Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
UI-2022-000696 (HU/00647/2020)
UI-2022-000697 (HU/13216/2019)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 20 July 2022	**On the 13 September 2022**

Before

THE HON. MR JUSTICE MORRIS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MI (BANGLADESH)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P. Saini, Counsel, instructed by E1 Solicitors
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Abdar ("the judge") promulgated on 13 October 2021, in which he dismissed the appellant's appeal against the refusal of his human rights claims.

2. This appeal concerns the approach to be taken by a judge at an appeal against the refusal of a human rights claim which has raised protection

grounds when the Secretary of State is not represented at the hearing. It involves the interaction between the so-called "*Surendran* guidelines", which provide general guidance concerning the hearing of appeals in the absence of the respondent ("the Secretary of State") in the First-tier Tribunal, and the natural degree of scepticism a judge is entitled to bring to the assessment of a human rights claim which raises protection grounds, where an asylum claim has not been made, pursuant to *JA (human rights claim: serious harm) Nigeria* [2021] UKUT 97 (IAC).

3. The proceedings also entail two parallel human rights claims, two decisions by the Secretary of State, two apparent rights of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), two appeals to the First-tier Tribunal, and one linked hearing before the same judge.

Factual and procedural background

4. The appellant is a citizen of Bangladesh born in 1983. He entered the United Kingdom in September 2009 with entry clearance as a student. He held leave in that capacity and, later, under section 3C of the Immigration Act 1971 ("the 1971 Act") following the refusal of a subsequent application and the ensuing appeal proceedings, until 25 July 2017. On 8 August 2017, he applied for leave outside the rules. He varied that application on 5 March 2018 by making a human rights claim for indefinite leave to remain on the grounds of his long residence, under paragraph 276B of the Immigration Rules ("the first application"). In the lengthy submissions accompanying the first application, the appellant's then solicitors stated in the cover letter:

> "It is noteworthy to mention here that the applicant is a member of an opposition party in Bangladesh. He informed us that he has received us [sic] threats from the ruling party activists in Bangladesh. Therefore the caseworker is requested to consider this issue before making any decision in this application."

5. The appellant made similar representations on 16 April 2018, in a "statement of additional grounds", served in response to a notice issued by the Secretary of State under section 120 of the 2002 Act.

6. By a decision dated 18 July 2019 ("the first refusal decision"), the Secretary of State refused the application. The appellant had not accrued ten years' continuous lawful residence, as required by paragraph 276B of the Immigration Rules, in light of his leave under section 3C of the 1971 Act expiring in July 2017, even though the first application had been submitted within 14 days of that leave expiring. There would be no very significant obstacles to his integration in Bangladesh for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules, and there were no exceptional circumstances such that it would be unduly harsh for him to return to Bangladesh. The letter concluded in these terms:

> "You have stated that you have a fear of return to Bangladesh as a result of your political opinion. If you feel you are unable to live in any part of Bangladesh because you fear persecution, you can apply for leave on protection grounds, also known as claiming asylum. You can lodge an asylum claim at a screening unit. If you wish to do so, you should contact the asylum screening unit appointments line on [contact details provided]."

7. The appellant appealed to the First-tier Tribunal against the first refusal decision on 2 August 2019 ("the first appeal").

8. On 18 December 2019, before the first appeal was heard, the appellant made a further human rights claim to the Secretary of State ("the second application"). It reiterated the claim that the appellant had now accrued ten years' continuous lawful residence, such that he met the requirements for indefinite leave to remain under paragraph 276B of the rules. It also stated that his uncle and nephew had "political association" with the Bangladesh Nationalist Party and that "the ramifications for the applicant must be given due consideration." The letter appended a number of documents which, it said, "clearly establishes that the applicant shall face very significant obstacles if he were to return to Bangladesh given his own strongly expressed political views in line with those of his maternal uncle and nephew."

