**Cart Judicial Reviews through the Lens of the Upper Tribunal**

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**Introduction**

1. *Cart* judicial reviews (‘*Cart* challenges’ or ‘*Cart* claims’) constitute the largest single group of claims for judicial review in the High Court – 20% of all judicial reviews and 24.8% of claims that reached the permission stage (since 2014).\(^1\) *Cart* challenges are judicial reviews of Upper Tribunal (UT) decisions to refuse permission to appeal a decision of the First-tier Tribunal (FtT).\(^2\) Despite being so numerous, *Cart* challenges are difficult to study because a very small percentage of them result in a judicial decision accessible from the public generalist case law databases. The Independent Review of Administrative Law (IRAL) fell into that trap by attempting to estimate the rate of success for *Cart* challenges based on judgments available on BAILII and Westlaw.\(^3\) The problem with access to relevant data also limited previous academic studies.\(^4\)

2. I adopted a different method and I analysed the best public source of information on the fate of *Cart* challenges: UT decisions following successful *Cart* claims from 2018 to 2020 selected programmatically from a dataset of over 42,000 – mostly unreported – UT decisions.\(^5\) This article uses the content analysis methodology.\(^6\) This analysis allows me to discuss the key aspects of successful *Cart* challenges, including the question of what claims succeed in meeting the ‘second-tier appeals’ test for permission set in CPR r 54.7A(7). This study complements the previous quantitative study on rates of success in *Cart* and non-*Cart* judicial reviews\(^7\) and contributes to the broader discussion on the

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\(^1\)Calculation based on Ministry of Justice, ‘Civil justice statistics quarterly: October to December 2020’ (4 March 2021) <www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2020> accessed 1 October 2021.

\(^2\)Richard Drabble and Christopher Jacobs, ‘New CPR to Implement *Cart*’ [2013] JR 113; Can Yeginsu, ‘The First Successful Judicial Review on *Cart* Principles: *R (Kuteh) v Upper Tribunal*’ [2013] JR 134; Joanna Bell, ‘The Relationship between Judicial Review and the Upper Tribunal: What Have the Courts Made of *Cart*?’ [2018] PL 394.

\(^3\)Independent Review of Administrative Law, The Report of the Independent Review of Administrative Law (March 2021) <https://perma.cc/8XJU-GCJE> accessed 21 May 2021, 3.46. For comprehensive criticism of the Review’s methodology, see Mikołaj Barczentewicz, ‘*Cart* Challenges, Empirical Methods, and Effectiveness of Judicial Review’ (2021) Modern Law Review (forthcoming) <https://ssrn.com/abstract=3836456>.

\(^4\)See eg Sarah Craig, ‘Judicial Review: How Much Is Too Much? A View of Eba, *Cart* and MR (Pakistan) from the Asylum and Immigration Perspective’ (2012) 16 Edinburgh Law Review 210; Bell (n 2).

\(^5\)I explain the method by which I identified the relevant Upper Tribunal decisions in Barczentewicz (n 3).

\(^6\)Mark A Hall and Ronald F Wright, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96 California Law Review 63; Richard Kirkham and Elizabeth A O’Loughlin, ‘A Content Analysis of Judicial Decision-Making’ in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), Routledge Handbook of Socio-legal Theory and Methods (Routledge 2019); Joanna Bell and Elizabeth Fisher, ‘Exploring a Year of Administrative Law Adjudication in the Administrative Court’ [2021] PL 505.

\(^7\)Barczentewicz (n 3).

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appropriateness of retaining the *Cart* procedure in the context of the proposal to discontinue *Cart* claims made by IRAL and adopted by the government in the Judicial Review and Courts Bill.⁸

3. The bulk of this article focuses on the problems with the *Cart* procedure, but this should not distract from the fact that many more *Cart*-following appeals cases succeed in the UT than fail even though failed cases are reported at much higher rates than successful ones (at least in the UT’s Immigration and Asylum Chamber). My discussion of the problems, especially with the application of CPR r 54.7A(7), is meant to help identify ways in which the *Cart* procedure could be improved.

