

Challenging the First Tier Tribunal and Appeals in the Upper Tribunal

By Mark Symes

Challenging the First-tier Tribunal and Appeals in the Upper Tribunal

This is an eBook about appeals to the Upper Tribunal (“UT”), which is the principal way in which adverse decisions of the First-tier Tribunal are challenged by Appellants who are unhappy about the outcome of their appeal hearing. We deal with

- Which forms of decision can be appealed to the Upper Tribunal,
- The relevant grounds of appeal,
- Proceedings within the Upper Tribunal itself, whether you are attacking a decision of the First-tier Tribunal (“FTT”) or defending one.

As we are now well into the era of new style appeals under the “relevant provisions” of the Nationality Immigration and Asylum Act 2002, we will concentrate our examples on modern appeals that progress from the First-tier Tribunal to the Upper Tribunal – ie those brought on human rights grounds, with a few examples based on asylum grounds too.

Overview

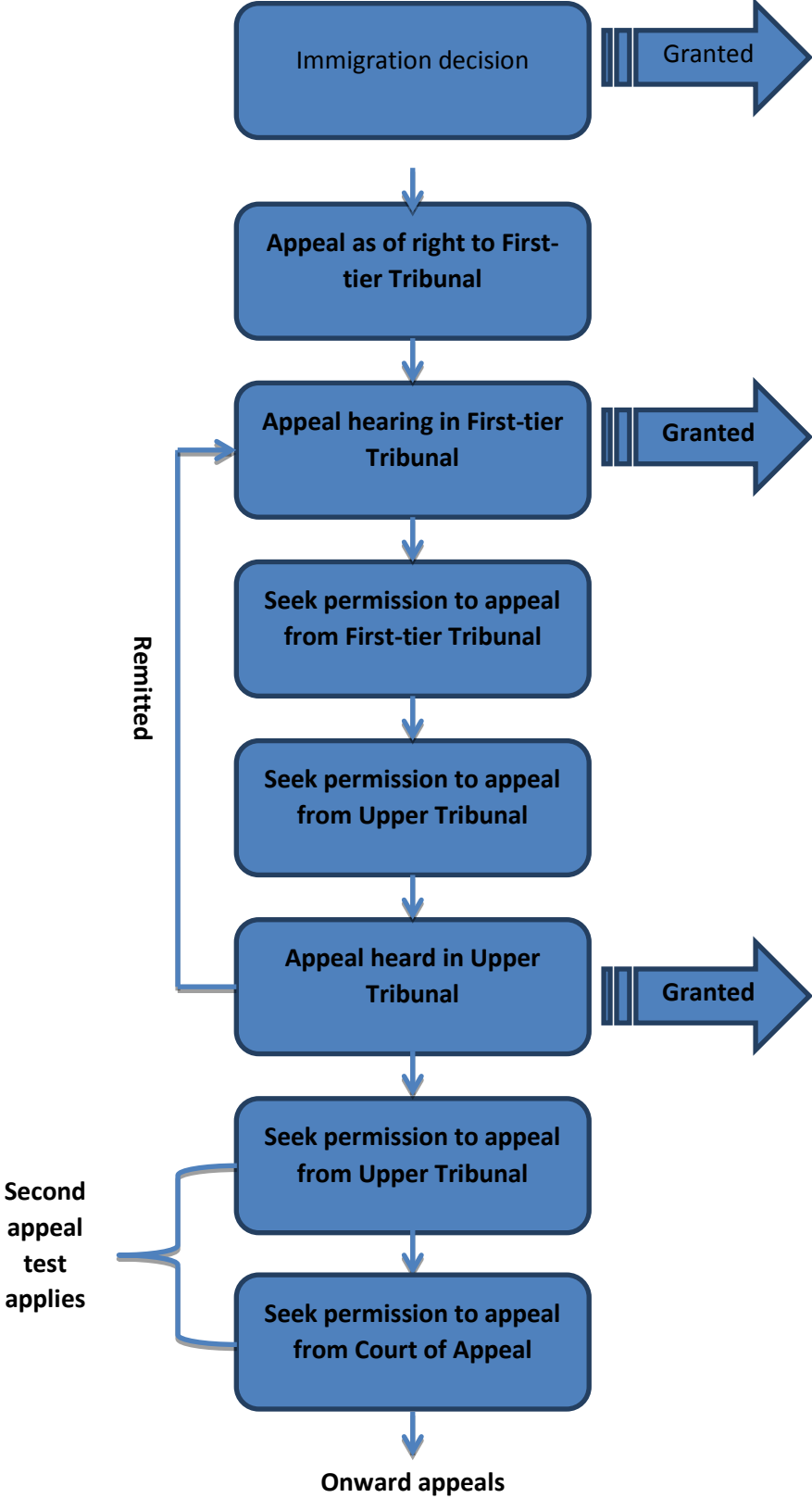
The key legal materials relevant to the practice and procedure before the Upper Tribunal Immigration and Asylum Chamber (UT) are:

- [The Tribunal Procedure \(First-tier Tribunal\) \(Immigration and Asylum Chamber\) Rules 2014](#)
- [The Tribunal Procedure \(Upper Tribunal\) Rules 2008](#)
- Upper Tribunal Immigration and Asylum Chamber [Guidance Note 2011 No 1: Permission to appeal to UT](#)
- [Practice Direction of the Immigration and Asylum Chambers of the First-tier and Upper Tribunal](#) on or after 13 November 2014 (at para 3 addressing assumptions as to whether an error of law hearing will proceed to full hearing in the UT; at para 4 addressing fresh evidence; at para 5 addressing pursuit of upgrading appeals after grants of leave; at para 6-11 addressing general procedures; at para 12 dealing with Country Guidelines issues; at para 13 addressing bail)
- [Practice Statement of the Immigration and Asylum Chambers of the First-tier and Upper Tribunal on or after 13 November 2014](#) (at para 6 addressing composition of the UT for hearings and other functions; at para 7 dealing with the practice on remittal for re-hearing in the FTT; at paras 8-9 addressing who on a legal panel shall preside at a hearing, transfer of proceedings, format of determinations, and at para 11 addressing with the reporting of determinations)
- There is a useful [Guide for unrepresented claimants](#) in *Upper Tribunal Immigration and Asylum Chamber*, which is in itself a good introductory guide to the UT's processes

We strongly recommend obtaining a copy of [The Immigration Appeals and Remedies Handbook](#) (Symes and Jorro; Bloomsbury Professional), the most comprehensive resource on immigration appeals generally.

On the next page we set out the basic structure of the appeals system. This course concentrates on the processes within the second to the sixth boxes.

Progress of an immigration appeal



Appealable Immigration Decisions

Not every unsatisfactory outcome in immigration proceedings can be appealed to the UT. Essentially the decision on the appeal itself can be challenged but other forms of decision are excluded. We can see the core provision giving a right of appeal to the UT in the Tribunals, Courts and Enforcement Act 2007 at section 11(1) which refers to:

a right of appeal to the Upper Tribunal on any point of law ... other than an excluded decision.

The right of appeal comes from a statute, and so immigration appeals are often called *statutory appeals*.

The key to determining whether you can appeal against an unsuccessful appeal to the FTT is whether you can identify a *point of law* (which we will come onto in a moment); and also we need to be able to identify excluded decisions, as those are not capable of being challenged via appeal to the UT. You can see the excluded decisions set out in section 11(5): there are some that are not relevant to immigration law, and then at 11(5)(d) there are some that might potentially be relevant in relation to the FT's power to review its own decisions (though statistically this seems to be exercised very rarely), and then the most important one which is at 11(5)(f) which authorises the Lord Chancellor to make an Order identifying what is "an excluded decision": that power has been exercised via The Appeals (Excluded Decisions) Order 2009 which excludes (in relation to immigration, nationality and EEA appeals)

any procedural, ancillary or preliminary decision

So the idea is that where the decision is fundamental to the appeal (and indeed effectively determines it), then it is appealable; but where it is more like a case management decision or something that takes place at the very outset of the process, it will not be appealable.

Those excluded decisions may only be attacked by way of judicial review (which is always available to challenge Tribunal decisions where there is no alternative remedy) rather than by a statutory appeal. Examples of preliminary decisions might be:

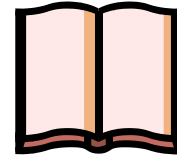
- Refusing to extend time where the appeal is brought late
- Finding that there is no right of appeal

There is in fact a distinction drawn in the case law (see see [Abiyat](#) [2011] UKUT 314 (IAC)) and [JH \(Zimbabwe\)](#) [2009] EWCA Civ 78) between

- those preliminary issues which are dealt with on the papers (now found within r 20 of the FTTRs and para 3 of the [Practice Statement for the FTT and UT](#)) (where the decision is properly defined as a "preliminary" one)
- as opposed to those which are determined at a hearing (eg where a lack of appeal right is identified only after full argument at an oral hearing in which case the remedy is onwards appeal).