9. By a decision dated 19 December 2019, the Secretary of State refused the second application ("the second refusal decision"). The decision noted that the appellant had appealed against the first refusal decision, but the appeal had not yet been heard. It adopted essentially the same approach to paragraph 276B as the first refusal decision; the appellant's leave under section 3C expired on 25 July 2017. He had not accrued the requisite ten years' continuous lawful residence, and, although paragraph 39E of the rules permits certain overstaying to be disregarded, since the appellant had not been granted leave to remain at any point since he became an overstayer on 25 July 2017, it was not engaged. He would not face very significant obstacles to his integration in Bangladesh, for the same reasons as given in the first refusal decision. The letter concluded:

> "You have stated that you have a fear of return to Bangladesh as a result of your political opinion. If you feel you are unable to live in any part of Bangladesh because you fear persecution, you can apply for leave on protection grounds, also known as claiming asylum…"

10. The second refusal decision stated that it attracted a right of appeal to the First-tier Tribunal, which the appellant exercised: "the second appeal".

The appeals before the First-tier Tribunal

11. The appeals against the first and second refusal decisions were linked before the First-tier Tribunal and were heard by the judge at a remote hearing conducted from Taylor House on 7 June 2021. As the judge set out at paragraphs 2 and 3 of his decision, the Secretary of State did not attend

the appeal hearing. This was due to a miscommunication within the Secretary of State's department, resulting in her inability to attend, the judge said. He concluded that the Secretary of State had been given notice of the hearing and that it would be in the interests of justice to proceed in her absence.

The decision of the First-tier Tribunal

12. In his decision promulgated on 13 October 2021, the judge set out the relevant procedural background, the applicable legal framework, the relevant provisions of the immigration rules, and summarised what took place at the hearing. He recorded that shortly before the hearing, out of working hours, the appellant had served a 272 page bundle featuring a number of additional materials concerning his claimed risk upon return to Bangladesh and including a fresh witness statement dated 5 June 2021, and on the morning of the hearing furnished the tribunal with a 57 page supplementary bundle. The material included a supplementary witness statement by the appellant in which he offered to provide further evidence, and a legal verification report of some of the documents he provided, should the tribunal deem it necessary. The judge recorded that the appellant's then counsel, Mr Jafferji, specifically confirmed that he did not apply for an adjournment to have more time to deal with new materials, and that he wished to proceed with the hearing. Since the Secretary of State had chosen not to attend, she had not objected to the late provision of materials, the judge noted: [18].

13. At [19], the judge recorded that the appellant and his two witnesses adopted their witness statements, but that there was no further oral evidence from them. Mr Jafferji made submissions, and the judge reserved his decision.

14. In his operative reasoning, the judge addressed the fact that two, parallel, refusal decisions were ostensibly before the tribunal. Mr Jafferji's initial position was that the first appeal "should not be before the Tribunal", however he revised his position upon stating that "at the time of the appellant's application of 7 November 2019 [*sic*], the Appellant was under the misapprehension that the Appellant enjoyed the benefit of s.3C leave under the [1971 Act]": see [29]. The appellant did not make an application on 7 November 2019, so it is not clear which application the judge (or Mr Jafferji) had been referring to, since, as we set out below, the appellant did not hold leave under section 3C of the 1971 Act at any time after 25 July 2017.

15. At paragraphs 30 and 31, the judge concluded that section 3C of the 1971 Act had statutorily barred the appellant from making the second application. He reached that conclusion having considered the Secretary of State's guidance (although he did not say which guidance he referred to), in reliance upon *JH (Zimbabwe) v Secretary of State for the Home*

Department [2009] EWCA Civ 78 at [35], and section 3C(4) of the 1971 Act, which provides:

> "(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section."

16. As to the consequence of the second application being statutorily barred, the judge said:

> "There was no decision to appeal against and therefore, the appellant's second appeal cannot be before the tribunal and the tribunal's jurisdiction is limited to the first appeal against the decision of 18 July 2019."

