Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08435/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decisions & Reasons Promulgated**
On Tuesday 2 February 2021	**On Tuesday 23 February 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

S M
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. This is an appeal on protection grounds. It is therefore appropriate to continue that order. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr A Burrett, Counsel instructed by Londonium solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of the First-tier Tribunal Judge Bonavero promulgated on 22 January 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 21 August 2019 refusing his protection and human rights claims.

2. The Appellant is a national of Bangladesh. He came to the UK as a visitor on 2 February 2010 and has overstayed since the expiry of his leave in June 2010. He claimed asylum only after being encountered and detained by the immigration services, on 11 April 2019.

3. The Appellant's protection claim is based on his activities for the Bangladesh National Party ("BNP") in Bangladesh and during his time in the UK. He says that he formally joined the party in 2004 and was made an Assistant General Secretary of his local branch. He claims that a criminal case was filed against him in 2009 for snatching ballot papers and boxes. He says that in February 2009, he was attacked by members of the Awami League and that he suffered injuries for which he was hospitalised for 7 days. He says that, since his arrival in the UK, two further false cases have been laid against him, the first in 2010 for having vandalised property and the second in 2012 for attacking a police station. He claims to have been convicted in his absence and sentenced to seventeen years in prison and fined. The Appellant has produced court documents, letters from lawyers in Bangladesh, other supporting letters from BNP officials in Bangladesh and medical evidence concerning his injuries in Bangladesh in support of his case. The Appellant also claims that he will be at risk on account of his sur place activities for the BNP in the UK.

4. The Judge did not accept the Appellant's claim to be credible. He therefore dismissed the appeal. It is common ground that the Judge did not refer to human rights grounds in the Decision.

5. Permission was sought on two grounds as follows:

   Ground one: The Judge has failed to consider the Appellant's Article 8 claim as raised in ground three of the grounds before the Judge. The grounds submit that "it was incumbent on the FTT to assess the factual and legal aspects of A's Article 8 rights". It is said that the failure to do so "has rendered the determination perverse".

   Ground two: The Judge has failed to take into account some of the documentary evidence when reaching the conclusion that the protection claim was not credible.

6. Permission to appeal was granted by Designated First-tier Tribunal Judge Macdonald on 27 February 2020 in the following terms so far as relevant:

> "... The grounds of appeal focus on the proposition that the Judge clearly erred in law by failing to consider the appellant's Article 8 rights inside and outside the Immigration Rules. This issue has been raised in the appellant's appeal grounds (see paragraph 27 of the grounds). I observe that his statement is silent on his private life here and it is unclear to what extent the issue was canvassed before the Judge.
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> While the appellant arrived in the UK in 2010 it is arguable that he was nevertheless entitled to a finding on his claim that to return him to Bangladesh would breach his rights under Article 8 ECHR. As such permission to appeal is granted and, for the sake of clarity, on all grounds."

7. The error of law hearing was originally scheduled to be heard on 27 March 2020. In anticipation of that hearing, the Appellant's solicitors lodged written submissions on 17 March 2020 and purported to make an application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("Rule 15(2A)") to adduce further evidence in relation to the protection and human rights claim. The covering letter purports to explain the reason why the evidence could not have been produced earlier as follows:

> "The Appellant apologies' [sic] for not being able to submit these documents before the hearing in the First-Tier Tribunal but this is understood that the evidence would certainly help his Article 8 claim succeed. The Appellant's interest would be seriously jeopardised unless the Tribunal kindly admits these documents as the claim is likely to be seriously affected without these supporting documents. The Appellant respectfully invited the Upper Tribunal to consider the enclosed documents in accordance with Rule 15(2A) of the Tribunal Procedure Rules 2008.
> Further, the fresh evidence is not only likely to substantiate his case, but would also assist the Tribunal to reach a fairer decision and enable the parties to avoid the cost of further litigation or application.
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> In light of the facts and submissions referred to above, the Appellant respectfully requests the Tribunal for the permission to adduce fresh evidence for the hearing dated 27 March 2020.
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> He was unable to file this evidence earlier due to his personal [sic], for which he apologises unreservedly. We would fervently request the Tribunal to allow this evidence filed 10 days before the date of the hearing."