It is important that misleading information to the contrary is not given by way of guidance in a notice of decision.

There is usually a choice as to the moment at which decisions of this nature are challenged: one could bring a judicial review at the moment the decision is made, or one could bide one's time and see whether the case management decision (eg refusal of an adjournment) is something which is relevant to the outcome of the substantive appeal, in which it could still be challenged on appeal to the UT.



Example

Judge Smith has an appeal listed before them. He refuses an adjournment for an additional witness to be produced – they have important work commitments which they cannot miss. When he dismisses the appeal, one of his reasons is a lack of corroborative evidence.

His refusal to permit a witness to be called is an ancillary decision. It is not appealable at the time it is made. However, it can be challenged then by way of judicial review. This might be accompanied by an application for a stay on the appeal process, to prevent adverse credibility findings being made without the benefit of that witness. Alternatively, one could formally object to the refusal to adjourn for the witness to be produced (in the language of the advocate, this is “reserving one’s position”) and await the outcome of the appeal – in this example, it would seem that the inability to call a corroborative witness has been material to the outcome of the appeal, so the appropriate remedy is then make this one of the grounds of appeal to the UT.

Other examples of non-appealable decisions are:

- Fee awards, being an ancillary decision
- Refusal to issue a witness summons
- Decisions in relation to costs
- A refusal to make a recommendation for leave to remain outside of the Rules.

There is a general rule that courts and tribunals have jurisdiction to determine their own jurisdiction; a decision wrongly made at an earlier stage cannot create jurisdiction on those who later consider the question. So a party might realise there was no right of appeal to the FTT in the first place, once the case is properly analysed, only once the appeal has reached UT stage: and they may still raise the issue at that point (presumably it will be the Respondent at first instance whose decision has been overturned who wishes to take such a point). Nevertheless an FTT decision made in such circumstances stands until successfully challenged ([Anwar](#) [2010] EWCA Civ 1275 at [19]–[23]).

Is there a material error of law?

What is an error of law?

Applications for permission to appeal are made only on the basis of an error of law. Just being unhappy with a decision is not enough: presumably one party is unhappy with every decision! If a challenger does not manage to scrape together a viable challenge on a point of law, the UT will say that it amounts to a “disagreement” with the decision rather than being something that merits a further hearing. Relatively few decisions actually involve interpreting a particular legal provision, though the constantly changing matrix of student and entrepreneur rules in particular offer more opportunities than the more settled area of asylum law; in reality when drafting grounds of appeal one is focussed on finding errors in the decision making process which are essentially “public law” errors, most famously summarised in the landmark decision of [R \(Iran\) \[2005\] EWCA Civ 982](#).

Essentially you need to find something which shows the judge in the FTT has not just rejected your client’s case in a way that you dislike, but that they have strayed beyond the boundaries of legitimate treatment of the case. Relevant errors identified in [R \(Iran\)](#) consist of:

- (i) Making perverse or irrational findings on a matter or matters that were material to the outcome (“material matters”);
- (ii) Failing to give reasons or any adequate reasons for findings on material matters;
- (iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) Giving weight to immaterial matters;
- (v) Making a material misdirection of law on any material matter;
- (vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
- (vii) Making a mistake as to a material fact which could be established by objective and uncontested evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.

What is not an error of law?

Where grounds of appeal are put forward which, properly analysed, do not show one of these errors, it may be said that the application is merely an unprincipled disagreement with a decision, see [Nixon \(permission to appeal: grounds\) \[2014\] UKUT 368 \(IAC\)](#):

the First-tier Tribunal and the Upper Tribunal can be expected to deal brusquely and robustly with any application for permission that does not specify clearly and coherently, with appropriate particulars, the error(s) of law said to contaminate the decision under challenge. ...

Terms such as “erred” or “erred in law” or “was wrong in law” or “misdirected itself in law” are unacceptable unless accompanied by a clear specification of the error/s of law alleged and suitable brief particulars

The weight to be given particular aspects of the evidence is for the first instance judge to decide, and a complaint based on findings being against the weight of the evidence is unlikely to involve an error of law, see eg [V](#) [2009] EWHC 1902 (Admin):

the question of evidential weight is quintessentially a matter for the tribunal.

Irrationality

Allegations of irrationality are often made and seldom upheld. The crucial point to understand is that judges in higher courts and Tribunals take the view that questions of assessing evidence are essentially for the judge at first instance, who may have the advantage of hearing oral evidence, and whose role is essentially to make factual findings. They do not see it as their role to interfere with their findings unless something has gone seriously wrong in the oral proceedings or within the written decision below. As it was put in [Haleemudeen](#) [2014] EWCA Civ 558:

different tribunals, without illegality or irrationality, may reach different conclusions on the same case and the mere fact that one tribunal has reached what may seem to another as an unduly generous view of the facts does not mean that it has made an error of law.

It must be understood that this ground of appeal is intended to address the scenario where evidence has been considered (not overlooked) and where the judge’s conclusion on it is simply unreasonable. There are numerous authorities which show that establishing irrationality is a very high hurdle (not least [R \(Iran\)](#) itself). The best decision on rationality (from the point of view of an Appellant, who will be seeking a lower rather than higher threshold) is that of the court in [Balchin](#) [1996] EWHC Admin 152 which defined irrationality as being present where there was

an error of reasoning which robs the decision of logic

Once an appeal is granted permission to the UT, the Respondent’s lawyer will often want to show that a challenge is, properly analysed, an allegation of irrationality; whereas the Appellant’s advocate will try to maintain that the challenge has a less steep hurdle to surmount, in that rather than suggesting a decision is *unreasonable* (having considered all the evidence), the grounds actually show that it is unsafe for *overlooking relevant considerations or evidence*.



Casework Tip

If you find yourself drafting grounds which say “The First-tier Tribunal was irrational to find that ...” or “The First-tier Tribunal erred in law by giving undue weight to ...”

THINK AGAIN

Can you put the point in a more promising way? For example, was material evidence overlooked or expert opinion not taken into account? It is only where the evidence has been analysed that you need to assert irrationality, and if you assert it, you will very rarely persuade the UT to accept that the threshold has been crossed

Fairness

Where issues of fairness arise, on appeal the question is whether the procedure below was right or wrong: so it is unnecessary to establish, for example, that the FTT acted very unfairly, or that very serious consequences flowed from the lack of fairness: the question is simply whether or not there was unfairness, as it was put in the legal language of the Court of Appeal in [Kingdom of Belgium and Others](#) [2000] EWHC Admin 293:

“Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The *Wednesbury* reserve has no place in relation to procedural propriety”.

Reasons

Sometimes you may consider that the reasons given by the FTT are inadequate. However, beware of how such a challenge is couched. A “reasons” challenge is essentially an allegation that the decision is incomprehensible – ie the grounds allege that the reader cannot tell why the appeal failed, or why critical evidence was rejected. Thus reasons must be provided in sufficient detail to (Lord Bridge in *Save Britain’s Heritage v No 1 Poultry Ltd* [1991] 1 WLR 153):

enable the reader to know what conclusion the decision maker has reached on the principal controversial issues

It is not supposed to be a challenge based on a dislike of the reasons actually given, if these are understandable: that amounts to a challenge on grounds of irrationality. There is a discussion of the cross-over in [Haleemudeen](#) [2014] EWCA Civ 558 at [32]-[35].

Error of fact

The Court of Appeal in [E v SSHD](#) [2004] EWCA Civ 49 explains the circumstances in which an error of fact could amount to an error of law:

First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontested and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

Challenging the conduct of the hearing

Sometimes the grounds of appeal seek to raise a challenge based on the conduct of the hearing. Perhaps the judge behaved in a way that is considered unfair, by limiting the evidence given by a witness, refusing to permit a witness to be called, or giving the impression that the appeal was going to be allowed, so discouraging the presentation of relevant evidence. Or the judge may have nodded off. All these matters will have to be proved by evidence that, obviously, goes beyond that which was before the FTT at that hearing.

