UT Neutral citation number: [2023] UKUT 00012 (IAC)

SSGA (Disposal without considering merits; R25) Iraq

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at **Field House**

THE IMMIGRATION ACTS

Heard on **17 August 2022**
Promulgated on **15 December 2022**

Before:

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department

Appellant

And

SSGA
(ANONYMITY ORDER MADE)

Respondent

Anonymity

We make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the original appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.
We make this order because this is a protection claim.
The parties have liberty to apply to discharge this order, with reasons.

Representation:
For the Appellant: Mr S Whitwell, Senior Presenting Officer.
For the Respondent: Mr R Claire, of Counsel, instructed by RKS Solicitors (Dewsbury) Ltd.

1. *Judges in the FtT (IAC) do not have power to dispose of an appeal without considering its merits. This is because of the statutory duty under s.86 of the 2002 Act to determine each matter raised as a ground of appeal.*

2. *Every judge seized of an appeal must reach his or her own decision on the case and must exercise for himself or herself any available discretion. Judges who give directions must be careful to ensure that the wording of their directions does not and cannot be perceived to direct how another judge should dispose of the appeal or exercise any available discretion. If a judge tasked with deciding an appeal is faced with any direction that may be so perceived, the judge must make it clear in the decision that he/she has considered the matter for himself/herself.*

3. *A positive act is required by a party demonstrating clearly that the party no longer pursues his or her case before a judge can be satisfied that that is the case. Nothing less will do. Judges in the FtT (IAC) do not have power to treat an appeal as unopposed on the ground that the party in question has not complied with any requirement of the FtT Rules or a practice direction or any direction(s) of the Tribunal even if the failure to comply is persistent.*

4. *The following guidance applies when consideration is being given to whether or not an appeal should be disposed of without a hearing:*

   (i) Rule 25(1) of the FtT Rules provides that the FtT (IAC) must hold a hearing which disposes of proceedings except where rule 25(1)(a) to (g) apply. Seven exceptions to the general rule are provided for in rule 25(1)(a) to (g).

   (ii) Any decision whether to decide an appeal without a hearing is a judicial one to be made by the judge who decides the appeal without a hearing. The mere fact that a case has been placed in a paper list does not and cannot detract from the duty placed on the judge before whom the case is listed as a paper case to consider for himself or herself whether one or more of the exceptions to the general rule apply. If, having considered rule 25, the judge is not satisfied that at least one of the exceptions in rule 25(1)(a) to (g) is satisfied, the judge must decline to decide the appeal without a hearing and direct the administration to list the appeal for a hearing.

   (iii) If a judge decides that one or more of the exceptions in rule 25(1) is satisfied and therefore decides an appeal without a hearing, the judge's written decision must explain which exception is satisfied and why by engaging with the pre-requisites specified in the relevant provision and giving reasons for how any discretion conferred by the relevant exception has been exercised and/or how any judgment required to be made is made. Furthermore:

      (a) For the exception in rule 25(1)(e) to apply, mere non-compliance with a provision of the FtT Rules, a practice direction or a direction is <u>not</u> in itself sufficient to permit a judge to decide an appeal without a hearing. The Tribunal must, in addition, be "satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing". The judge's written decision must

therefore identify the procedural failure or failures in question, explain the judge's view of their causes on such evidence as is before the judge as well as explain the persistence and gravity of the procedural failure or failures. The written decision must explain the extent to which such failures have obstructed the overriding objective and why the judge is "satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing". If credibility is in issue on any material aspect of the claimant's case, the judge's written decision must explain why it is nevertheless appropriate in all of the circumstances to decide the appeal without a hearing and the relevance of the procedural failure(s) to it being deemed appropriate by the judge to decide the appeal without a hearing.

(b) For the exception in rule 25(1)(g) to apply, rule 25(2) has to be satisfied. If a judge proceeds to decide an appeal without a hearing under rule 25(1)(g), the judge's written decision must demonstrate why rule 25(2) is satisfied and go on to explain why the judge has concluded that the appeal can justly be determined without a hearing notwithstanding any dispute there may be as to the credibility of any material fact.

(iv) A hearing should be held whenever credibility is disputed on any material issue or fact. Cases in which it would be appropriate to determine an appeal without a hearing if credibility is materially in issue would be rare indeed. In almost all cases, the appropriate course of action would be to list the case for a hearing and decide the case on such material as is before the Tribunal.

This decision follows a 'hybrid hearing". Mr SSGA and RKS Solicitors attended remotely and Mr Whitwell and Mr Claire attended at Field House. Neither party objected to the hearing being a hybrid one.

DECISION AND REASONS

1. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Ali dated 22 November 2021 by which Judge Ali allowed the appeal of Mr SSGA, a national of Iraq (hereafter the "claimant"), against the Secretary of State's decision of 6 May 2021 to refuse his further submissions of 26 February 2020 in support of his protection claim which he first made on 16 July 2009 following his arrival in the United Kingdom on 15 July 2009. His initial asylum claim was refused by a decision dated 14 August 2009.

2. Judge Ali also made a wasted cost order against the Secretary of State in respect of the costs incurred by the claimant in the First-tier Tribunal ("FtT"). There is no appeal before the Upper Tribunal against Judge Ali's decision to award the claimant his full costs of £900. However, the claimant has made an application for a wasted costs order against the Secretary of State in respect of costs totalling £2,114.40 incurred by him in the appeal before the Upper Tribunal.

3. At para 3 of his decision, Judge Ali said that he did not hear any oral evidence as the case was listed as a paper case.

4. At para 7 of his decision, Judge Ali said that as a result of the matters he had set out earlier (a reference to the procedural history of the appeal in the FtT, which we set out below) and "*the actions of the [Secretary of State] in repeatedly failing to comply with directions or engage with proceedings I find that she does not oppose the appeal and therefore the appeal is granted in favour of the [claimant]".*

5. Under the heading "*Notice of decision*", Judge Ali said: "*I therefore allow the appeal*". He did not state, in terms, whether the appeal was allowed on asylum grounds or humanitarian protection grounds and/or human rights, although the claimant's appeal was brought on all three grounds.

