Neutral Citation Number: [2022] EWCA Civ 145

Case Nos : C9/2020/1862 & C5/2021/0004

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2022

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE KING
and
LORD JUSTICE DINGEMANS

- -

Between :

HAMID HUSSAIN	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
And between	
GA (ETHIOPIA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

Gordon Lee and Ali Bandegani (instructed by **Braitch Solicitors**) for the **Appellant Hamid Hussain**

Charlotte Kilroy QC and Tasaddat Hussain (instructed by **Fountain Solicitors**) for the **Appellant GA**
John-Paul Waite (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 26 & 27 January 2022

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Approved Judgment

Lord Justice Dingemans:

Introduction

1. These two appeals, which have been heard together, raise issues about whether paper determinations of appeals from the First-tier Tribunal ("FTT") carried out by the Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") should be set aside on appeal to this Court. The paper determinations had been made pursuant to Rule 34 of the Upper Tribunal ("UT") Rules, after the onset of the COVID-19 pandemic.

2. The appeals raised a common ground of appeal in relation to paper determinations which were made after a guidance note issued by the President of UTIAC on 23 March 2020 ("the guidance note") at the beginning of the COVID-19 pandemic. The guidance note had been issued after the Senior President of Tribunals ("the SPT") had issued a Pilot Practice Direction on 19 March 2020.

3. Paragraphs 9 to 17 of the guidance note had subsequently been held to be unlawful by the High Court in *Joint Council for the Welfare of Immigrants v President of the Upper Tribunal (Immigration and Asylum Chamber)* [2020] EWHC 3103 (Admin); [2021] PTSR 800 ("*JCWI v President of UTIAC"*). The decision in *JCWI v President of UTIAC* was made on 20 November 2020 following a hearing on 21 and 22 October 2020. In that case it was held that guidance in the guidance note was unlawful because, objectively interpreted, it gave advice which was wrong in law and which would tend to encourage unlawful decisions about when to determine appeals on paper. This was because the guidance note did not make it sufficiently clear that any decision to determine an error of law appeal without a hearing had to be consistent with principles of fairness.

4. There were about 150 appeals which had been determined on the papers adversely to persons appealing against immigration and asylum decisions of the Secretary of State for the Home Department ("the Secretary of State"). The appeals determined on the papers adversely to the Secretary of State were not challenged on the grounds that they had been determined on paper.

5. Following the decision in *JCWI v President of UTIAC* some appellants to UTIAC whose appeals had been determined against them on paper made an application under Rule 43 of the Upper Tribunal Rules to set aside the paper determinations. They submitted that the effect of *JCWI v President of UTIAC* meant that the paper determinations of their appeals from the FTT should be set aside.

6. In *EP(Albania) and others* [2021] UKUT 233 (IAC) eighteen of these Rule 43 applications were heard by UTIAC (Swift J and UTJ Blundell) ("*EP(Albania)*") on 10, 11 and 29 June 2021. The decision and reasons in *EP(Albania)* were promulgated on 2 September 2021 (although the date does not appear on the decision). The UT held that not all appeals which had been determined on the papers after the guidance note had been issued should be set aside. Each Rule 34 decision to have a paper determination was a reasoned decision and the merits of the Rule 43 applications must be determined on consideration of the reasons given in each case.

7. At paragraphs 67 to 69 of the judgment in *EP(Albania)* the Upper Tribunal concluded that there was "no single, one size fits all, answer to the Rule 43 applications". The

Upper Tribunal held that a decision to determine the appeal on the papers would be unlawful if there had been a failure to act fairly and there would be a need to consider whether the "reasons 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". It was held that sixteen of the applications to set aside the paper determinations under Rule 43 should be refused. In two applications there had been specific errors in the decisions to have a paper determination which led to the setting aside of those determinations.

Some procedural matters on the appeal

8. After the decision in *EP(Albania)* had been made, I granted permission to appeal on the papers to both Hamid Hussain and GA on 5 October 2021. The permission to appeal order recorded that the appeals raised issues relating to: the guidance note; the decision in *JCWI v President of UTIAC*; and the decision in *EP(Albania)*. These issues had been raised in a considerable number of other applications for permission to appeal to the Court of Appeal and I directed that the appeal should be heard in 2021 if possible. In the event the appeals were listed to be heard on 26 and 27 January 2022.