4. The article proceeds as follows. First, I give an overview of the studied sample of *Cart*-following decisions of the UT. I then turn to the main issue: the problems with the application of the test for permission in *Cart* claims beginning with examples of what factors led the courts to grant *Cart* permissions. Subsequently, I discuss the specific problems with the application of the ‘second-tier appeals’ limb of the test for permission. I also point out the more general problem with the lack of clarity in *Cart* permission decisions. I then consider two further issues: raising new grounds in *Cart* judicial reviews and the appropriateness of *Cart* judicial reviews following a partial ground of permission to appeal by the UT. I end with suggestions of amendments to CPR r 54.7A(7) that may be worth considering in the light of my study.

**Overview of the studied *Cart*-following appeals in the Upper Tribunal**

5. I identified 81 UT decisions, promulgated from 2018 to 2020, which followed *Cart* judicial reviews successful in quashing of an UT decision to refuse permission to appeal.⁹ Of those cases 14 were reported (67 unreported). All unreported cases in my sample come from the Immigration and Asylum Chamber (IAC) because it is the only UT chamber that publishes all its decisions. The sample contained three decisions of the Administrative Appeals Chamber (AAC) and one from the Tax and Chancery Chamber (TCC) – all upholding the challenged FtT decisions. Among IAC appeals, only 26 (34%) resulted in an FtT decision being upheld, whereas in 51 (66%) the FtT decision was set aside. Following IRAL, I refer to the cases where an FtT decision was set aside as ‘positive results’ and to the other cases as ‘negative results’.¹⁰

6. There is an asymmetry in which IAC’s *Cart*-following decisions are directed to be reported: 23% of decisions upholding the FtT were reported compared with only 8% of those where the FtT decision was set aside. To be clear, some IAC decisions

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⁸IRAL Report (n 3) 3.46; Ministry of Justice, Judicial Review Reform: The Government Response to the Independent Review of Administrative Law (March 2021) [48]–[52]; Ministry of Justice, Judicial Review Reform Consultation: The Government Response (July 2021); Judicial Review and Courts HC Bill (2021–22) cl 2.

⁹See n 5 above.

¹⁰IRAL Report (n 3) 3.42.
explicitly critical of the Cart process were not reported, but the imbalance does suggest that the problems with the Cart procedure are more salient to IAC judges than its successes, even though the clear majority – 66% in the studied sample – of Cart-following appeals succeeded.

7. The 51 decisions where an FtT decision was set aside should not be treated as the total number of positive results in Cart cases in the studied years. Unreported decisions of other UT chambers than IAC, to which I did not have access, may contain additional positive results. Also, in 2017–2019, 2.3% of Cart challenges led to the UT setting aside an FtT decision; however, as many as 6.9% of all Cart challenges may have settled in favour of the claimant, which is clearly a positive result. Moreover, it is arguable that even failed Cart-following appeals may be beneficial to the administration of justice, for example, by giving the UT an opportunity to clarify an important point of law. A good example of this is Chowdhury, where a Cart permission was granted because the High Court judge believed that an aspect of an immigration regulation required clear guidance from the UT, which the UT provided while dismissing the appeal.

8. I will now present some of the general characteristics of the studied appeals before turning to a more detailed discussion of Cart permissions.

9. Asylum and international protection appeals constituted the largest group among positive results (23 cases, ie 45% of positive results) followed by leave to remain (12 cases, 24%), and deportation and removal (nine, 18%). Among negative results, leave to remain cases dominated (15, 50% of negative results), followed by four asylum and protection cases (13%) and four deportation cases. Hence, in the sample, asylum and protection appeals were more likely to succeed than leave to remain appeals.

10. Table 1 illustrates the genders of appellants. ‘Both’ refers to decisions with several appellants, with at least one female and one male. In the sample, both lone female and lone male appellants were more likely to succeed than to fail. In decisions considering several appeals of appellants of mixed genders there were as many successes as failures.

11. Over two-thirds of appeals in the sample raised human rights grounds (58 cases, 72%), with a very similar proportion among both the positive results (36, 71%) and negative results (22, 73%). Hence, it does not seem that presence of human rights grounds made a difference to the outcome in the sample. The rule most invoked was art 8 ECHR (31 cases alone, seven cases together with art 3 ECHR), followed by...
Table 1 Genders of appellants in Cart-following appeals.

| Gender | All appeals | Positive result | Negative result |
|--------|-------------|-----------------|-----------------|
| Female | 15          | 11              | 4               |
| Male   | 55          | 35              | 20              |
| Both   | 10          | 5               | 5               |

art 3 (seven cases alone). Moreover, six successful appeals relied on the Refugee Convention.

