Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001438
on appeal from HU/09903/2019

THE IMMIGRATION ACTS

Heard at Field House
On 4 August 2022

Decision & Reasons Promulgated
On 26 September 2022

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

N J (PAKISTAN)
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Chris Avery, a Senior Home Office Presenting Officer
For the respondent: Mr Alex Burrett of Counsel, instructed by Law Lane solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission from the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 22 May 2019 to refuse the claimant leave to remain on human rights grounds (private and family life). The claimant is a citizen of Pakistan.

2. **Anonymity order.** Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant, her partner and her child are granted

anonymity. No-one shall publish or reveal any information, including the name or address of the claimant, likely to lead members of the public to identify them or any of them. **Failure to comply with this order could amount to a contempt of court.**

3. **Mode of hearing.** The hearing today took place in hybrid form. The claimant gave her evidence remotely by Microsoft Teams. There were no significant technical difficulties. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.

Background

4. The claimant arrived in the UK from Pakistan on 15 March 2013, on a visa valid until 6 September 2013, and her leave was then extended in line with that of her former husband, until 5 October 2016. The claimant's first marriage had failed and she had significant difficulties with her in-laws, who were abusive.

5. On 8 August 2014, the claimant's leave was curtailed to expire on 7 October 2014. Thereafter, the claimant had no extant leave.

6. She met her current partner through his cousin, a longstanding school friend from her school days in Pakistan, and he helped her to get away from her abusive in-laws and to recover from her difficult first marriage. They began to live together in 2014.

7. On 9 January 2015, the claimant claimed asylum, saying that her own family had disowned her following the breakdown of her marriage, and that her first husband's family in Pakistan also would not approve of the relationship. The respondent refused her application and she was appeal rights exhausted thereon on 1 December 2017.

8. In November 2015, the claimant's new partner had returned to Pakistan at the end of his studies, but they stayed in close touch. The claimant's divorce from her first husband was finalised on 1 November 2016.

9. Her partner came back to the UK in February 2017 and their relationship became serious. In March 2017, the claimant was pregnant but was not yet married to her new partner and with great reluctance, she had an abortion.

10. On 9 February 2018, she made further submissions, which were unsuccessful. Her new partner got a job in Glasgow and moved up there, alone at first, but when he had made the appropriate living arrangements she joined him in September 2018 and they have lived together ever since.

11. On 5 December 2018, in Glasgow, the claimant married her new partner, who is now her second husband.

12. On 9 January 2019, the claimant made a human rights claim on the basis of private and family life with her second husband, who is a Tier 2 (General) Migrant, a software engineer with an annual salary of £42840 as at August 2021, significantly in excess of the minimum income requirement for the admission of a spouse. At the date of hearing before the Upper Tribunal, it was even higher, about £47000. His Tier 2 leave is valid until 18 July 2023.

13. The claimant's second husband has a pending application for settlement, having been lawfully in the UK since 2014. He is unwilling to return to Pakistan and start again as he has a good job, towards which he has studied here. He has had his biometric interview. Ms Cunha knew of no reason why he should be refused settlement although she could not pre-judge the outcome of that application.

14. The claimant and her second husband have a son born on 16 February 2022. He has health problems: he has a hole in his heart which will probably require an operation and which is currently managed with diuretic medication.

Refusal letter

15. On 22 March 2018, the respondent rejected the claimant's further submissions: that is the decision under challenge. The claimant's partner was in the UK with limited leave to remain, so at the date of application, the respondent considered that the claimant did not meet the requirements of Appendix FM. paragraph E-LTRP.1.1-1.12, and in particular sub-paragraph E-LTRP.1.2.

16. The Secretary of State considered whether paragraph EX.1 availed the claimant, but while accepting that the relationship between the claimant and her new partner was genuine and subsisting, concluded that it did not. The claimant had no child in the UK at the date of decision and had not demonstrated insurmountable obstacles to reintegration in Pakistan as required by paragraph EX.2.

17. The claimant could not bring herself within paragraph 276ADE. She had not been in the UK for 20 years, but only for 5 years, and she could not demonstrate very significant obstacles as required by paragraph 276ADE(1)(vi) or any of the other requirements of sub-paragraphs of paragraph 276ADE.

18. Nor were there any exceptional circumstances for which leave to remain should be given on human rights grounds outside the Rules. Her claim to be at life-threatening risk on return was no more than a repetition of the asylum claim already fully considered and dismissed and the present claim was limited to human rights.

19. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

20. First-tier Judge Wilding allowed the appeal. He treated the July 2016 decision of Upper Tribunal Judge Spencer as the *Devaseelan* starting point and set out the preserved findings at [16] of his decision. The present factual matrix did not yet exist in 2016: the claimant and her second husband were not yet in a relationship and there was no child. Judge Wilding was cautious, given the negative credibility findings in 2016. He found that there were no very significant obstacles to integration for the claimant.

21. However, the claimant's case turned on her then pregnancy and her refusal to fly whilst pregnant. Pakistan was then on the Covid-19 Red List and the claimant would be unable to return to the UK if she travelled there. The First-tier Judge found that these elements of the claimant's circumstances outweighed the public interest in controlling migration.

22. The First-tier Judge found that in the circumstances, the removal of the pregnant claimant to Pakistan would be disproportionate. He recommended, but did not direct, that she be granted leave in line with her second husband, until 18 July 2023.

23. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

24. First-tier Judge Easterman granted permission to appeal, finding it arguable that the First-tier Tribunal had misdirected itself as to the effect of the Red List: the Covid-19 Red List did not bar return to the UK for individuals who, like the claimant's second husband, had rights of residence and time remaining on their visas. If the claimant were to make a successful application for leave to enter as a spouse, she also would arguably be unaffected by the Red List restrictions. The respondent had produced the relevant public guidance on the government website to that effect.

25. The First-tier Judge had made an arguable error of fact in relation to the effect of the Red List which might be material to the outcome of the appeal.

Rule 24 Reply

26. The claimant's solicitors filed a Rule 24 Reply to the grant of permission. After setting out the history, she argued that the First-tier Judge's decision turned not only on the Red List issue but also on her pregnancy and her lack of supportive family in Pakistan.

27. The claimant's child had now been born. Neither family would accept her return with a child, with no male protector, and she asserted that the First-tier Judge had not erred in finding that she would face very significant obstacles to reintegration in Pakistan without family support.

Rule 25 Reply

28. As permitted by Rule 25, the respondent provided a Response to the claimant's Rule 24 Reply. She observed that even if the First-tier Judge had made an holistic assessment, a mistake of fact such as that which he made about the effect of the Covid-19 Red List would have attracted weight which rendered the conclusion unsafe such that the First-tier Judge's decision must be set aside.

29. The First-tier Judge had already found that there were no 'very significant obstacles' to the claimant's reintegration in Pakistan. The First-tier Judge's findings at [15]-[22] were not in issue and should be preserved.

30. The question of the claimant's new child, which was the subject of a rule 15(2A) application, was a new matter. The Secretary of State consented to the new matter being considered on remaking.

Upper Tribunal - Error of law

31. By a decision sent to the parties on 8 June 2022, I found a material error of law and allowed the appeal with no findings of fact or credibility preserved.

32. I set out the additional factual matters which would need to be weighed when the decision was remade:

> (1) Pakistan is no longer on the UK Red List: it was removed two weeks after the First-tier Tribunal and the Red List has been discontinued;
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> (2) The claimant's son, born on 16 February 2022, has medical issues: he was diagnosed in May 2022 as having a sizeable peri-membranous ventricular septal defect (a 'hole in the heart'). He is likely to need cardiac surgery to correct the defect. It is accepted that this is a 'new matter' but the Secretary of State has consented to it being dealt with in the current proceedings;
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> (3) The claimant's second husband is in the UK with Tier 2 leave. His leave expires on 18 July 2023. However, he will shortly be eligible to apply for indefinite leave to remain as he will have accrued 5 years' lawful residence in June 2022. If he succeeds, he will be able to register their son as a British citizen.

33. I gave directions for the remaking hearing. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal - remaking the decision

Supplementary bundle

34. The claimant filed a supplementary bundle, with 18 pages of new material, including an updated witness statement which is summarised below.

35. The supplementary bundle included a copy of the birth certificate for the claimant's child, showing that he was born at the Queen Elizabeth University Hospital in Glasgow in February 2022, with his father's occupation given as 'computer software engineer'.

36. On 3 May 2022, Dr Stavros Christoforides, Registrar in Paediatric Cardiology, wrote a detailed report on his review of the baby. After setting out the child's history in his short life (then less than three months old), Dr Christoforides summarised his advice:

> "In summary, [the child] has a sizeable VSD [hole in the heart] and I explained to the parents with detail what this means and that he is likely to need cardiac surgery to correct this defect. I have discussed this with Dr Walayat, and we decided to prescribe diuretics for [him] (I handed to [his] parents today a prescription request in order to receive the medications from their GP). [He] will be started on Frusemide 6 mg twice daily and Spironolactone 6 mg twice daily. I also gave them the contact details of the cardiac liaison nurses and they should contact us if they have any concerns until we next see him, which will be the 2nd June 2022, in Dr Walayat's clinic."

