



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/11919/2019

THE IMMIGRATION ACTS

Heard at Field House, London  
On Wednesday 17 November 2021

Decision & Reasons Promulgated  
On Monday 06 December 2021

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

D S

[Anonymity direction made]

Respondent

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. Unless and until a Tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

**Representation:**

For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer

For the Respondent: Mr S Bellara, Counsel instructed by Waterfords solicitors

DECISION AND REASONS

## **BACKGROUND**

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Ford promulgated on 1 March 2021 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 18 November 2019 refusing his protection and human rights claim. She did so only on Article 3 ECHR grounds. She dismissed the appeal on asylum and humanitarian protection grounds finding the Appellant to be excluded from the Refugee Convention and from humanitarian protection on account of his past criminal offence. There is no challenge by the Appellant to that conclusion. Accordingly, the appeal is limited to the Respondent's challenge to the Article 3 conclusion.
2. The Appellant is a national of India. He was involved with two others in an attack in London on a Lt General Brar. Lt General Brar was a senior officer in charge at the time of the Indian army attack on the Golden Temple of Amritsar. The army attacked the Golden Temple because they said that they believed that Sikh extremists had taken refuge there. The Appellant is a Sikh. The Appellant along with his two co-defendants was convicted of wounding with intent to do grievous bodily harm. The Appellant and one of his co-defendants ([LS]) were sentenced to fourteen years' imprisonment whilst the third man ([HK]) was sentenced to eleven years in prison. As I will come to, the immigration appeals of both [LS] and [HK] have been allowed.
3. I do not need to deal in any detail with the Judge's findings since those are not the main focus of the Respondent's challenge. The Respondent challenges the Decision on two grounds. The first is procedural unfairness. The Decision was made without a hearing and on the papers. I will come to the detail of how that occurred below. The Respondent accepts that she failed to reply in time to a call for written submissions about that course and the substance of the appeal due to "administrative error" but says that the "level of criminality and seriousness of the case mean that this case was not suitable to be held on the papers and should have been listed for a hearing either by video link or in person."
4. The second ground is based on what is said to have been a material misdirection. It is said that Judge Ford failed to appreciate that the Respondent's case was not an acceptance that the Appellant would be at risk on return to India. Whilst she accepted that the Appellant's expert report indicated that the authorities would take an interest in a person perceived to be a Sikh extremist, she did not accept that [DS] would be so perceived. Again, the Respondent accepted that her submissions in this regard might have created "some ambiguity" but says that "this further illustrates the point that this case was not one which should have been dealt with on the papers."
5. Permission to appeal was granted by Resident Judge R C Campbell on 13 August 2021 in the following terms so far as relevant:

“... 3. This is a finely balanced application. On the one hand, the decision is extremely thorough and cogently reasoned in relation to the certificate, the due weight to be given to the report from the expert and much else, as one would expect from such an experienced judge. On the other hand, the part of the decision titled ‘The appeal proceedings’ (paragraph 32 onwards) does not contain a chronology which shows how and why the judge reached a decision that the appeal could be fairly and justly decided without a hearing. The index offence was extremely serious and led to a sentence of imprisonment of 14 years. It is clear from paragraphs 32,33 and 34 of the decision that the appellant wished to pursue his protection grounds of appeal and the Secretary of State wished to ‘fully contest’ those grounds, although (as the judge found but as the author of the application for permission to appeal does not accept) the respondent did not challenge the report from the expert as it bore on Article 3 risk while not conceding that the Article 3 grounds were made out.

4. In the circumstances the proper course is to grant permission.”

6. The appeal came before me in order to consider whether there was an error of law in the Decision and if I so concluded either to re-make the decision or remit the appeal to the First-tier Tribunal in order for it to do so. I had before me a core bundle of documents including the Respondent’s bundle and the Appellant’s bundle before the First-tier Tribunal (hereafter referred to as [AB/xx]). As I will come to a number of documents were submitted in addition prior to, during and indeed after the hearing. I will deal with the detail of those documents below. I heard oral submissions from Ms Cunha and Mr Bellara. Following those submissions, I reserved my decision and indicated that I would issue that in writing which I now turn to do.