9. As a result of an oversight in the Government Legal Department, the grant of permission to appeal and the directions were overlooked on behalf of the Secretary of State. This oversight was identified in December 2021 and thereafter the parties made attempts to agree revised timetables. In the event an application to adjourn the appeal was made on behalf of the Secretary of State because of the oversight, because there had been delays in service of a Skeleton Argument on behalf of one of the appellants, and because the Secretary of State had made an open offer to compromise GA's appeal because it had been accepted that submissions on behalf of that appellant asking for an oral hearing had been overlooked.

10. There was a directions hearing before me on Friday 14 January 2022. I refused the Respondent's application to adjourn the appeals. This was because it became apparent at the hearing that, with the co-operation of all the parties, it would be possible to have effective and fair appeals, and because there is an interest in resolving the general issues raised by the appeals because of the number of other applications for permission to appeal which raise overlapping grounds of appeal. It was common ground at the hearing on 14 January 2022 that the issues of whether the decisions in *JCWI v President of UTIAC* and *EP(Albania)* were inconsistent, and if so whether the approach in *EP(Albania)* ought to be preferred, could be determined at the hearing of the appeal.

11. The directions given on 14 January 2022 included a direction that an amended Skeleton Argument and any amended Respondent's Notices be served on behalf of the Secretary of State by 4 pm on Wednesday 19 January 2022. In the amended Respondent's notice the Secretary of State submitted that the decision in *JCWI v President of UTIAC* was wrong. Reliance was placed on what had been said in *R(A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931 about the test for determining guidance to be unlawful as set out in *R(Letts) v Lord Chancellor* [2015] EWHC 402 (Admin); [2015] 1 WLR 4497. *R(Letts)* had been referred to and applied in *JCWI v President of UTIAC*.

12. Objection was taken on behalf of GA, supported by an objection on behalf of Mr Hussain, to the fact that the Secretary of State was now submitting that *JCWI v The President of UTIAC* was wrongly decided and a further directions hearing was arranged for Friday 21 January 2022. It was submitted on behalf of GA and Mr Hussain that the appellants would not be ready to deal with the submission that *JCWI v President of UTIAC* was wrongly decided, and that if that submission might be entertained then the appeal should be adjourned. This was because the issue about *JCWI v President of UTIAC* had only been raised in terms some four working days before the hearing of the appeal, there would not be enough time at the appeal to determine the issue (the hearing in *JCWI v President of UTIAC* in the High Court had taken two days alone), it would be unfair on others, including the successful claimants in that case, to determine the issue without them intervening, and it was an abuse of process to raise the issue in circumstances where there was no appeal from the decision. It was submitted on behalf of the Secretary of State that there was no abuse, and that the point was a short legal point and followed from the decision of the Supreme Court in *R(A) v Secretary of State for the Home Department* which had shown that the test relied on in *JCWI v President of UTIAC* was in error.

13. I refused the Appellants' application to adjourn the appeal and directed that the issue of whether the Secretary of State should be permitted to amend the Respondent's notice to submit that *JCWI v The President of UTIAC* was wrong should be addressed at the hearing of the appeal.

14. At the beginning of the hearing the Master of the Rolls announced that the Court's provisional view was that it would not determine, on the hearing of these appeals, whether the judgment in *JCWI v The President of UTIAC* was rightly decided. If that provisional view changed the parties would be notified and given further time to address the particular issue of whether *JCWI v President of UTIAC* was rightly decided. In my judgment there is no need to determine that issue for the reasons set out below.

Issues on the appeal

15. By the conclusion of the oral argument on this appeal the respective positions of the appellants and respondent had narrowed considerably. I have recorded what became common ground in the hearing. This is because it may assist in determining future applications for permission to appeal and any appeals, where the issue of paper determination of appeals in UTIAC arises again. It became common ground that UTIAC could, after the guidance note had been issued on 23 March 2020, determine an error of law appeal from the FTT on the papers, so long as it was fair to do so. Therefore the critical issue for the Court of Appeal will be to decide whether such a paper determination by UTIAC of the appeal from the FTT satisfied the common law requirements of fairness.

