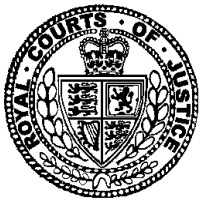

Neutral Citation Number: [2024] EWCA Civ 608

Case No: CA-2023-00486

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Gleeson
UI-2022-000769

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 June 2024

Before:

LORD JUSTICE MOYLAN
LADY JUSTICE ASPLIN
and
LADY JUSTICE ELISABETH LAING

- -

Between:

TAREQUE HOSSAIN	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Michael Biggs (instructed by **Liberty Legal Solicitors LLP**) for the **Appellant**
Tom Tabori (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 27 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 5 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The Appellant, Mr Tareque Hossain, appeals from the decision of Upper Tribunal (Immigration and Asylum Chamber) Judge Gleeson ("the UTJ") dismissing his appeal from the decision of First-tier Tribunal (Immigration and Asylum Chamber) Judge Beg ("the FTTJ") by which she dismissed his challenge to the Secretary of State for the Home Department's ("SSHD") decision refusing him leave to remain in the United Kingdom.

2. There are three Grounds of Appeal but only two were pursued. The first, and the Appellant's "main argument", is that the UTJ was wrong not to conclude that the hearing before the FTTJ was procedurally unfair because she departed from "her proper, supervisory, role" and improperly "descended into the arena". The second is that the UTJ had been wrong to "find" that the Appellant's then counsel had not been concerned about the FTTJ's conduct and had also been wrong to rely on the fact that the Appellant's then counsel had not raised any objection to the FTTJ's conduct during the course of the hearing before her. I only deal with the second ground of appeal very briefly, reflecting the focus given to it during the course of the hearing before us, because it is clear that the success of the appeal depends on whether the challenge to conduct of the hearing by the FTTJ is, or is not, made out.

3. The Appellant is represented, as he was before the UTJ, by Mr Michael Biggs. The SSHD is represented by Mr Tom Tabori who did not appear below.

Factual Background

4. The Appellant is a national of Bangladesh. He entered the UK in February 2010 on a Tier 4 student visa which was valid until 30 April 2013. On 1 May 2013, he applied for leave to remain as a Tier 4 student which was granted from 11 June 2013 to 17 August 2015. On 26 June 2014, the SSHD curtailed the Appellant's leave with effect from 30 August 2014 on the basis that he had cheated in a TOEIC (Test of English for International Communication) examination, the results of which he had relied on in his May 2013 application. This decision attracted no right of appeal and the Appellant raised no challenge by way of judicial review.

5. On 27 August 2014, the Appellant was served with notice that he was liable to removal from the UK under s.10 of the Immigration and Asylum Act 1999 ("Removal of persons unlawfully in the United Kingdom"). On 29 August 2014, the Appellant made a further application for leave to remain as a Tier 4 student which was rejected on 7 October 2014. The Appellant has remained in the UK without leave.

6. On 31 May 2017, the Appellant made an asylum claim. This was refused on 18 September 2017. On 11 December 2019, the Appellant applied for leave to remain relying on his private and family life. This was refused on 17 April 2020.

7. The Appellant then submitted a pre-action protocol letter in respect of this last decision. However, because the asylum decision had not been served on him, it was agreed that that decision would be withdrawn and reconsidered, incorporating the Appellant's human rights claim. The Appellant then withdrew his asylum claim on 21 September 2020, prior to the service of any decision.

8. On 21 October 2020, the Appellant made a further application for leave to remain on the basis of his family and private life. This was refused by a decision letter dated 16 September 2021. It was determined that the Appellant had no family life as he had not referred to any partner, parent or dependent children in the UK. As for his reliance on his private life, this was also rejected principally on the grounds of suitability. This was based on the SSHD being satisfied that, when making his application for leave to remain, the Appellant had relied on a TOEIC certificate from the Educational Testing Service ('ETS') which had been "fraudulently obtained". The ETS had undertaken "a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker". The ETS had, accordingly, "cancelled" the results of the test which the Appellant had taken at Queensway College on 16 January 2013.

Proceedings

9. The Appellant's appeal to the FTT from the SSHD's decision of 16 September 2021 was determined by the FTTJ in a decision promulgated on 31 May 2022, following a hearing at which the Appellant and two supporting witnesses gave oral evidence. The Appellant and the SSHD were both represented by counsel.

10. The issues determined by the FTTJ were, at [19]:

> "The issues before me are firstly whether the appellant used deception in an application for leave to remain dated 29 August 2014. Secondly, whether he meets the requirements of paragraph 276 ADE of the Immigration Rules in respect of his private life. Thirdly, whether his removal would breach his rights under Article 8 ECHR."

It is obviously important to note that the first, and indeed the critical issue, was whether the Appellant had "used deception", namely by relying on a test certificate which had been, at [8], "fraudulently obtained by the use of a proxy test taker".

11. Oral evidence was given by the Appellant and two supporting witnesses, Mr Islam and Mr Mazumder. Each of them was cross-examined by counsel for the SSHD. The Appellant's cross-examination included some questions about why he had chosen Queensway College, one or two questions about why Mr Islam had gone with him and some questions about what had happened when he took the test. Mr Islam was cross-examined about what he said had happened on the day of the test including the journey to the College and how long he had had to wait. Mr Mazumder was cross-examined about various aspects of his evidence including that he had recommended Queensway College to the Appellant, that he had helped the Appellant prepare for the test, and about the day of the test as he said that he had met the Appellant after he had finished.

12. During the course of each witness' evidence-in-chief and cross-examination, the judge asked a few questions. No complaint is, or could be, made about those questions. The focus of Mr Biggs' criticism of the FTTJ's conduct of the hearing is on the questions she asked after the cross-examination of each witness had concluded. I will deal with these further below but their extent can be seen by comparison with the length of the cross-examination on behalf of the SSHD: respectively approximately 4.5 (the FTTJ) and 8 (the SSHD) pages of the transcript for the Appellant; 2 and nearly 4 pages for Mr

Islam; and 3 and 4 pages for Mr Mazumder. After the judge had concluded her questions, she gave an opportunity for both counsel to ask further questions. Only counsel for the SSHD did.