6. The Secretary of State's grounds contend that, as there was no analysis at all of the merits of the claimant's asylum claim, Judge Ali erred by failing to provide any reasoning for his decision. Judge Ali appeared to have allowed the appeal on the basis that the Secretary of State had failed to comply with directions or engage with the proceedings.

7. In granting permission to appeal, Judge of the First-tier Tribunal Mills said that, although the First-tier Tribunal was "*undoubtedly justified*" in concluding that the Secretary of State had been given more than sufficient opportunity to comply with directions and was "*likely entitled to determine the appeal on the papers without a hearing",* it was arguable that it was necessary for Judge Ali to engage with the detail of the claimant's account and give reasons why, and on which ground or grounds, the appeal was allowed*.*

A. The claimant's protection claim

8. The basis of the claimant's asylum claim was that he feared being killed in a revenge attack by the family of a lady ("A") because his brother had been having an illicit affair with A and because his brother had killed two members of her family. In the decision letter dated 14 August 2009 refusing his protection claim, the Secretary of State considered that his asylum claim was not credible and that he had fabricated his account. The claimant did not appeal that decision. He exhausted his appeal rights on 1 September 2009.

9. The claimant's further submissions of 26 February 2020 contend that he would be at risk on return in Iraq due to the current country situation; he was not in contact with any family in Iraq; he would be destitute in Iraq; and he had no Iraqi documentation.

B. The Secretary of State's decision letter

10. In her decision letter of 6 May 2021, the Secretary of State relied upon and took into account her view as stated in the decision letter dated 14 August 2009 that the claimant had fabricated his account of the basis of his asylum claim. Whilst it was accepted in the decision letter of 6 May 2021 that the claimant was an Iraqi national of Kurdish ethnicity, that he had visited the Iraqi Embassy in London and that he had contacted the Red Cross, it was not accepted that the claimant was actually seen by Embassy staff or that they were unable to assist him nor was it accepted that he had opened a tracing request with the Red Cross to find his family members.

11. Accordingly, the decision letter of 6 May 2021 stated (at para 26) that "*It is considered that you could regain contact with your family and they could assist you on return. You have not demonstrated that they would be unable or unwilling to assist you in obtaining your documentation nor acting as a proxy in assisting you to obtain replacements*" and (at paras 32 and 35) that the onus was on the claimant to establish he was unable to obtain documentation for his return to Iraq.

12. The Secretary of State therefore did not consider that the claimant was unable to return to Iraq due to the general security or humanitarian situation. The Secretary of State further considered that there was an internal flight alternative available to the claimant. The Secretary of State decided that the decision to remove the claimant would not amount to a disproportionate interference with any right to family or private life under Article 8 of the ECHR.

C. The claimant's grounds of appeal to the FtT

13. As we have indicated above, the claimant's grounds of appeal were that his removal would be in breach of the United Kingdom's obligations under the Refugee Convention and in breach of the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection and that his removal would be unlawful under s.6 of the Human Rights Act 1998.

D. Procedural history in the FtT

14. The procedural history in the FtT is very helpfully set out at paras 2-6 of the permission decision of Judge Mills which we now quote:

> "2. This is an appeal against the Secretary of State's refusal of a protection claim, dated 06/05/21. The [Secretary of State] was first directed to serve her bundle of evidence by 16/06/21. Having failed to do so, further directions were sent with a deadline of 01/07/21. The [Secretary of State] again failed to comply and so a third set of directions were sent, giving a deadline of 03/08/21. That date, along with another deadline of 02/09/21 given in a fourth set of directions, were also both missed.
>
> 3. The [Secretary of State] was then required to attend a case management hearing on 04/10/21 to explain her repeated non-compliance but, remarkably, she failed to send a representative to that hearing. At the hearing Judge Saffer made the following direction:
>
> > "The [Secretary of State] is to file and serve a bundle of documents on which she intends to rely by 18 October 2021, in the absence of which she will be deemed not to seek to oppose the appeal in light of her previous non-compliance and non-engagement, and whereon a decision granting the appeal in favour of the [claimant] will be issued."
>
> 4. No bundle was received from the [Secretary of State] and so, in accordance with the above direction of Judge Saffer, the case was allocated to a Judge to be determined on the papers. Judge Ali considered and allowed the appeal on 22/11/21, finding in a very brief decision that the [Secretary of State] did not oppose the [claimant's] case, and so it must succeed.
>
> 5. The [Secretary of State], very belatedly, uploaded a bundle of documents to the MyHMCTS portal on 24/11/21, with a note requesting that it be

accepted, and indicating that the Home Office were in the process of "*procuring additional resources, including a recruitment drive (to) improve our performance and thus reduce bundle service delays".*

6. No doubt recognising that it was too late to serve the bundle once the appeal had been determined by a First-tier Tribunal Judge, on 30/11/21 the [Secretary of State] sought permission to appeal to the Upper Tribunal against the decision of Judge Ali. The grounds state that "*as there has been no analysis at all of the merits of this asylum claim, it is submitted that the FTTJ has erred in law by failing to provide any reasoning for his decision*"".

E. The decision of Judge Ali

15. As a consequence of the Secretary of State's non-compliance with directions, Judge Ali did not have the Secretary of State's bundle when he decided the appeal. However, he did have a copy of the Secretary of State's decision letter of 6 May 2021. The only document that he did not have and that was included in the Secretary of State's bundle uploaded belatedly (on 24 November 2021) was the record of the claimant's screening interview dated 16 July 2009.