16. In that respect both parties cited numerous authorities about what common law fairness required in different cases, and when oral hearings might be necessary. It is sufficient for the purposes of these appeals to say only that what fairness requires will depend on the circumstances of the particular case. In *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560 Lord Mustill said that "the standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decision of a particular type … What fairness demands is dependent on the context of the decision, and this is to be taken

into account in all its aspects." Lord Reed made a similar point in *R(Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 at paragraph 80 when he said "what fairness requires … depends on the circumstances. As these can vary greatly from one case to another, it is impossible to lay down rules of universal application", although the Court then did give some general guidance. It was also common ground between the parties that, if there had not been a fair determination of the appeal in UTIAC then, absent showing that the result of the appeal would inevitably have been the same, UTIAC's determination should be set aside.

17. It was in these circumstances that it became clear that it would not be necessary for this Court to determine the issue raised by the Secretary of State's late amended Respondent's Notice about whether the decision *JCWI v The President of UTIAC* was rightly decided. That particular issue can be determined, if necessary, in an appeal in which it arises. The reason that it is not necessary to determine whether *JCWI v The President of UTIAC* was rightly decided is because that judgment was looking at a different issue, namely whether the objective interpretation of the guidance note communicated a usual position whereby UTIAC substantive appeals would be determined on the papers (which Fordham J. had called "an overall paper norm") which would have been inconsistent with the proviso in paragraph 4 of the Practice Direction issued by the SPT on 20 March 2020, and common law fairness.

18. The position in these appeals is different. This Court is not looking at whether, objectively judged, the guidance note had the potential to mislead UT judges to make unfair, and therefore unlawful, determinations on paper. The issue before this court is whether the paper determinations were in fact unfair.

19. For broadly similar reasons in my judgment the UT was right in *EP(Albania)* to reject the submission that, as a result of the judgment in *JCWI v President of UTIAC,* the determinations on paper made by UTIAC after the guidance note had been produced, should be set aside. This is because the question is whether it was fair to determine the matter on the papers.

20. By the conclusion of the hearing and the refinement of the issues between the parties it became clear that the issue in Mr Hussain's appeal was whether there was a fair paper determination of his appeal generally and specifically because his written submissions dated 2 April 2020 were not considered, and because the UT Judge did not engage with a number of arguments as to why the FTT Judge had erred in law in making certain findings of fact.

21. So far as GA's appeal is concerned, the Secretary of State accepts that there was an error of law in the proceedings before UTIAC and that GA's appeal should be allowed. This was because the UT Judge did not appear to have given express consideration to whether it was fair to determine the appeal on the papers, and because the UT Judge did not appear to have been shown submissions by GA dated 23 July 2020 requesting an oral hearing.

22. There were also issues between the Secretary of State and GA about whether this Court should itself determine whether there was also an error of law in relation to the FTT's approach to GA's risk of persecution. If it was decided that there was such an error then an error of law hearing before the UT could be avoided and a new decision could

be made by either the FTT or UT. It was also submitted that this Court should give directions to the UT about the mode of hearing of any remitted appeal.

23. I am very grateful to Mr Gordon Lee and Mr Ali Bandegani, Ms Charlotte Kilroy QC and Mr Tasaddat Hussain, and Mr John-Paul Waite, and their respective legal teams, for all their hard work in preparing for the appeals and for their helpful written and oral submissions.

Relevant provisions of the Upper Tribunal Rules

24. Rule 34 of the Upper Tribunal Rules provides:

> "34.— Decision with or without a hearing
>
> (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
>
> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
>
> (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
>
> (4) …"

25. Rule 43 of the Upper Tribunal Rules provides:

> "43.— Setting aside a decision which disposes of proceedings
>
> (1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if— (a) the Upper Tribunal considers that it is in the interests of justice to do so; and (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are— (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative; (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time; (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or (d) there has been some other procedural irregularity in the proceedings.
>
> (3) …"

26. Rule 43(3) made provision for time limits for making the application.

Material parts of the Pilot Practice Direction and Guidance Note

27. The SPT issued the Pilot Practice Direction on 19 March 2020. This included, at paragraph 4:

> "Decisions on the papers without a hearing "Where a Chamber's procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties' ECHR rights and the Chamber's procedure rules about notice and consent."

28. The President of UTIAC issued the guidance note on 23 March 2020. Material provisions of the guidance note are set out in paragraphs 3.9 and 3.10 of the judgment in *JCWI v President of UTIAC*.