13. The FTTJ set out the legal and evidential approach she was required to take in respect of the allegation of deception. The judge did not find the Appellant a credible witness nor did she accept the evidence of Mr Islam or Mr Mazumder. She concluded, at [57], "taking the evidence as a whole", that the Appellant "used deception" in his application for leave because he had not taken the English language test on which he had relied. She also dealt with the other elements of the case and dismissed the Appellant's appeal.

14. The Appellant was given permission to appeal to the UT. The main challenge to the FTTJ's decision was based on "procedural unfairness". It was asserted that the FTTJ had "embarked on cross-examination" which involved "questioning in an 'aggressive manner' and so went beyond the Judge's 'remit of being an independent adjudicator'". For the purposes of that appeal, witness statements were provided by the Appellant, the Appellant's counsel before the FTT and both of the Appellant's witnesses.

15. The appeal was dismissed by UTJ Gleeson. She determined that the hearing before the FTT had not been unfair. She concluded, at [45], that: "A careful reading of the transcript shows that the Judge did ask many questions, but there is no indication that she did so in an aggressive manner". She also considered, at [48], that, if there had been procedural unfairness, the Appellant's then counsel "would not have hesitated to say so at the hearing".

Transcript of FTT Hearing

16. I propose to set out some of the passages relied on by Mr Biggs although in doing so I fully accept, as he submitted, that the transcript must be viewed as a whole and that a transcript does not fully convey what happened in a hearing.

17. Mr Biggs submitted that, in both of the following extracts, the FTTJ was pursuing her own line of enquiry which went beyond clarification questioning. She was testing the Appellant's case that he went to Queensway College with Mr Islam. He relied on both the extent and the nature of the questioning, which Mr Biggs suggested was better characterised as cross-examination and which, he submitted, went beyond the proper function of a judge as set out in *Jones v National Coal Board* [1957] 2 QB 55 and other cases.

> "Q. Who told you about Queensway College?
>
> A. I found it online.
>
> Q. And which other colleges did you look at?
>
> A. I found it, another one is like, is near the Ilford side, so it is quite far, yes after the Ilford roundabout, that area, but it is quite far. It was quite far for me.
>
> Q. Can you remember the name of that college?
>
> A. I can't remember. I can't recall.

Q. And how long did it take you to reach the college?

A. It's less than an hour.

Q. How long did it take?

A. How long, like we leave our house around 8/8.30. After we reach in the Queensway College, 9.30 around.

Q. Why did Mr Islam go with you?

A. He's just, he's just to keep me company because I'm, he was a [inaudible] so that's why he say, 'Okay, I'll go with you'.

Q. What was the purpose of him going with you when you were taking the test and he was not?

A. Just for company, nothing else.

Q. So when you went in to do the test, what did he do?

A. He was outside, sitting.

Q. He waited for you?

A. He waited for me outside, outside.

Q. How long did he wait for you?

A. Until I finished my exam.

Q. How long was that?

A. It was like around one o'clock, 1/1.30.

Q. So he waited from 9.30 until one o'clock for you to finish the test?

A. Yes, Madam.

Q. Did he take the test at the same college?

A. No, he didn't take… He didn't take the test."

And:

"Q. And when did you find out about the allegation of deception?

A. At 2014."

Q. Can you remember the month?

A. Around 2014, August.

Q. Was that before 29 August or after 29 August?

A. They send me around, when I submit this, 29 August I submit this after.

Q. So you heard after 29 August?

A. Yes, yes. I got the letter.

Q. And what did you do when you got the letter?

A. I went in the lawyer but I didn't… This is [inaudible] letter so they say I cannot stay[?].

So I'm trying to do, go the court because that time he say you don't have, because I don't idea for this so-

Q. Did you contact the college, Queensway College?

A. I did, but they say we don't know-

Q. No, just stop there, just slow down. You contacted Queensway. Tell me the date? A. I can't remember the date. After this one, I get the, when I had-

Q. Just a moment, just a moment. You cannot remember the date. Tell me which month it was and which year?

A. 2014 when I get this allegation letter, after I contact them.

Q. All right. So how many months after you got the letter did you contact Queensway College?

A. It's not too long. I phoned them. They say-

Q. Mr Hossain, I do need to have an answer to this. Was it in the same month or was it in the next month or the month after?

A. It was within a couple of days, something like this.

Q. A couple of days?

A. After a couple of days my lawyer say you can contact with the college.

Q. All right. So how did you contact the college?

A. Over the phone.

Q. And who did you speak to?

A. I spoke to reception, reception number.

Q. And what did the reception tell you?

A. They say exactly they don't know what is going on, so that time they say we are also going to lose the-

Q. Just pause there for a moment. The people in the other case, can you please re-join in one hour, thank you. I am sorry, what did the college tell you?

A. The college specifically nothing tell me. They say we don't know what is going on so you need to wait.

Q. Why did you not write to the principal?

A. I'm trying to contact with him but he say that-

Q. You tried to contact the principal. Who was that?

A. I tried to contact. I say I only spoke to the principal but they say you cannot contact at the moment, he can't do anything. So they didn't give me chance for-

Q. Well just a moment, just a moment. You tried to contact the principal. How did you do that? Did you ask to speak to him or did you write to him?

A. No, I didn't, I spoke to the college. When I called to college that time they said tell me.

Q. What did you say to the reception, that you wanted to speak to the principal?

A. Yes. I say I want to solve my problem, and because I had to sit in this college exam-

Q. Did you ask to speak to the principal?

A. Yes. I say I cannot contact with authority or principal or vice principal, say it's no point to contact with them, they cannot, they didn't give me chance to explain[?].

Q. Did you ever write to the college?

A. No, I didn't write. 2020 I'd written the letter, but that time they are not operating the-

Q. Sorry, you did not write to the college, but now you are saying you did write to the college but that was in 2020?

A. No, no, 2014 I didn't write anything. I just spoke to them over the phone. But after 2020 I was trying to contact with them via

> the email, post, but they didn't respond anything because they are not operating anymore.
>
> Q. Why did you wait until 2020 before you wrote to the college?
>
> A. Because before I'm trying to contact, but that time because lawyer say you no point to contact with them because if you contact with them they can't solve anything. So they say because I don't have money as well, so I could not move forward as well."