In any of these cases it is imperative that the author of grounds of appeal liaises with the advocate who appeared before the FTT. The UT's favourite phrase in this context is that "Grounds of appeal do not prove themselves". So any criticism that is made of the conduct of an Immigration Judge should be fully evidenced by way of witness statement. The UT considered the issues in [BW \(witness statements by advocates\) Afghanistan](#) [2014] UKUT 00568 (IAC):

(ii) In certain cases, likely to be rare, evidence presented to the Upper Tribunal may include a witness statement compiled by a representative involved in the hearing before the First-tier Tribunal ("FtT"). In practice, this is most likely to occur in cases where such evidence is considered necessary to demonstrate that the appellant was deprived of his right to a fair hearing at first instance.

(iii) Evidence of this kind will not be required if the determination of the FtT speaks for itself on the relevant issue.

(iv) In applications for permission to appeal, the distinction between legal submissions and arguments (on the one hand) and evidence about events at the hearing (on the other) must be carefully observed.

(v) Where an advocate makes a witness statement in the circumstances outlined above, a change of advocate may be necessary, since the roles of advocate and witness are distinct, separated by a bright luminous line. An advocate must never assume the role of witness.

The UT will usually expect to see any such conduct firmly challenged in the forum below. However in [KD \(Inattentive Judges\) Afghanistan](#) [2010] UKUT 261 (IAC) at [15]

it is unrealistic not to recognise the difficulty, even for legal representatives, in raising with the ... tribunal a complaint about the behaviour of a ...member who, if the complaint is not upheld, may yet be part of the ... tribunal deciding the case

Errors of law – some practical examples

So let us think about these principles in a practical case. We will use an example based on family life connections in this country raised as an application under Appendix FM. Imagine the Appellant is a citizen of Ghana and the Sponsor is a British citizen. The Appellant is an overstayer who came as a visitor. The Sponsor has family in this country by way of relatives that they see occasionally, and a job in the IT industry. They have been together for three years and cannot qualify under the five year route because of the Appellant's immigration status.

- (i) **Rationality** – the judge says “I have read the witness statements in so far as they address insurmountable obstacles. I note the Sponsor has parents and extended family in this country. However I do not think that these relationships are central to his life: on their own account he only sees them every few weeks and the most usual contact is via Skype. I do not think, bearing in mind that there are no children involved and that the relationship was formed at a time when the Appellant was present without leave to remain so her stay was precarious, that it would be unjustifiably harsh or disproportionate to expect them to relocate abroad.”
- Presuming that the judge is right about there being no children and stay being precarious, it is very hard to see any misdirection of law here: the correct legal tests are cited and he appears to have looked at the relevant explanation for relocation being difficult. So it would only be possible to challenge this finding by way of a rationality challenge: very difficult indeed, as it is very hard to say that this is an unreasonable conclusion.
- (ii) **Reasons** – the judge simply says, having found that the Appellant does not qualify under the five year route, “I do not accept that relocation abroad would involve the couple facing insurmountable obstacles.”
- No substantive reasons have been given for this finding. This falls below the minimal acceptable standard of reasoning as the Appellant does not know why their case has been rejected. Of course, the case seems a rather marginal one and so permission might be refused on the basis that the finding even if unlawful is not material.

Now imagine that there was an independent social worker’s report present in the case based on the relationship between the Appellant and the Sponsor’s sister’s young daughter who has learning difficulties, and spends a lot of time with the Appellant with whom she has a strong bond.

- (iii) **Failing to take account of relevant opinion** – the judge does not engage with the content of the report but merely mentions it in the list of documents before him before concluding that relocation abroad would not involve insurmountable obstacles or a disproportionate breach of Article 8. The failure to balance the child’s interests, given these were supported by an expert report, may well be a failure to take account of relevant evidence. It would be difficult to say the error is not a material one as one does not know what the judge would have said about the evidence had he read and analysed it.
- (iv) **Taking account of immaterial matters** – the judge writes “I noted that the witness statement was served late in breach of directions. I consider that were the underlying family life something that seriously mattered to the Appellant, the directions would have been complied with.” It is difficult to see that failure to comply with directions should (automatically at least) carry over to an adverse assessment of the merits of a claim.

Now imagine the couple have a three-year old child who has taken British citizenship via the Sponsor's ability to pass on their nationality to a child born here.

- (v) **Misdirection of law** – The judge concludes “I take note of the presence of a young British citizen child but at their age it seems to me they could be expected to relocate and it would not be unduly harsh for them to do so.” This is a

misdirection of law – where a British citizen child is involved, the test is not one of insurmountable obstacles or undue harshness, but rather one of reasonableness.

- (vi) **Procedural unfairness** - the existence of the British citizen child had been acknowledged and accepted as established by the Home Office Presenting Officer at the hearing based on documents in the Appellant's bundle, but the judge in his decision finds that it is not established that the child is that of the couple. This is unfair: after all, more evidence on the issue might have been led had the issue been thought to have been contentious.
- (vii) **Error of fact** – the judge find that relocation to Ghana would not be unreasonable for the family unit because the Appellant's home area is just outside Accra and so they would be able to access urban services and he would be able to find IT work in the city.

However, it is clear from looking at a map that he is mistaken – in fact the home village is in a remote part of the country. This is *potentially* a material error of fact – the location of the home area can be proved beyond unreasonable doubt, and unfairness has resulted. The only caveat may be whether the matter should have been clarified at the hearing by the Appellant's representative or affirmative evidence of the remoteness should have been put forward: the UT will have to make a judgement call on this.



Casework Tip

It is very common for a person to draft grounds of appeal other than the advocate before the Tribunal or the person who prepared the appeal in the office. Whether you are instructing counsel to prepare grounds of appeal or handing the matter over to another colleague in your own office, do bear in mind that it is the people who best understand the case that was put before the First-tier Tribunal who have the greatest chance of spotting an error in the decision, at least regarding the evidence. However adept the person drafting grounds is at spotting legal errors, it is very odd indeed to simply pass a determination to a person not previously involved in a case and ask them whether there are “merits” in appealing further.

Issues to bear in mind are

- Is the evidence of each witness who corroborated the Appellant's account (a) dealt with at all and (b) properly considered in all its dimensions?
- Is each document that potentially corroborated or supported the Appellant's case properly considered?
- Is any expert evidence adequately dealt with, both as to credibility of the account and as to any objective country-focussed opinion?

Materiality

Appeals against decisions of the FTT must identify an error of law (TCEA s 11(1)) and for such an error to lead to a viable challenge, they will usually need to be *material* to the outcome of the appeal (as was repeatedly stressed in R (Iran)).

As stated in Guidance Note 2011 No 1 at para 16, permission

should only be refused on the basis that the error was immaterial, if it is a plain case that the error could have made no difference to the outcome ... Where there is no reasonable prospect that any error of law alleged in the grounds of appeal could have made a difference to the outcome, permission to appeal should not normally be granted in the absence of some point of public importance that is otherwise in the public interest to determine.

Once an error of law is identified, in determining whether the decision can nevertheless stand, the question will be whether the decision maker would have inevitably reached the same conclusion absent the error: [Detamu](#) [2006] EWCA Civ 604

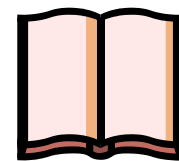
it is a high burden, falling upon the [respondent], to persuade anyone that the [judge below] would have been bound to have reached the same conclusion, notwithstanding an error of law, in relation to the approach to and conclusions about an important piece of factual evidence the question for us is whether the error of law was material in the sense that the [judge below] must have reached the same conclusion.

Though errors of law must normally be material to warrant a permission grant, this is not always required, see the Guidance Note 2011 No 1 at paras 14, 16:

Whilst the existence of reasonable prospects of success is a relevant criterion to apply to the grant of permission, it is not a precondition for its grant ... Disputes about materiality are best left to the appeal process itself rather than summarily determined by refusal of permission.

The Note explains that such cases will be rare and the overriding objective to ensure cases are dealt with justly and fairly counts against encouraging an appellant whose appeal is ultimately bound to fail. Nevertheless

the UT may wish to use the opportunity of the application to review the existing jurisprudence on the topic, to address frequently arising problems or give guidance in a reported case on a novel or important issue.



Example

The Appellant is a Nigerian national, who was originally a student before overstaying because their Sponsor lost their licence and was then unable to find an alternative sponsor; they subsequently worked here unlawfully. They have no family here, and have lived amongst the Nigerian diaspora; they have relatives and siblings in Nigeria. Judge Smith dismisses an immigration appeal brought on private life grounds by, because he does not accept that the Appellant lacks social, cultural or family ties with Nigeria applying Rule 276ADE(vi).

However the Home Office decision to refuse leave to remain was made in August 2014 and therefore after the change in the terms of Rule 276ADE(vi) to require serious obstacles to integration rather than a lack of ties.