16. In view of the fact that the submissions advanced before us on the claimant's behalf contended, inter alia, that Judge Ali's decision, taken as a whole, shows that he did in fact consider the merits of the claimant's protection claim, we now quote Judge Ali's (short) decision in its entirety:

> "1. The [claimant] is a citizen of Iraq who was born on the 5th May 1986. The [claimant] arrived in the UK on the 15th July 2009 and claimed asylum on the 16th July 2009. His claim for asylum was refused on 14th August 2009. He did not appeal the decision and he became appeal rights exhausted on the 1st September 2009. The [claimant] lodged further submissions on the 26th February 2020. His further submissions was on the basis that he would be at risk on return to Iraq due to the current country situation, that he was not in contact with any family and that he would be destitute, that he had no Iraqi documentation and that there would be a breach of Articles 2,3 and 8 of the ECHR. His further submissions was refused on the 10th May 2021. The [claimant] appealed against this decision and that was that matter that was scheduled to be determined by the Tribunal.
>
> 2. I record, as a formality, that in light of the previous proceedings the [claimant] is granted ongoing anonymity in these proceedings.
>
> 3. I have not heard any oral evidence in this case as the case was listed as a paper case.
>
> 4. At paragraph 1 of this determination I made reference to the fact that this appeal was scheduled to be determined by the Tribunal in a face to face hearing however the matter did not progress to such a stage because of the [Secretary of State's] failure to comply with directions and to be a party to these proceedings.
>
> 5. I refer to the CMRH that took place before Judge Saffer on the 4th October 2021. The [Secretary of State] again failed to attend the CMRH. Judge Saffer noted the following;
>
> > 'Upon being satisfied that the [Secretary of State] had been served with notice of the date time and venue of the hearing, but did not attend or give an explanation for her nonattendance; And upon noting

the failure by the [Secretary of State] to comply with directions of 17 June 2021, 20 July 2021, and 18 August 2021; And noting that the [Secretary of State] had been reminded of the Tribunal's power to treat the appeal as being unopposed by her, that the Tribunal could determine the appeal without a hearing, and the Tribunal could make a wasted cost order against a party; And upon hearing from Mr Hashmi.

Directions

1. The [claimant] is to file and serve a schedule of the costs wasted as a result of the continued non-compliance or engagement with the proceedings by the [Secretary of State] by 11 October 2021.

2. The [Secretary of State] is to file and serve a bundle of documents on which she intends to rely by 18 October 2021 in the absence of which she will be deemed not to seek to oppose the appeal in light of her previous non-compliance and non-engagement, and whereon a decision granting the appeal in favour of the [claimant] will be issued.

3. The [Secretary of State] is to explain why she should not pay towards the costs wasted by her non-compliance with directions and her failure to attend by 18 October 2021 in the absence of which a wasted costs order will be made against her'.

6. Despite the CMRH taking place and the directions issued by Judge Saffer the [Secretary of State] still failed to comply with the directions.

7. As a result of the above and the actions of the [Secretary of State] in repeatedly failing to comply with directions or engage with proceedings I find that she does not oppose the appeal and therefore the appeal is granted in favour of the [claimant].

NOTICE OF DECISION

I therefore allow the appeal."

F. The relevant legal provisions

17. Section 86 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") sets out the duty of the FtT in deciding an appeal. This reads:

86 Determination of appeal

(1) This section applies on an appeal under [section 82(1)](#).

(2) The Tribunal must determine—

(a) any matter raised as a ground of appeal, and

(b) any matter which [section 85](#) requires it to consider.

18. It is necessary to read s.86 in conjunction with ss.82, 84 and 85 which, insofar as relevant, read:

82 Right of appeal to the Tribunal

(1) A person ("P") may appeal to the Tribunal where—

(a) the Secretary of State has decided to refuse a protection claim made by P,

(b) the Secretary of State has decided to refuse a human rights claim made by P, or

(c) the Secretary of State has decided to revoke P's protection status.

(2) For the purposes of this Part—

(a) a "protection claim" is a claim made by a person ("P") that removal of P from the United Kingdom—

(i) would breach the United Kingdom's obligations under the Refugee Convention, or

(ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions—

(i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;

(ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) …;

(d) …;

(e) …;

(3) …

84 Grounds of appeal

(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds—

(a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;

(b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

(3) …

85 Matters to be considered

(1) …

(2) …

(3) …

(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a "new matter" if—

…

19. It is also necessary to set out (insofar as relevant) rules 2, 6 and 25 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "FtT Rules"). We also set out rule 28 which was relied upon on the claimant's behalf. These rules provide:

Overriding objective and parties' obligation to co-operate with the Tribunal

2. (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

Failure to comply with rules etc

6. (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—

(a) waiving the requirement;

(b) requiring the failure to be remedied; or

(c) exercising its power under paragraph (3).

(3) …

Consideration of decision with or without a hearing

25. (1) The Tribunal must hold a hearing before making a decision which disposes of proceedings except where—

(a) each party has consented to, or has not objected to, the matter being decided without a hearing;

(b) the appellant has not consented to the appeal being determined without a hearing but the Lord Chancellor has refused to issue a certificate of fee satisfaction for the fee payable for a hearing;

(c) the appellant is outside the United Kingdom and does not have a representative who has an address for service in the United Kingdom;

(d) it is impracticable to give the appellant notice of the hearing;

(e) a party has failed to comply with a provision of these Rules, a practice direction or a direction and the Tribunal is satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing;

(f) …; or

(g) subject to paragraph (2), the Tribunal considers that it can justly determine the matter without a hearing.

(2) Where paragraph (1)(g) applies, the Tribunal must not make the decision without a hearing without first giving the parties notice of its intention to do so, and an opportunity to make written representations as to whether there should be a hearing.

(3) This rule does not apply to decisions under Part 4 or Part 5.

Hearing in a party's absence

28. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.

G. Submissions of the parties

20. Mr Whitwell relied upon the Secretary of State's amended skeleton argument dated 16 August 2022 and Mr Claire relied upon the claimant's rule 24 reply of 28 July 2022.

21. The Secretary of State's case, in summary, is that there is no provision in the FtT Rules which permitted Judge Ali and/or Judge Saffer to deem that the Secretary of State did not oppose the appeal just because she had not complied with directions. To the contrary, rule 6 specifically provides that any irregularity arising from a failure to comply with any direction does not, of itself, render the proceedings, or any step taken in the proceedings, void. Rule 28 of the FtT Rules was irrelevant because the instant appeal was not listed for a hearing. The skeleton argument states that Judge Ali could not have been criticised if he had considered the merits of the claimant's protection claim on the papers or found that a discrepancy or inconsistency relied upon in the decision letter was untenable. Pursuant to s.86 of the 2002 Act, Judge Ali was obliged to determine any matter raised as a ground of appeal in s.84. There

were material aspects of the facts on which the claimant relied in his protection claim that were in dispute between the parties. Judge Ali had erred in failing to engage with the merits of the claimant's claim or give any reasons for allowing the appeal other than on the basis of the Secretary of State's non-compliance with directions. As a result, it was not clear the basis upon which the appeal had been allowed or why the Secretary of State lost the appeal and what form of leave the Secretary of State should notionally grant the claimant. The burden remained on the claimant to establish his protection claim notwithstanding that the Secretary of State had not complied with directions.