37. Following the review on 2 June 2022 (when the child was not yet four months old), on 14 June 2022 Dr M Walayat, Consultant Cardiologist, said this:

> "I have discussed [the child's] heart condition at joint cardiac conference on 10th June [2022]. The meeting was attended by consultant cardiologists, cardiac surgeons, anaesthetic team and intensive care specialists. In our opinion, it is safe for the time being to defer surgery for [him]. However, he will require regular monitoring.
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> In future, heart operation for VSD closure will be considered again, depending on [his] progress. He will return to see me in clinic as arranged previously. "

38. The remaining new documents are medical records, which add nothing to the summary above, and evidence, which is not disputed, of the second husband's application for indefinite leave to remain.

Claimant's evidence

39. The claimant gave evidence, adopting her original witness statement of 5 December 2019 and her updated witness statement of 4 July 2022, and was tendered for cross-examination.

40. The contents of the 2019 witness statement have been summarised under 'Background' above. In the 2022 witness statement, the claimant dealt with the circumstances of her son, who was still less than 6 months old at the date of the remaking hearing.

41. When born, the child had seemed fine, but at a month old, his intake of milk reduced and he began to have breathing difficulties. He was seen by

the family's general medical practitioner, who referred him to the Royal Hospital for Children in Glasgow. There, the consultant told the couple that their child has a hole in his heart, so that his heart rate raced even when he was resting, and he had difficulty breathing: see the 29 April 2022 letter from Dr Stavros Christoforides summarised above.

42. The claimant described herself as 'shattered' and 'heartbroken' by the news. She was paranoid: even if her son had a slightly longer nap, she would become worried and anxious. In the child's most recent consultant appointment, they had been told that due to his very young age, an operation now would be difficult. The surgery would be deferred, with regular monitoring, and he was prescribed diuretics to take out liquid from his body. The child was regularly checked by ECG. According to how his health progressed, he might need emergency heart surgery. This was not reflected in the consultant's letter but she had been told it at a consultation.

43. The claimant's second husband was eligible on 21 June 2022 to make an application for indefinite leave to remain. If that succeeded, as she expected that it would, their child could be registered as a British citizen. Her husband had not lived in Pakistan for a very long time and if they relocated together, the family would struggle financially. One needed good connections as well as qualifications to gain employment in Pakistan, which he did not have.

44. The claimant's own family were not happy with her having brought shame on the family name and had made it very clear that they would never help her or have anything to do with her. They had not seen or understood how unhappy she was in her first marriage. She did not know what health facilities were available for her son in Pakistan, but even if they existed, they were likely to be too costly for the claimant and her husband to afford.

45. The claimant remained extremely distressed and anxious about her son's condition and her own immigration status. She asked that her appeal be allowed.

46. In cross-examination, the claimant confirmed that her main concern was her child. He might have to remain on the diuretics until his operation: she was not sure. Originally, he was to have had the heart operation in June or July 2022 but it was now deferred until 'later'. She would have another appointment later in August 2022 and hoped to learn more then.

47. The claimant had not thought what she would do if they lost the case, or how she would manage if she and the baby had to leave.

48. There was no re-examination.

49. The claimant's husband adopted his witness statement of 5 December 2019. There was no updated statement. He confirmed that his employer

had told him that his services would be required for the foreseeable future. He had not yet heard from the Home Office about his settlement application. He was then tendered for cross-examination.

50. In cross-examination, the claimant's husband said that he had not thought what he would do if his wife lost her appeal. All of their focus was on their very sick baby, who would be six months old on 16 August 2022.

51. There was no re-examination.

Secretary of State's submissions

52. For the Secretary of State, Mr Avery noted that the claimant had remained in the UK without any leave since 2014 and that she could not meet the Rules. Were it not for the circumstances of her sick child, she would have no possibility of succeeding under Article 8 ECHR, within or outwith the Immigration Rules.

53. As regards the child, his circumstances should be considered as part of an holistic proportionality assessment. His health was currently managed with medication and there was no date for surgery nor any conclusive view that it would be necessary.

54. It was unhelpful that the claimant and her second husband had given no thought to what would happen if she were returned to Pakistan with the child. The husband's salary was good and he could afford to cover medical costs in Pakistan for his wife and child. The threshold set by the Supreme Court in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 was not reached.

Claimant's submissions

55. For the claimant, Mr Burrett relied on the claimant's skeleton argument settled by Counsel Mr Jay Gajjar and adopted the reasoning therein.