This may very well be an error of law, because the wrong test was applied – but it is very difficult to see that it is a material error of law, as had the right test been applied, the result of the case would have been the same.

Under the NIA 2002 prior to the entry into force of the TCEA 2007, only an unsuccessful litigant could launch an appeal against a determination with which they were dissatisfied: this reasoning was based on the requirement that an error of law be *material*, see [AN \(Only loser can appeal\) Afghanistan](#) [2005] UKIAT 00097. However the removal of the word *material* from the statutory basis for appeals to the UT undermines this reasoning for modern cases. Thus the UT recognises that it should grant permission to appeal to a dissatisfied migrant, even though their appeal has been allowed, where they might obtain a more beneficial status than that recognised by the FTT: [EG & NG \(UT rule 17: withdrawal; rule 24: scope\) Ethiopia](#) [2013] UKUT 143 (IAC) at [47].

The Tribunal's own duty to identify obvious points of law

Where fundamental rights are in issue, it would be wrong for a Tribunal to fail to identify a possible argument even if it has been overlooked by an Appellant. Thus the important case of [Robinson](#) [1997] EWCA Civ 3090 recognised that the FTT and UT are under a duty to identify points in favour of an appellant notwithstanding that they have failed to raise the point themselves. This applies at every stage of the proceedings, both before the FTT, when considering applications for permission to appeal, and at a full hearing before the UT. This is how the Court put it when the principle was first identified in the context of refugee appeals:

it is the duty of the appellate authorities to apply their knowledge of Convention jurisprudence to the facts as established by them when they determine whether it would be a breach of the Convention to refuse an asylum-seeker leave to enter as a refugee, and that they are not limited in their consideration of the facts by the arguments actually advanced by the asylum seeker or his representative.

The duty does not arise regarding a point which has to be searched out from a very careful reading of the papers, nor in relation to purely procedural matters, but only where an

obvious point of Convention law favourable to the asylum-seeker ... does not appear in the decision ... which has a strong prospect of success.

The principle has been developed beyond the asylum context:

- The principle extends to issues arising under the Human Rights Convention and by analogy must extend to points of international protection law beyond the Refugee Convention, those being aspects of European Union law ([AM \(Serbia\)](#) [2007] EWCA Civ 16 at [29])
- The *Robinson* approach would not normally extend to issues such as the construction of Home Office policies ([Mugwagwa \(s 72 – applying statutory presumptions\) Zimbabwe](#) [2011] UKUT 00338 (IAC), headnote at (2))
- Although the principle generally arises in favour of asylum seekers, a question going to an integral part of the refugee assessment, such as exclusion (or the statutory presumptions as to criminality), can also be taken on appeal by the Secretary of State, where it is clearly available on the facts already found below, though there is probably no duty to permit unpleaded human rights points to be taken in the government's favour ([A \[Iraq\]](#) [2005] EWCA Civ 1438)

- Beyond asylum, it may well be inappropriate to permit reliance on previously available points that were not advanced at an earlier stage of proceedings ([EB \(Turkey\)](#) [2008] EWCA Civ 1595 at [9]–[11])

It will be appreciated that the Robinson principle is not directly relevant to cases in which you have (competently!) represented earlier in the proceedings, as presumably no material points will have been missed given the competence you have exhibited so far. Indeed, it is rather uncomfortable to be telling the UT that you missed points earlier in the proceedings. So it is a principle which has more application from the perspective of the UT than from that of the ongoing representative. However, where you have taken a case on from other representatives, or where the client represented themselves, there may be a stronger argument that something important has so far been missed. It can be argued that a point has been missed in the grounds of appeal but was nevertheless *obvious* in this special sense, and so should be admitted into argument at a late stage.

Interestingly the UT [Guidance Note 2011 No 1](#): Permission to appeal to UT states at [9] that, beyond Robinson

there is power to consider any other point arising from the decision if the interests of justice so require

Applying for permission to appeal

The Two Stage Permission Process

We can see from section 11(4) of TCEA 2007 (which says that “Permission may be given by the First-tier Tribunal, or the Upper Tribunal, on an application by the party”) that permission may be given either by the FTT or the UT – it is this provision which gives rise to the two-stage system of lodging an appeal.

- First, you make an appeal to the FTT against its own decision – it won’t be decided by the same judge, as that is considered inappropriate at the level of the more junior courts, but rather will be determined by one of the more experienced judges who sit in the FTT and spend some days working their way through mounds of paper permission applications.
- If that is granted, then the appeal will have entered the jurisdiction of the UT who will list it for a hearing eventually.
- If the application to the FTT is refused, then you need to make a further application to the UT directly. So there are always two bites of the cherry.
- If the UT refuses permission, there is one further possible application: for judicial review of the UT permission refusal by the Administrative Court. However there will only be a realistic option in relatively rare cases because of the requirement that, not only there be an error of law in the UT decision, but additionally that the case pass the *second appeals* threshold: we address this further below in the section headed *Judicial review of decision of the UT to refuse permission to appeal against a decision of the FTT*.

Decisions made in the First-tier Tribunal on review and permission to appeal are made by a select band of experienced First-tier judges. Those made in the UT are made by UT or

deputy-UT judges. Decisions are virtually always made on the papers - there is scope for calling a case in for an oral hearing but this is exceedingly rare.

At either stage, the application should provide the relevant form, grounds of appeal, and, unless the material relied on is summarised in the FTT decision, any relevant documents cited in the grounds of appeal (or at least the relevant extracts from them): otherwise the judge who determines permission may do so without sight of something important.

Note that whereas migrants are always Appellants and the Secretary of State is always the Respondent in the FTT, in the UT the Appellant is the person who brings the appeal; and there is no need to describe the Appellant as the Applicant prior to permission to appeal being granted (UT rules at r1(3)).

Seeking permission to appeal to the UT from the FTT

A decision of the First-tier Tribunal can be challenged by either party on a point of law. To do so the complaining party must make an application to the First-tier Tribunal for permission to appeal to the UT. If permission is refused, the application for permission to appeal can be made directly to the UT.

Making an application to the First-tier Tribunal

An application form is provided on the First-tier Tribunal (IAC) section of the [Justice](#) website: [IAFT-4: Application to the First-tier Tribunal for permission to appeal to the Upper Tribunal](#)

The deadline for receipt of the application by the First-tier Tribunal is calculated from the date on which the party making the application *was provided with* [presumably this means the date of receipt, not the date of sending] *written reasons* for the decision (r33(2)-(3) First-tier Tribunal Procedure Rules):

- 14 days for in-country cases (note there is no shortened time limit for a detained case)
- 28 days where the appellant is outside the UK.

The rules are drafted on the basis that written reasons are not automatically provided (r33(6)-(7)) but as in practice the FTT always makes a written decision whether or not it indicates a provisional view at a hearing, this need not concern us. Time runs until midnight regarding FTT deadlines generally (r11(1)).

The application must

- (i) identify the decision of the Tribunal to which it relates,
- (ii) identify the alleged error or errors of law in the decision, and
- (iii) state the result that the party seeks.

Late applications

An application for an extension of time can be made if necessary. The time limit for lodging grounds of appeal may be extended, though there is no longer reference to “special circumstances” as there was under the 2005 Rules: rather consideration will be driven by the overriding objective (in both the FTT and UT) to deal with cases fairly and justly, in a manner

that is proportionate to the importance of the case and resources of the parties whilst ensuring full participation in proceedings, and avoiding unnecessary delay. [AK and Others \(Tribunal Appeal – Out of Time\) Bulgaria](#) [2004] UKIAT 00201 explains the relevant considerations, making the point that the strength of the grounds may be relevant but not determinative.

Where permission is granted where the grounds were submitted late without this having been noticed by the FTT, then:

- this will be treated as a procedural irregularity but one which cannot be raised once the UT has issued its final decision ([AK](#))
- if a Respondent takes a point about time, then the matter must be ruled upon: the grant of leave provides assistance in showing that permission would have been granted had the application been made in time ([AK](#))
- as a party always has the right to renew their application directly to the UT if the FTT refuses them permission to appeal, where the matter is first identified only by the UT, the UT must reconstitute itself (easy enough to do on the spot as all UT judges are also FTT judges) as the FTT to rule upon timeliness [Samir \(FTT Permission to appeal: time\) Afghanistan](#) [2013] UKUT 3 (IAC)

The case of [BO and Others \(Extension of time for appealing\) Nigeria](#) [2006] UKAIT 00035 is a very useful one for the general considerations as to extension of time:

- Strength of the grounds of appeal
- The consequences of the decision
- Length of delay - even a short delay should not always or regularly be condoned
- Prejudice to the Respondent
- Mistakes, delays and breaches of Rules by the Respondent



Casework Tip

Never let time run out on your watch. It is far preferable to make a timely application, even if it means staying in the office late or instructing counsel if there is no experienced draftsman available in the firm itself, than it is to make a late application pleading overwork. Any application involves the exercise of discretion by the Tribunal and there is always a chance that they will refuse to extend time.