12. I also attempted to identify protected characteristics – under s 4 of the Equality Act 2010 – raised as issues in the studied appeals. I counted 12 cases where disability was relevant, mostly in the form of mental health issues. Moreover, five cases concerned age (all dealing with children), three concerned sexual orientation and three alleged religious discrimination.

13. At least a strong suspicion of criminal behaviour of the appellant was noted as relevant in 11 cases with positive results (22%) and eight cases with negative results (27%). The difference of proportions is so small that no conclusions can be drawn from this observation.

The Cart test for permission (CPR r 54.7A(7)) in practice

14. Given that all the studied appeals followed grants of Cart permission to apply for judicial review – five in the Court of Appeal and 76 in the High Court – the UT decisions can inform our understanding of the Cart permission process. Cart permission decisions are almost always determinative of a Cart claim: just 11 out of all 323 Cart claims granted permission reached the substantive hearing stage and only two hearings concluded with a dismissal of a claim.14 In accordance with CPR r 54.7A(9), once permission is granted and unless a party requests a substantive hearing – which happens very rarely – a quashing order follows automatically.

15. CPR r 54.7A(7) sets the following strict (‘second-tier appeals’15) requirements for grant of permission in a Cart judicial review:

(7) The court will give permission to proceed only if it considers –

(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

14See n 1.
15R (Cart) v Upper Tribunal [2011] UKSC 28, [2012] 1 AC 663 [57] (Baroness Hale).
(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.

16. In this section, I consider examples of factors that led the High Court or the Court of Appeal decide that the ‘second-tier appeals’ test (from subpara (b)) was satisfied. The following sections are devoted to the difficulties with Cart permissions that can be seen in UT decisions.

17. The first limb of the ‘second-tier appeals’ test is that ‘the claim raises an important point of principle or practice’. One way in which this standard was met in the studied cases was due to decisions of higher courts interpreting the relevant law and post-dating the impugned FtT decision. Eight of the studied appeals succeeded on this ground. For example, in Khalid, the Court of Appeal granted permission because an FtT decision from September 2015 was arguably inconsistent with the approach taken by the Court of Appeal in a judgment from July 2016.\textsuperscript{16} In NA, in a similar situation, the UT noted that the FtT judge made an error of law ‘through no fault of her own’ given that she ‘cannot be faulted for applying the law as it was thought to be at the time of her decision’.\textsuperscript{17} Those cases show that both Cart claims and Cart-following appeals sometimes succeed on new grounds, which could not have been raised before the FtT – I come back to this issue later in this article.

18. However, not every Cart-following appeal on this ground succeeds. In Shah, while dismissing the appeal the UT criticised the appellant’s lawyers for misleading the High Court into thinking that the Court of Appeal granted permission on similar grounds to theirs in two other cases.\textsuperscript{18} Moreover, the UT rejected the notion that a Cart challenge might succeed just because of likelihood that a higher court may consider a relevant point of law in the future.\textsuperscript{19}

19. Another way a claim could raise an important point of principle or practice is if it concerns a point of law that calls for clarification. In Chowdhury, the High Court granted a Cart permission for that reason, stating that ‘[t]here is a public interest in further guidance being given as to the meaning of’ a phrase in one of the immigration regulations.\textsuperscript{20} Importantly, that appeal failed, but the UT provided the guidance that the High Court judge asked for. This case illustrates that administration of justice may be served by Cart challenges even if they do not result in a setting aside of the impugned FtT decision.

\textsuperscript{16}Khalid and others v SSHD (UT IAC, 1 November 2018, HU/00473/2015, HU/00476/2015, HU/00477/2015) [10].
\textsuperscript{17}NA v SSHD (UT IAC, 9 December 2020, HU/00860/2019) [25]–[27].
\textsuperscript{18}Shah (‘Cart’ Judicial Review: Nature and Consequences) [2018] UKUT 51 (IAC), [2018] Imm AR 707 [69].
\textsuperscript{19}Ibid.
\textsuperscript{20}Chowdhury (n 13) [6].
20. Turning to the ‘compelling reason’ limb of the ‘second-tier appeals’ test, perhaps the clearest example of a case that satisfies it is what Lord Dyson – quoting Laws LJ – referred to as ‘a wholly exceptional collapse of fair procedure’. However, either public authorities – chiefly the Home Office – settle such cases out of court at a considerably higher rate than other Cart cases, or such situations are quite rare, because I identified only four instances in the studied sample. Those cases involved: clerical errors in the FtT, a denial of adjournment of a hearing for medical reasons, denial of permission to appeal despite evidence that the appellant failed to attend his hearing due to being hospitalised, and a bank’s fraud-prevention mechanism stopping the payment of an application fee.