56. Only three issues remained live before the Upper Tribunal:

    (i) Whether removal would breach the Article 3 ECHR rights of the claimant's child, by reason of his health and the likely need for corrective cardiac surgery;

    (ii) Whether removal would constitute a disproportionate breach of the Article 8 ECHR rights of the claimant and/or her family members; and

    (iii) Whether the claimant's removal, with or without her family, would be 'hostile to the best interests of her son', pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009.

57. After setting out the factual matrix, the claimant's skeleton drew attention to the Secretary of State's September 2020 CPIN entitled *Pakistan:*

Medical and Healthcare Provisions , which at 4.2.7 set out information obtained in January 202 by MedCOI on the availability of paediatric cardiac surgery in Pakistan:

> "4.2.7 Referring to paediatric cardiac surgery, a MedCOI response dated 28 January 2020 noted:
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> > "Each year, about 50,000-70,000 children are born with congenital heart defects, and almost 25% are in need of surgery within the first year. There are no specialised Children's Heart Hospitals in Pakistan, according to the Pakistan Children Heart Foundation. A pediatric interventional cardiologist was quoted in a newspaper article to say: 'A fully functional, state-of-the-art centre with doctors who are specifically trained for such pediatric cases [congenital heart diseases] does not exist in our country' laments Dr Hasan. 'Children's Hospital in Lahore is the only exception. The rest of the country has three centres that have this facility, including Karachi's National Institute for Cardiovascular Diseases (NICVD) and Aga Khan University Hospital (AKUH)'. Information from Aga Khan University confirms that 4 facilities in the country can perform surgery on patients with congenital heart diseases.
> >
> > The country has about 21-25 trained pediatric cardiologists and 4-8 pediatric cardiac surgeons, as the exact number varies slightly according to different sources. Most trained Pakistani surgeons leave the country for countries with better pay and better quality of life, though some are said to be returning to Pakistan. According to the Pakistan Children Heart Foundation, this results in long queues, with 9,000 patients waiting for surgery and 25-30 new cases added to the list each week. According to the Head of Paediatric Cardiology, National Institute of Cardiovascular Diseases (NICVD), 22,000 surgeries need to be performed each year, but only 4,000 are performed each year.
> >
> > Due to long wait times, many who can afford go to India for treatment. There may also be other reasons – a patient with Tetralogy of Fallot was advised to seek treatment in India, because although the procedure could be done in Pakistan, the post-operative care was according to the treating doctor not adequate. However, the political tension between the countries means it can sometimes be difficult for Pakistani families to obtain a visa.""

58. There was an evident lack of skilled medical personnel in Pakistan to meet the demands posed by children born with the illness which the claimant's child has. The case reached the *AM (Zimbabwe)* threshold.

59. In relation to the second question, and section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended), Mr Burrett argued that sections 117B(2) and (3) were neutral for this claimant. As regards section 117B(4), little weight being attached to the claimant's private life was not the same as no weight. He acknowledged that the claimant's child could not yet benefit from section 117B(6) but that would change if the claimant's second husband became settled, as seemed likely.

60. Finally, in relation to his third question, it was plainly in the child's section 55 best interests to remain in the UK with his parents 'and in close proximity to the care, monitoring and treatment he needs'. The appeal should be allowed.

61. In oral submissions, Mr Burrett reminded me that the claimant's child was very sick indeed. The cost of treating him in Pakistan would be significant. His understanding was that the lack of evidence from Pakistan was because the situation was not straightforward and it was difficult to obtain a clear picture.

62. Mr Burrett referred to Mr Gajjar's skeleton argument at [6]. The child would be returning with just one parent, a lone female head of household who had not resided in Pakistan for nearly ten years. The evidence was that treatment for cardiac problems in Pakistan was inadequate.

63. The Tribunal should also give weight to the strong possibility that the child's father would soon be settled in the UK, such that the child could be registered as a British citizen. Nothing jumped out of the factual matrix to suggest that the father's settlement application would fail and he had current valid leave until June 2023.

64. If the claimant and her child were removed to Pakistan, there was sufficient income and (save for her negative immigration history) it was likely that she would meet the requirements of the Rules for admission as a spouse to join her second husband here. It was unreasonable in those circumstances to expect the child and the claimant to return to Pakistan and apply to regularise her status from there.

AM (Zimbabwe)

65. In *AM (Zimbabwe),* the Supreme Court considered the interpretation of the following passage in *Paposhvili v. Belgium - 41738/10* (Judgment (Merits and Just Satisfaction) : Court (Grand Chamber)) [2016] ECHR 1113 (13 December 2016):

> "183. The Court considers that the 'other very exceptional cases' within the meaning of the judgment in *N v The United Kingdom* (para 43) which may raise an issue under article 3 should be understood to refer to 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. The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."