## **DISCUSSION AND CONCLUSIONS**

### **Ground One: Procedural Unfairness**

7. The Appellant’s position in response to this ground is that Judge Ford carefully case managed the appeal through to the determination on the papers and that the procedure adopted was not unfair. Particularly in light of what is said by Judge Campbell about the lack of a chronology in the Decision in this regard and because various documents to which I was referred did not appear in any of the bundles, I need first to set out the procedural background in some detail.

### **Procedural Background before the First-tier Tribunal**

8. I begin with the Respondent’s decision under appeal. Her position at that time (in November 2019) was that, although the Appellant’s involvement in the attack on Lt General Brar was known and well publicised in India, he would not be of interest to the Indian authorities on return. She accepted that he might be re-tried in India but noted that the Indian authorities had not sought to extradite the Appellant after the offence. The Appellant claimed that the authorities had arrested his brother. It was also claimed that the mother of another member of the Appellant’s group had been detained by the Indian authorities. The Respondent did not accept that there was evidence that either person had been detained for any length of time. The Respondent relied on background evidence said to show that, in spite of retaliatory measures by the Indian authorities following the assassination of the Indian prime minister, Sikhs

had been removed from a 'blacklist' and the militancy of extreme groups had abated. Although the Appellant was described at the time of the attack as a "Sikh extremist" in some of the media coverage, there was no evidence of the Appellant's involvement in extremist groups or of any other extremist activities in India or the UK. For that reason, it was said that the Appellant would not be of interest to the authorities as he would not be perceived as extremist.

9. On 9 January 2020, a pre-trial hearing was convened. Directions were given by a Tribunal caseworker prior to that hearing. At that hearing which took place before a Tribunal caseworker, further directions were given. Those included directions in relation to the production by the Appellant of an expert report. The report was to be provided by 6 March 2020 and the Respondent was directed to indicate whether the expert report was contested and, if it was not, why the expert needed to be called. The expert was based in India. A further pre-hearing review was listed for 30 March 2020.
10. It does not appear that a pre-hearing review took place on 30 March 2020. However, nothing turns on that as the next relevant date is the filing of the expert report which was dated 5 June 2020. The expert is Mr Satnam Singh Bains ("the Expert"). His extremely lengthy report ("the Expert Report") is at [AB/94-222]. For reasons I will come to below, I do not need to refer to the substance of that report.
11. The other relevant occurrence at about this time was the allowing of the Appellant's co-defendants' appeals. [HK]'s appeal was allowed on 7 August 2017 ([AB/72-88]). Permission to appeal that decision was refused by this Tribunal (UTJ Grubb) on 2 October 2019 ([AB/90-91]). [LS]'s appeal was allowed on 9 December 2019. Permission to appeal was refused by this Tribunal (UTJ Hanson) on 11 March 2020. Those decisions were not in the bundles but, at least the First-tier Tribunal's decision was before Judge Ford and the Appellant filed both decisions following the hearing as I had requested. It is worthy of note that the Expert gave oral evidence in both appeals. He was cross-examined. His opinion that the appellants in those appeals would be at risk on return was accepted by First-tier Tribunal Judge Landes in both appeals.
12. Prior to the filing of the Expert Report, it appears that the Respondent carried out a review of the Appellant's case. I say that it appears that this was done because Ms Cunha drew attention to the review at the outset of the hearing but neither the Tribunal nor the Appellant's side had a copy of it. She therefore accepted that she could not rely on it as she could not demonstrate that it had ever been sent. However, I allowed her to submit a copy of it following the hearing and she was then able to take instructions from the caseworker who prepared it who forwarded an email showing that it was sent to the Tribunal and the Appellant's solicitor on 27 May 2020 apparently in preparation for a case management review hearing ("CMR") on 2 June 2020.
13. As a result of Ms Cunha's correspondence subsequent to the hearing, I permitted the Appellant to make submissions about the May 2020 review ("the Review"). I also need to deal with this document as it now appears that it was submitted.

14. In short summary, in the Review, the Respondent continued to rely on her reasons for refusing the Appellant's claim. She summarised the issues as being the following:

- (1) Was the Appellant excluded from the Refugee Convention as a result of section 72 Nationality, Immigration and Asylum Act 2002 ("Section 72") because he had been convicted of a particularly serious crime and continued to pose a danger to the community in the UK? The Respondent's stated position was that he should be excluded.
- (2) Does the Appellant have a well-founded fear of persecution on return to India?
- (3) Was the Appellant at risk of treatment on return which would breach Article 3 ECHR? In relation to those last two issues, the Respondent's stated position was that the Appellant's evidence about what had happened to his family was not credible and that his assertions about the authority's perception of him as an extremist Sikh was contrary to the background evidence. It was therefore said that these issues would need to be explored by way of cross-examination of the Appellant.

