IN THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002540

First-tier Tribunal No:
EA/12018/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 1st of February 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SEFEDIN KRAJA

(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECIDED WITHOUT A HEARING PURSUANT TO RULE 34 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appellant's appeal following my previous error of law decision, promulgated on 6 October 2022, by which I concluded that the First-tier Tribunal had materially erred in law when allowing the appellant's appeal against the respondent's refusal of his EUSS application.

2. This appeal has been brought under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020.

3. I intend to keep this re-making decision relatively brief. The parties will be well-aware of my error of law decision (annexed to this re-making decision), the protracted procedural history following that decision, and the various directions and further submissions provided as a consequence over the course of time.

4. It is important to note that, by correspondence dated 28 November 2023, the appellant confirmed (through his legal representatives) that he did not wish to attend a further hearing and that instead his appeal should be decided "on the papers".

5. I have considered all the circumstances of the case and whether it was appropriate to decide this appeal without a hearing, pursuant to rule 34 of the Tribunal's Procedure Rules. I concluded that it was. I have been provided with relevant evidence, together with written submissions from each party. Fairness does not require a hearing to take place.

The issues

6. Article 8 is not a live issue in this appeal. The First-tier Tribunal quite rightly concluded that the appellant's attempts to have raised it on appeal was effectively precluded by the "new matter" provisions of the 2020 Regulations. There was no cross-appeal against that conclusion.

7. The core issues are whether the appellant comes within the definition of "durable partner" under Annex 1 to Appendix EU to the Immigration Rules, or whether he can rely on the Withdrawal Agreement.

The evidence

8. I have considered relevant aspects of the appellant's consolidated bundle and the materials contained in the respondent's original appeal bundle.

The parties' submissions

9. I have considered the written arguments put forward by Mr B Hawkin, Counsel, dated 23 January 2023, together with what had been stated previously. On the respondent's side, I have had regard to the review

which pre-dated the First-tier Tribunal hearing, together with the written submissions from Mr P Deller, dated 7 February 2023.

10. The essence of the appellant's case as it now stands is that: (a) he is the "durable partner" of his EEA national spouse within the meaning of Annex 1 to Appendix EU; or alternatively, he can rely on the Withdrawal Agreement on the basis that the respondent's decision is disproportionate.

11. The respondent essentially submits that the appellant never held a "relevant document", could not otherwise bring himself within the definition of "durable partner", and cannot rely on the principle of proportionality.

Legal framework

12. I do not propose to set out swathes of the at times seemingly impenetrable provisions of Appendix EU, or the Withdrawal Agreement. The parties are well-aware of the legal framework.

13. They will also no doubt be well-aware of the current state of the authorities. I have of course had regard to the judgment of the Court of Appeal in Celik v SSHD [2023] EWCA Civ 921, together with other relevant reported decisions of the Upper Tribunal.

Conclusions

14. There is no dispute that the appellant had been in a durable relationship with his EEA national spouse at all material times. I have no reason to doubt that this relationship is now anything other than subsisting.

15. It is quite clear that the appellant had never applied for, nor been issued with, a residence card under the Immigration (European Economic Area) Regulations 2016. Therefore, he was not in possession of a "relevant document" as of 31 December 2020. That self-evident state of affairs means that the appellant cannot succeed in respect of his primary contention in this appeal.

16. In his written submissions of 23 January 2023, Mr Hawkin put forward an alternative basis on which he asserted the appellant could bring himself within the definition of "durable partner" under Annex 1. This submission relates to a specific element of the definition of "durable partner" set out at paragraph (b)(ii)(bb)(aaa) (referred to in some quarters as the "triple a" point). The provision as originally drafted was, to say the least, poorly drafted and has caused a certain amount of judicial consternation over time. It was amended (or, as the relevant Statement of Changes would have it, "clarified") in the spring of 2023.

17. Mr Hawkin has applied to rely on to unreported decisions of the Upper Tribunal which consider the “triple a” point and reached conclusions favourable to his position. It makes little difference as to whether I accede to that application. The issue has not as yet been the subject of a reported decision or consideration by the Court of Appeal. I am not bound by any authority. The relevant arguments can be made without the need to rely on unreported decisions. I would also note that the unreported decisions were, as far as I can see, concerned with a previous iteration of the definition under Annex 1.