In terms of "additional" evidence in relation to the Article 8 claim, the further evidence consisted of a statement from the Appellant himself dated 16 March 2020, an affidavit from his mother dated 12 March 2020

with translation, some letters from friends dating from early March and a few photographs.

8. Due to the interruption of normal Tribunal business by the Covid-19 pandemic, I issued a Note and Directions dated 26 March 2020 (sent on 24 April 2020), indicating that it might be possible for the error of law issue to be determined on the papers and without a hearing. The views of the parties on that proposal were sought. By letter dated 2 June 2020 (received on 18 June 2020 and therefore well beyond the time for filing of submissions), the Appellant's solicitors sought an oral hearing. The letter from the solicitors also contained the following passage:

> "The basis of the Applicant's [sic] request for permission is that while assessing the Applicant's Article 8 claim, proportionality, leave outside the Rules and exceptional circumstances, the FTT judge did not take account of his Article 8 claim.
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> The fact that the Applicant's [sic] residuary human rights claim and compassionate circumstances are now under consideration at the last stage, it of utmost importance [sic] that his case is presented to the Tribunal in the best possible way by way of an oral hearing by an experienced counsel.
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> Being a human rights claim, the Applicant's [sic] matter is not only fact sensitive but also is likely to require detailed oral submissions by a counsel. Further, impromptu response to any question by the tribunal judge and submission of the Respondent's presenting officer would further the Applicant's [sic] case. It is possible that a counsel would be able to assist the judge through hearing to understand his case better, which is otherwise less likely. The Applicant [sic] is of the firm belief that without such oral submission, his chance of winning the case would diminish to such an extent that his interest would be seriously prejudiced.
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> The Tribunal is also invited to consider the fact that the Applicant [sic] will be effectively barred from raising any further human rights claim in near future due to the operation of paragraph 353 of the Rules and the principle in *Devaseelan [2002] UKIAT 00702.* Thus, this is, in practical sense, his last opportunity to convince the Tribunal of his human rights claim and he cannot afford to jeopardise his last chance by not availing an oral hearing [sic].
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> In light of the foregoing, the Applicant [sic] respectfully requests the Tribunal to allow an oral hearing in the instant appeal."

9. Upper Tribunal Judge Pickup reviewed the file thereafter and issued a further Note and Directions on 29 June 2020. He drew attention to the foregoing chronology. He made the following observations about the Article 8 claim:

> "6. Although the appellant did not claim any partner or children in the UK, the refusal decision of 21.8.19 addressed his claim on private life grounds, both under paragraph 276ADE of the Immigration Rules and

outside the Rules, under article 8 and consideration of exceptional circumstances. The grounds of appeal to the First-tier Tribunal raised his private life claim between [25] and [40] of the grounds, relying on very significant obstacles to integration in Bangladesh and integration in the UK during his 9 years' residence. Although exceptional and compelling circumstances were pleaded, that claim was unparticularised. It is clear that no consideration was given at all to the appellant's private life claim in the impugned decision of the First-tier Tribunal. However, it is not entirely clear whether, although represented by counsel at the hearing, article 8 private life was relied or raised at all on his behalf. For example, whilst the appellant submitted a skeleton argument drafted by counsel, the arguments contained therein do not address human rights at all. Neither do the witness statements of the appellant or his supporting witness address at all the private life claim.