17. The judge addressed the first refusal decision by setting out the reasoning of the Secretary of State. He recorded a concession by Mr Jafferji that, in light of *Hoque v Secretary of State for the Home Department* [2020] EWCA Civ 1357, the appellant could not satisfy the requirements of paragraph 276B. He was an "open-ended overstayer" pursuant to the terminology used in *Hoque* to refer to a migrant who held lawful leave, followed by overstaying, with no subsequent grant of leave to remain. "Open-ended" overstaying contrasts with so-called "bookended" overstaying, where two periods of leave were punctuated by a period of overstaying between them. See paragraph 9 of *Hoque*, per Underhill LJ. The judge accepted Mr Jafferji's concession.

18. The judge returned to the long residence issue at paragraph 84, in his discussion of Article 8 outside the Immigration Rules. Mr Jafferji had produced a copy of the appellant's immigration bail conditions, dated 15 August 2019. He submitted that, under the Secretary of State's *Long Residence* guidance, a grant of immigration bail may be counted as lawful residence for long residence purposes if the recipient is later granted leave to remain. The judge rejected those submissions at paragraphs 86 and 87. The appellant was "deliberately seeking to stretch out his leave by years with the benefit of s.3C of the [1971 Act] to found an otherwise unfounded application to remain." The judge referred to the appellant's awareness of the apparent practice of the Secretary of State and some constitutions of the First-tier Tribunal in adopting his reasoning, and concluded at [87]:

> "I do not share the appellant's opinion and attach very little weight to the appellant's aforementioned evidence in the balance."

19. The judge addressed the appellant's protection-based Article 8 submissions at [37] and following under the auspices of paragraph 276ADE(1)(vi) of the Immigration Rules. He recalled the Secretary of State's encouragement for the appellant to claim asylum, and turned to the evidence, in particular that set out at paragraph 12 of the appellant's witness statement dated 5 June 2021. There, the appellant outlined how his uncle and nephew had been arrested after a demonstration against the Awami League's "one-sided election by massive fraud." Members of the

appellant's family were arrested. The appellant's name was on the official police list of suspects: "My name was cunningly included by alleging that I planned the disruption and riot with the others and was culpable of the same offences." The appellant relied on a news article dated 28 May 2021 which was critical of the Awami League. He claimed to have left a comment on the article, which had irked the authorities and led to an investigative file being opened at the Chittagong Cyber Tribunal against him, along with the article's author, publisher, assistant editor and the authors of the remaining online comments.

20. The judge set out the appellant's written evidence for not claiming asylum, and turned to the headnote and findings of *JA*, which we set out below. His operative reasons for dismissing the appeal commenced at [60]. He found the appellant's evidence on the serious risk of harm on return to be "incredible and unreliable", and said:

> "In my view, having failed to secure leave to remain in the UK with a spurious application for indefinite leave to remain, made in a category two years prematurely, the account of serious harm on return to Bangladesh is nothing more than a fabrication."

The judge continued:

> "If there was any truth to the appellant's fears of return being genuine, I find that the appellant would have taken the opportunity to claim asylum; I attach little weight to the appellant's evidence of his understanding of societal view of refugees as being a sufficient cause to refrain from claiming asylum, particularly as a reason given by the appellant for his inability to integrate into Bangladesh are the liberal views he purports to hold. In my view, the appellant has sought to contrive and circumvent the appropriate procedures by raising the claim in an attempt to avoid the necessary considerations."

21. The judge later relied upon a Country Policy and Information Note issued by the Secretary of State, *Bangladesh: documentation, version 2.0*, March 2020, to conclude that corruption in Bangladesh is "rife" and that it was "extremely easy to secure fake and forged documentations": see [67].

22. The appellant had relied on a report from one Md Taseb Hossain, an Advocate of the Supreme Court of Bangladesh, which sought to corroborate the charges against the appellant. The judge found that the service of the report was "in line with the appellant's attempt to circumvent the necessary scrutiny": [68]. One of the witnesses who attended the hearing to support the appellant was a Mr Mohammed, with whom the appellant presently lives. His statement was broadly consistent with the appellant's in relation to the claimed risk of serious harm in Bangladesh. At [72], the judge said, "I do not find Mr Mohammed's evidence to be reliable and anything other than a deliberate attempt to give credence to the appellant's fabrications." The judge made similar observations in relation to the appellant's other witness, Mr Tareq.