18. I am entirely satisfied that the appellant’s position on the “triple a” point is wrong. The provision reads as follows:

> (a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); and
>
> (b)(i) the person holds a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) for the period of residence relied upon…or
>
> (ii) where the person is applying as the durable partner of a relevant sponsor (or, as the case may be, of a qualifying British citizen), or as the spouse or civil partner of a relevant sponsor (as described in sub-paragraph (a)(i)(bb) of the entry for ‘joining family member of a relevant sponsor’ in this table), and does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:
> (aa) the date of application is after the specified date; and
>
> (bb) the person:
>
> (aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the entry for ‘family member of a relevant EEA citizen’ in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date, unless (in the former case):
> - the reason why they were not so resident is that they did not hold a relevant document as the durable partner of that relevant EEA citizen for that period; and
> - they otherwise had a lawful basis of stay in the UK and Islands for that period; or
> …

19. The focus is on (aaa). The meaning of the exception to the requirement to hold a relevant document is that the individual must have been residing in the United Kingdom without a relevant document and they otherwise had a lawful basis of stay in this country. In other words, they did not need to have a relevant document if they had some other form of leave to remain in the United Kingdom, for example as a student, a skilled worker, or suchlike.

20. Any other construction of that particular aspect of the definition, including the argument put forward by the appellant in the present case, would have the effect of permitting persons unlawfully in this country to simply avoid the need to have held a relevant document, which in turn would have placed them in a better position than individuals who had been here lawfully. That would be an absurd result and clearly not one intended by the respondent when drafting (and re-drafting) Appendix EU.

21. The construction I have placed on the provision is entirely consistent with a sensible reading of the words, giving them their natural meaning in context.

22. It follows that Mr Hawkin's alternative submission fails.

23. Turning to the Withdrawal Agreement, it is now clear following Celik in the Court of Appeal that individuals in the appellant's position cannot rely on the principle of proportionality in an appeal under the 2020 Regulations. I can see no basis in the present case in which to conclude otherwise. Therefore, this submission also fails.

24. As stated earlier, Article 8 is not alive issue

25. The appellant cannot succeed in his appeal under the 2020 Regulations.

Anonymity

26. There is no basis on which to make an anonymity direction in this case and I do not do so.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

The decision in this appeal is re-made and the appeal is dismissed.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber
Dated: 30 January 2024

ANNEX: THE ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002540

THE IMMIGRATION ACTS

Heard at Field House

On 22 September 2022

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KRAJA SEFEDIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Mr S Walker, Senior Home Office Presenting Officer
For the respondent: Mr B Hawkin, Counsel, instructed by Justice and Rights Law Firm

DECISION AND REASONS

Introduction

1. I shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more "the respondent" and Mr Sefedin is "the appellant".

2. The respondent appeals against the decision of First-tier Tribunal Judge Aldridge ("the judge"), promulgated on 2 March 2022 following a hearing on 10 February 2022. By that decision, the judge allowed the appellant's

appeal against the respondent's decision, dated 16 July 2021, refusing to grant leave to remain under the EU Settlement Scheme ("the EUSS").

3. The appellant is a citizen of Albania, born in 1987. He arrived in the United Kingdom in 2012 and has remained here unlawfully ever since. The relevant EEA national ("the sponsor") apparently last arrived in the United Kingdom in September 2020, having visited briefly on previous occasions during which she had met the appellant. The appellant and sponsor entered into a relationship and became engaged in October 2020. They were unable to conduct the wedding due to backlogs created by the Covid-19 pandemic restrictions. They eventually married on 10 April 2021. The EUSS application was made on 18 May 2021.

4. Following the respondent's refusal of the application, the appellant appealed under the Immigration (Citizens' Rights Appeals) Regulations 2020 ("the 2020 Regulations"). Under these, two grounds of appeal were available to the appellant: that the respondent's decision breached rights held by the appellant by virtue of the Withdrawal Agreement; and/or that the decision was not in accordance with the relevant Immigration Rules (contained within Appendix EU).

The decision of the First-tier Tribunal

5. Having set out background information, the judge dealt with a preliminary issue, namely whether the appellant was able to rely on Article 8 ECHR in his appeal: [13]-[17]. He concluded that any Article 8 claim would have constituted an "entirely new case" and could not be pursued in the appeal before him: [18]. That conclusion has not been the subject of cross-appeal by the appellant and was, in any event, in keeping with the recent decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC).

