Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/00449/2013

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 07 January 2014	**On 14 February 2014**

Before

The Hon. Mr Justice McCloskey, President
and
Upper Tribunal Judge King

Between

The Secretary of State for the Home Department

Appellant

and

Phillip Babatunde Faponnle

Respondent

Representation:

Respondent: Phillipe Bonavero (of Counsel) instructed by Trott and Gentry LLP
Appellant: Mr Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (hereinafter the "*Secretary of State*") whereby it was

determined, on 1st August 2012, that the Respondent be deported from the United Kingdom under section 32 of the UK Borders Act 2007. The Respondent's ensuing appeal to the First- Tier Tribunal (the "*FtT*") was allowed. The Secretary of State now appeals, with permission, to this Tribunal.

THE FACTS

2. The material facts are uncontentious. For the purposes of this error of law determination, it is unnecessary to rehearse *in extenso* the Respondent's history. It is sufficient to record that he is aged 36 years; he has been present in the United Kingdom since August 1990; his presence here has been unlawful during much of the ensuing period; and he has made unsuccessful applications for indefinite leave to remain and naturalisation. The Respondent has a not insignificant criminal record, having accumulated a series of convictions between 1997 and 2010. The most serious of these is the conviction made at Blackfriars Crown Court on 14th May 2010 for two counts of conspiracy to supply controlled drugs, namely Class A heroin. This gave rise to a sentence of 5 years and 8 months imprisonment, imposed on 3rd September 2010. The Respondent pleaded guilty to these offences on the basis that he has a "managerial role in respect of street dealing" which involved directing the street supply of elicit substances.

3. In his attempts to resist deportation, the Respondent has placed emphasis on an asserted long term relationship with a British citizen involving the birth of a child and his medical condition. At the appeal before the FtT, the Respondent's representative withdrew the application for asylum and conceded that the Respondent could not succeed under the Immigration Rules. The sole ground on which the appeal succeeded was Article 8 ECHR.

4. At the hearing before this Tribunal, two issues of law crystallised. In order to determine these issues, it is necessary to outline briefly the key events postdating the FtT determination, which was promulgated on 10th July 2013:

   (a) On 17th July 2013, the Secretary of State applied for permission to appeal to the Upper Tribunal.

   (b) On 19th August 2013, this application was refused by a Judge of the FtT.

   (c) On 23rd August 2013, this refusal was notified by HMCTS, in a formal "Notice of Decision", to both the Secretary of State and the Respondent's solicitors.

   (d) On 3rd September 2013, the Secretary of State renewed before the Upper Tribunal her application for permission to appeal. The fact of this renewed application was not notified to the Respondent or his solicitors.

(e) On 9th September 2013, the Home Office Criminal Case Work Division (Liverpool) wrote to the Respondent's solicitors in the following terms:

> "*In light of your client's allowed appeal of 10 July 2013 against his deportation, he will be granted Limited Leave to Remain in the UK. This leave will be issued on a Biometric Residence Permit. I would be grateful if you could advise your client of the following:*
>
> ***This letter is not evidence of your leave to remain in the United Kingdom, of right to work or of entitlement to benefits.***
>
> *You are required to enrol biometric information (scanned fingerprints and photograph) in order to obtain a Biometric Residence Permit, in accordance with the* [relevant Regulations] ….
>
> *The Biometric Residence Permit is the official document issued by the UK Border Agency to confirm your immigration status in the United Kingdom. Please complete the enclosed application form. Return the form and photographs within 7 working days to ……* [address] …….
>
> *Details of how to enrol your client's biometric information will be sent to you once we receive your client's completed forms.*"

[Emphasis added]

(f) On 13th September 2013, Upper Tribunal Judge Warr acceded to the Secretary of State's renewed application for permission to appeal. A formal "*Notice of Decision*" was issued to both parties on this date.

(g) On 17th September 2013, the Respondent's solicitors posted the completed "*Application for a Biometric Residence Permit*" to UKBA.

