period of drug cultivation in UK, in my view shows that such direct detailed evidence from the appellant demonstrates that it is highly plausible that he has experienced these problems personally in Vietnam and that he has been a victim of trafficking."

[21] Dr Tran went on to consider information about trafficking from Vietnam both by way of publicly available information and her own interviews with recognised victims of trafficking. She expressed the views that the account of travel arrangements described by the petitioner was "very much a typical route of human trafficking from Vietnam and one arranged by a professional trafficking organization", and that the "way the petitioner was trafficked and transported from Vietnam, then forced to work at the cannabis factory/house in the UK is highly consistent with the country information on the human trafficking situation in Vietnam."

[22] On a fair reading of the whole passage, the FtT judge is giving reasons for attaching little weight to the report. It is perhaps curious that she uses expressions such as "he (sic) does not make any allowance or make reference to the possibility of the appellant knowing such details through any other experience than the personal experience of being a street child" and "he (sic) makes no reference to the appellant knowing such details in other ways,

such as discussing with fellow Vietnamese, through the internet, television programmes on trafficking etc". It is, however, clear that the FtT judge did not accept the expert's characterisation of the petitioner's account as supporting his contention that he, personally, had lived as a street child and experienced trafficking in Vietnam. As the finder of fact she was entitled to reject evidence. At paragraph 15 she gave her reason for rejecting this aspect of the expert's opinion. It was her view that:

> "[a]t most Dr Anh's (sic) report confirms that the appellant's account is consistent with the background information available in the public domain with regard to street children, victims of trafficking, the trafficking process and risk on return".

[23] The credibility of the petitioner's account was rejected in both the NRM decision and the decision of the Secretary of State. The FtT judge was entitled to observe, as she did, also at paragraph 15, that the expert report did not comment on the particular matters which the previous decision-makers had regarded as telling against the credibility of the account. The expert had been instructed by the petitioner's agent to comment on the plausibility of the petitioner's account. In that context the FtT judge was entitled to note the absence of comment on the matters that had exercised those making decisions in the case at an earlier stage. Those matters were of potential relevance to her own, independent, consideration of the petitioner's credibility.

[24] The decision under review in this petition is that of the UT. The UT judge wrote:

> "The grounds criticise the judge's approach to the expert evidence of Dr Anh (sic). However it is not arguable that the judge erred in respect of this evidence. The judge set out a comprehensive analysis of the report and was not mistaken when observing that the report did not address the specific credibility issues raised by the respondent."

That paragraph engages with the criticism of the FtT judge's approach to the expert report, and records the reason for rejecting it. It expresses a conclusion that was open to the UT judge on the material before him.

(ii) Failure to exercise anxious scrutiny

[25] The petitioner asserted that the UT had not acknowledged the failure of the FtT judge to exercise anxious scrutiny. The relevant paragraphs of the grounds of appeal to the FtT were 2 and 3. The FtT judge had summarised the basis for her decision as being that there were a number of significant problems in the petitioner's evidence which went to the core of his claims and which he had not satisfactorily explained to the low standard of proof that he required to satisfy: paragraph 42. That was a reference back to earlier portions of her decision.

[26] At paragraph 20 of her decision she had written:

> "There are a number of discrepancies and implausibilities in the appellant's accounts and whilst it is submitted that the appellant had addressed them all clearly and satisfactorily, I find he has not. There is not the time or space to go through every point raised but I give some examples below."

[27] In paragraphs 21 to 41 she went on to provide those examples. The first is in relation to an account that the trafficker knocked out the petitioner's front teeth and then took the petitioner to the dentist on three occasions. He had, however, also given an account that he had only left the premises where he was kept on one occasion. He said he had escaped, and been beaten so that he lost his teeth. His agent sought to clarify this matter with him in the course of evidence, but the petitioner confirmed that he had never been brought out of the premises after the occasion when he lost his teeth. The second was what the FtT judge regarded as a discrepancy in the petitioner's accounts as to whether or not he was paid by the traffickers. The third was what the FtT judge regarded as a vague and implausible account of successfully escaping and finding other Vietnamese people who assisted him. The fourth was the petitioner's account at one stage that he did not know that the premises in which he had been apprehended, and where cannabis was also found, was a hotel rather

than a flat. Fifth, the petitioner had answered at a screening interview that he had not been subject to exploitation or forced labour. The FtT judge did not accept that the appellant had misunderstood the question put to him. Sixth, the petitioner had claimed to be 16 when he was arrested. He had been assessed by the Asylum and Roma Children and Families Service as being so obviously over the age of 18 that an age assessment was not required. The FtT judge took the view that the petitioner had deliberately attempted to deceive the authorities as to his true age.