7. I have also looked at the judge's comprehensive typed Record of Proceedings (ROP). At the outset of the hearing the two representatives apparently agreed that the only issue was in relation to activities in Bangladesh and sur place activities in the UK, both relevant to the risk on return. None of the recorded questioning or evidence of the appellant and his supporting witness related to article 8 issues. Neither, apparently, was article 8 raised in the submissions of the two representatives at the conclusion of the hearing. The judge certainly would not be required to address private life grounds if not pursued at the hearing by evidence or submission. On the basis of the ROP, it does not appear that it was. It may well be that the appellant wishes to pursue the matter now, it having been pleaded in the grounds of application for permission to appeal to the Upper Tribunal and given that permission has been granted primarily on that ground. However, **unless the Tribunal has evidence it was in fact pursued at the appeal hearing, it would be difficult to identify any error of law on the part of the First-tier Tribunal Judge in not addressing article 8 private life. Even if there was an error by failing to address article 8, given the circumstances of this case it may be difficult to see how such an error was material and on what basis the appeal had any prospect of being allowed on human rights grounds relating solely to private life and integration in the UK whilst the appellant has been an illegal overstayer for all but 6 months of his now 10 years in the UK, particularly given the 'little weight' requirement of section 117B of the Nationality, Immigration and Asylum Act 2002.**

8. The above considerations raise a number of issues that are far from clear from the papers now before the Upper Tribunal. **Although the appellant now wishes to introduce evidence of private life and integration in the UK, at this stage the Upper Tribunal has to consider what in fact was before the First-tier Tribunal and what submissions were made on private life grounds. Only if there was an error of law in the making of the decision of the First-tier Tribunal can the Upper Tribunal intervene."**
[my emphasis]

10. I was told that the Appellant's solicitors had filed a consolidated bundle in July 2020 but, if one was filed, it was not filed in hard copy and does not

appear on the file. The absence of it did not affect my ability to find the documents to which reference was made during the hearing which were replicated elsewhere.

11. On 25 January 2021, and therefore about one week before the hearing, the solicitors filed what again purported to be an application under Rule 15(2A) with further evidence. That letter referred to the consolidated bundle which it is said was filed and served on 10 July 2020 and continued as follows:

> "... 3. Upon a brief review conducted recently, it has been revealed that several important aspects of the Appellant's private life and exceptional circumstances were not addressed by way evidence [sic]. He is now seeking the Tribunal's kind permission to adduce the following evidence to be considered in the upcoming oral permission hearing [sic]:
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> a. Additional witness statement of the addressing [sic] his private life and exceptional circumstances;
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> b. The death certificate of the Appellant's father (translation will be provided later); and
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> c. Personal reference letters from friends of the Appellant.

Having set out Rule 15(2A), the letter set out the following:

> "... 5. The Appellant accepts that this evidence should have been adduced along with the consolidated bundle submitted on 10 July 2020, and he apologises unreservedly for the delay. It is regretted that the importance of this evidence was not properly realised earlier. Also, the Appellant as a less educated person struggled to understand the method of obtaining evidence from different sources and express his circumstances adequately which contributed to the delay ion submitting this evidence.
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> 6. Further, the Appellant is submitting this evidence as soon as he has obtained the documents and he is submitting this without unreasonable or excessive delay. Besides, it would not be otherwise unfair to admit the evidence.
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> 7. The Appellant was granted permission to appeal on Article 8 grounds only and without this evidence, his claim is likely to suffer significantly. This, it is submitted, outweighs the negative factors arising from the delay in producing the evidence before the Tribunal."

Fortunately for the Appellant, that last paragraph misunderstands that the grant of permission was not so limited.

12. The solicitor's letter also misunderstands the stage which this appeal had reached. It came before me at the error of law stage and not permission to appeal. As such, the appeal came before me to determine whether

the Decision contains an error of law and, if I so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

13. The hearing before me took place via Skype for Business. It was attended by the representatives as noted above and the Appellant himself. There were a few minor technical difficulties but not such as to affect the overall conduct of the hearing. Both representatives indicated that they had been able to follow the hearing throughout.