Options beyond granting permission to appeal

The first thing the FTT has to do on receipt of an application for permission to appeal is decide whether it should itself review the decision against which an appeal is sought. This is provided for at r34 of the FTT Rules, and the review procedure is detailed at r35. The statutory authority to review a decision of the FTT is contained in section 9 of the TCEA

2007. In order to undertake a self-review, the FTT has to be satisfied that there was an error of law in the decision. If the FTT decides not to review or having reviewed the decision decides to leave it substantively the same, the FTT then has to go on and decide whether to grant permission to appeal to the UT. The FTT rarely self-reviews.

It will be seen that there are a series of options open to a FTT judge considering a first application for permission to appeal:

- to make an order for correction of “clerical mistake or other accidental slip or omission” under FTTR r 31
- to review the decision under FTTRs r 35 if there is an error of law by which a party has been deprived of a fair hearing or other opportunity to put their case, or, rarely, if there are other compelling reasons for the matter being redecided by the FTT
- To set aside the decision under FTTRs r 32 where a document went astray, a relevant person was absent from a hearing, or some other procedural irregularity casts doubt over the proceedings
- To grant permission to appeal to the UT against the decision of the FTT, in whole or in part under FTTRs r 34

Thus there are several different routes to a FTT decision being overturned, albeit that the trigger for any of them will be an application for permission to appeal. It may be that you can make an application for a correction in order to forestall an appeal by the other side – eg you might find it unsatisfactory if you won an appeal, and then the losing side obtained permission to appeal because a decision is arguably lacking in adequate reasons, when in truth the inadequacy was clearly down to a typographical error. If a party does want to argue for a particular form of relief as opposed to the standard grant of permission to appeal, then submissions could be made on this point in the grounds.

Determining the permission application - limited grants of permission; construing the grounds of appeal

The Tribunal may give permission on limited grounds, but must comply with its obligations to give written reasons and to describe the mode of appeal regarding any grounds which are refused: [Ferrer](#) [2012] UKUT 304 (IAC). The pragmatic suggestion in the President's Guidance Note 2011 No 1 is that a limitation on the grounds is often more trouble than it is worth, adding that

“such a limited grant is unlikely to be as helpful as a general grant, which identifies the ground or grounds that are considered by the judge to have the strongest prospect of success ... which can then form the backdrop for the Upper Tribunal's subsequent case management directions”.

Any limitation on the grounds of appeal should be clear and unambiguous: Davis LJ in [Rodriguez](#) [2014] EWCA Civ 2.

When construing the application before the Tribunal, as was said by the Court of Appeal in [MA \(Palestinian Territories\)](#) [2008] EWCA Civ 304:

“what is required is a fair and reasonable examination of the grounds of appeal to see whether a point of law is identifiable.”

It is essential that the grounds of appeal on which the UT acts truly identify an error of law. If the UT granted permission to appeal and overturned a FTT decision, when in reality the grounds were a “mere disagreement” with a FTT decision that failed to demonstrate a real error of law, an appeal to the Court of Appeal against the UT’s decision could succeed, see eg [Miftari](#) [2005] EWCA Civ 481. In such a case the Court of Appeal would overturn the UT and declare the FTT decision to have been right all along.

The recommendation from Lord Woolf MR in *Robinson* that considerations of transparency and consistency called for some indication as to the Tribunal’s practice in granting leave to appeal was eventually taken up with the ascendancy of Blake J to the Tribunal’s Presidency: [Guidance Note 2011 No 1](#) is recommended reading.



Casework Tip

If you have been granted permission to appeal on limited grounds, and wish to renew a ground on which permission has been refused, it is a very good idea to give formal notification of the fact. There is no set procedure, but the point could be flagged up in a timely skeleton argument. Additionally you should ensure you have strong arguments for renewing the point – generally speaking judges will tend to respect the views of colleagues unless the point is really rammed home, perhaps citing further authorities and with fuller argument than the so far unsuccessful drafting has done.

Seeking permission to appeal from the UT directly

If the FTT refuses permission, or refuses to extend time for the application for permission, a further application can be made directly to the UT.

Applications to the UT are governed by the [Tribunal Procedure \(Upper Tribunal\) Rules 2008](#) as amended from time to time (the [UT webpage](#) usefully contains the latest version).

The application to the UT must be made within time periods running from the date on which the FTT’s permission refusal *was sent to the appellant* (see UT rule 21(3)):

- no later than 14 days after the date on which notice of the First-tier Tribunal’s refusal of permission was sent to the appellant
- (4 working days in fast track cases)
- one month where the appellant is outside the UK.

Rule 5(3)(a) imparts the UT with discretion to vary any time limits (and the overriding objectives of the UT, which include dealing with cases fairly and justly under r2(1), will be relevant), so if an application is made late reasons for an extension of time should be included: doubtless the same considerations as identified above for FTT applications will be relevant.

The form provided for applications to the UT for permission to appeal to the UT is:

[IAUT-1](#) Application to the Upper Tribunal for permission to appeal to the Upper Tribunal

There should already have been an application made to the FTT before this stage is reached, together with an adverse permission decision from the FTT. So the grounds at this stage should address any reasons given by the FTT for refusing permission. Beyond making such points, there may not be any requirement to significantly alter the grounds previously drafted (though it is a very good idea to avoid simply submitting the same document as previously supplied, at least without making it clear that this is intentional, where this is headed as an application for permission to appeal made directly to the First-tier Tribunal, as this will just cause confusion).

The UT must give written notice of a permission grant to both parties.



Casework Tip

Be very clear when drafting the renewal grounds that this is now an application made direct to the UT. It is irritating for the judge determining a large pile of permission applications to be unclear as to whether they are reading the grounds to UT via FTT, or the grounds to UT directly.

So give your grounds a clear title, and perhaps use headers/footers to make it really clear on each page which version of the grounds the reader is holding.

Take the opportunity, as this is your second crack at getting permission, to drop points that on reflection seem weak and - to make the argument more concise on the stronger ground(s). And ensure you address the reasoning of the FTT judge who refused permission.

Pursuing an Upper Tribunal appeal

Procedure in the UT is dictated by the amended Tribunal Procedure (Upper Tribunal) Rules 2008 in combination with the joint Practice Directions and Practice Statements of the FTT and UT Immigration and Asylum Chambers. We have identified in the Introduction which matters are dealt with by the Directions as opposed to the Statements.

Faced with a permission application, the UT must **grant** or **refuse** permission.

Once the UT has granted permission to appeal, it possesses greater powers than does the FTT. It is a superior court of record, and has the same powers, rights, privileges, and authority as the High Court in relation to the attendance and examination of witnesses, production and inspection of documents, and all other matters incidental to its own functions, for example because it may set precedent and may punish for contempt, as was noted, outside the UT Immigration and Asylum Chamber but nevertheless in the Upper Tribunal generally, in [MD](#) [2010] UKUT 202 (AAC):

The powers of referral to the Upper Tribunal which have now been conferred on tribunals in order to aid them in ensuring compliance with their orders may have very serious consequences, including the deprivation of a person's liberty

Once you receive the hearing notice, always make sure that you read the directions that accompany it. Permission grants are routinely allocated to a UT Judge who will look at each case and decide what particular directions it needs: typically these

- remind parties to make any necessary fresh evidence application in good time
- remind parties that at the “error of law” hearing the Tribunal will normally expect parties to be ready to proceed to a re-determination of the appeal there and then if an error of law is established unless further oral evidence is required
- state that no interpreter will be provided unless the Appellant was unrepresented before the FTT and required an interpreter then
- documents to be relied upon at the UT hearing are to be provided within 21 days after the directions are sent
- a skeleton argument should be provided if the grounds of appeal are to be developed
- state that the documents before the FTT need not be re-served although an index of all material relied upon should be provided, including that previously filed
- warn that non-compliance with directions may lead to the exclusion of evidence

The text accompanying the hearing notice allows this option to be ticked:

I would like this appeal to be considered for a short notice hearing should a place become available. I am content that I will receive a minimum of five working days notice before the date of the hearing.