23. The judge said that, although he had analysed the appellant's case by reference to the balance of probability standard, since he had advanced a case under article 8, he nevertheless would have reached the same findings in the lower standard of proof. The appellant did not face a risk of serious harm upon his return to Bangladesh, found the judge.

24. The judge dismissed the appeal.

Grounds of appeal

25. The grounds of appeal are lengthy, but may be categorised as follows:

a. It was procedurally unfair for the judge to find that the appellant had fabricated his account, obtained fraudulent documents, and contrived to circumvent the appropriate procedures, given (i) those allegations were not made by the Secretary of State; (ii) the Secretary of State had not attended the hearing to put such allegations to the appellant; and (iii) the judge had not raised any such concerns of his own motion. *JA* only permits protection claims made as human rights claims to be treated with "some scepticism", not wholesale disbelief.

b. The judge failed to make findings concerning the Secretary of State's guidance on long residence application under paragraph 276B of the Immigration Rules, in particular by reference to the guidance that discretion may be exercised in relation to out of time applications, and those in the UK on temporary admission or immigration bail.

c. The judge erred when reaching his findings of fact and conducting the proportionality assessment, by approaching certain aspects of the evidence irrationally.

26. The grounds of appeal were accompanied by witness statements from the appellant and Mr Mohammed stating that the judge did not ask any questions during their evidence or give any indication that he was minded to make such damning adverse credibility findings.

27. Permission to appeal was granted by Upper Tribunal Judge Grubb on the basis that that the procedural fairness issue was arguable in light of *JA*, particularly where the Secretary of State was not represented.

Submissions

28. Mr Saini submitted that the witness statements of the appellant and Mr Mohammed demonstrated that the judge had not raised any concerns with either witness at the hearing. The appellant was not on notice that those concerns would be raised which, in the absence of the Secretary of State,

it was incumbent upon the judge to raise at the hearing himself, pursuant to the *Surendran* guidelines, if he sought to hold them against the appellant. The judge made positive findings of fabrication of documents and the submission of a false claim. The Secretary of State had not adopted such reasons. It was unfair to hold them against the appellant, without putting them to him.

29. Mr Whitwell relied on the Secretary of State's rule 24 notice dated 12 May 2022. He submitted that credibility was a matter for the judge and would always be a live issue. The hearing before the First-tier Tribunal was "the first and last night of the show" and was not a "dress rehearsal". The judge had evaluated the evidence and reach findings that were open to him on the evidence. It was relevant that the appellant had not subjected himself to the scrutiny that would ordinarily attach to the examination of a claim for asylum, such as a screening interview and a substantive interview. The remaining grounds of appeal were a disagreement with the findings of fact reached by the judge. In her skeleton argument, the Secretary of State relied upon *Secretary of State for the Home Department v Maheshwaran* [2002] EWCA Civ 173 at [3] to [5], which rejected submissions that it was incumbent upon an adjudicator to raise every point of rejection with an appellant at a hearing, or otherwise be taken to have accepted their case in full.

The authorities

30. In *MNM (Surendran guidelines for Adjudicators) Kenya* * [2000] UKIAT 00005, the Immigration Appeal Tribunal endorsed the *Surendran* guidelines concerning the duties on an adjudicator conducting an appeal hearing in the absence of the Secretary of State. At [18], Collins J said:

> "While we appreciate the problem created by the increase in the number of cases and the consequential increase in sittings, in an adversarial process… it is very difficult for the adjudicator if the Home Office is unrepresented… The adjudicator cannot and cannot be expected to conduct its case for the Home Office. Equally, he will be understandably and correctly reluctant to let what he regards as an improbable account lead to a wrong decision because it has not been tested or all relevant material has not been produced."