(h) Also on 17th September 2013, the Home Office (i) instructed SERCO to remove the Respondent's electronic tagging device "*due to him winning his appeal*" and (ii) instructed the relevant Reporting Centre "*Please cancel reporting events re above named. He is no longer required to report as he has now won his appeal.*"

(i) On 18th September 2013, the Home Office Criminal Casework Division wrote at length to the Respondent's solicitors:

> "*Please convey the contents of this letter to your client. This letter entitles the applicant to a fee free biometric enrolment at the Post Office Limited …..*
>
> *Dear Mr Faponnle,*
>
> *As part of your process for granting you leave you must have your biometric information (scanned fingerprints and photographs) taken.* ***This letter in itself***

confers no leave to enter or remain in the United Kingdom and does not constitute proof of your immigration status *…*

Even though the Home Office has agreed to grant you leave to remain in the United Kingdom, it is only the Biometric Information Residence Permit that constitutes proof of your immigration status in the United Kingdom and this permit cannot be issued until you have enrolled your biometric information ….

If you fail to enrol within 15 working days and do not contact us with a reason, no further action may be taken ……. It is only the Biometrics Residence Permit that constitutes proof of your immigration status in the United Kingdom."

[Underlining added.]

(j) On the same date, 18th September 2013, the Respondent's solicitors telephoned the Secretary of State's "*Special Appeals Team*". A record of this communication was made. This confirms that the Upper Tribunals grant of permission to appeal had been received by the Respondent's solicitors. It notes *inter alia*:

> "*Things got as far as the Respondent having his electronic tag removed and the Home Office writing to the Respondent to inform him we would be granting him limited leave. It is clear that an admin error cropped up with SAT and CCD not communicating effectively.*"

The legal representative concerned was informed that the appeal would be pursued. ("SAT" denotes "Special Appeals Team", while "CCD" denotes "Criminal Case Work Division".)

(k) On 2nd October 2013, the Respondent's solicitors forwarded their appeal hearing bundle to the Secretary of State's representative.

(l) On 8th October 2013, the Respondent and his solicitors were informed in writing that the cancellation of the bail conditions had occurred in error and that these would be reintroduced with effect from 14th October 2013.

5. It was represented to this Tribunal, without challenge, that the Respondent presented himself at a Post Office, where his biometrics were duly registered. While the precise date of this event is unclear, it would appear to have post-dated the conversation between the parties' respective representatives on 18th September 2013. It is also agreed that no Biometric Residence Permit was issued to the Respondent.

6. In the chronology, there followed a most unsatisfactory event. The Secretary of State's appeal was listed for hearing before a panel of two Upper Tribunal Judges on 20th November 2013. However, the Secretary of State was not ready to proceed. An adjournment was requested, and granted, on the basis that time was needed to enable the Secretary of State to check the authenticity of the letter sent on her behalf

dated 9th September 2013. That this was highly unsatisfactory *per se* is beyond plausible argument. To this we must add the comment that it is truly remarkable that the Secretary of State's representative, against the background documented above, was unable to confirm the authenticity of the Secretary of State's letter of 9th September 2013 **and**¸ evidently, doubted its authenticity to the extent that the hearing had to be adjourned. From every perspective, this was, frankly, astonishing. Furthermore, it gave rise to a period of pre-eminently avoidable delay and a grave waste of Tribunal time and public resources. This must be deprecated in the strongest terms.

7. Regrettably, no lesson was learned. At the reconvened appeal hearing before this panel on 7th January 2014, the Secretary of State's representative was, again, significantly ill prepared. A series of requests from the panel for basic, relevant information and documents could not be answered and, in consequence, it was not possible to complete the hearing. Rather, the Tribunal had to have resort to the mechanism of formal Directions. Only then were the necessary information and documentation provided by the Secretary of Sate, following the hearing. The breadth and depth of this further information and documents confirmed the gravity of the earlier failure on the part of the Secretary of State to discharge her obligation to disclose all relevant information and documents to the Respondent's legal representatives and the Tribunal. These failures merely served to compound and aggravate the significant errors which characterised the conduct of the Secretary of State's officials during the earlier phase of the appeal process detailed above. All of this can only be described as disturbing.