The FTTJ then questioned the Appellant about why he had waited until 2020 to contact the ETS.

18. Mr Biggs also relied on other parts of the FTTJ's questioning of the Appellant including when she asked him whether he had a receipt for his payment for the test which was an issue which, he submitted, the SSHD had not raised:

> "Do you have any evidence that you paid for the test? Do you have a receipt?
>
> A. No, I don't have anything.
>
> Q. Why do you not have the receipt?
>
> A. Because I paid by cash.
>
> Q. Well you still get a receipt whether you paid by cash or not, so where is the receipt?
>
> A. Receipt, truly I lost it. I didn't think I need to come like this position, so I didn't keep it. They give me small receipt but I didn't keep it."

19. Mr Biggs, likewise, relied on passages in the FTTJ's questioning of the Appellant's witnesses which, he submitted, demonstrated that she had descended into the arena. For example, he pointed to her questioning of Mr Islam about why he did not know whether the Appellant had contacted Queensway College when they were "childhood friends". This was also a new line of questioning.

20. In respect of Mr Mazumder, Mr Biggs pointed to parts of the FTTJ's questioning which, he submitted, amounted to cross-examination. For example:

> "Q. And were you with the appellant when he found out about the allegation of deception?
>
> A. I hear it, I was not with him, but I hear later on that this is what happened.
>
> Q. And do you know whether he contacted – sorry, did somebody say something? Do you know whether he contacted

> Queensway College after he found out about the deception allegation?
>
> A. I'm not sure Ma'am exactly.
>
> Q. Have you never asked him?
>
> A. I asked him to contact ETS, not Queensway College.
>
> Q. When did you tell him to contact ETS?
>
> A. It was around 2018/19, I'm not sure exact date.
>
> Q. Why did you advise him so late in the day."

Submissions

21. I summarise the parties' respective submissions as follows.

22. As referred to above, the Appellant's "main argument" was that the hearing before the FTTJ was procedurally unfair because she departed from "her proper, supervisory, role" and improperly "descended into the arena". The UTJ had been wrong when she determined otherwise and had failed to apply the necessary objective judicial assessment when reaching this conclusion. Instead, she largely relied on the absence of complaint during the hearing before the FTTJ by the Appellant's then counsel.

23. Mr Biggs submitted that the FTTJ had "entered into the arena" during the course of the evidence in the manner criticised in *Yuill v Yuill* [1945] P 15 and *Jones v NCB* [1957] 2 QB 55. He accepted that, as referred to in *Southwark LBC v Kofi-Adu* [2006] HLR 33 599, judges are more interventionist than they used to be. However, he submitted that the FTTJ had departed from her "supervisory role"; that she had ceased to be "an objective judge" by descending into the arena and "getting involved in the evidence"; and that "her evaluation of the evidence had been adversely affected by the fact that she had descended into the arena". As a result, the hearing had been unfair "in a *Jones v NCB* sense".

24. As to what needs to be established, Mr Biggs submitted that "descending into the arena triggers the unfairness". There is no need to establish anything further because descending into the arena by itself makes the hearing unfair. By departing from his or her supervisory role, it creates the risk that the judge is unable properly to fulfil his or her proper function as it hampers the judge's ability to weigh the evidence justly. The "unfairness is the risk that the judge is unable to complete his or her task". In support of this submission, he referred to what Black LJ, as she then was, had said in *In re G (A Child)* [2015] EWCA Civ 834, at [52]: "the careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent … of prejudicing the exploration of the evidence". He further submitted that this could be squared with what was said in *Keane v Sargen* [2023] EWCA Civ 141 and other cases because it could be, in a particular case, that the risk had not reached the required threshold to mean that the judge was not able to complete their task.

25. Mr Biggs further submitted that, in any event, the FTTJ's evaluation of the evidence had been affected or impacted by the manner in which she had descended into the arena. The meant that, if expressly required, unfairness was established in this case.

26. Mr Biggs relied on the observations in *WA (Role and duties of judge) (Egypt)* [2020] UKUT 127 (IAC) ("*WA (Egypt)*") and *Elais (Fairness and Extended Family Members)*]2022] UKUT 00300 (IAC) ("*Elais*") about the "merely supervisory role" of the judge during the taking of evidence. He took us to a number of other authorities dealing with the proper function of a judge, which I deal with below.

27. Mr Biggs also addressed the "nature of a Tribunal's function" and whether it was adversarial or inquisitorial. Again, he took us to a number of authorities, starting with *MN (Somalia) v SSHD* [2014] 1 WLR 2064 to which I refer below.

28. In respect of this case, Mr Biggs submitted that the judge had departed from her supervisory role. His overarching argument, as summarised in his written submissions, was that: "Fairly evaluating the relevant evidence, particularly the totality of the transcript of the hearing before her, the FTTJ departed from her supervisory role, and thus risked her ability to properly evaluate the evidence and arguments. The hearing before her was therefore unfair". Mr Biggs relied, in particular, on the following points.

29. First, the extent of the FTTJ's questioning of the Appellant and his witnesses (what he described as a "lengthy interrogation") was, by itself, sufficient to indicate that she had descended into the arena especially when both sides were represented so there had been no need for her to do so.

30. Secondly, there was "good reason to think that the FTTJ adopted a partisan and/or critical approach when engaging in this extensive questioning, at times engaging in cross-examination". As referred to above, Mr Biggs relied on particular passages in the course of the judge's questioning which, he submitted, demonstrated such an approach. The judge had pursued her own lines of inquiry and had picked "up the baton from one party" and run with it. The judge's questions showed, he submitted, the judge "pursuing a line of questioning apparently designed to test the appellant's evidence" in a manner which "can be characterised as cross-examination" and which "included leading questions, sometimes apparently interrupting the appellant".

31. Mr Biggs relied on elements in the FTTJ's decision which, he submitted, clearly showed the impact that the judge's questioning had had on her assessment of the evidence. They showed that the judge had not been able to consider the evidence objectively and had focused on the answers to the questions she had asked. For example, when the judge referred, at [40], to the Appellant as having been "hesitant in his evidence about whether he had asked to speak to the principal" at the College, this had all been based on questions asked by the judge. In other respects, the judge had not properly addressed the evidence or her analysis was flawed.