21. The other type of a ‘compelling reason’ according to Lord Dyson is ‘an error of law which has caused truly drastic consequences’. A large group of cases that seem to be given Cart permissions for this reason are appeals where dismissal may lead to deportation or administrative removal. In the next section, I discuss the controversy whether a mere risk of deportation or administrative removal can be considered as a ‘compelling reason’ under the ‘second-tier appeals’ test.

22. Finally, there are other ‘compelling reasons’ cases which do not fit Lord Dyson’s examples. For example, in Stinson, a Cart permission was granted in an ‘exceptional’ situation where the applicant argued that the FtT did not take seriously enough the applicant’s claim that they ‘regarded themselves as being in a state of religious betrothal’ though they were not engaged and did not have firm plans to marry.

23. UT decisions noted several types of difficulties in ascertaining what led the High Court or the Court of Appeal to decide that the requirements of the test for permission are satisfied, which I will now discuss.

Problems with the ‘second-tier appeals’ test

24. First, some Cart permission decisions expressly consider only the requirement of arguability from subpara (a) of CPR r 54.7A(7), with no express consideration of the ‘second-tier appeals’ test from subpara (b) or at least with no specific reasons given in respect to this test. This led UT judges to question whether the High Court properly applies the subpara (b) test.

25. For example, in Amin and Usman, the High Court did not expressly consider the requirements from subpara (b) at all in its permission decision. Similar problems were
apparent in *Ejiogu*,*S*, and *P*. This is particularly concerning because, as Joanna Bell argued, ‘the logic of *Cart* requires that questions of arguability are addressed after the applicant clears the hurdle laid down by the second-appeals criteria’. One would expect the High Court to explain in a permission decision why the second-tier appeals criteria are met first and foremost, but I have seen little evidence of such explanations. It is, however, possible that more robustly reasoned permission decisions lead to out-of-court settlements and hence such cases tend not to reach the UT.

26. A specific problem with the High Court’s approach to the ‘second-tier appeals’ criteria in *Cart* cases concerns the second limb of subpara (b) – ‘there is some other compelling reason to hear it’. In *Thakrar*, a case concerning potential removal of a Kenyan citizen from the UK, the UT reported that the High Court took the view that ‘the consequences of removing the appellant would be “so momentous … that I can safely say there is a compelling reason for an appeal to be heard”’. As the UT noted, the problem with that reasoning is that ‘all appeals to the First-tier Tribunal against the respondent’s refusal of a human rights or a protection claim involve the prospect of removal’. *Thakrar* was not the only case in the sample where the question whether the severity of removal from the UK was a ‘compelling reason’ in the sense of subpara (b) arose.

27. It is possible that some High Court judges see all arguable errors of law in removal cases as situations that ‘cry out for consideration’ or instances of potentially ‘truly drastic consequences’. However, the vast majority of FtT appeals ‘involve the prospect of removal’ – even if indirectly. The sum of asylum, protection, human rights and deportation appeals constituted 80% of the appeals received in the FtT in 2019–2020. Moreover, 29% of UT IAC decisions in 2018–2020 expressly discussed ‘removal’. This raises the question whether the discussed approach of some High Court judges is consistent with the Supreme Court’s decision in *Cart v Upper Tribunal*, which stressed the exceptional nature of what we now know as *Cart* challenges. The readings of *Cart* adopted by Bell in her *Public Law* article and by Carnwath LJ in *PR (Sri Lanka)* suggest that this approach is inconsistent with *Cart*.