[28] The essence of the complaints made in the substantive hearing was, first, that because the judge had not indicated what were the other discrepancies that troubled her she had not given adequate reasons for her decision. It was impossible to scrutinise her approach to those other discrepancies because she had not enumerated them. She had not demonstrated that she had considered all the evidence for herself, as required by *ES*. Second, the reasons given by the FtT judge were said to be inadequate. In particular she should have considered, in relation to the account of being taken to the dentist, that it would have been in the interests of the traffickers to have the petitioner fit for work, and that his account that that had happened was not inconsistent with his being a victim of trafficking. In failing to recognise these matters, the UT had failed to exercise anxious scrutiny.

[29] The complaint that the FtT judge did not enumerate every aspect of the account that she regarded as unsatisfactory is without merit. What is required of a decision maker is that she leave the informed reader in no real or substantial doubt as to the reasons for her decision. It is apparent from the reasons that she gave that she regarded discrepancies in the petitioner's evidence as going to the core of his account. She gave six examples of those. Lord Penrose's observations in *Mohammed Asif, Petitioner*, 12 January 1999 unreported at

p 10, and referred to with approval in *Daljit Singh* v *Secretary of State for the Home Department* 2000 SC 219, p223B-C are apposite:

> "...nothing could be more destructive of the efficient disposal of immigration appeals than the notion that the adjudicator and the tribunal are under an obligation to carry through a mechanical process of narration of the evidence, analysis of it into classes, and an explanation factor by factor of the relevance or irrelevance, credibility and reliability or otherwise of it".

[30] The challenge to the adequacy of the FtT judge's reasons relating to the account of being taken to the dentist misses the point that the FtT judge was troubled, as she was entitled to be, by the discrepancy between an account on the one hand of having been taken to the dentist three times, and an account that he was never taken out of the premises after the occasion on which he lost his teeth. This challenge does not feature in paragraph 2 or 3 of the grounds of appeal.

[31] The criticisms focused in this part of the submission were said to be based on grounds of appeal two and three as presented to the FtT. Those grounds are to the effect that the FtT judge failed to consider the evidence in the round applying the lower standard of proof as required by *ES*, and that she failed to enumerate every matter that bore on her consideration of the petitioner's credibility. The UT responded to the grounds presented to it in paragraphs 3 and 4 of its decision:

> "3. It is not arguable that the judge applied the wrong standard of proof or failed to appreciate that the competent authority applied a different standard.
>
> 4. It is not arguable that the assessment of credibility is undermined by a failure to address material evidence as it is evident that the appellant's claim was considered in detail."

The petitioner has not demonstrated any failure on the part of the UT to discern the essence of the complaints being made in the grounds of appeal. For the reasons I have given above,

the UT was entitled to conclude that the grounds did not disclose an arguable error of law on the part of the FtT.

(iii) Failure to recognise factual errors or misapprehension of evidence on the part of FtT

[32] Grounds of appeal 4 and 5 presented to the FtT narrate criticisms of the FtT judge's approach to credibility. Ground 4 says that in relation to the claim that the petitioner had been taken to the dentist three times:

> "The … judge … finds against the appellant regarding the fact that it took him a walk of a day and a half to find a place populated with houses and people, yet he was brought on three different occasions in order to visit a dentist. The … judge gave no consideration to the issues of how the appellant was transported to the dentist and to the direction in which appellant walked after he escaped when reaching these findings. The … judge has been demonstrated to have materially erred in law in her failure to consider the evidence in the round before her."

Ground 5 relates to the accounts regarding whether or not the petitioner was paid:

> " … the … judge refers to a serious discrepancy in the appellant's claim regarding these questions in his interview, by him claiming at one point that he was never paid, and then claiming that he was paid, and that he used the money to ask the traffickers to buy more food. The … judge however, when considering the appellant's evidence at questions 173 and 174 of his asylum interview, has materially erred in law. … It is submitted that if said judge had applied proper scrutiny to his said answers, the finding that this evidence amounted to a serious discrepancy would not have been made."