22. In our view, the claimant's rule 24 reply is poorly drafted and, in certain parts, makes little or no sense. For example, the following paragraph on the third page makes no sense at all:

> "A just mere argument that the [Secretary of State] was under the process of resources defines the credibility test against them when considering the local authority with loaded facts of financial sources. For a fact even if such an action was under process when considering the timeline of the directions. It is evident that the [Secretary of State] was not truly defining the merits of this case and a true negligence is evident within their own statements."

23. The main points discernible from the remainder of the claimant's rule 24 reply may be summarised as follows: Judge Ali had considered the claimant's asylum claim on the evidence that was before him; he had not erred in doing so; the appeal was allowed on its merits; and Judge Ali did not err in concluding, "*in the presence of no opposition*" that the Secretary of State "*did not intend to disagree with the initial decision*". The rule 24 reply refers to rule 28 of the FtT Rules which allows the Tribunal to proceed with a hearing if a party does not attend the hearing. The Secretary of State has acted negligently in failing to comply with directions and her "*application for permission*" should be "*dismissed immediately for Justice and Fairness*".

24. At the hearing, Mr Claire referred us to the overriding objective in rule 6. He submitted that the Secretary of State had had every opportunity to comply with directions and had failed (as at the date of Judge Ali's decision) to give any reasons for her failure to comply with directions. In the circumstances, Judge Ali was entitled to proceed on the basis of the documents that were before him.

25. We referred Mr Claire to rule 25 of the FtT Rules. Mr Claire accepted that Judge Ali did not say in terms that it was appropriate to proceed to decide the appeal without a hearing pursuant to rule 25(1)(e) of the FtT Rules but he submitted that it was implicit that he did decide that it was appropriate to decide the appeal on the papers.

26. Mr Claire submitted that para 1 of Judge Ali's decision shows that he did consider the claimant's claim because para 1 shows that he was aware of the facts of the claimant's claim. However, he also accepted that it was obvious that there was no analysis in Judge Ali's decision of the Secretary of State's decision letter and that Judge Ali did not make any findings of fact. Mr Claire drew our attention to the fact that, although Judge Ali did not refer to the Secretary of State's decision letter, he had the decision letter.

27. Mr Claire referred us to the Surendran guidelines set out as an Annex to the decision of the Immigration Appeal Tribunal in MNM (Surendran guidelines for Adjudicators) Kenya * [2000] UKIAT 00005.

28. Mr Claire relied upon para 5 of Judge Ali's decision where he referred to Judge Saffer's direction to the effect that, if the Secretary of State failed to comply with the direction made by Judge Saffer at the case management hearing on 4 October 2021, *"she will be deemed not to seek to oppose the appeal in light of her previous non-compliance and non-engagement, and whereon a decision granting the appeal in favour of the [claimant] will be issued*". We asked Mr Claire to address us on whether this direction in effect also directed the judge who would eventually be tasked with deciding the appeal to treat the claimant's appeal as unopposed by the Secretary of State. Mr Claire submitted that Judge Saffer was not directing Judge Ali to decide the appeal by treating it as unopposed. He submitted that it is implicit that Judge Ali agreed with Judge Saffer that the Secretary of State did not oppose the claimant's appeal and that the claimant's appeal should be allowed.

29. Mr Claire submitted that, if the Secretary of State were to succeed in the instant appeal, it would encourage the Home Office to routinely fail to comply with directions in the FtT. He asked us to bear in mind that appellants in the FtT have limited resources whereas the Secretary of State has significant resources.

30. Mr Claire accepted that, if the Secretary of State were to succeed in the substantive appeal before the Upper Tribunal, the claimant's application for a wasted costs order against the Secretary of State is bound to fail.

H. Assessment

31. We say at the outset that the Secretary of State's repeated failure to comply with the directions given in the First-tier Tribunal, compounded by her failure to be represented at the case management review hearing ("CMRH"), is lamentable. The explanation given is that the failure to comply with the directions was due to staff shortages as a result of the Covid-19 pandemic and that steps have been taken to address this issue. Whilst we are mindful that the pandemic has given rise to many difficulties, including difficulties in maintaining adequate staffing levels, for public and private institutions up and down the country including no doubt the Home Office, the reality is that directions were issued requiring compliance by the Secretary of State on five separate occasions in the instant case. Such a repeated failure to comply with directions in the instant case is not satisfactorily explained by the explanation advanced (belatedly) on the Secretary of State's behalf.

32. Nevertheless, we are satisfied that Judge Ali did materially err in law for reasons which we now give.

(i) The duty in s.86

33. Firstly, Judge Ali failed to discharge the statutory duty imposed upon him by s.86 of the 2002 Act which *required* him, by the use of the word "*must*" in the opening words of s.86, to "*determine (a) any matter raised as a ground of appeal*…".

34. Given that the decision letter of 6 May 2021 refused the claimant's asylum, humanitarian protection and human rights claims and given the claimant's grounds of appeal which are set out at para 13 above, Judge Ali was obliged by s.86 to determine whether the claimant's removal would be in breach of the United Kingdom's obligations under the Refugee Convention, whether it would be in breach of the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection and whether his removal would be unlawful under s.6 of the Human Rights Act 1998. Although para 1 of his decision shows that he was aware of the general nature of the claimant's claim, there is nothing in the decision to show that he was aware of the facts of the claimant's asylum claim, i.e. that he was aware of the facts summarised at our para 8 above which the Secretary of State had contended in her decision letter dated 14 August 2009 had been fabricated. We therefore reject Mr Claire's submission that the judge was aware of the facts of the claimant's protection claim.