Background and proceedings below for Mr Hussain

29. Mr Hussain entered the UK in 2010 with leave to enter as a student. On 19 May 2015 and on 31 August 2018 he applied for a residence card as an extended family member of an EEA national (his uncle) pursuant to the Immigration (European Economic Area) Regulations 2016. This was on the basis that when he lived in Pakistan he was financially dependent on his uncle who had left Pakistan in 1990, moved to Holland and who had entered the UK in 2007. It was common ground that the appellant was a nephew of an EEA national. The issues were whether there was evidence of either prior dependency on his uncle when Mr Hussain lived in Pakistan and either present dependency on his uncle or present membership of his uncle's household in the UK, see generally *Dahuoo (EEA Regulations) Mauritius* [2012] UKUT 79. The factual issue which divided the parties was whether Mr Hussain had been dependent on his uncle in Pakistan. The earlier applications were refused because insufficient evidence of dependence in Pakistan had been given.

30. On 12 December 2018 Mr Hussain again applied for a residence card on the same basis. That further application was refused by letter dated 22 February 2019. So far as is relevant, the refusal letter relied on the fact that the payment of fees to the University of Wolverhampton had been made in August 2010 after Mr Hussain had entered the UK, and was not evidence of dependence in Pakistan. The refusal letter also stated that on entry to the UK Mr Hussain had listed another person, and not his uncle, as his sponsor. It was said that money payments and receipts did not show dependence in Pakistan on the uncle.

31. Mr Hussain appealed to the FTT. Mr Hussain and his uncle gave evidence. On 26 September 2019 FTT Judge Bart-Stewart dismissed the appeal. The FTT Judge explained how none of the documents evidenced the financial dependency of Mr Hussain on the uncle when Mr Hussain was living in Pakistan.

32. Mr Hussain applied for permission to appeal to the Upper Tribunal on the basis that the FTT Judge had erred in assessing the evidence of dependency in Pakistan. On 28 February 2020 the application for permission to appeal was granted by FTT Judge Macdonald. This included the then standard directions for an oral hearing.

33. As a result of the developing COVID-19 pandemic, on 18 March 2020 the Vice President of UTIAC sent out written directions. He stated that he had reached a provisional view that it would be appropriate to determine the error of law and the decision whether to set aside the FTT decision without a hearing. He directed that any party who considered a hearing to be necessary should make written submissions.

34. The SPT's Practice Direction was issued on 20 March 2020. The guidance note was issued on 23 March 2020. It should be noted that the Vice President's direction in Mr Hussain's appeal to the UT pre-dated the guidance note dated 23 March 2020.

35. Written submissions drafted by counsel previously instructed dated 2 April 2020 were filed on behalf of Mr Hussain. At paragraph 3 of these submissions it was stated: "The appellant submits that some form of hearing in the instant case is appropriate and is (at least arguably) necessary in order to provide the appellant with an effective hearing of this error of law appeal. In line with the said directions, the appellant may provide reasons in support of this proposition in a separate document which is to be filed by 9 April. He reserves the right to do so". The document then addressed and summarised Mr Hussain's grounds of appeal which it was noted had not been expressed either with concision or precision.

36. Mr Lee submitted that the 2 April 2020 document was a recasting of the grounds of appeal. He referred to specific points made in the 2 April 2020 document relating to the Habib bank receipts and a ledger.

37. Written submissions on behalf of the Secretary of State were lodged on 3 April 2020. In these submissions the grounds of appeal were addressed and it was submitted that there were no errors of law in the FTT decision.

38. Counsel on behalf of Mr Hussain produced further written submissions dated 9 April 2020. These were 4 pages long. In this document it was submitted that the appeal should be stayed or adjourned, but that in default of a stay or adjournment there should be an oral hearing because of the central place of oral argument in English legal proceedings.

39. Further written submissions in reply to the submissions of the Secretary of State's submissions dated 3 April 2020, were produced by counsel dated 16 April 2020. These were 11 pages long. Mr Lee also pointed out that in this document dated 16 April 2020 there was reference back to the document dated 2 April 2020 (although the 2 April 2020 submissions were misdescribed as being dated 18 March 2020).