31. At [19], Collins J said of the *Surendran* guidelines:

> "They must be observed. If they are not, there is a real danger that the hearing will be regarded as having been conducted unfairly."

32. The *Surendran* guidelines were annexed to *MNM*. Guideline 5 is relevant:

> "5. Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, the special adjudicator himself considers that there are matters of credibility arising therefrom, he should similarly point these matters out to the representative and ask that they be dealt with, either in examination of the appellant or in submissions."

33. In *WN (Surendran; credibility; new evidence) Democratic Republic of Congo* [2004] UKIAT 00213, the Immigration and Asylum Tribunal addressed the *Surendran* guidelines. It held, at [33]:

> "Where guideline five applies because no matters of credibility have been raised in the refusal letter, and there is no new material before the Adjudicator, the Adjudicator should raise any issues which concern him, as guideline five says. But as with guideline four, it is proper for the issue to be raised by the Adjudicator himself directly in questions of a witness, subject to the same caveats as to timing, content, manner and length. **The Adjudicator must here be especially careful not to invent his own theory of the case and must deal with what are significant problems, not minor points of detail. In this situation, it is much less likely that an Appellant would be aware that his credibility was under consideration if it were not raised with him, and it is unlikely to be fair for the issue to be raised in the determination for the first time.** This is rather different from *Koca* [Outer House 22nd November 2002, paragraphs 34-36, per Lord Carloway (IAS Update 2004 vol 7 no 4)] and *Maheshwaran*." (Emphasis added)

34. In *AM (Fair hearing) Sudan* [2015] UKUT 656 (IAC), this tribunal held, at paragraph 7(v):

> "If a judge has concerns or reservations about the evidence adduced by either party which have not been ventilated by the parties or their representatives, these may require to be ventilated in fulfilment of the '*audi alteram partem*' duty, namely the obligation to ensure that each party has a reasonable opportunity to put its case fully. This duty may extend beyond the date of hearing, in certain contexts. In this respect, the decision in *Secretary for the Home Department v Maheshwaran* [2002] EWCA Civ 173, at [3] - [5] especially, on which the Secretary of State relied in argument, does not purport to be either prescriptive or exhaustive of the requirements of a procedurally fair hearing. Furthermore, it contains no acknowledgement of the public law dimension and the absence of any *lis inter-partes.*"

35. Paragraph (3) of the headnote to *JA* provides:

> "…the failure of a person to make a protection claim, when the possibility of doing so is drawn to their attention by the Secretary of State, will never be relevant to the assessment by her and, on appeal, by the First-tier Tribunal of the "serious harm" element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by a person's refusal to subject themselves to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. Such a person may have to accept that the Secretary of State and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day."

Discussion

36. We deal first with two jurisdictional matters that have arisen.

37. The first is the status of the second application and the second refusal decision. It was common ground at the hearing before us that the judge was wrong to conclude that section 3C(4) of the 1971 Act meant that the second application was "statutorily barred". Section 3C(4) prohibits the making of a further application in circumstances where an individual already enjoys leave under section 3C. So much is clear from the terms of subsection (4) itself. The prohibition applies in relation to an application for "variation" of leave, that is, to vary extant leave, where such leave has already been extended by section 3C. Given the appellant had not held leave since 25 July 2017, any further applications for leave were not an application for variation of leave. By definition he did not hold leave under section 3C. Section 3C(4) did not prohibit the making of any further applications. In any event, section 3C(4) says nothing about making a further human rights claim, as opposed to an application for leave.

38. Secondly, the Secretary of State submitted in the rule 24 notice that the protection limb of the appellant's human rights case before the judge was a "new matter" for the purposes of section 85(5) of the 2002 Act. That being so, the rule 24 notice contended, the judge did not have the jurisdiction to consider the protection-based evidence relied upon by the appellant in any event, and any error, or procedural unfairness, was immaterial, because the judge reached findings in excess of his jurisdiction.