8. The adjourned hearing of 20th November 2013 resulted in a further letter written on behalf of the Secretary of State, addressed to the Respondent's solicitors, dated 22nd November 2013. This letter begins with an apology for the earlier errors and inaccuracies. It asserts that the earlier letters of 9th and 18th September 2013 were "*issued in error due to an administrative oversight*", by reason of "*a misinterpretation of information received from the Home Offices Specialist Appeals Team*". It further states:

> "*I apologise for the administrative errors that have occurred in your client's case and for any inconvenience and misunderstanding that has been caused. At present the Home Office will await the outcome of the proceedings at* [sic] *the Upper Tier Tribunal before making a decision on how to proceed in your client's case. Again I apologise for the error ……*"

The only document of note generated on the Respondent's behalf during the October 2013/January 2014 phase is the formal Rule 24 Response. This was composed by Mr Bonavero (of Counsel) and served the useful function of a skeleton argument.

THE TWO ISSUES OF LAW

9. The framework outlined above gives rise to two issues of law which we must determine. We formulate these in the following terms:

   (i) Whether the Secretary of State's appeal to the Upper Tribunal is deemed to have been abandoned.

   (ii) Whether to permit this appeal to proceed would unlawfully frustrate a substantive legitimate expectation on the part of the Respondent generated by the conduct of the Secretary of State's agents described above.

THE FIRST ISSUE

10. Mr Bonavero's argument was based on section 104(4A) of the Nationality, Immigration and Asylum Act 2002 ("*the 2002 Act*"). It is necessary to begin with section 82 of this statute, which provides:

> "*Right of Appeal: general*
>
> *(1) Where an immigration decision is made in respect of a person he may appeal [F1 to the Tribunal] F1 .*
>
> *(2) In this Part "immigration decision" means –*
>
> *(a) refusal of leave to enter the United Kingdom,*
>
> *(b) refusal of entry clearance,*
>
> *(c) refusal of a certificate of entitlement under section 10 of this Act,*
>
> *(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,*
>
> *(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,*
>
> *(f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,*
>
> *(g) a decision that a person is to be removed from the United Kingdom by way of directions under [F2 section 10(1)(a), (b), (ba) or (c)] F2 of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom),*
>
> *(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal),*
>
> *(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),*

[F3(ia)a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c. 77) (seamen and aircrews),]

[F4F3(ib)a decision to make an order under section 2A of that Act (deprivation of right of abode),]

F4(j)a decision to make a deportation order under section 5(1) of that Act, and

(k)refusal to revoke a deportation order under section 5(2) of that Act.

(3)F5. . . . . .

(4) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part."

The subject matter of section 104 is "*Pending appeal*". It's provisions are concerned with the lifetime of appeals brought under section 82(1). Within this discrete regime, section 104(4A) provides:

> "*An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the Respondent is granted leave to enter or remain in the United Kingdom.*"

This is expressly stated to be "*subject to subsections (4B) and (4C).*" It is common case that neither of these latter provisions has any application to the context under scrutiny.

11. We consider that the Respondent's argument on this issue must fail for the elementary reason that the "*treated as abandoned*" mechanism contained in section 104(4A) is triggered only where the following conditions are satisfied:

(i) The appeal is brought by the person adversely affected by an "*immigration decision*" as defined in section 82(1).

(ii) The appeal must be made to the First-Tier Tribunal.

(iii) The appeal must be brought by such person while in the United Kingdom.

(iv) The person appealing must be granted leave to enter or remain in the United Kingdom.

None of these conditions is satisfied in the present matrix, because:

(i) The Appellant is the Secretary of State and not Mr Faponnle.

(ii) The only extant appeal is an appeal to the Upper Tribunal (viz the present appeal) and not the FtT.

(iii) Mr Faponnle's presence in the United Kingdom is irrelevant, in this context.

(iv) Mr Faponnle has not been granted leave to remain in the United Kingdom.

Since **all** of the conditions listed above must be satisfied, this argument is doomed to failure.

12. We elaborate on the fourth of our discrete conclusions set out above as follows. The Respondent was at no time granted leave to remain in the United Kingdom. Rather, he was simply notified of the Secretary of States **intention** to confer this status on him and he was advised of the steps which would have to be taken in order to bring this about. In particular, he was informed unambiguously that the terms of the relevant letters – dated 9th and 18th September 2013 – did **not** operate to grant him leave to remain in the United Kingdom. Furthermore, these letters stated unequivocally that he would acquire this status only if issued with a Biometric Residence Permit. The terms of the letters must also be considered in conjunction with the Immigration (Biometric Registration) Regulations 2008, as amended by the Immigration (Biometric Registration (Amendment)) Regulations 2012. Properly analysed, these regulations and the administrative outworkings thereof constitute the regime presently in vogue regulating the grant of leave to enter and remain in the United Kingdom. The general provisions contained in sections 3 and 4 of the Immigration Act 1971 must be considered in this wider context. The conclusion that, as a matter of law, the Appellant has at no time been granted leave to remain in the United Kingdom follows inexorably.