6. The judge found as a fact that the appellant and sponsor had been in a durable relationship since September 2020 and had married in April 2021. However, the appellant had not held a "relevant document" at any material time and so was unable to comply with the definition of a "durable partner" set out in Appendix EU: [29]-[30]. It is common ground that the appellant had never be issued with a residence card as a durable partner, pursuant to the Immigration (European Economic Area) Regulations 2016 ("the 2016 EEA Regulations"), nor had he applied for one prior to 31 December 2020 (that being the end of the transition period).

7. The judge then addressed the appellant's submission that the respondent's decision was incompatible with the terms of the Withdrawal Agreement on the basis that it was disproportionate (whilst the judge made no reference to a specific provision, this must in my view have related to Article 18.1(r)). At [31] and [32], the judge said the following:

> "31. It is asserted that the decision is incompatible with the terms of the Withdrawal Agreement as the sponsor will be unable to reside with her husband in the UK, the decision is disproportionate and will deter her from exercising free movement. I do find considerable strength in this argument. I confirm that I have found that the sponsor and appellant were in a durable relationship, however, this is without the relevant documentation for the purposes of the [Immigration] Rules. The appellant and sponsor were in a durable relationship at the date of the withdrawal, and this is further evidenced by the consequent marriage in April 2021. An extensive examination of the appellant's personal circumstances must involve consideration of the fact that, but for Covid-19 pandemic, he would have married the sponsor before the specified date. I find this assertion is evidenced by the attendance at Kingston Register Office to apply for a Notice of Marriage on 2 November 2020 and accept the evidence of the appellant and the sponsor that no dates during 2020 were available.
>
> 32. I find that the effect of the Withdrawal Agreement is such that I must consider the proportionality of the refusal against the appellant and the effect of such a denial where he is the family member of an EEA citizen. I do find that the denial of the appellant's application would have a disproportionate effect upon the free movement of the EEA national sponsor. The effect would be that the refusal would discourage the union citizen to reside there and encourage her to leave in order to be able to lead a family life in another member state or in a non-member country. Accordingly, I find that the decision is incompatible with the terms of the European Withdrawal Act."

8. The appeal was "allowed", although it must be the case that this was solely on the ground of appeal set out in regulation 8(2) of the 2020 Regulations. On the judge's findings, the second ground of appeal relating to the Immigration Rules could not have succeeded.

The grounds of appeal and grant of permission

9. The only operative passage in the respondent's grounds of appeal is in paragraph 4 of the grounds, which reads:

> "4. Despite the dismissal of the appeal under Appendix EU and correctly not engaging with Article 8 claim the judge has allowed the appeal on the basis that the decision is incompatible with the terms of the Withdrawal Agreement. With all due respect to the learning judge it is not at all clear how the refusal decision is incompatible with the terms of the Withdrawal Agreement. It is submitted that there is a complete lack of reasoning in the judge's decision and that he materially misdirected himself in law. It is not clear if the judge was considering that the terms of Appendix EU were *ultra vires* or perhaps even that the appendix fell afoul of the appellant's human rights within the context of the Withdrawal Agreement. If he were it is respectfully submitted that such considerations were not within the learning judge remit at the First-tier Tribunal."

10. Permission to appeal was granted by the First-tier Tribunal on 3 May 2022.

The decision in Celik

11. On 19 July 2022, the Upper Tribunal promulgated the decision in Celik. It was published on the Tribunal's website on 10 August 2022.

12. The judicial headnote of Celik reads as follows:

> "(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.
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> (2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations"). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.
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> (3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State."

13. Paragraphs 61-66 of Celik address the issue of proportionality under Article 18.1(r) of the Withdrawal Agreement and read as follows:

> "61. The appellant places great reliance on Article 18.1(r) of the Withdrawal Agreement. As we have seen, this gives a right for "the applicant" for new residence status to have access to judicial redress procedures, involving an examination of the legality of the decision as well as of the facts and circumstances on which the decision is based. These redress procedures must ensure that the decision "is not disproportionate".
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> 62. Ms Smyth submitted at the hearing that, since the appellant could not bring himself within Article 18, sub-paragraph (r) simply had no application. Whilst we see the logic of that submission, we nevertheless consider that it goes too far. The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions.
>
> 63. The nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant. The requirement of proportionality may