39. It was common ground at the hearing before us that the protection-based matters were "new evidence" but were not "new matters". Mr Whitwell resiled from the rule 24 notice in that respect, and in our judgment rightly. While the first application and the section 120 response dated 16 April 2018 featured only oblique references to the protection-based matters the appellant would later rely upon, we are satisfied that the 18 December 2019 application contained a significant amount of material relating to largely the same factual matrix covered by the new evidence submitted shortly before the hearing before the First-tier Tribunal. In our judgment, the appellant's evidence before the First-tier Tribunal was "further or better evidence" evidence of an existing matter, namely the appellant's claim that he was at risk of being persecuted on account of his opposition to the Awami league, and imputed political opinion arising from his family's political affiliations in Bangladesh. See *Mahmud (S. 85 NIAA 2002 – 'new matters')* [2017] UKUT 00488 (IAC) at [31].

40. It follows that the judge was seized of two appeals, although erroneously considered only one, and that he did have the jurisdiction to consider the new protection-based evidence relied upon by the appellant for the first time at the hearing.

Procedural fairness: discussion

41. We must first consider what took place at the hearing. We can deal with this briefly. At [19], the judge recorded that, after the witnesses adopted

their statements, there was no further oral evidence. That chimes with the witness statements provided by the appellant and Mr Mohammed, in which they each state that the judge did not raise any questions concerning the credibility of their accounts, or otherwise ask Mr Jafferji to invite them to address any such matters. Further, the judge does not record elsewhere in his decision having put any questions to the witnesses, or what they said in response to his concerns about fabrication. Accordingly, it is not necessary to obtain a transcript of the hearing or adjourn to seek a witness statement from Mr Jafferji in accordance with the process in *BW (witness statements by advocates) Afghanistan* [2014] UKUT 00568 (IAC).

42. We therefore accept that the judge did not put any of his concerns to any of the witnesses. The appellant found out that the judge had concerns about the claimed fabrication of his evidence and documents for the first time upon reading the judge's decision, over four months after the hearing. He did not have the opportunity to address the judge on *any* of the adverse credibility findings he reached.

43. We turn now to whether it was unfair for the judge to resolve the case on that basis.

44. By way of a preliminary observation at this juncture, although the appellate framework and nomenclature has changed since the *Surendran* guidelines and *WN*, the underlying principles of procedural fairness encapsulated by the authorities remain the same. A party is entitled to know the case against it and challenge that case accordingly.

45. We find that the judge's approach was at odds with the fifth *Surendran* guideline: the concerns relied upon by the judge had not been raised in any refusal letter, and the judge did not put his own credibility concerns to the appellant, nor point them out to Mr Jafferji for them to be addressed during additional evidence in chief, or during submissions. The Secretary of State had not raised credibility concerns of her own. Of course, by definition she could not have done: the appeal bundles were served at the last minute, and the Secretary of State was not represented at the hearing. The procedural impact of that state of affairs was that "the adjudicator must here be especially careful not to invent his own theory of the case" (*WN* at [33]). Yet that is precisely what the judge did; he concluded that the documents were fabricated and that the entire claim was contrived. It is nothing to the point that the Secretary of State had not had the opportunity to consider the new evidence or make submissions in relation to it; that did not absolve the judge of adhering to the fundamental requirements of procedural fairness.

46. The Secretary of State's submission that *Maheshwaran* obviated the need for the judge to put the adverse credibility points to the appellant is without merit. As held in *WN*, and as observed in *AM (Sudan)*, *Maheshwaran* did not concern a situation when the Secretary of State was

unrepresented and did not purport to stipulate the requirements of procedural fairness for all purposes. Of course, a judge cannot be expected to give a running commentary on the likely findings of the tribunal in the course of a hearing, but where a judge wishes to resolve an appeal on a basis not ventilated between the parties, in those circumstances it is incumbent upon the judge to give the parties the opportunity to address the tribunal on those issues.

47. We also reject Mr Whitwell's submissions that, since the judge was entitled to approach the appellant's evidence with "some scepticism" pursuant to *JA*, it was not necessary for him to raise his concerns with him at the hearing. Nothing in *JA* is authority for the proposition that the "scepticism" with which such a human rights claim may be approached would be so great that the appellant need not be given the opportunity to respond to concerns that he or she did not know had been raised. The greater the scepticism (however legitimate), the more important it is that an appellant has the opportunity to respond.