40. On 1 May 2020 the UT Judge issued written directions. He referred to the Vice President's directions and stated that: '…What is clearly anticipated by such directions was that there will be a sequential opportunity for the parties to comment upon each other's further observations. Despite that the first document to be received was that of 3 April 2020 from the Secretary of State. The first communication from the appellant was not received until 9 April 2020 which, rather than dealing with the specific terms of the Vice President's direction, applied for an adjournment claiming the hearing should be stayed for a face-to-face hearing after the Covid 19 emergency had subsided relying upon the letter from ILPA dated 2 April 2020 which was annexed… There then followed further written submissions received on 16 April 2020 from the appellant described as being submissions in reply. Whilst these seek to respond to those provided

by the Secretary of State's representative they are the first detailed submissions made as to the making of an error of law and the failure to provide the same in the first submissions deprived the Secretary of State with the opportunity to respond to the same. This is procedurally unfair.' (underlining added). The UT Judge then made directions providing for the Secretary of State to file and serve submissions if so advised. It was apparent from the terms of the directions dated 1 May 2020 that the UT Judge could not have been provided with the written submissions dated 2 April 2020 filed on behalf of Mr Hussain.

41. Mr Hussain's solicitors emailed the Upper Tribunal on 12 May 2020 and 18 May 2020 to point out that submissions had in fact been lodged on 2 April 2021 in accordance with the directions. On 15 May 2020 the Secretary of State confirmed by email that she had received the submissions dated 2 April 2020. This was also proved by the Secretary of State's own submissions dated 3 April 2020 which referred to Mr Hussain's submissions dated 2 April 2020. For example at paragraph 1 of the Secretary of State's submissions dated 3 April 2020 noted that they were, in part, "… in response to the Appellant's further submissions dated 2nd April 2020…".

Decision and reasons of the Upper Tribunal in Mr Hussain's appeal dated 27 May 2020

42. On 27 May 2020 the UT Judge promulgated a written decision and reasons. The decision and reasons were headed in the top left "On the papers, pursuant to COVID-19 UTIAC directions, on 18 May 2020". At paragraph 2 of the decision it was stated: "Following the closure of Field House and adjournment of UTIAC hearings outside London a direction was sent to the parties on 20 March 2020 indicating a preliminary view that the error of law hearing was suitable for determination remotely and providing an opportunity for the parties to respond. A response was received but not in the terms anticipated by the directions. Accordingly further directions were issued and sent [to] the parties on 12 May 2020 a copy of which is set out at Annex A. On 14 May 2020, the respondents representative emailed UTIAC advising that the Secretary of State did not wish to file any further submissions." (underlining added).

43. The UT Judge recorded that it was for the Upper Tribunal to determine what form of hearing should take place and that there was no right to face to face hearings enshrined in law but it was a protected concept that there should be fairness and the interests of justice in the manner in which a case was decided.

44. The UT Judge dismissed the appeal on the merits on the basis that the FTT Judge had considered all the relevant evidence and reached a permissible decision on the facts about Mr Hussain's lack of dependency on his uncle.

45. At the end of the decision and reasons there was a stamp above the UT Judge's name and the decision was dated "18 May 2020". Immediately below that date was an annexe A. This annexe comprised the directions made by the UT Judge on 1 May 2020. This included the statement in those written directions by the UT Judge that although the Vice President's directions contemplated submissions from the appellant to be filed first, "despite that the first document to be received was that of 3 April 2020 from the Secretary of State."

46. After the decision and reasons had been sent to the parties permission to appeal to the Court of Appeal was sought on behalf of Mr Hussain. Ground two of the grounds of appeal dated 10 June 2020 asserted that the Upper Tribunal had committed a procedural error by failing to consider correspondence from the parties identifying that submissions dated 2 April 2020 had been filed on behalf of Mr Hussain.

47. Permission to appeal was refused by the UT Judge in a decision dated 8 September 2020. In the reasons refusing permission to appeal it was recorded that "it was not a requirement to set out each and every aspect of the evidence, but all pleadings and available material was properly considered by the Upper Tribunal". The reasons provided that "whilst directions issued indicated a failure to serve written submissions in accordance with Mr Ockleton's directions, the chronology was clarified at a later stage, leading to all submissions being taken into account". It was not apparent from the material or submissions before this Court when the chronology had been clarified at a later date.

No fair determination of Mr Hussain's appeal to UTIAC

48. It is clear that the UT Judge did not have Mr Hussain's submissions dated 2 April 2020 before making the directions dated 1 May 2020. This is because those directions specifically recorded what submissions had been received, wrongly stated that the Secretary of State's response was the first document received, and stated that the failure to file submissions first on behalf of Mr Hussain had been "procedurally unfair". It was unfortunate that Mr Hussain should have been blamed for a failing which had not taken place.