29 *Ejiogu (Cart cases)* [2019] UKUT 395 (IAC) [22], [31].
30 *S and others v SSHD* (UT IAC, 1 May 2019, IA/48457/2014, IA/48466/2014, IA/48474/2014) [16].
31 *P v SSHD* (UT IAC, 30 July 2020, PA/09273/2017) [9].
32 Bell (n 2) 410.
33 *Thakrar (Cart JR; Art 8: Value to Community)* [2018] UKUT 00336 (IAC) [38].
34 Ibid [39]–[40].
35 See also *Cojan v SSHD* (UT IAC, 23 January 2019, DA/00144/2016) [10]–[13]; *N v SSHD* (UT IAC, 28 February 2020, HU/03856/2017) [18].
36 *Cart (SC)* (n 15) [131] (Lord Dyson). See also Yeginsu (n 2) [9].
37 Ministry of Justice, ‘Tribunal statistics quarterly: October to December 2020’ (11 March 2021) <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2020> accessed 1 October 2021.
38 Calculation based on my dataset of UT decisions, see Barczentewicz (n 3).
39 *Cart (SC)* (n 15) [51]–[56] (Lady Hale), [92] (Lord Phillips), [131] (Lord Dyson).
40 Bell (n 2) 409.
41 *PR (Sri Lanka) v SSHD* [2011] EWCA Civ 988, [2012] 1 WLR 73 [36]. See also *JD (Congo) v SSHD* [2012] EWCA Civ 327, [2012] 1 WLR 3273 [26].
General lack of clarity of reasons why permission granted

28. Some permission decisions do no more than merely repeat the wording of CPR r 54.7A(7), without giving any specific reasons related to the claim in question – also regarding the first limb of the test (arguability of an error of law), from subpara (a). Given that permission decisions tend to be dispositive of Cart claims, arguably they should be better reasoned than ordinary permission decisions in judicial review. In MA, the UT complained that it was unable to ascertain what arguable error of law the FtT made according to the High Court because the grant of permission contained only the following sentences:

   Permission is hereby granted.

   Observations: The Applicant has demonstrated a reasonable prospect of success in establishing that both the FtT and the UT made serious legal errors and the claim crossed the threshold on the basis of compelling reason.42

29. This is not an isolated case. For example, in Das the UT noted regarding the Cart permission decision: ‘[t]he only reason given for that decision was that “The grounds reach the threshold for obtaining permission”’.43 The permission decision reported in Singh was slightly longer, but similarly unhelpful in identifying the reasons why permission was granted.44

30. There is a large discrepancy between some Cart permission decisions that are robustly reasoned and those which contain little or no indication of reasons. Given that I did not study a statistically representative sample of the High Court’s permission decisions in Cart cases, I cannot say how common the latter problem is. However, I can say that the examples I mentioned so far constitute over 12% of the studied sample. Moreover, UT IAC signalled this problem very explicitly in reported decisions like MA.

Permission decisions unavailable to UT judges

31. Aside from the issue of lack of clarity of reasons why a Cart permission was granted, it sometimes happens that UT judges have no access to the permission decision or to submissions the parties made before the High Court (or the Court of Appeal) in Cart proceedings. Such issues were raised in Alauddin,45 Khalid,46 and ZA.47

32. However serious this problem may be, especially when for some reason the parties are not able to assist the UT, it is puzzling why the UT would complain about not

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42MA (Cart JR: Effect on UT Processes) Pakistan [2019] UKUT 00353 (IAC) [30].
43Das (Paragraph 276B, s3C – Application Validity) [2019] UKUT 354 (IAC) [10].
44Singh v SSHD (UT IAC, 10 September 2019, IA/02496/2016) [11].
45Alauddin v SSHD (UT IAC, 17 November 2020, HU/13977/2018) [16].
46Khalid (n 16) [15]–[16].
47ZA v SSHD (UT IAC, 5 June 2018, PA/12860/2016) [3].
having access to documents from proceedings in which the UT is always the defendant. It is one thing that the UT takes a neutral position in Cart proceedings, but it is unclear why the UT could not receive and appropriately file the documents served on it as a party to those proceedings. This looks like a problem with internal clerical procedures in the UT, not something to be addressed by imposing additional duties on the parties.

**New grounds in Cart claims**

33. It is well-settled ‘that the arguments which can be raised on appeal are limited by the grounds of appeal for which permission has been granted’. Relatively often claimants succeed in Cart judicial reviews on different grounds than those used previously before the FtT and the UT. However, in such cases the UT requires appellants to apply for permission to amend grounds – a Cart permission and a successful quashing of a UT refusal of permission to appeal do not constitute a permission to appeal, much less permission to appeal on new grounds. It seems that applications to amend grounds are normally granted and refused only if the UT is convinced at the outset that the grounds are hopeless.