14. Having heard from both representatives, I found an error of law in the Decision based on the Appellant's second ground. I indicated that I would therefore set aside the Decision and it was agreed that the appeal should be remitted. I indicated that I would set out the reasons for my conclusions in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

15. I will return to the Appellant's ground one in due course. I merely observe at this stage as I indicated to Mr Burrett at the outset of the hearing before me that, although Article 8 ECHR was raised in the initial pleaded grounds of appeal, that ground was not mentioned in the Appellant's Counsel's skeleton argument for the hearing nor was there any evidence in support of a claim based on the Appellant's private life at that stage. Furthermore, I had the benefit of typed notes of the hearing before Judge Bonavero. Those notes indicate that Article 8 was not raised in the course of legal submissions nor does it appear that the Appellant was asked any questions about this aspect of his case. As Judge Pickup identified in his Note, the parties are said to have agreed at the outset that the only issue for the Judge was the protection claim based on the events said to have occurred in Bangladesh and the sur place claim. There is no evidence put forward by the Appellant to suggest that this was an incorrect reflection of what occurred at that hearing. I pause to note that Mr Burrett was not the Appellant's representative at the hearing before Judge Bonavero and cannot be criticised in any way for the conduct of the appeal at that stage or since. The same cannot be said of the Appellant's solicitors but I will return to deal with their conduct after consideration of the error of law.

16. Mr Burrett sought to vary the way in which ground two was pleaded. The focus of the ground remained on the way in which the Judge had dealt with the documents, but he concentrated on the Judge's conclusions about and criticisms of the documents which he did consider. The ground as pleaded asserts that some of the documentary evidence was not considered at all.

17. In order to set Mr Burrett's submissions in context, I set out [19] to [28] of the Decision which formed the central focus of those submissions. Those paragraphs read as follows:

"19 I agree with Mr Martin that some of the documents in this appeal, in particular those said to emanate from the Bangladeshi courts, lie at the centre of the appellant's asylum appeal. It may also be that they are capable of being verified, though this is rather less certain.

20. In determining whether this case is the one which exceptionally necessitated the respondent to carry out verification checks, I take the following factors into account. I note that the documents in question were obtained by the appellant himself. Unlike in *PJ*, it is not the case here that the documents were transferred by one set of lawyers to another. I note that the appellant claimed asylum only some nine years after arriving in the UK, whilst in detention pending removal. On the other side of the equation, I bear in mind the fact that the respondent accepts that the appellant is a member of the BNP in the UK.

21. Taking all these factors into account, I conclude that this case is not one in which the respondent was required to verify the appellant's documents. Instead, I must approach those documents applying *Tanveer Ahmed* principles.

22. As for the provenance of the documents, there was an important inconsistency in the appellant's evidence. He said in oral evidence that he had received the court documents by post in or around May 2019, and that he gave them to his solicitor straight away. In his substantive asylum interview, on the other hand, he said that he had given those documents to his solicitor the day before the interview (question 16), so on 30 July 2019. I put this inconsistency to the appellant, as did Mr Martin, but no satisfactory explanation was forthcoming.

23. I note also that at the end of his asylum interview, the appellant said that he had only found out about the two more recent cases in June 2019. However, there is a letter at page 158 of the respondent's bundle from Mr [SC] dated 21 May 2019 which states that Mr [C] updated the appellant about those two cases 'some time ago' and that the appellant's mother had attended Mr [C]'s office 'some time ago' to discuss the cases. That is plainly inconsistent with the appellant's account in his asylum interview.

24. I take into account the respondent's CPIN entitled 'Bangladesh: Background information, including actors of protection, and internal relocation' dated January 2018 which states:

> ' 13.2.1 The Immigration and Refugee Board of Canada (IRBC), in a response dated 20 September 2020, citing various sources, stated that:
> 'In 7 September 2010 correspondence with the Research Directorate, an official at the High Commission of Canada to Bangladesh stated that 'There is a significant prevalence of fraudulent documents [in Bangladesh] including passports, birth certificates, bank statements, taxation documents, business documents, school documents, marriage certificates. If we ask for it, it can be produced.' The Canadian Official added that '[t]here is no difficulty at all for anyone to obtain these documents. Quality varies with prices paid.'