SECOND ISSUE: SUBSTANTIVE LEGITIMATE EXPECTATION

13. The doctrine of substantive legitimate expectations is now firmly embedded in the public law compartment of the common law of the United Kingdom. The *locus classicus* continues to be the decision of the English Court of Appeal in R – v – North and East Devon Health Authority, ex parte Coughlan, [2001] QB 213. Other recent contributions to the developing jurisprudence include the decision of the Privy Council in Paponette – v – Attorney General of Trinidad and Tobago [2012] 1 AC 1 and two notable judgments, in the same case, emanating from Northern Ireland, Re Loreto Grammar School's Application [2011] NIQB 36 (at first instance) and [2012] NICA 1 [Court of Appeal]. For present purposes, two discrete elements of this doctrine fall to be considered. The first concerns the nature and quality of the promise or representation required. The second relates to the interaction of substantive legitimate expectations with the public interest.

14. The doctrine of substantive legitimate expectations is the response of the common law to failures by public authorities to honour promises and assurances made to citizens. Its central tenets are fairness and abuse of power. In appropriate cases, it is incumbent on the Court to conduct –

> "….. *a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.*"
>
> (Coughlan, paragraph [56].

In the typical case, the conduct of the public authority under scrutiny will normally take the form of something said verbally or in writing. The cases belonging to this field are replete with the word "*promise*". In Coughlan, for example, the judgment speaks of "*a current policy or an extant promise*": paragraph [65]. In that particular case, there was "*an express promise or representation made on a number of occasions in precise terms*", such that a failure to honour it "*… would be equivalent to a breach of contract in private law*": paragraph [86].

15. Fairness to the citizen and the misuse of public power are two of the themes which course through the veins of Coughlan and subsequent decisions. They are also reflected in the following passage in Administrative Law (Wade and Forsyth, 10th Edition), page 447:

> "*Good government depends upon trust between the governed and the governor. Unless that trust is sustained and protected officials will not be believed and the Government becomes a choice between chaos and coercion.*"

The two basic ingredients of what the law has come to recognise as a substantive legitimate expectation are satisfied where there is an unambiguous promise or assurance by a public official in which the affected citizen reposes trust. The decided cases have established with reasonable clarity the boundaries of the doctrine. In Coughlan, for example, the Court recognised, tacitly, that a public authority would not be acting unlawfully in circumstances where to adhere to the relevant promise would be tantamount to "*acting inconsistently with its statutory or other public law duties*": paragraph [86]. In an earlier passage, the Court coined the test of "*a sufficient overriding interest to justify a departure from what has been previously promised*": paragraph [58]. In the immediately preceding paragraph, the standard formulated was that of "*any overriding interest relied upon for the change of policy*". In R – v – Secretary of State for Education, ex parte Begbie [2000] 1 WLR 1115, the Court held that an election promise made by a shadow Minister did not bind the appointed Minister following a change of Government. In a different context, in R (Bloggs 61) – v – Secretary of State for the Home Department [2003] 1 WLR 2724, it was decided that the public agency concerned, the Prison Service, was not bound by a promise made by the police to a prisoner about future conditions, as this lay outwith their ostensible authority. Further guidance is found in the following passage in R (Bhatt Murphy and Others) – v – The Independent Assessor and Others [2008] EWCA Civ 755:

> "*[41] ……. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest ….*

> *This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation…..*
>
> *[42] But the Court will (subject to the overriding public interest) insist on such a requirement and enforce such an obligation where the decision maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself ….*
>
> ***What is fair or unfair is of course notoriously sensitive to factual nuance***."

[Emphasis added]

Finally, turning to the nature of the promise or representation required to engage the doctrine, Laws LJ adverted to "*a specific undertaking, directed at a particular individual or group*" and "*the pressing and focused nature of the kind of assurance required*": paragraphs [45] and [46].