[33] In relation to the trips to the dentist, counsel submitted that had the FtT judge examined the contents of the petitioner's screening interview properly, she would have realised that the incident in which he lost his teeth happened when he was located in the Lancaster area, not in a rural location in Scotland. The FtT judge wrote:

> "The claim is, therefore, that the appellant was taken out of the warehouse which appears from the appellant's evidence to have been in the country, given it took him a walk of a day and a half to find a place populated with houses and people, on 3 different occasions in order to visit a dentist."

The passage can be read as indicating a degree of scepticism on the part of the FtT judge about this aspect of the account. There is no mention in the grounds of appeal of the misapprehension about the location of the premises of which the petitioner now complains. The grounds of appeal complain, instead, of a failure to consider how the petitioner was transported. The complaint is of a different nature from that now made. If the FtT judge misapprehended the evidence as to the location of the warehouse, that is not something that the UT could reasonably be expected to discern from the grounds of appeal before it. It is not an obvious point of the sort contemplated in *R* v *Secretary of State for the Home Department ex parte Robinson* [1997] 3 WLR 1162. The decision of the UT is not, therefore, open to challenge in this respect.

[34] Counsel again submitted that the FtT judge should have taken into account that it was in the interests of the traffickers to have the petitioner treated. There was evidence that one of the petitioner's friends had received treatment when ill, which bolstered the petitioner's account. The FtT judge had not considered those matters. Again, neither of these complaints features in the grounds of appeal. They do not, in any event, raise an error of law. They are in essence expressions of disagreement with the FtT judge's conclusions. Neither engages with the FtT judge's concern regarding the inconsistency of the petitioner's accounts about this matter, as opposed to scepticism on her part about the plausibility of the claim that the petitioner had been taken to the dentist.

[35] So far as the accounts of being paid or not are concerned, counsel submitted that an account of being paid was not necessarily inconsistent with forced labour. The FtT judge had also misunderstood the evidence. The relevant passage in the asylum interview is this:

> "Q173 Were you ever paid?

> R173 Once we asked Lam if we were going to be paid. He said no and he explained that we had been sold to them and there is no pay.
>
> Q 174 Did he say how long you would have to work for them?
>
> R174 They did not say for how long they or he did not say for how long. Each time they harvested the product John would give us £20 or £30 each and that was the first time we were given money. Did not know what to do but we held on to the money we were given. (How many harvests did you complete?) Many I cannot remember exactly. We would harvest every three weeks."

[36] The petitioner provided an explanation in a statement prepared for the purposes of the appeal to the FtT, at paragraphs 27 and 42:

> "27. My Solicitor has explained to me that at paragraph 48 the Home Office have referred to me, by saying in my asylum interview, in answer to question 173, that I asked Lam if we were going to be paid and he said no. The Home Office then say I contradicted myself in my next answer to question 174 of my asylum interview when I said that after each harvest we would get £20 or £30 each. I have said that each harvest would take place every three weeks or so. After every harvest if they were happy with the produce they would give us £20 or £30 each. That is the truth, I am not lying and I confirmed this at my asylum interview. I do not think I have been inconsistent about this. […]
>
> 42. The Home Office also refer to it being said in my NRM referral, dated 27th February 2018 that I said that I was not paid for the work by the traffickers because I had been told I had been sold and we were working to repay the cost of the journey and that I also said that we were given some money each time the plants were harvested. I am telling the truth about this, that is what we were told and we were given the money as I have said, that is the truth. I do not think I have contradicted myself about this."

[37] The FtT judge referred to, and quoted in part, the statement in her decision. She went on to say, however:

> "This answer simply does not answer the discrepancy of the claims of the appellant, claiming at one point that he was never paid, despite asking if he would be, to then claiming that he was paid and that he used the money he was paid to ask the traffickers to buy more food. Again, I find this a serious discrepancy in the appellant's claims and damaging to his credibility that he was detained by human traffickers for nearly 2 years."

[38] The FtT judge has read the response to Q173 as answering the question posed in the negative. It is possible to read it as an indirect and partial answer to the question, with the

remainder of the answer being given in response 174, and therefore not necessarily involving any inconsistency. The petitioner disclaims any inconsistency in his statement. The statement was before the FtT judge, and she specifically refers to it and takes account of it, but goes on to reject it. A different decision-maker could have come to a different view about the passage in the interview, but that in itself does not found an appeal based on error of law.