> 25. I note that there is no correspondence between the appellant's solicitors in the UK and his lawyers in Bangladesh. All of the evidence in this case has passed through the appellant's hands. It would have been a simple matter to ask the appellant's lawyers to correspond directly. While the appellant is plainly not required to corroborate every element of his claim, I find that this failure weighs against the appellant.
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> 26. Whilst it cannot be determinative of this asylum claim, I do find that the appellant's lengthy delay in claiming asylum significantly damages his credibility. The appellant arrived in the UK in 2010, but he did not claim asylum until 2019. Even then, he only did so once in detention, having been encountered on an enforcement visit. These actions are inconsistent with a claimed fear of return to Bangladesh.
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> 27. I take into account the fact that the appellant has been carrying out political activities in the UK. I further note that the appellant's account is broadly consistent with country evidence relating to Bangladesh, and in particular the use of false criminal charges to intimidate political opponents. Those matters support the appellant's case.
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> 28. However, in all the circumstances, applying the lower standard of proof and looking at the evidence in the round, I find that I can give only little weight to all of the documents said to emanate from Bangladesh."

18. I permitted Mr Burrett to put forward his oral arguments which, as I have said, varied somewhat from the pleaded ground. Ms Everett did not object to the variation.

19. I begin with the parts of the submissions which I did not accept. I do not accept that the Judge was being "overly critical" when dealing with the way in which the documents were obtained by the Appellant. Whilst it was open to the Appellant to obtain documents directly and he cannot be criticised for proceeding in that way, he has instructed solicitors in his appeal and Londonium solicitors have acted for him from the outset. The Appellant gave the documents to his solicitors and it was for them, as professionals, to consider whether the evidence was presented in the right way or whether further enquiries or additional documentation should be obtained by way of corroboration. It was therefore open to the Judge to take the point that correspondence between the lawyers could and should have been provided to deal with any deficiencies in the evidence regarding the way in which the documents were obtained from Bangladesh.

20. Neither can the Judge be criticised for not dealing in more depth with the reasons for the delay in claiming asylum. The Judge noted the Appellant's immigration chronology at [8] and [9] of the Decision. The Appellant's statement before Judge Bonavero says only that the Appellant did not claim asylum earlier because he had leave to remain. However, he only had such leave for a very limited period (having come here as a visitor) and that does not explain the very lengthy delay

thereafter. The other reason given that he thought he would be sent back to Bangladesh if he brought himself to the attention of the authorities does not withstand scrutiny since, as the Judge observed, even when the Appellant was encountered, he did not claim asylum until two weeks later when in detention.

21. However, I do accept Mr Burrett's other point regarding [28] of the Decision. As Mr Burrett rightly pointed out, the documents either corroborate the Appellant's claim or they do not. Particularly in relation to the court documents, either the Judge had to find that the documents were false and could be given no weight or he had to accept that they were reliable and therefore added weight to the credibility of the case. The conclusion that the Judge could give the documents "only little weight" is not one which was open to him. At the very least, he needed to explain what was meant by that (if needs be by reference to the acceptance of some if not all of the documents) and what impact that weight had on the credibility of the claim. That was particularly important in circumstances where the Judge accepted the broad consistency of the claim with the background evidence and where the Respondent had not provided any verification evidence to directly undermine the court documents.

22. Ms Everett very fairly accepted that this point had merit and that she could not, for that reason, seek to maintain the Decision.

23. I accept that the Respondent's concession is one which is rightly made. I also accept that there is some merit in ground two as pleaded as regards documents which are said not to have been considered by the Judge, particularly the medical evidence about the injuries which the Appellant claims to have suffered during the attack in Bangladesh and the reference letters purporting to corroborate the evidence of false claims being raised against the Appellant.

24. For those reasons, I conclude that ground two discloses an error of law in the Decision and I therefore set the Decision aside. The Judge's treatment of the documents is directly relevant to the Appellant's credibility. As a result, the adverse credibility findings cannot stand. The credibility of the protection claim will therefore need to be considered completely afresh. For that reason, I agreed with the representatives that this appeal should be remitted for a de novo hearing.