16. Applying these principles to the matrix of the present appeal, we make two principal conclusions. The first is that the Respondent received from the Secretary of State, through a combination of the letters dated 9th September and 18th September 2013 and the surrounding events noted above, an unambiguous representation, devoid of any relevant qualification. The representation, duly analysed, was twofold. Firstly, particularly taken in conjunction with the notification to both parties that the Secretary of State's application for permission to appeal to the Upper Tribunal had been refused, on 23rd August 2013, the Secretary of State's representation to the Respondent, scrutinised objectively, conveyed to him that the decision of the FtT was no longer under challenge and was, therefore, final. The second element of the representation was that in the (probable) event of the Respondent successfully applying for a Biometric Residence Permit, he would be granted limited leave to remain in the United Kingdom. In this way a substantive legitimate expectation was engendered in him.

17. As a matter of fact, the Secretary of State subsequently reneged on the representation made. The promise, or assurance, was withdrawn. This gives rise to an interface between the personal interest of the Respondent and the public interest. Our second main conclusion is that, in the particular matrix of this appeal, the public interest must prevail. This conclusion has several elements. The first is that the representation made was the product of pure, genuine error: the Secretary of State's left hand did not know what the right was doing. Secondly, the Respondent gained a sheer, undeserved windfall in consequence. Thirdly, the representation was withdrawn speedily: its lifespan was confined to approximately one month. Fourthly, the representation was made in circumstances where the Secretary of State was entitled by statute to continue to challenge the decision of the FtT. Such efforts were in fact continuing and no relevant time limit had expired. Moreover, the period

during which the Respondent and his legal representatives were unaware of this continued challenge was short lived, confined to some two weeks, ending with the date on which the Upper Tribunal's decision to grant permission to appeal was received: within some few days of the date of the Notice of Decision, 13th September 2013. Fifthly, the grant of permission to appeal to the Secretary of State establishes that the Secretary of State's continuing challenge to the decision of the FtT was not speculative or formulaic. Rather, it was serious in nature and was judicially adjudged to possess sufficient merit to overcome the relevant threshold. Finally, we consider that the decision of the FtT is so unsatisfactory that it should properly be reviewed by the Upper Tribunal. We shall elaborate this latter issue *infra*.

18. We are satisfied that this conclusion is not precluded by the decision of the High Court in R – v – Secretary of State for the Home Department, ex parte Ram [1979] 1 All ER 687. In that case, the Applicant, upon arrival at Heathrow Airport, was granted leave to enter and remain indefinitely in the United Kingdom by the relevant immigration officer, who stamped the passport to this effect. The officer acted in error. Some 17 months later, the Applicant was detained as an illegal immigrant. He applied, successfully, for a writ of habeas corpus. The Divisional Court considered the decisive factors to be that the immigration officer had been acting *intra vires* his statutory powers and there had been no fraud or dishonesty on behalf of the Applicant. It followed that there were no reasonable grounds on which the Secretary of State could have decided that the Applicant was in the United Kingdom illegally. We consider that the matrix of the present appeals defers from that of Ram in certain material respects. Factually, the two cases are quite different: in Ram there was a completed act of granting leave to enter and remain in the United Kingdom. In contrast, in the present case, the relevant process was merely initiated and was incomplete. Secondly, the legal landscape has evolved considerably since Ram was decided: see paragraphs [11] – [13] above. In this respect, Lord Widgery CJ, in finding the case more difficult than his two judicial brethren, stated, prophetically, that the law was "*fast developing*", while acknowledging that the issue would probably have to be reconsidered in some future case.

19. To summarise, the Respondent was the fortuitous and undeserved beneficiary of a short lived, genuine administrative error. We consider that his good fortune must bow to the significant public interests identified above. We are satisfied that to give effect to the Secretary of State's withdrawal of the representation made will not be so unfair to the Respondent as to countenance and sustain a misuse of public power. In the particular circumstances of this appeal, the public interest must prevail.