15. It is worthy of note that the Review pre-dated the Expert Report. It appears that the CMR did take place on 2 June 2020 although I have been unable to find any reference to directions made following it. It must though have taken place because the Respondent wrote to the Tribunal on 19 June 2020 in the following terms:

"Further to the appellant's previous case management review hearing on 2<sup>nd</sup> June 2020, the appellant now seeks to rely upon additional evidence in support of his upcoming appeal.

In response to the directions served by the IAC, the respondent has now reviewed the evidence submitted by the appellant on 9<sup>th</sup> June 2020, sent via email.

The appellant has submitted an expert report by Satnam Singh, dated 5<sup>th</sup> June 2020, along with a vast amount of objective evidence in the form of various country reports and news articles. The report specifically outlines the appellant overall risk of harm within the UK and if returned to India.

It is not accepted that the findings made within this report substantiate the definitive risk the appellant may face in India as result of his conviction in the UK. Therefore the respondent continues to maintain her position in respect of her decision to deport the appellant, as outlined within her letter dated 18<sup>th</sup> November 2019.

Therefore in respect of these findings the respondent contests the appellant's evidence and asks for the appeal to proceed at the next available hearing date."

16. I can deal very shortly with the parties' position in relation to this correspondence (by which I mean both the Review and the 19 June letter). The Respondent's position is that the Review and the 19 June letter made clear that the Respondent continued to take issue with the Appellant's evidence and continued to assert that the Appellant would not be at risk on return to India. As Mr Bellara pointed out in his submissions made after Ms Cunha's confirmation that the Review had been sent, the Review adds nothing to the argument. It could not do so in any event because it preceded the filing of the Expert Report. If matters had rested there and Judge Ford had proceeded at that stage to make a determination on the papers, she certainly would have needed to explain why she was doing so in light of the Respondent's objection to that course. However, as Mr Bellara pointed out, the decision to deal with the appeal on the papers

was not made at this stage. It is therefore necessary to consider the Review and the 19 June letter in the context of what followed.

17. On 29 October 2020, Judge Ford became seized of the appeal. She held a further CMR. Her record of that hearing refers to the Expert Report. In that regard, she notes the following:

“Report includes video evidence and links very extensive. Expert to give evidence – unclear if this is still necessary following appeals of co-defendants in which same expert gave evidence. HO Review 19 June 2020 – did not accept that expert report should alter decision.”

Having set out a little more of the background and issues, she noted that “[i]f Respondent no longer wishes to cross examine the country expert it may be possible to deal with this appeal on written submissions”.

18. In light of the observations made it appears in the course of the CMR, and having noted first that the Expert intended to leave the UK in early December and second that the Respondent was “waiting for a review decision from the CCD and that the decision [would] need to be reviewed by a senior civil servant before being finalized”, Judge Ford directed the filing of the relevant decisions in relation to the Appellant’s co-defendants. She also made the following direction:

“The Respondent is to inform the Tribunal and the Appellant in writing by no later than 19/11/2020 if she wishes to challenge the expert evidence of Mr Satnam Bains by way of cross examination. Should she wish to do so then the parties must expect that the expert evidence of Mr S Bains will be taken no later than 04/12/2020 given his intention is to leave the UK in early December.”

The appeal was to be listed for a further CMR before Judge Ford on 24 November 2020.

19. The Respondent failed to comply with the direction made on 29 October 2020. So far as I can see there was no further CMR on 24 November 2020 (possibly due to the pandemic situation at that time). A further CMR was held on 8 January 2021. Judge Ford noted that the Respondent had failed to comply with the earlier direction and had failed to take the opportunity to review the decision under appeal. Both parties were represented at that hearing and the following directions were given on 13 January 2021:

“1. Unless the Respondent writes to the Tribunal and the Appellant by no later than 15.01.21 with what the Tribunal considers to be good reasons in line with the overriding objective as to why this matter should be listed for oral hearing, this matter will be listed for determination on the basis of written submissions.