[39] The decision challenged in this petition is that of the UT, not that of the FtT. In addition to the passages from it that I have already quoted, the UT decision included the following, in paragraph 5.

> "The grounds seek to identify inadequacies in the assessment of credibility but it is not arguable, when considering the findings as a whole, that the judge has failed to engage with the evidence, or has reached a conclusion on credibility that was not open to her based on that evidence. I agree with the comments of First-tier Tribunal Judge Bulpitt at paragraph 2 of his refusal to grant permission dated 2 September 2019."

The relevant passage in Judge Bulpitt's decision is the one to which I refer at paragraph 9. Judge Bulpitt in that connection referred to *VW (Sri Lanka)* [2013] EWCA Civ 55, at paragraph 12, which reads:

> "Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact. […]"

[40] The UT judge has considered the FtT judge's conclusion on credibility looking at her findings "as a whole" and has concluded that the conclusion she reached was one open to her. In *AH (Sudan)* Lord Hope, at paragraph 19, said the following:

> "I agree also with what Baroness Hale of Richmond says about the caution with which the ordinary courts should approach the decision of an expert tribunal. A

> decision that is clearly based on a mistake of law must, of course, be corrected. Its reasoning must be explained, but it ought not to be subjected to an unduly critical analysis. As your Lordships have indicated, there are passages in the decision that is before us which might, when read in isolation, suggest that the tribunal misdirected itself. But I am quite satisfied that the decision as a whole was soundly based, and that a more accurate wording of the passages that have attracted criticism would have made no difference to the tribunal's conclusion on the facts that the Secretary of State's refusal of asylum in these cases should be upheld."

The reference to Baroness Hale of Richmond is to paragraph 30 in the same judgment:

> "This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

[41] The UT judge has approached matters, in accordance with the approach described by Lord Hope, by looking at the FtT judge's findings as a whole. In so doing he did not err in law. The FtT judge founded on a number of matters in reaching her overall conclusion on credibility. The UT judge was entitled to determine that it was not arguable that in reaching that conclusion she had materially misdirected herself in law, bearing in mind the approach desiderated by Lord Hope and Baroness Hale in the passages quoted above.

(iv) Failure to identify that the reasons given for rejecting the account as incredible were unsound

[42] This ground of challenge was in substance mainly a reformulation of the petitioner's complaints about the FtT judge's treatment of the account of having been taken to the dentist, and about her treatment of what he said at interview about whether or not he had

received payment. In this chapter counsel also submitted that the FtT judge should not have placed any reliance on the matters that she did so far as the circumstances of the petitioner's arrest were concerned. Those matters had not been raised by the respondent in cross-examination. Counsel submitted that these matters had been focused in paragraphs 6 and 7 of the grounds presented to the FtT. Those paragraphs, in fact, deal exclusively with the circumstances of arrest. Paragraph 6 states that the FtT judge was not entitled to regard the petitioner's account that he did not know that he was in a hotel, rather than a domestic flat, because there had been no evidence before her that he had walked through reception, and no evidence that there was in any event a reception area in the hotel. The issue had not been raised by the respondent in cross-examination or at any other stage of the claim. Paragraph 7 contains a contention that the FtT judge was not entitled to make adverse credibility findings on the basis that cannabis was found in the vicinity of the petitioner in the hotel room when he was arrested by the police, and that there was no evidence to support her suggestion that he had been involved in the production of cannabis for profit.

[43] Again, counsel argued that the FtT judge was obliged to explain why she had not accepted the petitioner's explanation at interview, and again in a statement tendered to the FtT, for being taken to the dentist, namely that he had been unable to eat and therefore unable to do the work the traffickers wanted him to.

[44] So far as the visits to the dentist and the matter of payment is concerned, this ground of challenge added nothing to those already advanced, and I reject them for essentially the same reasons as I have already given.