32. He also pointed out that a transcript "paints an incomplete picture" because, for example, it does not convey the tone of the questioning. He referred to and relied on statements adduced before the UT from counsel who had appeared on behalf of the Appellant before the FTT and from the Appellant and his witnesses.

33. On Ground 2, Mr Biggs submitted that the UTJ was wrong to rely on what the Appellant's counsel had, or had not, done during the course of the hearing before the FTT. He referred to *PA (protection claim: respondent's enquiries; bias) Bangladesh* [2018] UKUT 0337 (IAC) ("*PA (Bangladesh)*"), which I deal with below. He accepted that the lack of objection or comment by counsel during the hearing was "part of the overall circumstances" but, he submitted, the absence of any objection was of little relevance in this case. The assessment must be an objective one and the lack of complaint was of "very limited relevance" because a hearing either was or was not fair and a lack of complaint could not turn an unfair hearing into a fair one. The "most reliable evidence" would usually be, and was in this case, a transcript of the hearing.

34. Mr Tabori submitted that the effect of the manner in which and the extent to which a judge intervened in the evidence or asked questions is a fact-specific issue and depended on whether it made the hearing unfair. As set out in *Southwark LBC v Kofi-Adu*, at [142], although "not unlimited", "a first instance judge is entitled to a wide degree of latitude in the way in which he conducts proceedings in his court". The threshold was not, as submitted by Mr Biggs, a *risk* that the hearing was unfair but whether the hearing was unfair. In support of this submission, Mr Tabori relied on *Keane v Sargen* in which Newey LJ had said, for example, at [66], that the "ultimate question … is whether the Judge's interventions made the trial unfair".

35. Mr Tabori also pointed to the fact that, in none of the cases relied on by Mr Biggs, had the court been considering, as was the issue in this case, questions by a judge *after* a witness had been examined and cross-examined and when the judge gave the parties the opportunity to ask further questions afterwards. In taking this course, he submitted that the FTTJ had adhered to what had been said in *WA (Egypt)* and repeated in *Elais* (as set out below), as well as in *Keane v Sargen*. The core mischief highlighted in the authorities was, he submitted, interfering or interrupting a witness *during* their examination-in-chief or cross-examination particularly when doing so in a hostile manner. While he accepted, in an "extreme example", it might be that the length of subsequent questioning by itself made a trial unfair, he submitted that this was not such a case nor had the judge asked questions in a "hostile manner".

36. Further, he submitted that, although there might have been a degree of divergence in some of the FTTJ's questioning from what had been asked by the SSHD, the matters on which the judge asked questions fell within the areas previously covered by the evidence including the SSHD's cross-examination. For example, both the SSHD's cross-examination and the judge's questioning concerned why the Appellant had chosen Queensway College, about Mr Islam going with him to the test and what had occurred on the day of the test and what the Appellant had done when he received the letter curtailing his leave to remain in April 2014. The judge, he submitted, had not taken over the case or developed a new theory or different case but could be seen to be seeking to achieve greater specificity in the evidence. The questions were all directed to the central issue of whether the Appellant had undertaken the language test.

37. In respect of Ground 2, Mr Tabori submitted that, if Mr Biggs was submitting that the lack of objection by counsel during the hearing was irrelevant, that was "simply wrong". There was a duty on counsel to raise concerns. The UTJ had dealt with this because the matter had been put in issue by the Appellant relying on a statement from his then counsel. It could be seen from the UTJ's determination that she had undertaken a broad analysis when concluding that the hearing before the FTTJ had been fair: for

example, her assessment that the FTT judge "did not ask too many questions" and that there was "no indication that she did so in an aggressive manner".

Legal Framework

38. In *Yuill v Yuill*, Lord Greene MR said, at p. 20:

> "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict."

39. In *Jones v National Coal Board*, the plaintiff appealed on the ground that she did not have a fair trial because, at p. 61, of "the nature and extent of the judge's interruptions during the hearing of the evidence called on behalf of the defendants made it virtually impossible for counsel for the plaintiff to put the plaintiff's case properly or adequately or to cross-examine the witnesses called on behalf of the defendants adequately or effectively". The defendant cross-appealed "in similar terms complaining that the judge's interruptions prevented him from properly putting his case". The Court of Appeal (Denning, Romer and Parker LJJ) allowed the appeal on the basis, at p. 63, that the trial judge's interventions during the course of witnesses' evidence "were far more than they should have been".

40. In the judgment of the court, given by Denning LJ (as he then was), there are a number of references to the nature of the judge's interventions. For example, at p. 62, the judge "took the [examination-in-chief] of the witness out of the hands of leading counsel for the rest of that day and of his junior counsel next morning" and then during the cross-examination the judge intervened on several occasions to protect the witness from what he thought was a misleading question, and to bring out points in favour of the witness's point of view". When the next witness was cross-examined, "the judge seemed to be afraid that he was being misled, intervened at considerable length, and in effect stopped his cross-examination on the important point of chocks". During the course of the evidence of an expert witness, the judge again, at p. 63:

> "took the examination-in-chief largely out of the hands of Mr. Edmund Davies. He took the points of criticism made against the defendants, went through them with the witness, and appeared to accept his explanations. Mr. Mars-Jones cross-examined the witness, but after a while the judge disclosed much impatience with him and he brought it to a close."

41. Lord Denning referred to what Lord Greene MR had said in in *Yuill v Yuill* and then, at p. 64, commented that if the judge "drops the mantle of a judge and assumes the robe of an advocate … the change does not become him well". He also said, at p. 65, that, although a judge can intervene during the course of a witness's evidence, "it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination".