2. Should the Respondent fail to write to the Tribunal in accordance with paragraph 1 above and the Tribunal proceed to a decision on written submissions, the parties are to exchange their written submissions by no later than 29.01.21 and serve those submissions on the Tribunal by the same date.

3. The matter is reserved to First Tier Tribunal Judge Ford, there being no objection to this.”

20. The Respondent again failed to meet the deadline set by these directions. On 27 January 2021, in the absence of any submissions from the Respondent, Judge Ford communicated to the parties further directions that the appeal should be listed for determination on written submissions which were to be exchanged and served no later than 29 January 2021 in accordance with the earlier directions.
21. Also absent any submissions from the Respondent by 15 January 2021, the Appellant filed his submissions on 28 January 2021, possibly in ignorance of Judge Ford's 27 January directions. Those submissions cover ten pages and I therefore do not set them out in full. Having summarised the Appellant's case and the relevant legal principles as well as drawing attention to the allowing of the appeals of the Appellant's co-defendants, the submissions set out the Appellant's position about the prospect of an oral hearing as follows:

"11. The Respondent has not put forward any reasons as to why there should be an oral hearing with live evidence. This is a sensible approach in light of the determinations and the Respondent has not expressed any intention to challenge the expert evidence. The Appellant relies upon his interview record, statements and the expert report of Satnam Singh Bains compiled for this Appellant. The two determinations of [HK] and [LS] are also relied upon. The FTT is asked to note the reasons and findings set out in both those determinations by the FTT and the UT. The UT determination of Judge Hanson of March 11<sup>th</sup> 2020 is helpfully detailed and carries significant weight."

The submissions went on to point out that the Expert had been cross-examined in the two appeals of the Appellant's co-defendants. It was pointed out that the First-tier Tribunal and the Upper Tribunal had "given significant weight" to the evidence of the Expert in those appeals. Reference was made to relevant passages from the Expert Report as well as the decisions in the appeals of the two co-defendants.

22. Finally, on 29 January 2021, the Respondent made her written submissions in a letter which reads as follows:

"The Respondent does not accept that the appellant has demonstrated he has a well-founded [sic] fear of persecution for a convention reason that would breach UK's obligations to the 1951 Refugee Convention. The decision to refuse asylum should be upheld.

The Respondent invites the First-tier Tribunal to uphold the decision to refuse the asylum claim and to apply section 72 of the Nationality, Immigration and Asylum Act 2002 to the appellant excluding him from the Refugee Convention under the provisions of Article 33(2) of the 1951 Refugee Convention. [DS] has not rebutted the presumption that he constitutes a danger to the community and the certificate should be upheld so excluding him from the Refugee Convention.

The Respondent is not challenging the findings of the report by Satnam Singh Bains in regard to [DS]'s claim under Article 3 of the European Convention on Human Rights only. The Respondent respectfully invites the First-tier Tribunal to list the appeal at the first available date."

23. Following the 29 January 2021 letter, the Tribunal gave the following directions on 10 February 2021:

“The following is the direction of Senior Tribunal Caseworker Potter:

In her submissions dated 29 January 2021, the respondent has invited the Tribunal to uphold the decision to refuse the asylum claim and the s72 certificate. However, the respondent has conceded the Article 3 grounds. I make the following direction:

By no later than 4.00pm on 12 February 2021, the appellant’s representative must consider the respondent’s written submissions dated 29 January 2021 and indicate whether the appellant a) still intends to pursue his appeal on protection grounds or b) consents to his appeal being allowed on Article 3 grounds only and not to rely further on protection grounds.”

It was perhaps incorrect to refer to the Article 3 grounds being anything other than part of the protection claim. There was no other basis for that aspect of the claim. It arose if the claim under the Refugee Convention was rejected, or the Appellant was excluded from the Refugee Convention. Otherwise, the issue was the same – in other words, was the Appellant at risk on return to India or entitled to humanitarian protection. However, nothing turns on that because Judge Ford found against the Appellant on both counts.

24. The Appellant filed further submissions on 12 February 2021. He made clear that he still pursued his protection claim under the Refugee Convention. It was said that the Appellant’s “background and circumstances [were] somewhat different to those of [LS] and [HK]”. This was because his “profile [was] more marked out due to his involvement and it is undisputed that his family has come under threats in India”. It was said that there had been “no express challenge to the fact that his Brother [was] in detention”. As I have already noted and as Ms Cunha submitted, this is incorrect as the Respondent had taken issue about the veracity of the claim so far as concerned action taken against family members. Again, the submissions drew attention to the relevant passages of the Expert Report. Those were set out in some detail.