35. In the section under the heading: "*Notice of decision*", the judge did not state the grounds upon which the appeal was allowed. Taking this fact together with the fact that there is nothing in Judge Ali's decision that shows that he was aware of the facts of the claimant's asylum claim, that the judge did not analyse the claimant's evidence, that he did not analyse the evidence that related to the facts that were disputed by the Secretary of State and that, as Mr Claire accepted, he did not make any findings of fact, there is nothing that sheds light on whether he intended to allow the appeal on asylum grounds or humanitarian protection grounds and/or human rights grounds. This is important because in the absence of clarity about the ground upon which the appeal was allowed, the Secretary of State cannot know what form and duration of leave she should grant.

(ii) Judges must reach their own decisions

36. Connected to the duty in s.86 is the following important general point of principle:

37. It is axiomatic that a judge appointed to decide a case must reach his or her own decision on the case. Likewise, a panel of judges appointed to decide a case must reach their own decision on the case. No person or judge can direct another judge or a panel of judges seized of a case to take a particular view or decide any issue in the case in a particular way. The ultimate decision in each case must be the decision of the judge or panel of judges seized of that case. This principle is sacrosanct. It is the principle by which the independence of the judicial decision in every case is ensured and therefore plays an important role in ensuring the independence of the judiciary.

38. The importance attached to this principle is such that any purported direction by one judge to another how a decision should be made or how any discretion available to the latter should be exercised is of no legal effect. Whenever a judge seized of an appeal is faced with a direction by another judge how a decision should be made or how any available discretion should be exercised, the judge should make it clear in his or her decision that he or she has considered the matter for himself/herself and reached his or her own independent decision on the matter in question.

39. We are satisfied that the words "*will be issued*" in Judge Saffer's direction, quoted at para 3 of the permission decision of Judge Mills, did amount to a purported direction by Judge Saffer to the judge eventually seized of the appeal to make "*a decision*

granting the appeal in favour of the [claimant]" if the Secretary of State failed to comply with Judge Saffer's direction. We reject Mr Claire's submission to the contrary. For the reasons we have given, Judge Saffer could not in law have directed Judge Ali to issue a decision allowing the appeal. The decision whether to allow or dismiss the appeal was for Judge Ali and Judge Ali alone, notwithstanding Judge Saffer's direction.

40. At para 7 of his decision, Judge Ali said: "*As a result of the above and the actions of the [Secretary of State] in repeatedly failing to comply with directions or engage with proceedings I find that she does not oppose the appeal and therefore the appeal is granted in favour of the [claimant]."* Although this shows that he made his own finding that the Secretary of State did not oppose the appeal, the opening words - "*As a result of the above*" – referred back to Judge Saffer's direction. In these circumstances, there is a clear risk of it being perceived that, in making his finding, Judge Ali was influenced, at least in part, by Judge Saffer's direction that the Secretary of State *will be deemed not to oppose the appeal*. Judge Ali erred by failing to make it clear that his finding in para 7 was not in any way reliant upon the direction of Judge Saffer that the Secretary of State will be deemed not to oppose the appeal.

(iii) Non-compliance with directions as basis of decision that a party no longer pursues his/her case

41. Next, we consider whether it is open to a judge to deem it to be the case, if the Secretary of State fails to comply with directions, that she no longer opposes the appeal. If the answer is 'yes', the corollary must also be correct, i.e. that it is likewise open to a judge to deem it to be the case, if an appellant fails to comply with directions, that he/she no longer pursues his or her case in the appeal and therefore proceed to dismiss the appeal. The latter proposition, once stated, makes it immediately obvious that non-compliance with directions cannot justify a judge deeming it to be the case that the party who has failed to comply with directions no longer pursues his or her case.

42. Rule 6(1) of FtT Rules provides that an irregularity arising from a failure to comply with a direction (amongst other specified failures) does not of itself render void the proceedings or any steps set taken in the proceedings. It is evident that rule 6(1) does not apply because there is no suggestion that Judge Ali treated the proceedings as void; it was not suggested before us that the Secretary of State's failure to comply with directions rendered the proceedings in the FtT void, the whole point of this appeal being that the Secretary of State had failed to take any steps in the proceedings in the FtT as at the date of Judge Ali's decision.

43. Rule 6(2) provides that, if a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include (a) waiving the requirement; (b) requiring the failure to be remedied; or (c) exercising its power under rule 6(3). Mr Whitwell accepted before us that it would have been impractical for the FtT to have exercised its power under rule 6(3). We are satisfied that it would not have been appropriate for the FtT to have waived the requirement for the Secretary of State to comply with the direction to file and serve documents which she is bound by the rules to serve in any appeal. Given that the Secretary of State repeatedly failed to comply with directions on no less than five occasions, we are satisfied that the FtT was justified in not

exercising its discretion under rule 6(2) to require the Secretary of State to remedy her failure to comply with the previous directions.

44. Whilst the words "*may include*" in rule 6(2) mean that the actions that the FtT may take are not limited to those specified in rule 6(2), nothing in rule 6 or the overriding objective in rule 2 or any other rule in the FtT Rules can detract from the statutory duty in s.86 of the 2002 which we have already considered.

45. It may well be the case that a party's failure to comply with a direction that is given in order to assist the Tribunal to resolve a particular issue (for example, a direction given to a party for country evidence on a particular issue to be submitted) may mean that that party may be in difficulty in making good his or her case on the issue in question. However, non-compliance with directions cannot justify a judge deeming that the party has abandoned completely his or her case in the appeal.

46. Mr Claire relied upon the Surendran guidelines set out in the Annex to the decision in MNM. The Surendran guidelines, first issued in about June 1999 and set out in the Annex to MNM, provided guidance to Immigration Adjudicators in the conduct of hearings that are attended by the appellant but there is no attendance on behalf of the Secretary of State or Entry Clearance Officer.

47. The Surendran guidelines have been subsequently modified over the years in subsequent decisions which we do not need to deal with since there was no hearing of this appeal in the FtT. Accordingly, nothing we say in this decision should be taken as a departure from any such modification of the Surendran guidelines.