25. I return now to the Appellant's ground one. As I have remitted the appeal for a de novo hearing, the Appellant will be able to argue all his grounds at the fresh hearing. I make it clear, however, that, if I had not found an error relying on the Appellant's ground two, I would not have found an error on ground one.

26. Although I accept that the Appellant's initial grounds of appeal did raise Article 8 ECHR, thereafter there is no indication that the Appellant was

pursuing this ground of appeal. There is no evidence which was before Judge Bonavero dealing with this aspect of the Appellant's case. A private life claim is not mentioned at all in the Appellant's Counsel's skeleton argument. The notes of the hearing show that it was not raised in oral evidence or submissions at the hearing. Indeed, there is an express concession that only the protection claim was in issue. In short, there was no indication given to the Judge that this was a live issue.

27. Even if, as Mr Burrett submitted, most judges would have gone on to look at the issue whether raised or not, Judge Bonavero could not have said anything about it except that there was no evidence before him, or submissions made to him on this aspect. He would, on the evidence then available, have been bound to reject it for that reason. No issue could arise either under paragraph 276ADE(1)(vi) of the Immigration Rules. The Judge rejected the protection claim as not credible so that could not be relevant to conditions facing the Appellant in Bangladesh. The Appellant provided no evidence at the First-tier Tribunal hearing about any other obstacles to his integration in Bangladesh. Any error in the Judge's failure to mention Article 8 ECHR (which I do not accept was an error in any event) could not have led to any different outcome. As such, it would not have led to a setting aside of the Decision.

28. If the success or otherwise of the error of law hearing had depended on ground one, I would also have rejected the attempts to adduce further evidence as contained with the letters of 17 March 2020 and 25 January 2021 which I have set out at [7] and [11] above. The latter of those two letters appears to have thought that it was necessary to explain why the evidence was not filed with the bundle in July 2020. That was not the point. The relevant time to adduce evidence was prior to the hearing before Judge Bonavero. It is not explained in either letter why that evidence could not have been produced at that time with the initial appeal bundle. The evidence so far as it concerns the Article 8 claim consists of statements from the Appellant himself and letters from his friends in the UK. There is no reason why that evidence could not have been obtained at any earlier date.

29. This brings me on to a further point regarding that evidence. It is suggested in the solicitor's letters that the fault lies with the Appellant who as a lay person did not understand what evidence needed to be obtained or how it should be presented. So far as the Appellant is concerned, I accept that is right. However, it was not an explanation or apology from the Appellant himself which was needed. He has been represented at the outset by a firm of solicitors, Londonium solicitors. They are well versed in immigration practice. They were undoubtedly being paid by the Appellant to represent him in his claim and appeal. It was for them to advise him and assist him in the preparation of his case. There is no explanation from them why this was not done adequately or at all so far as the Article 8 case is concerned.

30. There is no issue of fairness arising from the exclusion of the evidence had the Appellant not succeeded on his other ground. The Judge could not be expected to consider evidence which was not before him. The Appellant has the benefit of legal representation which he ought to be able to trust to prepare his case on all and any aspects which he is pursuing. There is no explanation for the solicitor's shoddy conduct of this appeal. Fortunately for those solicitors, I have found an error of law which will lead to the appeal being heard afresh on which occasion the Appellant will be able to also raise his Article 8 grounds. They should however reflect on their conduct of this appeal in the future as they may not be so fortunate on another occasion. The real impact in such circumstances, as they observe in their letters, is on the appellant whose interests they are instructed to represent and who may well be prejudiced if they do not act in accordance with their professional obligations to him.

CONCLUSION

31. For the foregoing reasons, ground two discloses errors of law in the Decision. It is therefore appropriate to set aside the Decision. I do not preserve any findings. For the reasons given above, it is appropriate to remit the appeal to the First-tier Tribunal for a de novo hearing. Both representatives submitted that this was the appropriate course.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Bonavero promulgated on 22 January 2020 is set aside in its entirety. No findings are preserved. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Bonavero

Signed L K Smith Dated: 9 February 2021
Upper Tribunal Judge Smith