Casework Tip

Do think carefully about the documents that are needed at a UT hearing. If there were a large number of documents provided to the FTT and very few of them are relevant any longer, bear in mind that it may greatly simplify proceedings if you provide a short, consolidated bundle – this will concentrate the minds of everyone involved at an appropriately early stage

The UT will provide its own version of the key documents (eg the refusal letter giving reasons for the decision appealed against, the grounds of appeal, the decision of the FTT, any response to the grounds of appeal, by way of a bundle to the Judge(s) who hear the appeal, though you may sometimes wish to include these in a core bundle to be confident that everyone at the hearing is singing from the same hymn sheet

Non-compliance with rules or directions in the UT

Non-compliance with UT rules is explicitly dealt with at UT rule 7 and also rules 8 (strike out of case), 10 (wasted costs) and 5 (case management). However, rules 8 and 10 do not apply in immigration and asylum cases, leaving the UT with very limited powers.

In a speech to the new tribunal shortly before commencement, President Mr Justice Blake said as follows regarding compliance with directions:

We must expect that the legal profession and UKBA representatives will respond to these directions and be imaginative in sanction if they don't. Although this chamber of the UT may not have the power to strike out cases for non-compliance, there are other measures available in terms of identifying the issues and how they will be determined that may sorely disadvantage defaulting parties [whoever] they are.

In [Hysaj](#) [2014] EWCA Civ 1633 the Court of Appeal considered the issue of non-compliance generally, in the context of what they style relief from sanctions, and noted that the notorious civil litigation decision of [Mitchell v News Group Newspapers Ltd](#) [2013] EWCA Civ 1537 could be summarised thus:

- (i) if the failure to comply with the relevant rule, practice direction or court order can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly;
- (ii) if the failure is not trivial, the burden is on the defaulting party to persuade the court to grant relief;
- (iii) the court will want to consider why the default occurred; if there is a good reason for it, the court will be likely to decide that relief should be granted, but merely overlooking the deadline is unlikely to constitute a good reason;
- (iv) it is necessary to consider all the circumstances of the case before reaching a decision, but particular weight is to be given to the factors specifically mentioned in [CPR 3.9](#) - which provides that

- (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
 - (a) for litigation to be conducted efficiently and at proportionate cost; and
 - (b) to enforce compliance with rules, practice directions and orders.
- (2) An application for relief must be supported by evidence.

Respondent's response to appeal; Cross appeals; Reply to response

Rule 24(1A) states that, subject to any directions from the tribunal, the respondent *may* (not must) lodge a response to a notice of appeal, providing (24(3)):

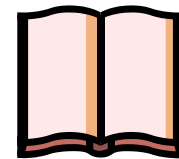
- (a) the name and address of the respondent;
- (b) the name and address of the representative (if any) of the respondent;
- (c) an address where documents for the respondent may be sent or delivered;
- (d) whether the respondent opposes the appeal;

- (e) the grounds on which the respondent relies, including [(in the case of an appeal against the decision of another tribunal)] any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal; and
- (f) whether the respondent wants the case to be dealt with at a hearing.

The failure to lodge a response may give the UT the green light to find an error of law without a hearing. Should there be a hearing though, the failure to lodge a response does not preclude the Respondent from arguing that there is no error of law. Sub-rule 24(4) suggests by its very existence that non-compliance may be taken seriously:

If the respondent provides the response to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time), the response must include a request for an extension of time and the reason why the [response] was not provided in time.

A response is *not* an invitation to re-argue the Respondent's case as if it had never been determined. It should focus on the Appellant's grounds of appeal and demonstrate by reference to the FTT's decision why these are said to be unfounded. Anyone who reads it can be presumed to have read the grounds of appeal and the decision appealed against, so there is little point in repeating the contents of those documents. If you find yourself extending beyond around a dozen paragraphs, you may be overhitting the target.



Example

A national of Thailand wins an appeal against deportation because the FTT accepts that removal of the migrant from their family unit in the United Kingdom would be unduly harsh given the private and family life connections they had in this country. The Secretary of State appeals saying that the pre-July 2014 Rules were wrongly relied on, and that the FTT only considered whether there were “insurmountable obstacles” to removal and not the post-July 2014 test of whether “it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above the very significant difficulties ...” envisaged in Ex.1 to Appendix FM.

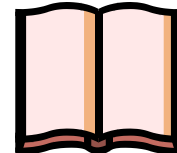
The response would seek to demonstrate that

- *the FTT did in fact have in mind the modern test (“at para [n] the FTT cites the test ...” or (“at para [n] the FTT accurately paraphrases the test ...”)*
- *in any event it is obvious from the reasoning in the decision that whatever test was applied, the decision would have been the same*

Cross appeals

A response should not be used to try and resurrect arguments that lost at first instance: [EG and NG](#) (UT r 17: withdrawal; r 24: scope) [Ethiopia](#) [2013] UKUT 143 (IAC) at [46]. As the headnote says:

A party that seeks to persuade the Upper Tribunal to replace a decision of the First-tier Tribunal with a decision that would make a material difference to one of the parties needs permission to appeal. The Upper Tribunal cannot entertain an application purporting to be made under rule 24 for permission to appeal until the First-tier Tribunal has been asked in writing for permission to appeal and has either refused it or declined to admit the application.



Example

An asylum seeker brings an appeal on both Refugee Convention and family life grounds. The FTT allows their appeal because of the dangers they face in their country of origin but dismisses the ground based on Article 8 ECHR. The Secretary of State appeals against the Refugee Convention findings because the FTT overlooked a relevant Country Guidelines case.

If the asylum seeker wishes to challenge the Article 8 findings, the correct approach is NOT to try and raise this by way of response, but rather to lodge an appeal to the FTT directly.

Reply

The appellant may provide a reply to the respondent's response (subject to the UT's direction) r 25(1). This must be in writing and must be sent or delivered to the UT so that it is received by the earlier of this pair of dates:

- one month after the copy of the response was sent, or
- five days before the hearing of the appeal.

It is very unusual to wish to submit such a document, particularly given that Responses from the Secretary of State are often relatively generic in content. However, if a Response asserts facts that are considered misleading, or if a relevant authority has so far been overlooked (or a new one has come to light), then a Reply might be appropriate.

Variation of grounds of appeal

The variation of grounds of appeal within the UT is not the subject of express treatment in the Rules: however, given the need to sensibly construe the UT Rules in order that any identified unlawfulness in FTT decisions can be addressed, variation must be permissible – presumably as part of the UT's general powers to “permit or require a party to amend a document” r 5(3)(c).

Further evidence

The UT may consider fresh evidence not previously relied on in the FTT. However it will be rare for it do so at the “error of law” stage: for in general the UT cannot give permission to appeal, nor consider whether to allow an appeal, on the grounds of fresh evidence, unless

and until an error of law is established in the FTT decision Tribunal, see [CA \[2004\] EWCA Civ 1165](#). How, after all, can the FTT have erred regarding evidence that was not before it?

A specific provision was inserted into the general UT procedure rules to deal specifically with immigration and asylum appeals, however, at rule 15(2A):

(2A) In an asylum case or an immigration case

- (a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party
 - (i) indicating the nature of the evidence; and
 - (ii) explaining why it was not submitted to the First-tier Tribunal;and
- (b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.

Practice Direction 4 addresses evidence in the UT and emphasises that rule 15(2A) must be complied with in every case where a party wishes to rely on further evidence. In addition, the Practice Directions specifies that a party seeking to adduce new evidence must make it clear in the rule 15(2A) notice whether the evidence is:

- (a) in connection with the issue of whether the First-tier Tribunal made an error of law, requiring its decision to be set aside; or
- (b) in connection with the re-making of the decision by the Upper Tribunal, in the event of the First-tier Tribunal being found to have made such an error.

Fresh evidence will normally be subject to the test set out by the Court of Appeal in [E v SSHD \[2004\] EWCA Civ 49](#):

The [Ladd v Marshall](#) principles are, in summary: first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently credible although not necessarily incontrovertible. As a general rule, the fact that the failure to adduce the evidence was that of the party's legal advisers provides no excuse: see *Al-Mehdawi v Home Secretary* [1990] 1AC 876.

As the Tribunal recognized in the starred appeal of [MA \(Fresh evidence\) Sri Lanka \[2004\] UKIAT 00161](#):

Of course there may be exceptional factors in an asylum or human rights case, which mean that evidence which could and should have been before the Adjudicator can be admitted on appeal.