48. We are satisfied that there is nothing in the Surendran guidelines at Annex A of the decision in MNM to the effect that failure by the Secretary of State to comply with directions means that it is not necessary to consider the Secretary of State's case as set out in the refusal letter. There is therefore nothing in MNM which assists the claimant in resisting the Secretary of State's appeal in the instant case.

49. Nevertheless, it so happens that paras 1 and 2 of the Surendran guidelines, set out in the Annex to MNM, make some general points that are relevant to the question we are considering, i.e. whether it is appropriate for a judge to deem that a party no longer pursues his or her case because of a failure to comply with directions. Paras 1 and 2 read:

> "1. Where the Home Office is not represented, we do not consider that a special adjudicator is entitled to treat a decision appealed against as having been withdrawn. **The withdrawal of a decision to refuse leave to enter and asylum requires a positive act on the part of the Home Office in the form of a statement in writing that the decision has been withdrawn.** In the instant case, and in similar cases, this is not the position. The Home Office, on the contrary, requests that the special adjudicator deals with the appeal on the basis of the contents of the letter of refusal and any other written submissions which the Home Office makes when indicating that it would not be represented.
>
> 2. **Nor do we consider that the appeal should be allowed simpliciter. The function of the adjudicator is to review the reasons given by the Home Office for refusing asylum within the context of the evidence before him and the submissions made on behalf of the appellant, and then**

come to his own conclusions as to whether or not the appeal should be allowed or dismissed. In doing so he must, of course, observe the correct burden and standard of proof."

(Our emphasis)

50. In our judgment, the first sentence of para 1 above applies not only where the Home Office is not represented at a hearing but also where a judge is considering whether the failure of the Secretary of State to comply with directions means that she is to be deemed to have withdrawn her decision or conceded an appellant's appeal or not to oppose an appellant's appeal. Judges are not entitled to treat a party to an appeal in the Immigration and Asylum Chamber (IAC) of the FtT as no longer pursuing his or her case simply because that party has failed to comply with directions, even if there is a repeated failure to comply with directions.

51. In part, this is because of the overarching statutory duty in s.86 to determine each ground of appeal. In part, and as is clear from the second sentence of para 1 of the Annex to MNM, it is also because a positive act is required by a party demonstrating clearly that the party no longer pursues his or her case before a judge can be satisfied that that is the case. Nothing less will do. Judges in the FtT (IAC) do not have power to treat an appeal as unopposed on the ground that the party in question has not complied with any requirement of the FtT Rules or a practice direction or any direction(s) of the Tribunal even if the failure to comply is persistent.

52. In the instant case and for the reasons we have given, we are satisfied that the Tribunal had no power to treat the appeal as being unopposed by the Secretary of State simply because she had failed to comply with directions, contrary to Judge Saffer's note following the CMRH on 4 October 2021 stating that the Tribunal did have such a power. It was clear from the Secretary of State's decision letter of 6 May 2021, a copy of which was before both Judge Saffer and Judge Ali, that the Secretary of State took issue with the claimant's credibility. The decision letter of 6 May 2021 specifically stated that the Secretary of State had taken into account her view as expressed in the decision letter dated 14 August 2009 that the claimant's asylum claim was not credible and that he had fabricated his account. The Secretary of State's case was set out clearly in the decision letter. She and she alone could depart from her written case. That would have required positive action on her part, in the form of a concession, either in writing or by oral submissions by a Presenting Officer, that certain issues previously taken against the claimant were no longer pursued. There was no such positive act or concession before Judge Ali.

53. We are therefore satisfied that Judge Ali erred in finding that the Secretary of State did not oppose the claimant's appeal simply because she had failed to comply with directions.

54. It is clear that the Secretary of State's case as set out in the decision letter of 6 May 2021 was not considered at all by Judge Ali. It is contrary to natural justice for a judge not to consider the case advanced by a party to an appeal, as Mr Claire accepted before us.

55. Judge Ali also erred in law by failing to give any reasons for allowing the appeal, in that, he failed to give a reasoned assessment of the factual basis of the claimant's protection claim.

56. Judge Ali's failure to give any reasons for allowing the appellant's appeal is particularly important in the instant case, given that the claimant appealed on asylum grounds (amongst other grounds) and that refugee status is a status that is of international significance and internationally recognised.

(iv) Disposing of an appeal without considering its merits

57. In effect, Judge Ali allowed the claimant's appeal without considering its merits. There is simply no basis upon which any Judge of the FtT (IAC) can dispose of an appeal without considering its merits. There is no statutory provision or procedure rule that permits such a course of action. To the contrary, s.86 of the 2002, in terms, requires judges to determine each ground of appeal.

58. We are fortified in reaching this view by the fact that between 2 October 2000 and 31 March 2003, rule 33 of the then applicable procedure rules (that is, the Immigration and Asylum Appeals (Procedure) Rules 2000) (the "2000 Procedure Rules")) made provision for appeals to be disposed of without considering its merits. In the period from 2 October 2000 until its deletion with effect from 1 April 2003, rule 33 of the 2000 Procedure Rules provided as follows:

> Version in force from 2 October 2000 until 6 January 2002
>
> 33.- Failure to comply with these Rules
>
> (1) Where a party has failed—
>
> (a) to comply with a direction given under these Rules; or
>
> (b) to comply with a provision of these Rules;
>
> and the appellate authority is satisfied in all the circumstances, including the extent of the failure and any reasons for it, that it is necessary to have regard to the overriding objective in rule 30(2), the appellate authority may dispose of the appeal in accordance with paragraph (2).
>
> (2) The appellate authority may—
>
> (a) **in the case of a failure by the appellant, dismiss the appeal or, in the case of a failure by the respondent, allow the appeal, without considering its merits;**
>
> (b) determine the appeal without a hearing in accordance with rule 43; or
>
> (c) in the case of a failure by a party to send any document, evidence or statement of any witness, prohibit that party from relying on that document, evidence or statement at the hearing.
>
> Version in force from 7 January 2002 until 31 March 2003
>
> 33.- Failure to comply with these Rules
>
> (1) Where a party has failed—
>
> (a) to comply with a direction given under these Rules; or
>
> (b) to comply with a provision of these Rules;
>
> the appellate authority shall dispose of the appeal in accordance with paragraph (2) if, after considering all the circumstances, including the extent of the failure

and any reasons for it, it is desirable to do so to give effect to the overriding objective in rule 30(2).