### The Decision

25. In order to consider whether the making of the Decision without an oral hearing was procedurally unfair, it is next necessary to consider Judge Ford’s reasons for proceeding in this way. The Judge’s reasons for adopting the procedure she did appear at [32] to [37] of the Decision as follows:

“32. When I first considered this appeal at CMR on 29 October 2020, the Respondent’s representative was not in a position to inform me whether he wished to cross-examine the country expert who was due to leave the UK in December 2020. The respondent had not responded to the points raised in the expert’s report. Consequently, I directed that the parties exchange further written submissions on their respective positions as to whether the appeal should be allowed on article 3 grounds following the expert report (and the tribunal’s decisions in the appeals brought by the appellant’s co-defendants). Those directions were not complied with by the date stated and an extension of time was granted. On 29 January 2021 the respondent filed her further written submissions. In those submissions she stated that



she did not wish to put any questions to the country expert. This seems sensible as she had had the opportunity to put any relevant questions she might wish to put to the same expert at a co-defendants appeal hearing.

33. Whilst not conceding the appeal on article 3 grounds, the respondent did not seek to contest the content of the expert report on Article 3, i.e. that there is a real risk that the Appellant will be subjected to inhuman and degrading treatment on his return to India. However, she made her position clear that if the s72 certificate was not upheld and the appellant sought to proceed on asylum grounds, she would wish to fully contest such an appeal.

34. The appellant stated that he wished to pursue his protection appeal despite the indication from the respondent concerning the article 3 appeal grounds.

35. The appellant's representative sought to distinguish the appellant's background and circumstances from those of his co-defendants, whose appeals were allowed on article 3 grounds. It is argued that the appellant's profile is 'more marked out due to his involvement' and that it is undisputed that his family has come under threats in India and the appellant's brother taken into detention by the authorities in India.

36. The appellant asks the Tribunal to consider whether the appellant has rebutted the section 72 certificate presumption. Reference is made to the appellant not having committed previous offences and to his good behavioural record while in prison. Reference is made to the character references he produced during his trial. His OASys report is said to be of material significance. In his sentencing remarks the sentencing Judge confirmed that the appellant was of previous good character. The tribunal is asked to note that the sentencing judge found that the appellant did not come under the dangerous classification of the criminal justice act 2003. It is submitted that the appellant cannot be classed as a danger to the community as his attitude to courses and programs whilst in custody must be given significant weight. It is stated that 'the fact that the appellant may be more likely to commit the offence again against that individual does not classify him as a danger to the community.'

37. The submission states that the appellant is 'almost certainly marked out as someone with a strong political and religious profile'. His family circumstances and his own background classes him as someone in need of protection under the convention. Reference is then made to specific paragraphs within the expert report and the appellant's earlier submissions on this report."

26. The Judge first considered whether the Appellant should be excluded from the Refugee Convention as the Respondent had asked. She considered that issue at [38] to [57] of the Decision before concluding that the Appellant should be so excluded. There has been no challenge to that conclusion. In consequence, the Judge did not have to consider whether the Appellant had a well-founded fear of persecution in India as he could not succeed in any event under the Refugee Convention. Nor could he claim humanitarian protection as he was similarly excluded.

27. The only issue which remained was whether the Appellant would be at real risk of treatment breaching Article 3 ECHR. I have set out at [22] above the Respondent's position in relation to this issue. The Judge considered the issue at [58] and [59] of the Decision as follows:

"58. Having carefully considered the evidence before me including the expert's report and the submissions and background evidence relied upon by both parties, I find that this Appellant faces a real risk of being detained on his arrival in India and subjected to

prolonged detention, interrogation, and ill-treatment. That is because he is perceived to be involved with Sikh extremism and with Sikh separatist ideology due to the way in which the CPS and the media in the UK and the media in India covered the criminal proceedings. He does not have a passport and could only be returned on an emergency travel document. This in itself will alert the authorities to his being a person of potential adverse interest.

59. I accept the expert's view that there is likely to be a look out circular in existence for this Appellant. Even if he manages to get past the airport, I accept that he will find it very difficult to get an Aadhar card and even if he could get one, he will not wish to make his presence and whereabouts known to the authorities. Without such a card he cannot survive in India. He is estranged from his family."