Hence the test for admission of fresh evidence has three stages:

- (1) Prior availability taking into account the need for reasonable diligence;
- (2) Materiality;
- (3) Apparent Credibility;

With a fourth, doubtless rare, get-out clause:

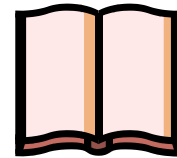
- (4) With a residual possibility of exceptional factors being present in an asylum and human rights case albeit that the above criteria are not met.

In asylum and human rights cases where the facts have to be decided at the date of hearing, it will be normal for fresh country information or other relevant evidence to be admitted, if updating is required, if an error of law is established and the appeal proceeds to re-hearing. Absent that scenario, the appropriate route for new evidence to be considered is by way of making further representations to the Home Office (ie the Rule 353 fresh claim procedure).

Summary of when fresh evidence is admissible at the error of law stage

In summary, fresh evidence is admissible at the stage where an error of law is being contended for in certain circumstances:

- where it was itself relevant to proving the existence of an error of law such as an error of fact (eg the true location of the Appellant's home town)
- to show procedural irregularity (eg where complaints is made that the FTT a judge refused to let a witness give oral evidence)
- to show that, once an error of law had been found to exist, the new evidence, which could then become admissible, could lead to a different outcome on the appeal, and
- to adduce cogent evidence of fraud, as nobody should ever be allowed to benefit from a Tribunal decision made in the light of false representations



Example

A new client comes to see you. They have lost an appeal on asylum grounds in the FTT. You note that the findings of the FTT seem different to the Home Office published position on the country in question. The Home Office Guidance says that there is no possibility of internal relocation for a person in danger. However that material was not before the FTT.

You might draft something like this by way of Rule 15A notice:

- “(1) The Appellant is a citizen of ... whose appeal has been dismissed by the First-tier Tribunal, before whom there was limited information regarding internal relocation and state protection for a person in her situation.
- (2) In determining whether the asserted errors of law set out in the grounds of appeal, the country evidence situation regarding internal relocation and state protection may become relevant.
- (3) It is submitted that it would be appropriate to admit into evidence the Respondent's position on these issues as it was in the latest operational guidance prevailing at the date of the First-tier Tribunal decision.
- (4) In truth there was an obligation on the Respondent to put this material into evidence: see *UB Sri Lanka* §15-22 as it was clearly relevant.”

Initial hearing

The first issue to be decided in the Upper Tribunal will be whether there was in fact an error of law in the decision of the First-tier Tribunal. This test is a prerequisite to an appeal to the UT and must be satisfied in all cases, whether permission was granted by the FTT or the UT. The possible grounds for asserting that there is an error of law are addressed briefly above.

As discussed above, it will be unusual for new evidence to be relied on at this stage in the proceedings because the focus must be the material that was before the decision maker who it is contended committed an error of law.

Once an error in the FTT decision is established, it will be difficult for the UT to uphold the decision unless it is very confident indeed that the decision below would have been the same without the error. See [HK](#) [2006] EWCA Civ 1037 at [45] where the Court of Appeal recognises that a decision may only be upheld where the tribunal is

tolerably confident that the tribunal's decision would have been the same on the basis of the reasons which have survived its scrutiny

Generally speaking, FTT judges are to be assumed to know what they are doing unless one can clearly see that something has gone wrong. So the UT will read the decision as a whole to ensure that a real mistake has been made, and will not reward appellants who are simply nit-picking.

If no material error of law is established, then the appeal will simply be dismissed. See for example the Court of Appeal in [EJA](#) [2017] EWCA Civ 10, quoting an earlier case:

reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account ... [an] appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.

A consent order is an order by which the parties agree on a particular course of action, which they then jointly submit to the court in question as an appropriate disposal of an appeal. There is specific provision in the UTRs at Rule 39 for consent orders to be used where appropriate, though it is fair to say that the notion has not caught on in the context of statutory appeals. This would obviate the need for an error of law hearing where the error is clear – though where this requires early engagement from the Secretary of State's side, it may be difficult to find a correspondent who is able and willing to consider matters before the hearing. A brief discussion with the Presenting Officer who appears for the Home Office before the hearing starts is more likely to bear fruit, as they have historically often been willing to make pragmatic concessions as to whether an error of law is established.

Remaking the decision – straight after the error of law hearing, or by adjournment or remittal?

The procedure to be followed on appeal once a material error of law is identified is set out in Practice Direction 3. There is a clear steer towards the UT retaining cases for final decision rather than remitting them to the FTT, though in practice remittal has become much more common as the UT has become more established.

Representatives will have to consider carefully whether further evidence should be prepared in advance of an initial error of law hearing. This is because any such preparation could be a waste of time and money because the tribunal might decide there was no error of law, meaning the evidence would not be called upon. Of course, where the appeal was fully prepared before the FTT and there is no significant change of circumstances (particularly where it is not long since the FTT hearing), this will not be a concern.

Practice Direction 3 provides as follows:

3.2 The parties should be aware that, in the circumstances described in paragraph 3.1(c), the Upper Tribunal will generally expect to proceed, without any further hearing, to re-make the decision, where this can be undertaken without having to hear oral evidence...

3.3 In a case where no oral evidence is likely to be required in order for the Upper Tribunal to re-make the decision, the Upper Tribunal will therefore expect any documentary evidence relevant to the re-making of the decision to be adduced in accordance with Practice Direction 4 so that it may be considered at the relevant hearing; and, accordingly, the party seeking to rely on such documentary evidence will be expected to show good reason why it is not reasonably practicable to adduce the same in order for it to be considered at that hearing.

It therefore seems safe to assume that where the error of law asserted is such that oral evidence would be necessary for a re-decision, witnesses need not attend the initial UT hearing and full up-to-date evidence need not be prepared.

In all other cases, representatives have to assess whether it is 'reasonably practicable' to prepare and adduce any necessary further evidence.



Casework Tip

It is always possible to write to the UT seeking particular directions in order to clarify the approach that will be taken.

However, it is impossible to be completely sure what approach will be taken, although the culture in recent years has been overwhelmingly in favour of adjourning to a second stage hearing. Common sense and experience will be required in assessing whether to prepare on the basis that the UT may immediately re-hear the case. If there are good reasons for not taking a belt-and-braces approach and updating the evidence, such as the cost of doing so prior to an error of law being identified if the client lacks means, it is a good idea to write to the UT to put them on notice of the situation.

Consider the following examples:

Credibility challenge in asylum case

- It is unlikely that the case can be re-decided without oral evidence, adjournment very likely

Failure to consider relevant evidence

- Oral evidence may not be needed, adjournment unlikely

Legal error such as Convention reason

- Oral evidence unlikely to be needed, adjournment very unlikely

[Practice Statement](#) 7 sets out the considerations as to whether the remaking should be completed in the UT or via remittal to the FTT.

7.2 The Upper Tribunal is likely on each such occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.

Thus under Practice Statement 7:

- In an asylum case where medical evidence relevant to the assessment of credibility was overlooked, this is likely to require a full re-hearing with all findings of fact being re-assessed – remittal is very likely;
- In a private and family life case where the only error was as in assessing proportionality outside the Immigration Rules, it is likely that no further fact-finding will be necessary and the earlier conclusions will simply be adopted as a basis for a proper application of the law – remittal is unlikely
- Wherever the decision of the FTT is undermined by unfairness, remittal is likely

Remaking the decision – conduct of the next hearing

In [AH \(Scope of s103A reconsideration\) Sudan \[2006\] UKAIT 00038](#), decided in the era of reconsideration in the single-tier system but nevertheless relevant to the era of the UT, the Tribunal said:

Although the Tribunal reconsidering the appeal has all the grounds of appeal before it, it also has – indeed it has just been considering – the previous decision, and it must be at liberty to adopt those parts which it considers are sound. The principle perhaps goes further than that. Because the process is a reconsideration, we would incline to the view that in general the Tribunal should always adopt those parts of a previous decision which are not shown to be unsound.

This consideration aside, the hearing can be expected to proceed much as one in the FTT, via the adoption of witness statements and taking of further evidence in chief from the Appellant and their witnesses, cross examination, and the making of submissions on the law and evidence. As everybody involved has already seen a dry run of the appeal, having read the proceedings in the FTT, re-hearings in the UT tend to be rather speedier than they were first time around, unless the case is an especially complex one.