42. In *Southwark LBC v Kofi-Adu*, the judgment of the court (Laws and Jonathan Parker LJJ and Sir Martin Nourse) was given by Jonathan Parker LJ. Under the heading, "*The judge's conduct of the trial*" it was noted, at [142], that "a first instance judge is entitled to a wide degree of latitude in the way in which he conducts proceedings in his court. However, that latitude is not unlimited. Ultimately, the process must always be the servant of the judicial function of dealing with cases justly". Later, after referring to *Jones v NCB* and *Yuill v Yuill*, it was observed, at [145], that:

> "Nowadays, of course, first instance judges rightly tend to be very much more proactive and interventionist than their predecessors, and the above observations (made, in the case of Lord Denning M.R., almost 50 years ago, and, in the case of Lord Greene M.R., more than 60 years ago) must be read in that context. That said, however, it remains the case that interventions by the judge *in the course of oral evidence* (as opposed to interventions during counsel's submissions) must inevitably carry the risk so graphically described by Lord Greene M.R. The greater the frequency of the interventions, the greater the risk; and where the interventions take the form of lengthy interrogation of the witnesses, the risk becomes a serious one." (emphasis in original)

It was then noted, at [146]:

> "It is, we think, important to appreciate that the risk identified by Lord Greene M.R. in *Yuill v Yuill* does not depend on appearances, or on what an objective observer of the process might think of it. Rather, the risk is that the judge's descent into the arena (to adopt Lord Greene M.R.'s description) <u>may</u> so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and <u>may</u> *for that reason* render the trial unfair." (my underlining)

43. It is relevant to note, having regard to Mr Biggs' submissions, that the question was whether what had occurred had rendered the trial unfair; that is why I have emphasised the word "may" in the passage quoted above. In that case the Court of Appeal decided that, at [147]:

> "the judge's constant (and frequently contentious) interruptions during the oral evidence, examples of which we have given earlier in this judgment, served to cloud his vision and his judgment *to the point where* he was unable to subject the oral evidence to proper scrutiny and evaluation." (my emphasis)

And, at [148]:

> "In our judgment, therefore, the manner in which the judge conducted the trial led to a failure on his part to discharge his judicial function."

44. Among the examples given earlier in the judgment were: at [53], that "the judge effectively took over … examination-in-chief (of Southwark's first witness), pursuing his own lines of questioning" which was on "occasion … somewhat less than neutral (to put it no higher)" and, at [57], that during that witness's cross-examination, "the judge continued to intervene with his own questions.to such an extent that [the witness] could be forgiven for feeling that she was simultaneously facing two cross-examiners: counsel and the judge"; and, at [58], that the judge "effectively took complete control of … examination-in-chief (of Southwark's second witness), and throughout her cross-examination he intervened constantly with his own questions". The judge, at [66], had also "effectively" taken over examination-in-chief of the defendant and had intervened in the course of the defendant's cross-examination although, at [68], this "had occurred less frequently than … had occurred during the cross-examination of Southwark's witnesses".

45. In *Serafin v Malkiewicz and others (Media Lawyers Association intervening)* [2020] 1 WLR 2455, the Supreme Court considered the approach the court should take when considering the effect of a judge's interventions during the course of a hearing. It was noted, at [40], that the "leading authority on inquiry into *the unfairness of a trial* remains" *Jones v NCB* (my emphasis). *Southwark LBC v Kofi-Adu* was referred to, at [41], both in respect of the observation, at [145], that trial judges are "more proactive and interventionist" and the observation, at [146], that "interventions during oral evidence … continued to generate a risk of their descent into the arena, which should be assessed not by whether it gave rise to an appearance of bias in the eyes of the fair-minded observer but by *whether it rendered the trial unfair*" (my emphasis).

46. In the course of his analysis of the authorities, Lord Wilson (who gave the sole judgment) also referred, at [38], to what Hildyard J had said in *M & P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch) ("*M & P Enterprises*"), at [32]-[42], about the difference in the approach to an allegation that a trial had been unfair and to an allegation that the judge had been biased. As Lord Wilson noted: Hildyard J "added that they required appraisal from different perspectives for, *while the fairness of a trial required objective judicial assessment*, the appearance of bias fell to be judged through the eyes of the fair-minded and informed observer" (my emphasis).

47. He also quoted what Black LJ had said in *In re G (A Child)*, at [52], which I repeat: "the careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent . . . of prejudicing the exploration of the evidence".

48. If further clarity was required that the objective assessment is whether the judge's conduct led to the trial being unfair, in my view it is provided by the following further observations by Lord Wilson. At [45], he noted that "the focus of the appeal is … upon the alleged breach of the appellant's right to a fair trial". And, at [48], he set out his decision that the judge's conduct had been such that he was "driven … to uphold the Court of Appeal's conclusion that [the judge] did not allow the claim to be properly presented; that therefore he could not fairly appraise it; and, that, in short, the trial was unfair".

49. In *Keane v Sargen and others* [2023] EWCA Civ 141, one of the grounds of appeal, at [55], was "to the effect that the trial was unfair because the Judge intervened too much when Mr Keane was giving oral evidence". The judge, at [60], had intervened on "52

occasions … during the course of [counsel's] cross -examination of" the claimant. Again, having regard to Mr Biggs' submissions, it is relevant to quote what Newey LJ said (in a judgment with which Sir Geoffrey Vos MR and Simler LJ, as she then was, agreed), at [59], that "excessive interventions by the judge during the oral evidence *will not necessarily* render a trial unfair" (my emphasis). This was repeated, at [66], when Newey LJ set out his conclusions. I quote them in full including because of the references, again, to the issue of fairness (my emphasis):

> "The *ultimate question, however, is whether the Judge's interventions made the trial unfair*. *I have already indicated that the Judge intervened more often than was appropriate*. He should have attempted to postpone his questioning of Mr Keane until after Ms Anderson had conducted her cross-examination, save when it was necessary to clarify the evidence being given. Judicial self-restraint is required to avoid the consequences referred to above and to ensure that the trial process is fair to all involved. That said, I do not consider that the interventions either prevented the appellants from fully presenting their case at trial or impaired the Judge's decision-making. There was a fair trial and Ms Anderson did not really suggest otherwise in her submissions to us. While the Judge may have intervened more than was appropriate, his conduct was nothing like that which led to appeals being allowed in *Kofi-Adu* and *Serafin v Malkiewicz* and, "look[ing] carefully at what were the real issues in the case and how the judge's conduct impacted on them", *I am in no doubt that the trial remained fair."*

Accordingly, although the judge had intervened more often than was appropriate, the trial "remained fair".