For those reasons the Judge concluded that Article 3 would be breached if the Appellant were returned to India.

### Discussion and Conclusion

28. I begin with ground one as pleaded. That draws attention to the directions made on 13 January 2021 (see [19] above). The drafter accepts that the deadline was missed. He makes no reference at all under this head to the 29 January 2021 letter nor to any of the preceding hearings and the intimation as far back as 29 October 2020 that this might be an appeal capable of determination on the papers (see [17] above) given the Expert Report and the outcome of the appeals of the Appellant's co-defendants. The drafter makes no reference to what Mr Bellara rightly described as the "careful case management" carried out up to the point of the determination.
29. The ground as pleaded suggests that the "level of criminality and seriousness of the case" meant that it was not suitable for determination on the papers. It is not explained why that was so. The issues were not particularly complex. The central issue was whether the Appellant would be at risk on return to India. Whether he would be at risk was obviously as a result of his past criminality and the fact of his exclusion was due to the seriousness of the offence but it is not explained why, in light of the Expert Report, and the Respondent's response to it, the issue of risk was not capable of determination on the papers.
30. Ms Cunha suggested that the Respondent's position in relation to the Article 3 issue might be "ambiguous". I cannot accept that submission. Her position was clear. Whilst the Judge accepted that the Respondent did not expressly concede the appeal on that issue, the Respondent made plain that she was not contesting the Expert Report. She did not wish to cross-examine the Expert.
31. Ms Cunha also suggested that the Respondent would still have wished to cross-examine the Appellant. She pointed out that in the Review and the 19 June 2020 letter, the Respondent made clear that she still relied on her reasons for refusing the protection claim. Those included a rejection of the credibility of the Appellant's account that his brother had been detained and that the mother of one of the other members of the group had been arrested ([43] of the Respondent's decision). The Respondent did not accept that the Indian authorities would re-try the Appellant for

the offence (although did accept that they could do so). That assertion was based on their failure to seek to extradite the Appellant and his co-defendants at the time. However, the issue whether the Indian authorities would have a continued interest in the Appellant and would perceive him as a Sikh extremist now was very much a matter for the Expert. The Respondent relied upon background evidence, which was general in nature, but the Expert was commenting on the position of this individual. Further, the continuing risk arising from this offence had been accepted in the appeals of the Appellant's co-defendants following cross-examination of the same expert. For that reason, I do not need to make reference to the passages of the Expert Report to which Mr Bellara drew my attention.

32. I come back then to the central issue raised by ground one. Was the making of the Decision without an oral hearing procedurally unfair?
33. I begin with the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the Rules"). Paragraph 25(1) of the Rules requires the Tribunal to hold a hearing before making a decision which disposes of proceedings except in certain circumstances. It was accepted by the parties that the circumstance said to apply here is (g) (where "the Tribunal considers that it can justly determine the matter without a hearing"). That sub-paragraph is subject to paragraph 25(2) which requires the Tribunal to give notice of its intention to do so and the opportunity to make written representations. There can be no dispute that the Tribunal did this.
34. Ms Cunha relied on the guidance given by this Tribunal in EP (Albania) & Ors (rule 34 decisions; setting aside) [2021] UKUT 233(IAC) ("EP (Albania)"). That guidance was given in the context of the rules of the Upper Tribunal and against the background of a High Court judgment finding a Presidential guidance note to be unlawful. The Tribunal was also considering applications to set aside. Notwithstanding those differences, I accept that the guidance is relevant to the procedural unfairness ground in this appeal.
35. I do not need to set out the headnote as that refers to the body of the decision for guidance. The parts of the decision in EP (Albania) relevant to this appeal are at [32], [36] to [38], [62] to [64] and [69]. The principles are summarised in conclusion at [69] of EP (Albania) as follows:

"...each rule 34 decision is a reasoned decision. The merits of the rule 43 applications must be determined on consideration of the reasons given in each case. If those reasons whether expressly or by inference point to a conclusion reached without consideration of the principles that make up the overriding objective, or without consideration of whether determination of the error of law appeal without a hearing would be consistent with the principles of fairness, .... then the rule 34 decision should be set aside because it proceeded on incorrect premises. As we have said already, the conclusion ..is unlikely to depend simply on whether in the case in hand, certain matters are or are not expressly mentioned ... The reasons must be considered in the round to see what inferences and what conclusions may properly be drawn. .."