> assume greater significance where, for example, the applicant contends that they were unsuccessful because the host State imposed unnecessary administrative burdens on them. By contrast, proportionality is highly unlikely to play any material role where, as here, the issue is whether the applicant falls within the scope of Article 18 at all.
>
> 64. In the present case, there was no dispute as to the relevant facts. The appellant's residence as a durable partner was not facilitated by the respondent before the end of the transitional period. He did not apply for such facilitation before the end of that period. As a result, and to reiterate, he could not bring himself within the substance of Article 18.1.
>
> 65. Against this background, the appellant's attempt to invoke the principle of proportionality in order to compel the respondent to grant him leave amounts to nothing less than the remarkable proposition that the First-tier Tribunal Judge ought to have embarked on a judicial re-writing of the Withdrawal Agreement. Judge Hyland quite rightly refused to do so.
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> 66. We also agree with Ms Smyth that the appellant's interpretation of Article 18(1)(r) would also produce an anomalous (indeed, absurd) result. Article 18 gives the parties the choice of introducing "constitutive" residence schemes: see Article 18.4. Article 18.1(r) applies only where a State has chosen to introduce such a scheme. If sub-paragraph (r) enables the judiciary to re-write the Withdrawal Agreement, this would necessarily create a divergence in the application of the Withdrawal Agreement, as between those States that have constitutive schemes and those which do not. This is a further reason for rejecting the appellant's submissions."

14. The decision in Celik post-dated the hearing before the judge and the respondent's application for permission to appeal. There has been no application to amend the respondent grounds of appeal. Having said that, the decision is significant and plainly germane to the issues arising the present case. It would be both artificial and simply wrong to ignore Celik.

15. The day before the hearing, the appellant belatedly provided a rule 24 response. It contended that the judge was entitled to consider the issue of proportionality, had provided adequate reasons, and had reached a conclusion which was open to him.

The hearing

16. Mr Walker had not received the rule 24 response and I gave him time to read and consider it. He had no objection to it being admitted and, in all the circumstances, I decided that I should indeed consider its contents (they would, in any event, simply been repeated in oral submissions at the hearing).

17. Mr Walker relied on the grounds of appeal and submitted that the judge had, in effect, sought to re-write the Withdrawal Agreement, with

reference to what was said at paragraph 65 of Celik. He submitted that it had not been open to the judge to deal with proportionality in the way that he had, with reference to the passages in Celik quoted above.

18. Mr Hawkin relied on his rule 24 response. He submitted that the judge had clearly based his analysis at [31] and [32] on proportionality, pursuant to Article 18.1(r) of the Withdrawal Agreement. Contrary to the respondent's assertions in the grounds of appeal, the judge had not effectively addressed an Article 8 claim, nor had he found that the Immigration Rules were *ultra vires*. Mr Hawkin emphasised that the judge had taken into account the deterrent effect on sponsor as result of the respondent's decision: she may have to leave the United Kingdom to continue her relationship with the appellant. The Hawkin submitted that paragraphs 63-66 of Celik did not preclude the judge from reaching a conclusion on proportionality favourable to the appellant. Every case was fact-specific.

19. At the end of the hearing I reserved my decision.

Conclusions on error of law

20. Before turning to my analysis of this case I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, paragraph 19 of which states as follows:

> "19. I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v Secretary of State for the Home Department at [30]:
>
> > "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."

21. Following from this, I bear in mind the uncontroversial propositions that the judge's decision must be read sensibly and holistically and that I am

neither requiring every aspect of the evidence to have been addressed, nor that there be reasons for reasons.

22. It is plain that the appellant's residence in the United Kingdom had not been facilitated by the respondent before the end of the transitional period. Accordingly, he could not bring himself within the substance of Article 18.1 of the Withdrawal Agreement: Celik, at paragraph 64.

23. I agree with Mr Hawkin to the extent that paragraph 62 of Celik confirms that article 18.1(r) can in principle cover the position of those, such as the appellant, who do not fall within the scope of Article 18 at all. I would just add an observation on the wording of Article 18.1(r). On one reading, it might be thought that the fact that an individual has a right of appeal against a negative decision of the respondent is, of itself, sufficient to comply with the wording of the particular provision. However, this does not fall for consideration in the present case.