50. In the course of his judgment, Newey LJ also, at [59], quoted from Patten LJ's judgment in *Shaw v Grouby* [2017] 1 WLR 2455 in support of the proposition that "excessive interventions … will not necessarily render a trial unfair". I set out this in full:

> "Patten LJ, with whom Vos C agreed, considered that "the judge's interventions, whilst always courteous, were … excessive and … he should have attempted to postpone his questioning, particularly of the witnesses of fact, until after counsel had conducted his cross-examination except when it was necessary to ask the witness to clarify an answer so that the judge could understand the evidence that was being given" (paragraph 45), but "reached the conclusion that there was still a fair trial and a proper judicial determination of the main issues" (paragraph 46). "The allegation of unfairness," Patten LJ said, "requires one to look carefully at what were the real issues in the case and how the judge's conduct impacted on them" (paragraph 46)."

The reference to postponing questioning is clearly relevant to the present appeal as is the reference to looking carefully at "how the judge's conduct impacted" on the real issues in the case.

51. I would also observe the same point has been made in other cases to which we were not referred, such as *In re K and another (Children)* [2023] 4 WLR 61, in which Baker LJ said, at [25], "excessive judicial intervention, particularly during the evidence, *may* undermine the fairness of the process" (my emphasis); and, at [27], that "the fact that a judge has intervened frequently during the hearing, or interrupted one advocate but not others, *is not by itself unfair*" (my emphasis). He also approved Hildyard J's comment in *M & P Enterprises*, at [23], that "interventions need to be assessed not only quantitatively, but also qualitatively" and quoted what Black LJ had said in *In re G*, at [39]: "It is necessary to look not only at the quantum of the judge's interventions but also at their nature".

52. We were referred to a number of Tribunal decisions on the issue of judicial interventions which included the following.

53. As referred to above, Mr Biggs relied on *WA (Egypt)* and *Elais*. In the former, the headnote states: "*During the taking of evidence a judge's role is merely supervisory*". This was dealt with more extensively, at [6], including that "[w]hen both sides have finished their examination, [a judge] may ask questions of his own by way of clarification; if he does, he should give both sides an opportunity to ask any further questions arising from his".

54. In *Elais*, it was noted, at [26], that whether "a hearing was fair is an objective judicial assessment; either the hearing was fair, or it was not". The headnote states that: "In order to conduct a fair hearing, cross-examination should be facilitated by the judge without undue interruption"; see also [70]. It was noted, at [36], that "[o]ne facet of a fair trial is the exercise of judicial restraint during the taking of evidence". Then, after quoting from *WA (Egypt)*, it was said, at [37]: "In summary, interventions that stray beyond the merely supervisory role of a judge during the taking of evidence risk a judge descending into the arena and so clouding their vision by the dust of conflict". It was decided, at [63], that the hearing had been unfair:

> "primarily because of the limits he placed on Mr Fazli's cross-examination, the extent to which he intervened during cross-examination and the consequential, and unfair, impact that had on the Secretary of State's ability to advance her case. The judge's interventions during the appellant's cross-examination strayed significantly beyond the merely supervisory role that judges have during the taking of evidence."

55. Although Mr Biggs understandably emphasised the words "merely supervisory", I did not understand him to be submitting that they had to be applied literally. In my view, he was right not to do so. It is clear from the general principles enunciated by, for example, *Serafin*, that a judge's role is not so strictly confined. This can also be seen from some of the other Tribunal decisions to which we were referred, including *JK (Conduct of Hearings) Côte d'Ivoire* [2004] UKIAT 00061 ("*JK (Côte d'Ivoire)*") and *XS (Kosovo – Adjudicator's conduct – psychiatric report) Serbia and Montenegro* [2005] UKIAT 00093 ("*XS (Kosovo)*") in both of which the determination was given by Ouseley J as President of the Immigration Appeal Tribunal.

56. In both of those cases, the Adjudicator's conduct of the hearing was challenged. In the former, it was argued, at [8], that the Adjudicator "had intervened excessively, both in

the course of the giving of evidence and in the course of the [Appellant's] submissions". In the latter, the Adjudicator's decision was challenged including on the basis that, at [15], "he had acted in a way which was procedurally unfair" because, at [16], of "the way in which questions had been asked" by him. This included that they had been asked "in a manner which was akin to a cross-examination asking leading questions in a hostile and sceptical tone"; that the questions were extensive and "in part were interposed during the course of cross-examination"; and that they "raised issues with which the Home Office Presenting Office had not been concerned".

57. The appellant in *JK (Côte d'Ivoire)* had relied on the earlier decision of *Oyono* [2002] UKIAT 2034 in which it had been said, in the passage quoted in *JK*, that when a witness was giving evidence and both parties are represented, "an Adjudicator's role is of silent listening". Ouseley J commented, at [42], that there was "a danger that the comments … in *Oyono* have been misunderstood". He pointed to a number of ways in which an Adjudicator might not only have the power but also the obligation to intervene. One was "during evidence-in-chief to seek clarification of an answer". Another was:

> "Even where the parties are both represented, it is still relevant for questions to be put by the Adjudicator to a witness if they raise matters which trouble the Adjudicator if they have not been raised or dealt with by the opposing advocate. This is especially so if the Adjudicator is concerned by the point and it is something which may affect the decision or indeed should affect the decision, but cannot fairly do so without the relevant witness being given the opportunity to deal with it. The comments made in this respect by the Adjudicator in paragraph 60 are entirely right."

This is a relevant and important observation about the proper role of a judge in their conduct of a hearing. The Adjudicator's comments, which Ouseley J endorsed, had been made when the Adjudicator had been responding to an objection to the questions he was asking. He had said: "I did not agree … and pointed out that it was far fairer to allow the appellant an opportunity to explain matters that concerned me in his evidence".