[45] As regards the treatment of the circumstances of arrest, the FtT judge did not believe the petitioner's account of how he came to be found by police in a hotel room in which there was also cannabis. She was criticised for regarding as incredible the petitioner's claim that

he thought he was in a flat at the time, and did not realise until later that he was in fact in a Jury's Inn Hotel. The passage of her decision dealing with the credibility of the petitioner's account of his escape and apprehension requires to be read as a whole. It appears at paragraphs 31-36:

> "31. In interview, the appellant described in extremely vague terms the somewhat fortuitous way he was able to escape from a farmhouse barn, walk from the country across the fields, keep in hiding from his traffickers who were presumably searching for him, and when came (sic) entered a town or city after a day and a half or 2 days, came across some Vietnamese people in a street who helped him (question 189). I found the appellant's evidence no more specific at the hearing, although I asked him to be so with regard to how he managed to meet Vietnamese people so fortuitously after his escape in an unknown area of Scotland.
>
> 32. To continue with the answer given by the appellant at interview at question 189, he said after meeting these Vietnamese people who helped him, he would go around the town centre and Vietnamese people would give him food. The day before he was arrested he met a Vietnamese man who told the appellant to go to his house and have a shower and have some food. The appellant said 'When I got to his house one person was also in there and then police came and knocked on the door and they came in to ask if we have any paperwork documents and when we said, 'No', they took us away'.
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> 33. The appellant was apprehended by the police in a hotel with another man. The appellant was asked, 'Was this a house you were arrested at?' and he replied, 'A flat' (question 190). That was not the case given the appellant was arrested in a hotel although it appears at this stage of the interview the appellant did not know the respondent knew that. It was put to him then by the interviewing officer 'Not a hotel?' to which the appellant replied, 'I did not know it was a hotel at the time. Only later on I did'.
>
> 34. The appellant clearly knew the difference between a house and a flat at the time of this interview. He gave oral evidence that he was in a hotel room. I do not consider that this could be called 'a flat'. Even if the appellant did not know, despite walking through the large reception of Jury's Hotel in Glasgow, that it was a hotel in which he claims he spent overnight with another man before he was apprehended by the police and during which time they had ample time to explore the accommodation, the most one could describe a hotel room would be as a 'room'. Apparently, according to the appellant, he knew nothing about the cannabis that was found in the room.
>
> 35. I note this evidence because I do not find credible the appellant's claim of how he ended up, not in a house as he originally stated, then changed in the next question to a flat, but in a hotel room. Also, I consider it relevant that cannabis was

> found in the vicinity of the appellant in the hotel room. Mr Mullen indicated there were various ways that the appellant could be fully aware of how a cannabis farm looked and the conditions. A way I would suggest is that he was directly in the production and profit of a cannabis 'factory' rather than as a victim of those who were. This would explain being found in a hotel room with cannabis rather than, say, locked in an artificial environment and having suffered beatings and little food over a period of nearly 2 years.
>
> 36. I accept the appellant has provided details in certain parts of his evidence in relation to, for example, the cannabis farm, but nothing which he could not have gleaned from a variety of sources by the time of his substantive interview which took place some months after he was apprehended by the police. I find it of note that in the screening interview in February 2018 when the appellant was asked whether he had been subject to exploitation, for example, forced labour, in his own country, on the way to the UK or in the UK his reply was 'No'. Just before the substantive interview in July 2018 the appellant made amendments to the screening interview record and at this point it is claimed that the appellant did not understand what was meant by the word 'exploitation' which is why he said, 'No'. However, I consider amongst the examples given in the question of what 'exploitation' meant, i.e. 'forced labour' the appellant would have understood the question."

[46] It was open to the FtT judge to regard the petitioner's account of his escape and apprehension as incredible. Her reasons are apparent from the passages quoted above. Her conclusion did not depend on there being evidence that the petitioner walked through a reception area at the hotel, as is apparent from her use of the words "even if". The FtT judge was entitled to entertain the possibility that the circumstance that the petitioner was found in a hotel room in which cannabis was also found could point to his being involved in the trade in cannabis at the time other than as a victim of forced labour as a "gardener". She goes on in paragraph 36 to explain that the possibility that the petitioner had detailed information about the process for the production of cannabis was something that was in issue in the appeal, and which was the subject of submission by the respondent.

[47] These criticisms of the FtT judge's conclusions are, again, in substance, statements of disagreement with those conclusions. They do not identify an error of law. The UT was entitled to reject them without specific reference to their substance. Paragraph 5 of the UT's

decision provides adequate reasons for rejecting paragraphs 6 and 7 of the grounds of appeal.