48. Finally, we address Mr Whitwell's submissions that a hearing before a trial judge is intended to be "the first and last night of the show" and not a "dress rehearsal". That is of course correct, but appellate deference to first instance findings of fact does not extend to tolerating hearings that were procedurally unfair.

49. In our judgment, the judge made significant allegations against the appellant of fabrication, contrivance and collusion with others for the first time in the decision and without giving him the opportunity to respond. It was unfair for the judge not to raise his concerns with the appellant, with the result that it was an error of law to find against the appellant on the basis of such adverse findings of credibility.

50. The judge's analysis of the interests of justice in proceeding in the absence of the Secretary of State under rule 28(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the FTT Rules") was non-existent: the judge simply stated that it was in the interests of justice to continue in the absence of the Secretary of State. As with all exercises of discretion under the FTT Rules, or, indeed, the Tribunal Procedure (Upper Tribunal) Rules 2008, broad questions such as what is in the interests of justice must be assessed by reference to the overriding objective "to deal with cases fairly and justly".

51. We consider that the non-participation of the Secretary of State before the First-tier Tribunal, and the ensuing absence of the scrutiny likely to be performed by a presenting officer, is a factor which it may be appropriate to consider when deciding whether it is in the "interests of justice" to proceed in the absence of the party. This is especially so in cases such as the present where, consistent with *JA*, the nature of what is being alleged could also constitute a protection claim, and the tribunal may legitimately wish to approach this element of the claim with "some scepticism".

Conclusion: procedural fairness

52. We find that the decision of the judge involved the making of an error of law on procedural fairness grounds. We set the decision aside with no findings of fact preserved and, pursuant to paragraph 7.2(a) of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, since the appellant was deprived of a fair hearing, it is appropriate to remit the appeal to be re-heard by the First-tier Tribunal before a different judge.

53. These findings apply to both appeals that were before the judge. Although the judge considered that there was only a single appeal before him, for the reasons given above there were two. His decision in relation to the appeal against the first refusal decision was infected by procedural unfairness, for the reasons set out above. His decision that there was no appeal in relation to the appeal against the second refusal decision was an error of law. We overturn his decision that there was no appeal, and remit both appeals to the First-tier Tribunal.

Other grounds of appeal

54. In light of our findings on the first ground of appeal and our disposal of the appeal, it is not necessary to consider the remaining grounds of appeal in any depth.

55. We simply observe that Mr Saini did not pursue the submission concerning the Secretary of State's long residence guidance with any vigour. He was right not to do so. Immigration bail is only regarded as "lawful residence" by the Secretary of State's *Long Residence* guidance, version 17.0, 11 May 2021, page 20, if leave is later granted:

> "Temporary admission or release or immigration bail only qualifies as lawful residence if leave to enter or leave to remain is later granted. For example, if an applicant is granted leave following a period of temporary admission, the time on temporary admission counts as lawful residence."

56. The appellant has not been granted any leave subsequent to being placed on immigration bail. Mr Saini relied on a wholly circular argument, seeking to establish that the appellant's time on immigration bail will count as lawful residence, if he is later granted leave to remain on the basis that his time on immigration bail amounted to lawful residence. Put like that, the argument cannot succeed. Mr Saini was right not to press the point.

Anonymity

57. Since the appellant has advanced a protection-based case, we consider that it is appropriate, for the time being, to make an anonymity order, which can be re-visited by the First-tier Tribunal if necessary.

Notice of Decision

The appeals are allowed. The decision of Judge Abdar in both appeals involved the making of an error of law and are set aside with no findings of fact preserved.

The appeals are remitted to the First-tier Tribunal to be heard by a judge other than Judge Abdar.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Stephen H Smith Date 2 August 2022

Upper Tribunal Judge Stephen Smith