58. Ouseley J also said, at [43]:

> "An Adjudicator ought not to interrupt examination-in-chief or cross-examination except in the circumstances to which we have referred or for other reasons associated with the general control of the case and the court room. If there are inconsistencies between documents and oral evidence or between answers which have been given already, it is nearly always best to wait until after cross-examination and re-examination to see what matters are put. *However, it is wholly legitimate for the Adjudicator to ask his or her own questions on issues of inconsistency, points raised in the refusal letter or matters which trouble the Adjudicator whether or not they are raised by the other party. What is important, however, in relation to those matters is that the Adjudicator should not develop a different case from that*

> *being presented by the other party or pursue his or her own theory of the case*." (my emphasis)

And, at [44]:

> "*The manner in which any intervention is undertaken is also important*. It should not be done in any hostile manner or in a manner which suggests that the Adjudicator's mind has been made up. Questions should not be leading questions or ones which conceal the purpose for which they are asked, but instead should be direct and open-ended questions. It is perfectly proper for the Adjudicator to ask, after questions have been put in cross-examination and re-examination has taken place, why a witness has said x when earlier that or another witness has said y, or how document x can be reconciled with document or oral evidence y. *An Adjudicator is entitled to follow the logical train of answers to see how they fit with the case if that is regarded as potentially significant for an issue in the case. It is also important, however, that an Adjudicator should keep a sense of proportion about the questions which he or she asks. It is not for the Adjudicator to take over conduct of the case either by the number of questions asked or the development of his or her own theories*. The interventions may or may not assist one or other party. They are not unfair merely because one or other party may derive assistance from them." (my emphasis)

I agree with all of the above.

59. In *XS (Kosovo)* Ouseley J noted, at [25], that the "question that underlies all cases in which, as here, an Adjudicator's conduct of the hearing is at issue, is whether the hearing was fair". He also made similar observations to those he had made in *JK (Côte d'Ivoire)* including, at [33]:

> "The questions should not be too long. There is no precise permissible ratio, but asking significantly more questions than the Home Office Presenting Officer is again an indication of apparently excessive intervention with the attendant risk of apparent bias."

60. We were also referred to some authorities in which unfairness was alleged because a point had *not* been raised during the course of the hearing. Although not dealing directly with the issues raised by this appeal, they provide an additional perspective because they demonstrate that a judge can also be criticised if they do not raise matters on which their decision was based. These included *HA v SSHD (No 2)* [2010] CSIH 28, [2010] SC 457 and *Abdi and Ors v Entry Clearance Officer* [2023] EWCA Civ 1455.

61. The former decision involved two cases in both of which, at [1], "the critical question is whether the immigration judge was entitled to base his conclusion to some extent upon a matter which had not been raised during the course of the hearing before him". The opinion of the court, given by Lord Reed, considered a number of authorities which

had addressed the fairness of proceedings including *R v Secretary of State for the Home Department, ex p Doody and Ors* [1994] 1 A.C. 531. He noted Lord Mustill's observation in that case ("in a speech with which the other members of the House expressed their agreement"), at p. 560D, that "what fairness requires is essentially an intuitive judgment. Although it is possible to identify a number of general principles, they cannot be applied by rote identically in every situation, 'what fairness demands is dependent on the context of the decision'". It is fact-specific and context-specific.

62. One example given by Lord Reed, at [7], was that "the tribunal may identify an issue which has not been raised by the parties to the proceedings, but it will be unfair, ordinarily at least, for it to base its decision upon its view of that issue without giving the parties an opportunity to address it upon the matter". I would note, in passing, that in one of the cases to which Lord Reed referred on that issue, *Sahota v Immigration Appeal Tribunal* [1995] Imm AR 500, at p. 504, one of the grounds on which judicial review had been sought had been that there had been "a breach of natural justice because the Adjudicator failed to put to the applicant before her critical questions which related to her determination".

63. Later, at [13], Lord Reed again dealt with role of the judge:

> "Given the judicial nature of the tribunal's function, it is generally inappropriate for it to become involved in challenging the evidence placed before it. As Moses J observed in *R v Special Adjudicator, ex p Demeter* (p 430):
>
> > 'The appeal should be, and is, adversarial. It is important that the special adjudicator should avoid, if possible, giving any appearance of entering into the arena by challenging the account that the applicant gives himself.'
>
> There are, however, circumstances where, as a matter of fairness, the tribunal cannot remain silent in the face of the evidence presented to it."

64. Mr Biggs also referred to authorities which dealt with the issue of whether a tribunal hearing is adversarial or inquisitorial. I was not persuaded that this was of much relevance to the present appeal. As was pointed out by Lord Carnwath in *MN (Somalia) v SSHD* [2014] 1 WLR 2064, at [25], there is no hard and fast rule:

> "there is no presumption that the procedure will necessarily follow the adversarial model which (for the time being at least) is the hallmark of civil court procedures. In a specialist tribunal, particularly where parties are not represented, there is more scope, and often more need, for the judges to adopt an inquisitorial approach. This has long been accepted in respect of social security benefits (see *Kerr v Department for Social Development* [2004] 1WLR 1372, paras 61-63, where Baroness Hale spoke of the process of benefits adjudication as "inquisitorial rather than adversarial . . . a co-operative process of investigation in which both the claimant and the department play their part"). However, there is no single approach suitable

> for all tribunals. For example, in a major case in the tax or lands tribunals, the sums may be as great, and the issues as complex, as in any case in the High Court, and the procedure will be modelled accordingly."

65. Finally, I deal briefly with *PA (Bangladesh)* which addressed the question of the role of counsel during the course of a hearing in respect of which it was subsequently alleged that the judge had acted inappropriately (in that case, in the context of allegations of bias). The headnote sets out that:

> "4) As a general matter, if Counsel concludes during a hearing that a judge is behaving in an inappropriate manner, Counsel has a duty to raise this with the judge.
>
> (5) Although each case will turn on its own facts, an appellate court or tribunal may have regard to the fact that a complaint of this kind was not made at the hearing or, at least, before receipt of the judge's decision."

In his judgment, Lane J said:

> "[81] Members of the Bar are expected to put their clients' cases fearlessly. As a general matter, if Counsel concludes during a hearing that the judge is behaving in an inappropriate manner, Counsel has a duty to raise that matter with the judge, there and then. In this way, the issue will, at the very least, be recorded in the judge's record of proceedings and, ideally, in the record of Counsel and/or his or her instructing solicitor.
>
> [82] The fact that an allegation of bias is not made until an application is filed for permission to appeal is not, of course, determinative of the issue. Each case must turn on its own facts and circumstances. The appellate court of tribunal may, nevertheless, be entitled to have regard to the absence of any challenge at the hearing, or at least before receipt of the decision, in determining the allegation."

Determination

66. It is clear, as submitted by Mr Biggs and as set out for example, in *Keane v Sargen*, at [56], that the courts "have repeatedly warned of the dangers of judges intervening when witnesses are giving evidence".