(2) The appellate authority may—

(a) **in the case of a failure by the appellant, dismiss the appeal or, in the case of a failure by the respondent, allow the appeal, without considering its merits;**

(b) determine the appeal without a hearing in accordance with rule 43; or

(c) in the case of a failure by a party to send any document, evidence or statement of any witness, prohibit that party from relying on that document, evidence or statement at the hearing.

59. As can be seen, both versions made provision for the Tribunal to allow or dismiss an appeal without considering its merits. It is unnecessary for us to go into any detail about the case-law that developed on the interpretation and application of rule 33. Suffice it to say that rule 33, as set out above, was deleted with effect from and including 1 April 2003.

60. We attach some significance to the fact that rule 33 in the form set out above was introduced on 2 October 2000 and subsequently deleted without being replaced by another rule permitting a judge of the FtT (IAC) to dispose of an appeal without considering its merits. In our judgment, this shows that, having decided at some stage and for a period of time to confer a power to dispose of an appeal without considering its merits, Parliament subsequently made a decision to remove that power in the case of immigration, humanitarian protection and human rights appeals.

61. For all of the above reasons, including the fact that s.86 of the 2002 Act requires judges in the FtT to determine any mater raised as a ground of appeal, it is our firm view that the judges in the FtT (IAC) do not have power to dispose of any appeal without considering its merits.

(v) Deciding an appeal without a hearing

62. We turn next to consider whether Judge Ali erred in proceeding to decide the appeal without a hearing.

63. Rule 25(1) of the FtT Rules requires the FtT to hold a hearing before making a decision which disposes of proceedings in all cases except in cases falling within rule 25(1)(a) to (g). Rule 25(1)(a) to (g) set out seven exceptions to the requirement that the Tribunal must hold a hearing before making a decision that disposes of the proceedings. In the instant case, the exceptions in rule 25 (1)(e) and (g) are relevant. We set them out here again for convenience.

Consideration of decision with or without a hearing

25. (1) The Tribunal must hold a hearing before making a decision which disposes of proceedings except where—

…

(e) a party has failed to comply with a provision of these Rules, a practice direction or a direction **and the Tribunal is satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing;**

(f) …; or

(g) **subject to paragraph (2), the Tribunal considers that it can justly determine the matter without a hearing.**

(2) **Where paragraph (1)(g) applies, the Tribunal must not make the decision without a hearing without first giving the parties notice of its intention to do so, and an opportunity to make written representations as to whether there should be a hearing.**

(our emphasis)

64. If a judge decides that one or more of the exceptions in rule 25(1) is satisfied, then the judge must explain which exception is satisfied and why by engaging with the pre-requisites specified in the relevant sub-rule of rule 25(1), stating whether they are satisfied and if so, why, and giving reasons for how any discretion conferred by the relevant sub-rule has been exercised and/or how any judgment required to be made was made.

65. In addition, if credibility is in dispute, the judge must provide an explanation of the disputed facts and their relevance or otherwise to the outcome of the appeal and go on to explain why the relevant exception in rule 25(1) nevertheless applies notwithstanding the disputed fact. Judges are reminded that a hearing should be held whenever credibility is disputed on any material issue or fact. Cases in which it would be appropriate to determine an appeal without a hearing if credibility is in issue would be rare indeed. In almost all cases, the appropriate course of action would be to list the case for a hearing and decide the case on such material as is before the Tribunal.

66. For the exception in rule 25(1)(e) to apply, mere non-compliance with a provision of the FtT Rules, a practice direction or a direction is not in itself sufficient to permit a judge to decide an appeal without a hearing. The Tribunal must, in addition, be "*satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing*". The judge's written decision must therefore identify the procedural failure or failures in question, explain the judge's view of their causes on such evidence as is before the judge as well as explain the persistence and gravity of the procedural failure or failures. The written decision must explain the extent to which such failures have obstructed the overriding objective and why the judge is "*satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing*". If credibility is in issue on any material aspect of the claimant's case, the judge's written decision must explain why it is nevertheless appropriate in all of the circumstances to decide the appeal without a hearing and the relevance of the procedural failure(s) to it becoming appropriate to decide the appeal without a hearing.

67. For the exception in rule 25(1)(g) to apply, rule 25(2) has to be satisfied. If a judge proceeds to decide an appeal without a hearing under rule 25(1)(g), the judge's written decision must demonstrate why rule 25(2) is satisfied and go on to explain why the judge has concluded that the appeal can justly be determined without a hearing notwithstanding any dispute there may be as to the credibility of any material fact.

68. In the instant case, it is clear that the following errors were made:

(i) We do not accept Mr Claire's submission that it is implicit that Judge Ali did decide that it was appropriate to decide the appeal on the papers. There is simply nothing in Judge Ali's decision that shows that he had considered whether he was "*satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing*". He did not even mention rule 25. In these circumstances, it would be entirely wrong for us to infer that he must have been aware of his duty to considered rule 25 and had considered it. We are satisfied that he failed to consider rule 25(1). He therefore erred in law.

(ii) Judge Ali failed to notice that, whilst Judge Saffer reminded the Secretary of State that the Tribunal could determine the appeal without a hearing, the parties were not given an opportunity to make written representations as to whether there should be a hearing. Judge Ali therefore failed to note that rule 25(2) was not satisfied.

For these reasons, we do not agree with the observation of Judge Mills in the permission decision that the FtT was *"likely entitled to determine the appeal on the papers without a hearing*" and we do not agree with the Secretary of State's position in her skeleton argument that Judge Ali could not have been criticised if he had considered the merits of the claimant's protection claim on the papers.

(iii) The last sentence of para 1 of Judge Ali's decision, taken together with paras 3 and 4, clearly show that Judge Ali decided that this appeal was no longer "*scheduled to be determined … in a face to face hearing*" because of the Secretary of State's "*failure to comply with directions and be a party to these proceedings*". However, as we have seen from rule 25(1)(e), a decision to proceed without a hearing cannot be based solely on a party's non-compliance with directions. Furthermore, the Secretary of State had not withdrawn from the proceedings. Judge Ali therefore gave no sustainable legal reasons for proceeding without a hearing.