34. In Shah, the UT stated that a Cart challenge is ‘emphatically not an opportunity for a party to raise new grounds of appeal against the decision of the First-tier Tribunal’. In that case, the claimant succeeded in a Cart judicial review on new grounds, but the follow-up appeal failed in the UT. This approach was confirmed in Das and in MA, both reported. In Ahammad, the UT cited Shah and noted that the appellant attempted to advance new grounds, but the tribunal seems to have allowed it, which did not affect the result as the appeal failed. In Aslam, the UT also allowed the appellant’s counsel to proceed on new grounds even though no specific application to amend the grounds was made – here too the appeal failed. In both Ahammad and Aslam the UT noted that the respondent did not object to proceeding on the basis of new grounds. Other examples of cases where the UT also allowed amendments of grounds of appeal are N and P.

35. On the other hand, Ejiogu provides an example of a refusal of application to amend grounds of appeal. This application was opposed by the respondent, but the key problems were that the UT did not see the merit in the amended grounds and that the counsel did not satisfy the UT in his explanation ‘why the grounds upon

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48 ME (Sri Lanka) [2018] EWCA Civ 1486 [22] (Lewison LJ).
49 Shah (‘Cart’ Judicial Review: Nature and Consequences) [2018] UKUT 51 (IAC), [2018] Imm AR 707 [62].
50 Das (n 43) [12]–[17]; MA (n 42) [40].
51 Ahammad v SSHD (UT IAC, 29 October 2019, IA/01859/2016) [16].
52 Aslam v SSHD (UT IAC, 12 March 2020, HU/12157/2018) [26]–[28].
53 N v SSHD (UT IAC, 28 February 2020, HU/03856/2017) [21]; P v SSHD (UT IAC, 30 July 2020, PA/09273/2017) [11]–[14]. In P the respondent tried unsuccessfully to oppose the amendment of the grounds referring to Shah.
54 Ejiogu (n 29).
which he now sought to rely could not have been advanced within the time limited for the application to the Upper Tribunal’.55

36. In S the UT raised a possibility of an approach that is difficult to square with Shah, Das and MA and with the requirement of permission to amend the grounds of appeal:

Given that the High Court found that ground arguable, and in the result persuasive, leading to the quashing of the decision, I have no doubt that the appellants are entitled to rely on that ground before the UT once permission has been granted subsequently. It may be, and I express no concluded view on this as it was not touched on in the submissions, that he [sic] High Court’s decision acts as an implied amendment or variation (by addition) of the original grounds to the UT.56

37. Cojan highlights a difficulty with the seemingly permissive approach to using new grounds accepted by the High Court in a grant of a Cart permission.57 The UT said:

Since that basis had not featured in the grounds of permission to appeal to the Upper Tribunal, it is difficult to see how the decision of the Upper Tribunal, in refusing permission, could have been ‘wrong in law’, as required by CPR 54.7A(7)(a).

38. The UT dealt with this problem also at least two times in 2021 (my main sample only covered cases until the end of 2020, but I was later informed about the more recent cases).58 In Osefi so, the appellants applied to amend the grounds of appeal before the UT after the UT had already decided to refuse permission to appeal.59 The appellant’s application to amend grounds was, according to the UT, substantially identical to their subsequent successful Cart application, and relied on entirely new grounds.60 This irregular application to amend was likely an implicit recognition of the problem noted in Cojan. That is, that the High Court cannot grant a Cart permission on grounds which the UT did not need to consider – because they were not pleaded and not ‘Robinson obvious’61 – because in such a situation it can hardly be said that the UT was ‘wrong in law’ regarding those grounds. In Osefi so, the UT denied that it has jurisdiction to hear this kind of a late application to amend in the absence of a procedural irregularity (r 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008).62 The UT expressed the hope that ‘no one should repeat those steps in future’.63 However, despite the irregularity, the UT accepted that there was a Robinson obvious ground in this case, gave permission to amend grounds, and allowed the appeal.64

55ibid [25]–[27].
56S and others (n 30) [48].
57Cojan (n 35) [14].
58My thanks to Gabriel Tan.
59Osefi so and another (PTA Decision: Effect; ‘Cart’ JR) [2021] UKUT 0116 (IAC).
60ibid [27].
61ibid [34]. See R v Secretary of State for the Home Department ex p Robinson [1998] QB 929, [1997] Imm AR 568.
62Osefi so (n 59) [29]–[38].
63ibid [37].
64ibid [38].
39. In another recent case the UT criticised the appellant’s counsel in very strong terms (‘may have been professionally reprehensible’) for what looked like misleading the High Court that a ground had been put to the FtT, when it was not. The High Court granted a Cart permission specifically due to that ground, stating that it arguably should have been explored ‘whether the FTT judge erred by failing to take into account’ that ground. The appeal failed.