24. As I read paragraph 4 the grounds of appeal (and acknowledging that they could have been drafted with greater clarity), the essence of the challenge is that the judge's explanation for the conclusion that the respondent's decision was disproportionate was inadequate. The points raised in the penultimate sentence of paragraph 4, beginning "It is not clear if…" were, in my view, only examples of what might have been in the judge's mind. I agree with Mr Hawkin that the judge was not, on the face of his decision, relying on Article 8 or any *ultra vires* argument (I accept that no such argument was never put forward on the appellant's behalf). However, this does not preclude consideration of the underlying reasons challenge.

25. I again agree with Mr Hawkin to the extent that the judge did provide reasons for his conclusion that the respondent's decision was disproportionate. Where I disagree with Mr Hawkin's position, and agree with the central thrust of the respondent's argument, is in respect of the adequacy of those reasons.

26. This was not a case in which the judge had found that the respondent had, to use the phrase adopted in paragraph 63 of Celik, "imposed unnecessary administrative burdens" on the appellant. Certainly, there is no indication that this particular point was put to the judge, nor has Mr Hawkin sought to rely on it at this stage. I am satisfied that the judge did not base his conclusion on the existence of any "burdens" resulting from actions of the respondent.

27. The factual matrix with which the judge *was* concerned was, to all intents and purposes, precisely the same as that in Celik: a relationship with an EEA national established prior to 31 December 2020; no residence card issued, or application made, under the 2016 EEA Regulations prior to that date; an inability to marry due to the consequences of the Covid-19 pandemic; a subsequent marriage after the end of the transition period; an application under the EUSS.

28. Mr Hawkin has pointed to the fact that the judge took account of the possible deterrence to the sponsor as result of the respondent's refusal. Yet that would manifestly apply to any EEA national sponsor in cases such as the present. It had no connection to the existence of any "burdens". I do not regard that particular element of the judge's assessment as constituting any material distinguishing factor from the scenario in Celik.

29. In light of the above and when seen in the context of what was said at paragraph 63-66 of Celik, the reasons provided by the judge at [31] and [32] were not legally adequate to support the conclusion that the respondent's decision was disproportionate. With respect to the judge, those reasons only went to demonstrate that he was doing precisely what the Tribunal in Celik said was impermissible, namely effectively re-writing the Withdrawal Agreement such as to compel the respondent to grant leave, utilising Article 18.1(r) as something akin to a general dispensing power.

30. The conclusion in the preceding paragraph means that the judge erred in law and that decision must inevitably be set aside.

Next steps

31. Mr Walker has urged me to go on and re-make decision in this case on the evidence before me and to dismiss the appeal. Mr Hawkin suggested that a resumed hearing might be appropriate at which further evidence could be considered. He emphasised the passage of time between the judge's decision and now as a basis for this course of action.

32. Having considered the parties' position, my provisional view is that a resumed hearing is not necessary. There is no material factual dispute in this case (for the avoidance of any doubt, the durable relationship and marriage-related findings are to be preserved) and Mr Hawkin has not been able to point to any specific new evidence which might be adduced. The simple fact that some 8 months have passed since the hearing in the First-tier Tribunal does not require evidence. There has been no indication of any significant changes in the appellant's circumstances.

33. The appropriate course of action at this stage is to seek the written submissions from the parties, setting out their respective legal arguments and, if necessary, providing cogent reasons as to why a resumed hearing would be necessary. If any further evidence is to be adduced, this must be done at the same time as the provision of the written submissions. On receipt of such submissions, or in default, I will decide whether a hearing is necessary, or whether the decision in this appeal will be re-made on the papers.

Anonymity

34. The First-tier Tribunal made no anonymity direction and there is no basis upon which I should make one at this stage in proceedings.

Notice of Decision

35. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

36. I set aside the decision of the First-tier Tribunal.

37. The appeal is retained in the Upper Tribunal and the decision will be re-made in due course.

Directions to the parties

1. **No later than 10 days after this error of law decision is sent out to the parties, the appellant shall file and serve written submissions setting out in a concise manner the legal arguments relevant to this appeal and, if so advised, reasons why a resumed hearing is necessary, together with any new evidence relied on (which must be accompanied by a notice under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008);**

2. **No later than 21 days after this error of law decision is sent out to the parties, the respondent shall file and serve written submissions setting out in a concise manner the legal arguments relevant to this appeal and, if appropriate, any reasons why there should, or should not, be a resumed hearing;**

3. **With liberty to apply to vary these directions.**

Signed: H Norton-Taylor Date: 23 September 2022

Upper Tribunal Judge Norton-Taylor