36. In this case, I accept that the Decision itself does not make reference to the overriding objective or offer particular reasons why it was thought appropriate to make the Decision on the papers. However, the reasoning there given has to be read in conjunction with the earlier case management and the consideration in the context of the CMRs how the appeal was to be approached and, importantly, what remained at issue (and see [36] and [37] of the decision in EP (Albania)).
37. As the decision in EP (Albania) makes clear, whether it is procedurally fair to make a decision on the papers in this context does not depend on any consent or objection by either party (see [62] to [64] of EP (Albania)). That the Respondent did not expressly consent to this course is therefore of no relevance. She did not expressly object and could easily have done so but, in any event, her objection could be of limited weight.
38. Neither does an argument that the outcome might have been different hold sway (see [64] of EP (Albania)). In any event, as I have already pointed out, in this case, the only argument made is that Judge Ford misunderstood the Respondent's case. I have dealt with this to some extent above in relation to Ms Cunha's submission that the Respondent did not accept the Appellant's credibility. The Appellant's credibility was not however part of Judge Ford's reasoning for allowing the appeal. There could be no doubt that the Appellant had committed the offence which he said would put him at risk from the authorities on return. That he would be at risk was accepted by Judge Ford based on the Expert Report. The Respondent did not propose to cross-examine the Expert if the matter had been heard orally. It is therefore difficult to see what would have been done differently had the appeal been determined at an oral hearing. The only difference would have been the making of oral submissions rather than written ones. The Respondent had every (and several) opportunities to make written submissions about this appeal. Those were considered by the Judge.
39. In light of the above, it cannot sensibly be argued that the appeal was determined in a manner which, when considered as a whole, was procedurally unfair. The Respondent's first ground is not made out.

## **Ground 2: Material Misdirection**

40. Given my conclusion regarding the first ground, I do not strictly need to deal with the second. I have in any event dealt with this to a limited degree already when dealing with the first ground. For that reason, I can deal with this ground quite shortly.
41. In essence, the Respondent repeats her position that she had not conceded the risk on return. The drafter of the grounds under this heading does mention the 29 January 2021 letter and accepts that "read in isolation" it might "create some ambiguity". It is said that this is in fact further reason why the appeal should not have been determined on the papers.
42. I reject that submission. First, the Respondent's position as set out in the January 2021 letter is to my mind palpably clear. The Respondent continued to argue that the

Appellant should be excluded from the Refugee Convention. He was so excluded by Judge Ford. Second, the Respondent was not challenging the Expert Report but on the other hand was not accepting that the Appellant had demonstrated that he had a well-founded fear of persecution on return. It is no doubt for that reason that Judge Ford accepted that the Respondent had not conceded the Article 3 ground ([33] of the Decision set out at [25] above).

43. The issue of risk was however for the Judge to determine on the evidence. The drafter of the ground submits that whilst the Respondent accepted that a person perceived as a Sikh extremist would be at risk on return, she did not accept that the Appellant would be so perceived. I do not discern any suggestion by Judge Ford that she considered the Respondent's position to be any different (and see in particular the summary at [22] to [24] of the Decision). However, again, that issue was for the Judge to decide based on evidence which the Respondent did not dispute, namely the Expert Report (see [25] of the Decision). The Judge set out the content of the Expert Report at [26] to [31] of the Decision. She was obviously aware that the same expert's evidence had been accepted in the appeals of the Appellant's co-defendants. That was relevant.
44. The Respondent has failed to demonstrate that the Judge misunderstood her position. The Judge clearly understood that the issue of risk on return had not been conceded. She considered the Expert Report which was not challenged. She explained why she accepted that evidence (as had another Judge in the appeals of the Appellant's co-defendants) and therefore accepted that the Appellant would be at risk on return.
45. For those reasons, the Respondent has failed to identify any error of law by her second ground.

## CONCLUSION

46. For the foregoing reasons, I am satisfied that the Respondent has failed to show that the Decision contains any legal error. I therefore uphold the Decision.

## DECISION

**The Decision of First-tier Tribunal Judge Ford promulgated on 1 March 2021 does not involve the making of an error on a point of law. I therefore uphold the Decision.**

Signed: *L K Smith*

**Upper Tribunal Judge Smith**

Dated: 29 November 2021