40. As I noted earlier, the UT allowed appeals on grounds that were not raised before the FtT or the UT, even in situations where the FtT and the UT decisions only came to be seen as clearly erroneous in the light of a later authoritative interpretation of the relevant law by a higher court. The UT also allowed appeals on grounds of new evidence. There may be some tension between that practice and the understanding of the role of an appellate tribunal implicit in Cojan – ie that it is meant to decide whether the original decision was erroneous in law at the time it was made.

Are Cart judicial reviews appropriate when the UT partially grants permission to appeal?

41. Another point that seems to have led to some confusion is the question of what path is available to an applicant who is successful in obtaining a permission to appeal from the UT, but only on some grounds? There is some evidence of contradictory approaches taken by different judges.

42. In Moss – a decision from the UT’s Administrative Appeals Chamber – the appellant was successful in his Cart judicial review after being refused permission to appeal by the UT on some grounds only – the Cart order quashed the UT decision in part in which it denied permission on other grounds. The UT AAC judge subsequently granted permission to appeal on the remaining grounds, without any notes about this process being improper. The UT decision did not register whether the High Court judge made any comments about this either.

43. This approach can be contrasted with HOK (Iraq), where a judge of the UT’s Immigration and Asylum Chamber said the following about CPR r 54.7A:

There is no reference in the rule to the possibility of an application being made where permission has been granted on limited grounds only. This is plainly an intentional omission, since the CPR makes express provision for such applications in other contexts. Where, for example, permission to proceed with an application for judicial review has been granted ‘on certain grounds only’, CPR 54.12 makes provision for the partly successful applicant to request that decision to be reconsidered at a hearing.

65 X v SSHD (UT IAC, 4 March 2021, HU/23868/2018) [28]–[29].
66 ibid [27].
67 ibid [31].
68 Moss v Information Commissioner and the Cabinet Office [2020] UKUT 242 (AAC) [17].
69 ibid.
If it had been intended that an appellant who had been granted limited permission to appeal by the Upper Tribunal should have to seek recourse in the Administrative Court, that would have been made clear in CPR 54.7A.70

44. Given those apparently contradictory approaches, it may be advisable to consider whether CPR r 54.7A is sufficiently clear on this point.

**CPR changes worth considering**

45. Permission decisions are final decisions in nearly all Cart judicial reviews. Therefore, it is important for High Court judges to provide more robustly reasoned permission decisions that explicitly address how the claim meets both the first and second limb of CPR r 54.7A(7).

46. As an alternative to the proposed sweeping reforms in cl 2 of the Judicial Review and Courts Bill, it may be worth considering whether the Civil Procedure Rules should be amended to include an explicit direction to judges deciding Cart permissions to provide reasons that will allow the UT to identify specifically on what grounds, with reference to the relevant law and facts, the High Court believed that the requirements of both subparas of CPR r 54.7A(7) are satisfied.

47. Given the problems with priority between the two limbs of the test and following Bell’s argument, it may also be advisable to reframe CPR r 54.7A(7) to make it clear that the ‘second-tier appeals’ test must be satisfied *before* considering the issue of arguability.

48. Finally, the question whether CPR r 54.7A(7) applies in situations where the UT only partially refuses may be calling for clarification.

**Conclusion**

49. This article focused on *problems* with Cart claims that are reflected in follow-up appellate decisions of the UT. However, I want to stress that those problems are not evidence that the procedure does not work in general. To the contrary, a clear majority of appellants succeed in their Cart-following UT appeals.71 The problems I noticed do make it more difficult for UT judges to decide such appeals, but the issues can be addressed with relatively small procedural or organisational changes. Had the Cart procedure been a clearly disproportionate use of judicial resources, either in the High Court or in the UT, I would have expected to see much more significant signs of that in follow-up UT appeals. Moreover, in my other research I argued

70HOK (Iraq) (UT IAC, 22 May 2020, PA/08004/2019) [22]–[23].
71See also Barczentewicz (n 3).
that evidence that Cart claims are a disproportionate burden on the High Court is insufficient.\textsuperscript{72}

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\textsuperscript{72}ibid.