(v) Failure to consider ground of appeal relating to Article 8 ECHR

[48] Paragraph 13 of the grounds of appeal to the FtT reads:

> "The … judge … finds that the appellant's case under Article 8 can be upheld. It is submitted that the … judge's findings are made further to material errors of law as highlighted in these grounds. It is submitted that the … judge's decision in this regard is therefore materially erroneous."

[49] Counsel submitted that the UT had failed to mention this ground of appeal in its decision and had failed to exercise its jurisdiction in that respect. He cited *HMD, Petitioner* [2019] CSOH 84, at paragraph 14.

[50] This ground of challenge cannot succeed. The UT did not require to provide a separate reason for rejecting this ground of appeal. The ground of appeal is expressly predicated on the errors – namely errors in the FtT judge's approach to credibility – set out in the preceding paragraphs in the grounds of appeal. The UT rejected the grounds of appeal directed at the FtT judge's treatment of credibility. Specific reference to this ground of appeal was therefore unnecessary. What I said in *HMD* at paragraph 13 applies, namely:

> "The UT need not in all cases give reasons for refusing each ground of appeal individually. Different grounds of appeal may in substance address the same matters. There may be cases in which some claimed errors of law are not material unless another is found established. If that latter claimed error is not deemed arguable, it will be pointless for the UT to consider permission in relation to all of the others."

(vi) The rejection of the expert report was contrary to principle

[51] Counsel submitted that the FtT judge had rejected the expert report because she had reached an adverse view of the credibility of the petitioner. That meant that she had erred in

law by failing to look at the evidence in the round as she required to do. Counsel referred to *TF (Iran)*. The relevant passage in that case is this, at paragraphs 49 and 50.

> "49. The second point is that even if the FTT judge concludes that the witness's evidence on the critical matters is undermined by a finding that he is generally incredible and not to be relied on, that has the limited effect that the appellant's (disbelieved) evidence is disregarded or put to one side: it does not somehow become evidence to the opposite effect, to be used against the appellant in contradiction of other independent evidence on which he relies. That again reflects the standard direction in criminal cases in Scotland and applies in civil cases too, including cases before tribunals. The judge should not allow his adverse finding about the credibility of the appellant to sway his assessment of the credibility and relevance of other independent evidence bearing upon the issue before him. So here, where the FTT judges have disbelieved the appellants' evidence that they are genuine converts to Christianity, their evidence to that effect will be put to one side, given no weight. But the rejection of their evidence on this point does not become evidence that their conversion is not genuine, to be set against other, independent, evidence from which the genuineness of their conversion can be inferred. That other evidence requires to be assessed on its merits, without any a priori assumption derived from the complainer's own false evidence that it is in some way suspect or of little value.
>
> 50. The third point is very familiar in this type of case. It is wrong in principle to form a concluded view of the probable veracity of particular items of evidence and then, from that fixed point, to allow that view to govern the assessment of other evidence in the case. The proper approach is to adopt what is sometimes called an 'holistic' approach, considering all the evidence 'in the round' before arriving at any concluded view on the facts. The authority usually cited for this proposition is the judgment of Sedley LJ in *Karanakaran v Secretary of State for the Home Department* …"

[52] Counsel did not submit that this point was focused in any particular paragraph of the grounds of appeal.

[53] It would be a material error of law if a judge were to carry out a compartmentalised evaluation of the evidence, whereby she made an adverse finding in relation to a claimants' credibility, and then allowed that to influence or sway her assessment of other evidence in the case, such as the evidence of an expert witness. My reading of the FtT judge's treatment of the expert's report in this case is that she afforded little weight to it because she did not accept the expert's view that the claimant's account was derived from personal experience

rather than from information that was in the public domain. There were matters which were not the subject of comment in the expert report which caused her to conclude that the petitioner's account was not credible. They were matters in relation to which the expert report offered no information or opinion. The judge does not appear to have committed the error referred to in *TF (Iran)*. Further, although there is a lengthy paragraph in the grounds of appeal to the FtT which makes various criticisms of the FtT judge's approach to the expert report, I cannot discern in it this particular criticism. It follows that the decision of the UT is not open to challenge on the basis that it did not address this point.

Disposal

[54] I therefore refuse the petition.