66. At [23] in the judgment of Lord Wilson JSC (with whom Lady Hale JSC, Lady Black JSC, Lady Arden JSC and Lord Kitchin JSC agreed), he set out the respective obligations of the parties after *Paposhvili:*

> "23. Its new focus on the existence and accessibility of appropriate treatment in the receiving state led the Grand Chamber in the *Paposhvili* case to make significant pronouncements about the procedural requirements of article 3 in that regard. It held
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> (a) in para 186 that it was for applicants to adduce before the returning state evidence "capable of demonstrating that there are substantial grounds for believing" that, if removed, they would be exposed to a real risk of subjection to treatment contrary to article 3;
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> (b) in para 187 that, where such evidence was adduced in support of an application under article 3, it was for the returning state to "dispel any doubts raised by it"; to subject the alleged risk to close scrutiny; and to address reports of reputable organisations about treatment in the receiving state;
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> (c) in para 189 that the returning state had to "verify on a case-by-case basis" whether the care generally available in the receiving state was in practice sufficient to prevent the applicant's exposure to treatment contrary to article 3;
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> (d) in para 190 that the returning state also had to consider the accessibility of the treatment to the particular applicant, including by reference to its cost if any, to the existence of a family network and to its geographical location; and
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> (e) in para 191 that if, following examination of the relevant information, serious doubts continued to surround the impact of removal, the returning state had to obtain an individual assurance from the receiving state that appropriate treatment would be available and accessible to the applicant."

67. That, therefore, is the approach which must be taken to the risk to the claimant's child if he is returned to Pakistan with her.

Analysis

68. Much of what was before the First-tier Tribunal has fallen away. The only issues now are those identified by Mr Gajjar's skeleton argument:

    (i) Whether removal would breach the Article 3 ECHR rights of the claimant's child, by reason of his health and the likely need for corrective cardiac surgery;

    (ii) Whether removal would constitute a disproportionate breach of the Article 8 ECHR rights of the claimant and/or her family members; and

(iii) Whether the claimant's removal, with or without her family, would be 'hostile to the best interests of her son', pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009.

69. I remind myself that the factual matrix falls to be considered as it is today, and further, that the Secretary of State has consented to the new matter of the claimant's child being dealt with in these proceedings. I begin by considering the Article 3 ECHR risk to his health if he is returned. The evidence of his ill health, and the need for very active monitoring and possible emergency surgery, even in the first year of his life, is enough to meet the paragraph 186 *Paposhvili* obligation to raise a prima facie case 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, or even Article 2 ECHR.

70. The Secretary of State has asked MedCOI to provide her with an objective overview of the treatment options in Pakistan for children with cardiac surgery needs. She has not verified on a case-by-case basis whether the care generally available in Pakistan is in practice sufficient to prevent this child's exposure to treatment contrary to Article 3 ECHR, but the MedCOI evidence, which is recent, is of 22000 children needing cardiac surgery but only 4000 getting it each year, of parents paying to go to India if they can get the visas, and of at least one cardiac specialist considering that post-operative care is seriously inadequate. There is no suggestion that the level of monitoring until surgery is needed, or emergency surgery, would be available in Pakistan.

71. I am particularly concerned by the paragraph 190 requirement for the returning state to consider the accessibility of treatment, 'including by reference to its cost if any, to the existence of a family network, and to its geographical location'. No such evidence is before me. Nor, as required by paragraph 191, have individual assurances been sought from the Pakistani authorities.

72. I am satisfied that the *AM (Zimbabwe)* Article 3 standard is met, given the fragile health of the claimant's child.

73. Turning to Article 8, it is right that the claimant cannot bring herself within the Rules. In relation to Article 8 generally, section 117B(4)(b) of the 2002 act requires me to give little weight to a relationship formed with a qualifying partner, if it was formed when the claimant was here unlawfully. The claimant's private life in the UK, and her relationship with her second husband, do not avail her much for that reason. Her relationship with her child is unaffected by the section 117B presumptions, but if removed, she would be removed with her son.

74. I am satisfied that it is in the child's section 55 best interests to remain in the UK with his parents, and close to his current medical and treatment team, for the remaining duration of his father's Tier 2 visa, which is valid well into 2023. By that time, the question of when he should be operated

upon may be clearer and as Mr Burrett observed, his father may have been granted settlement, entitling the claimant's child to be registered as a British citizen.

DECISION

75. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by allowing the claimant's appeal.

Signed Judith AJC Gleeson Date: 9 August 2022
Upper Tribunal Judge Gleeson