67. In the course of his reply, Mr Biggs submitted that there are no "bright lines" and that what was said, for example, in *JK (Côte d'Ivoire)* and *XS (Kosovo)* should not be treated as "canonical rules or guidelines". I agree. I also agree, if I understood his submission correctly, that the words "merely supervisory" cannot be applied literally. As Lord Reed said in *HA v SSHD (No 2)*, at [13], "There are … circumstances where, as a matter of fairness, the tribunal cannot remain silent in the face of the evidence presented to it". One example he gave, at [7], was when the tribunal identified "an issue which has not been raised by the parties to the proceedings, but it will be unfair, ordinarily at least,

for it to base its decision upon its view of that issue without giving the parties an opportunity to address it upon the matter". Ouseley J made a similar point in *JK (Côte d'Ivoire)* when, at [42], he said that a judge may have an obligation to intervene during the evidence and he agreed with the Adjudicator's comment that it had been "far fairer to allow the appellant an opportunity to explain matters that concerned me in his evidence".

68. The authorities make clear that the issue is context and fact-specific. This can again be seen from, among other cases, *HA v SSHD (No 2)* in which Lord Reed quoted what Lord Mustill had said in *R v Secretary of State for the Home Department, ex p Doody and Ors* [1994] 1 A.C. 531, namely, I repeat, that: "Although it is possible to identify a number of general principles, they cannot be applied by rote identically in every situation, 'what fairness demands is dependent on the context of the decision'".

69. The question of whether a hearing was unfair is an objective assessment. This can be seen, for example, from Lord Wilson's evident approval of Hildyard J's observation that "the fairness of a trial required objective judicial assessment".

70. I also agree with Mr Biggs' submission that a written transcript does not provide a complete picture of what transpired during a hearing because, for example, it does not convey intonation or the full effect of the manner in which questions were asked (and answered).

71. I do not, however, agree with his submission that a trial will be unfair whenever a judge, as it is described in short, descends into the arena. A trial is not unfair, as he submitted, because of the *risk* (as he emphasised) that a judge will not be able to undertake an objective evaluation of the evidence or that he will be unable properly and fairly "to complete his task".

72. As set out in *Keane v Sargen*, at [59], "excessive interventions by the judge during oral evidence will not necessarily render a trial unfair" and, at [66], the "ultimate question, however, is whether the Judge's interventions *made* the trial unfair" (my emphasis). This can also be seen from *Southwark LBC v Kofi-Adu* in which it was said, I repeat, at [146], that:

> "the risk is that the judge's descent into the arena (to adopt Lord Greene M.R.'s description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may *for that reason* render the trial unfair." (my underlining)"

I do not propose to repeat what was said, to like effect, in *Serafin v Malkiewicz* and in *In re K and another (Children)* as set out above.

73. The ultimate issue is, therefore, whether the FTTJ's questioning made the trial unfair. As Lord Mustill observed, as set out above, this is "essentially an intuitive judgment". I have carefully considered the transcript as a whole, with particular attention to the passages relied on by Mr Biggs. Also, I repeat, I have taken into account that a transcript does not provide a complete picture. I have also considered the FTTJ's decision having regard to Mr Biggs' submission about the impact of her questioning on her assessment of the evidence.

74. The judge's questioning which is being challenged occurred after the examination of each witness by counsel had concluded. She also expressly gave counsel an opportunity to ask further questions. It is clear that the FTTJ asked a significant amount of questions and also that, on occasion, her questioning was persistent (for example, when she said, "I do need to have an answer to this."). However, although the number of questions might well be unusual, it is necessary to look at what happened qualitatively as well as a quantitatively. There is nothing to suggest that her questioning could be described overall as hostile. Further, I agree with Mr Tabori's submission that the FTTJ was not pursuing her own line or lines of inquiry but was asking questions about matters that fell within the areas previously covered by the evidence including the SSHD's cross-examination and, indeed, were questions directed to the central issue of whether the Appellant had undertaken the language test.

75. Looking at the conduct of the hearing overall, I have come to the clear conclusion that the FTTJ stayed well within the bounds identified in the cases including *Jones v NCB*. Her conduct did not begin to impact on the course of the hearing in the manner which happened in that case or other similar cases. She did not "descend into the arena" in the manner described by Mr Biggs; she did not assume "the robe of an advocate"; and she did not pick up the baton on behalf of the SSHD and run with it. As referred to above, she did not interfere with the evidence-in-chief or the cross-examination and it could not possibly be said that she took over the conduct of the case or acted as a second advocate on behalf of the SSHD.

76. As for her judgment, the FTTJ clearly, and rightly, took into account the evidence given by the Appellant and his witnesses in the answers they gave to her questions but this does not, as Mr Biggs submitted, suggest that she was not able to consider the evidence objectively nor that she focussed on these parts of the evidence. The FTTJ clearly, and appropriately, took all the evidence into account when reaching her conclusions.

77. Finally, I would add that she was clearly asking questions about matters that troubled her and which went to the central factual issue she had to decide, namely whether the Appellant had or had not taken the English language test. It was, in my view, fairer that she asked questions about these matters rather than leave her concerns unaddressed and without having given the Appellant and his witnesses an opportunity to deal with them.

78. I have, accordingly, come to the clear conclusion that Ground 1 is not made out. For the reasons set out above, the UTJ did not err in law in deciding that the hearing before the FTT was fair and, indeed, was plainly right to do so.

79. This makes it unnecessary to deal with Ground 2, because my conclusion in respect of Ground 1 has been reached independently of the fact that the Appellant's counsel did not complain about the judge's questioning during the hearing before the FTTJ. I would, however, just very briefly add that, as was said in *PA (Bangladesh)*, counsel in general have a duty to raise concerns about the fairness of a hearing during the course of the hearing. As was also said, the absence of any such concern being raised might well be a material factor if it is subsequently asserted that the judge's conduct was inappropriate. The relevance of this will depend on the particular circumstances and, of course, as Mr Biggs submitted, the absence of complaint cannot make an unfair trial fair. However, in my view, it was a material factor which the UTJ was entitled to take into account when deciding whether the hearing before the FTTJ had been unfair.

Lady Justice Asplin:

80. I agree.

Lady Justice Elisabeth Laing:

81. I also agree.