69. It is clear that the appeal came before Judge Ali *as a paper case*. In other words, a decision had been made by some unidentified person to place the case in a paper list. It may well be that that person was a member of the administration as opposed to a judge. We do not know. Any decision whether to proceed without a hearing is a judicial one to be made by the judge who decides the appeal without a hearing. The mere fact that a case has been placed in a paper list does not and cannot detract from the duty placed on the judge before whom the case is listed to consider for himself or herself whether one or more of the exceptions in rule 25(1) apply. If, having considered rule 25, the judge is not satisfied that at least one of the exceptions in rule 25(1)(a) to (g) is satisfied, the judge must decline to decide the appeal without a hearing and direct the administration to list the appeal for a hearing.

(vi) Rule 28 of the FtT Rules

70. The claimant's rule 24 reply relies upon rule 28 of the FtT Rules. However, this rule is not relevant in the instant appeal given that it applies when a party fails to attend a hearing whereas the difficulty in the instant case is that the FtT did not list this appeal for hearing.

(vii) Summary

71. Judges in the FtT (IAC) do not have power to dispose of an appeal without considering its merits. This is because of the statutory duty under s.86 of the 2002 Act to determine each matter raised as a ground of appeal.

72. Every judge seized of an appeal must reach his or her own decision on the case and must exercise for himself or herself any available discretion. Judges who give directions must be careful to ensure that the wording of their directions does not and cannot be perceived to direct how another judge should dispose of the appeal or exercise any available discretion. If a judge tasked with deciding an appeal is faced with any direction that may be so perceived, the judge must make it clear in the decision that he/she has considered the matter for himself/herself.

73. A positive act is required by a party demonstrating clearly that the party no longer pursues his or her case before a judge can be satisfied that that is the case. Nothing less will do. Judges in the FtT (IAC) do not have power to treat an appeal as unopposed on the ground that the party in question has not complied with any requirement of the FtT Rules or a practice direction or any direction(s) of the Tribunal even if the failure to comply is persistent.

74. The following guidance applies when consideration is being given to whether or not an appeal should be disposed of without a hearing:

(i) Rule 25(1) of the FtT Rules provides that the FtT (IAC) must hold a hearing which disposes of proceedings except where rule 25(1)(a) to (g) apply. Seven exceptions to the general rule are provided for in rule 25(1)(a) to (g).

(ii) Any decision whether to decide an appeal without a hearing is a judicial one to be made by the judge who decides the appeal without a hearing. The mere fact that a case has been placed in a paper list does not and cannot detract from the duty placed on the judge before whom the case is listed as a paper case to consider for himself or herself whether one or more of the exceptions to the general rule apply. If, having considered rule 25, the judge is not satisfied that at least one of the exceptions in rule 25(1)(a) to (g) is satisfied, the judge must decline to decide the appeal without a hearing and direct the administration to list the appeal for a hearing.

(iii) If a judge decides that one or more of the exceptions in rule 25(1) is satisfied and therefore decides an appeal without a hearing, the judge's written decision must explain which exception is satisfied and why by engaging with the pre-requisites specified in the relevant provision and giving reasons for how any discretion conferred by the relevant exception has been exercised and/or how any judgment required to be made is made. Furthermore:

(a) For the exception in rule 25(1)(e) to apply, mere non-compliance with a provision of the FtT Rules, a practice direction or a direction is not in itself sufficient to permit a judge to decide an appeal without a hearing. The Tribunal must, in addition, be "*satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing*". The judge's written decision must

therefore identify the procedural failure or failures in question, explain the judge's view of their causes on such evidence as is before the judge as well as explain the persistence and gravity of the procedural failure or failures. The written decision must explain the extent to which such failures have obstructed the overriding objective and why the judge is "*satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing*". If credibility is in issue on any material aspect of the claimant's case, the judge's written decision must explain why it is nevertheless appropriate in all of the circumstances to decide the appeal without a hearing and the relevance of the procedural failure(s) to it being deemed appropriate by the judge to decide the appeal without a hearing.

(b) For the exception in rule 25(1)(g) to apply, rule 25(2) has to be satisfied. If a judge proceeds to decide an appeal without a hearing under rule 25(1)(g), the judge's written decision must demonstrate why rule 25(2) is satisfied and go on to explain why the judge has concluded that the appeal can justly be determined without a hearing notwithstanding any dispute there may be as to the credibility of any material fact.

(iv) A hearing should be held whenever credibility is disputed on any material issue or fact. Cases in which it would be appropriate to determine an appeal without a hearing if credibility is materially in issue would be rare indeed. In almost all cases, the appropriate course of action would be to list the case for a hearing and decide the case on such material as is before the Tribunal.

(viii) Decision in the instant case

75. Given our decision that Judge Ali erred by failing to consider rule 25(1) before proceeding to decide the appeal without a hearing, that he erred by failing to consider the merits of the claimant's protection claim and that he erred by failing to give any reasons at all for his decision to allow the claimant's appeal, we are satisfied that the effect of his errors has been to deprive the Secretary of State of a fair hearing. We are therefore satisfied that para 7.2(a) of the Practice Statements for the Immigration and Asylum Chamber of the First-tier Tribunal and the Upper Tribunal applies as well as para 7.2(b) of the Practice Statements.

76. This appeal is therefore remitted to the FtT for a hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal Ali and Judge of the First-tier Tribunal Saffer.

(ix) Wasted cost order

77. Mr Claire accepted that, if the Secretary of State were to succeed in this appeal, the claimant's application for a wasted costs order against the Secretary of State in respect of costs incurred by him in the Upper Tribunal is bound to fail. He was undoubtedly correct to do so. This is because the claimant has incurred his costs in the Upper Tribunal not because of any failures on the part of the Secretary of State but because Judge Ali had erred in law in reaching his decision on the appeal, for the reasons we have given above.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision to allow the appeal is set aside. This case is remitted to the First-tier Tribunal for a hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal Ali and Judge of the First-tier Tribunal Saffer.

Signed

Upper Tribunal Judge Gill