THE SUBSTANTIVE APPEAL

20. In granting permission to appeal, Upper Tribunal Judge Warr referred to the "Practice Directions. These are the Practice Statements issued by the Senior President of Tribunals, dated 25th September 2012. These must be considered in conjunction with the Tribunals, Courts and Enforcement Act 2007 and the First-Tier Tribunal and Upper Tribunal (Composition of Tribunals) Order 2008 ("*the 2008 Order*"). Article 2

of the latter provides that the SPT determines the composition of FtT panels. Article 8 provides:

> "*If the decision of the Tribunal is not unanimous, the decision of the majority is the decision of the Tribunal: and the presiding member has a casting vote if the votes are equally divided.*"

Paragraph 10.2 of the SPT's Practice Statements provides:

> "*Since Article 8 of the 2008 Order provides that the decision of the majority is the decision of the Tribunal (and that the presiding member has a casting vote),* ***where the jurisdiction of the Tribunal is exercised by more than one member the resulting determination or other decision will not express any dissenting view or indicate that it is that of a majority.***"

21. The composition of the FtT in the present case consisted of a Judge of the First-Tier Tribunal and a non-legal member. The written decision of the panel is replete with expressions of disagreement between the two panel members. This begins in paragraph 56 and ends in the penultimate paragraph, 93. In summary, the two members disagreed on virtually all of the main issues addressed in these passages. Their disagreement was repeated and profound. Within these paragraphs one finds a recitation of the individual views, opinions and findings of the two members on a lengthy menu of issues. This section of the judgment, the crucial one, begins with the statement:

> "*56. There was common ground between the lay member and by myself* [sic] *that the Appellant had established a private and family life in the United Kingdom. There was however a clear difference of opinion about* ***a number of findings of fact.***"

It ends with the following statement:

> "*93. ….. Given the balancing act and the fundamental difference of opinion, I conclude that my decision as Immigration Judge prevails* ***given my assessment and interpretation of the law.***"
>
> [Emphasis added.]

We have highlighted the last words in both passages for the reason that, properly analysed, the extensive disputes between the two panel members did not relate to conflicting assessments or interpretations of the law. Rather, they concerned issues of fact and evaluative judgment relevant to the application of the governing legal rules and principles. This *per se* constitutes an error of law of some magnitude.

22. We acknowledge Mr Bonavero's submission that the FtT's non-observance of paragraph 10.2 of the Senior President's Practice Statements is not, *ipso facto*, tantamount to an error of law. It is unnecessary for us to decide whether, in some

cases, non-compliance with the Practice Statements might not be erroneous in law, for example where the misdemeanour is trivial, technical or immaterial in nature. In the present case, there has been a serious breach of the relevant provision of the Practice Statements. The breach is of grave dimensions. It cannot be dismissed as peripheral or inconsequential. It is, rather, stamped all over the relevant passages of the determination. We consider that this wholesale breach cannot be categorised as anything other than a material error of law.

23. In addition to the freestanding errors of law identified in paragraphs 20 and 21 above, we consider that the decision of the FtT is infected by two further errors of law. The first is is that, in our estimation, the proper course for the panel was to have the appeal considered by a different, reconstituted panel. As a matter of good practice, where differences of opinion between panel members are as acute and fundamental as those disclosed in the determination under scrutiny in this appeal, we consider that the panel should proceed no further. While this will have regrettable costs and delay implications, such cases are likely to be very rare.

24. In the particular context of this case, we consider that the panel's failure to stop, adjourn and reconstitute was erroneous in law. The final *malaise* in the FtT's determination is that it offends the fundamental principle that justice must not only be done, but must manifestly and undoubtedly be seen to be done. Citation of authority for this principle is unnecessary. The determination of the FtT makes for disturbing reading. Its contents disclose a judicial decision making process and outcome which we consider inimical to the rule of law. This decision cannot be permitted to stand in the contemporary legal culture which places such emphasis on appearances and due process.

25. We conclude that the determination of the FtT must be set aside accordingly.

DECISION

26. Our decision is:

(i) We allow the appeal to the extent that the decision of the FtT is set aside.

(ii) Given our profound concerns about what transpired at first instance, we consider that the appeal should be remitted for fresh consideration and determination by the FtT. This exercise will be undertaken by a differently constituted FtT.

Direction

Following promulgation of this determination, a case management review hearing in the forum of the differently constituted FtT should be convened, with a view to ensuring, in particular, that all of the evidence on which both parties seek to rely has been assembled and is presented in a coherent indexed and paginated bundle.

PRACTICE

27. Finally, we draw attention to paragraphs 6 and 7 above. In the conduct and presentation of this appeal there were, regrettably, significant failures by the Secretary of State's officials and representatives to comply with elementary requirements and standards of good practice. We trust that lessons will be learned.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 13 February 2014