Casework Tip

Summary of Upper Tribunal Procedures

It can be seen that the main stages in the UT procedure, from the grant of permission to the hearing, may include the following

- **the appellant considers, if granted permission by the FTT, whether there are any grounds on which they have been refused permission that they wish to pursue, via an application direct to the UT**
- **the appellant and respondent have regard to the terms of the permission grant for any directions relevant to future conduct of the case**
- **the respondent considers whether to file and serve a response under rule 31, within one month (though two weeks is preferred by the UT) of the UT sending them the permission grant, or whether there is any aspect of the determination below, not appropriate for a response, against which they should seek permission to appeal**
- **the appellant considers whether to file and serve a reply to any respondent's response under rule 32 (within one month, or sooner)**
- **the parties consider whether they wish to submit any further evidence, and if doing so should supply a Rule 15A notice (in line with directions or otherwise as 'soon as is practicable') indicating its nature (ie whether it is oral or documentary, and addressing whether it is necessary for it to be considered in relation to establishing error of law or only in the event the decision must be remade) and why it was not submitted below, as soon as practicable after permission to appeal is granted subject to other direction of the UT**

- any skeleton argument is provided, five working days before the hearing under the generic standard directions or as otherwise directed
- at the first hearing, the UT will consider whether an error of law has been established
- if it has not, the appeal will be dismissed, orally at the hearing or subsequently in writing
- if an error of law has been established, the UT will proceed to remake the decision
- in general the expectation should be that the decision is remade there and then, subject to the need to make further findings of fact which, if a significant amount of oral evidence is required, is likely to require an adjournment or transfer in the UT or remittal to the FTT, subject to directions having been given prior to the first hearing for the taking of such evidence

Refugee status and race relations appeals

There is a specific procedure laid out at UT rule 17A and [Practice Direction 5](#) for pursuing an appeal where leave has been granted and the appeal would otherwise be treated as abandoned i.e. where refugee status is sought or the appellant wants a finding made on their race discrimination grounds.

Judicial review of decision of the UT to refuse permission to appeal against a decision of the FTT

Where the UT has refused permission to appeal against a decision of the FTT, there is one further throw of the dice theoretically available: judicial review of the refusal in the Administrative Court.

Because this challenge must be made in the Administrative Court, a branch of the High Court, the relevant procedures are found in the [Civil Procedure Rules](#) (CPR).

Permission will be given only if the court considers ([CPR, r 54.7A\(7\)](#)):

- (a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and
- (b) that either –
 - (i) the claim raises an important point of principle or practice; or
 - (ii) there is some other compelling reason to hear it.

As you can see, this is a very high threshold, essentially one of error of law *plus* one of the two special features.

Relatively few cases will involve an important point of principle or practice (and the test is whether a new point is being established, not simply whether an established principle was applied correctly, see [Uphill v BRB \(Residuary\) Ltd](#) [2005] EWCA Civ 60 at [18])

So most cases will have to be argued via the “compelling reasons” limb:

Compelling reasons will normally be legal ones, although exceptionally it is possible that political or emotional ones will add weight to these; the “mere” fact that the case raises asylum issues is not in itself sufficient, though the extremity of consequences for the individual in combination with a strong argument that there has been an error of law may suffice ([JD \(Congo\)](#) [2012] EWCA Civ 327 at [22], [26] and [27])

It may be easier to cross the threshold where the best interests of the child are involved suffice ([JD \(Congo\)](#) [2012] EWCA Civ 327 at [14])

The fact that there has only been one tier of consideration, because the UT has remade the decision particularly where it heard an appeal afresh rather than preserving first tier findings, may be a relevant factor ([JD \(Congo\)](#) [2012] EWCA Civ 327 at [14])

Unless there has been procedural unfairness, it will be necessary to establish very high prospects of success on appeal ([Uphill v BRB \(Residuary\) Ltd](#) [2005] EWCA Civ 60 at [18])

A second appeals point should be capable of very concise expression: if it takes a lot of convoluted argument or extensive references to the evidence that was before the FTT to try and make the argument, it probably won't make the grade as a second appeals challenge.

The application is made with these supporting documents (CPR, r 54.7A(3)):

the grounds of appeal

resultant UT refusal,

prior FTT permission refusal, and

any other essential documents (eg vital evidence which you intend to argue was overlooked).

Other key points:

The application must be made no later than 16 days after the date on which notice of the UT's decision was sent to the applicant (CPR, r 54.7A(4))

The claim form must be served on the Defendant Tribunal (the Secretary of State or other Respondent will be named as an “interested party”) no later than seven days from the date of issue

The application must expressly refer to the fact the claim is brought under these provisions of the CPR ([CPR PD 54A, para 19.1](#))

The UT and any other defendant wishing to participate in proceedings must file and serve an Acknowledgment of Service within 21 days of service of the claim form upon them, and if wishing for a hearing must make such a request within 14 days of a permission grant being served ([CPR, r 54.7A\(6\)](#); CPR PD 54A, para 19.2)



Casework Tip

Summary of the procedure in a ‘Cart’ Judicial Review:

- **Claimant drafts grounds addressing the second appeal criteria.**
- **Claimant lodges judicial review within 16 days of the impugned determination being sent to claimant.**
- **Claimant serves claim on defendant and interested party (ie the respondent to the appeal) within seven days of issue.**
- **Defendant serves Acknowledgment of Service within 21 days.**
- **Administrative Court judge makes decision on papers (there is no right of oral renewal).**
- **If claim is refused, possible appeal to Court of Appeal (there is no right of oral renewal).**
- **If claim is granted, usually the permission refusal will be quashed leaving the case outstanding before the UT, subject to the UT or interested party wishing there to be a substantive hearing of the judicial review application in the Administrative Court.**

Bail in the UT

This is not a course about detention and bail. However you will note that the UT procedure rules are silent on bail. This is because the grant of bail is done in the capacity of an FTT judge – so where the UT considers bail, it will reconstitute itself as the FTT to do so: see eg [Practice Direction](#) para 13.3. At that point the rules on bail found in the [The Tribunal Procedure \(First-tier Tribunal\) \(Immigration and Asylum Chamber\) Rules 2014](#) will apply.

Remedies against the UT

Appeals to the Court of Appeal - seeking permission from the UT

A decision of the UT can be challenged in the Court of Appeal. This includes both decisions of the UT that finally determine an appeal, and also those which complete the UT's involvement with the case: thus appeal lies against a remittal (see [AA \(Iraq\) v Secretary of State for the Home Department](#) [2017] EWCA Civ 944).

An application must be made to the UT for permission to appeal which, if refused, can be renewed directly to the Court of Appeal (proceedings in the Court of Appeal are beyond the scope of this course).

The deadline is set out at UT rule 44(3B) and is

- 12 working days from the sending of the determination, or
- 7 working days if the person is detained or
- 38 days if the person is outside the UK. Different time limits apply where the person was served personally or by electronic means.

An appeal to the Court of Appeal must be on a point of law (s13 TCEA 2007) and must also satisfy the second appeals criteria (identified above where we address judicial review of UT

permission refusals). The Court of Appeal is generally much stricter in its approach to deciding whether factual findings should be revisited than is the UT. These days (as is obvious when one reviews the decisions on www.bailii.org) it is very rare to see appeals proceedings on the kinds of “public law” grounds, ie regarding the overlooking of material evidence and the other errors identified in *R (Iran)* regarding the approach to the evidence generally.

The reason why one sees a significant number of statutory immigration appeals in the Court of Appeal is because the Immigration Rules are complex and ever-changing, and their interaction with the Human Rights Convention is an ongoing source of controversy, rather than because case-specific decisions will be granted permission to appeal.

Given the limited arguments which can go forward to the Court of Appeal, it can be expected that those instructing counsel to look at the case for the first time will be able to readily identify some significant aspect of the evidence that has been overlooked, or point to some potential issue of interpretation of the law or Immigration Rules that raises an issue of public importance.

UT self-review

Under section 10 of TCEA 2007 the UT may review its own decision, either on its own initiative or via on application by a party with a right of appeal. It may set aside its own decision.

This is dealt with at UT rules 41 to 47, although not all of those rules will be relevant in immigration and asylum cases.

The circumstances in which the UT can review its decision are limited. UT rule 45(1) provides that a review can only occur on receiving an application for permission to appeal (this may allow review in the unlikely scenario that an application for permission to appeal is not made) where either

- (a) when making the decision the Upper Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision; or
- (b) since the Upper Tribunal’s decision, a court has made a decision which is binding on the Upper Tribunal and which, had it been made before the Upper Tribunal’s decision, could have had a material effect on the decision.

In addition, the decision can only be set aside where the UT considers that it would be in the interests of justice to do so AND one of four conditions applies (UT rule 43(2)):

- (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party’s representative;
- (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;
- (c) a party, or a party’s representative, was not present at a hearing related to the proceedings; or
- (d) there has been some other procedural irregularity in the proceedings.