49. It is apparent that those then acting on behalf of both Mr Hussain and the Secretary of State attempted to draw the attention of the UT Judge to the submissions dated 2 April 2020 in emails to the UT. However it seems clear that these cannot have been received by the UT Judge before the paper determination of the appeal. This is because the decision expressly recorded at the outset that directions had been sent out and "a response was received but not in the terms anticipated by the directions", which must have been a reference to what was (wrongly) considered to have been the failure on behalf of Mr Hussain to comply with the directions. This conclusion is supported by the fact that the directions dated 1 May 2020, in which it was expressly stated that what had been done on behalf of Mr Hussain was "procedurally unfair", were annexed as part of the decision and reasons. There was nothing in the decision and reasons promulgated by the UT Judge to suggest that that comment had been recognised to have been mistaken.

50. Mr Waite, on behalf of the Secretary of State, properly drew attention to the reasons given by the UT Judge when refusing permission to appeal to the Court of Appeal. As noted above these were to the effect that the chronology had been clarified at a later date and that all submissions had been taken into account. It is clear however that whatever was thought by the UT Judge when dealing with the application for permission to appeal, which application was determined on 8 September 2020, nearly four months after the decision and reasons dated 18 May 2020, the submissions dated 2 April 2020 were not taken into account by the UT Judge. The fact that documents which had been filed on behalf of parties might not have been supplied to judges is not particularly surprising given the disruption caused to office systems during the pandemic, and particularly during the early phases of the pandemic.

51. Mr Waite also pointed out that many of the submissions made in the 2 April 2020 document had been repeated in the submissions dated 16 April 2020. I agree that many submissions were repeated but I do not consider that to have cured the unfairness to Mr Hussain in this particular case of his submissions being overlooked. First this is because not all of the submissions were repeated, and there was express reference back from the 16 April 2020 submissions to the earlier submissions (although inaccurately described as being dated 18 March 2020, which was also probably another example of the difficulties created to everyone by the pandemic). Secondly it is because the UT Judge had expressly stated that Mr Hussain's failure to follow the direction was procedurally unfair. This would have been a perfectly proper conclusion if it had been accurate, but it was based on mistaken information and Mr Hussain would be entitled to feel a sense of grievance at having been wrongly accused of having been responsible for some procedural unfairness.

52. In all these circumstances in my judgment the determination of Mr Hussain's appeal on the papers did not satisfy the requirement of common law fairness. I would therefore allow Mr Hussain's appeal against the decision and reasons promulgated on 27 May 2020 and remit the appeal to the UT.

Background and proceedings below for GA

53. GA arrived in the UK. He applied for asylum but this was refused by the Secretary of State by letter dated 5 August 2019 who did not accept GA's claims because of what was said to be vague and inconsistent answers in interview. GA appealed against that refusal and there was a hearing in the FTT. By a determination dated 3 February 2020 the FTT Judge dismissed GA's appeal. The FTT accepted that GA may well have been a supporter of the opposition party Patriotic Ginbot 7 ("PG7") but rejected GA's account that he had been detained and ill-treated in Ethiopia and held that GA had not been of interest to the Ethiopian authorities. It was accepted that GA was a member of PG7 in the UK but there was nothing to suggest that he had undertaken any activities in the UK which would attract the adverse attention of Ethiopian authorities. GA's appeal to the FTT was therefore dismissed.

54. GA sought permission to appeal to the Upper Tribunal on, among other grounds, the basis that it was arguable that the FTT Judge had failed to make findings about whether GA faced a risk of persecution arising from the fact that he had become a member of the political group known as PG 7 in the UK, and had not provided adequate reasons for the findings.

55. On 23 March 2020 the guidance note was issued. Permission to appeal was granted on 18 May 2020 on the basis that it was arguable that having made a finding that as GA was a member of PG7 in the UK it should have considered whether that fact meant that GA was at real risk of harm in Ethiopia.

56. On 1 June 2020 the UT Judge sent out directions dated 29 May 2020 further to the grant of permission to appeal on 18 May 2020. The UT Judge recorded that "I have reached the provisional view that it would in this case be appropriate to determine" whether the FTT's decision contained an error of law or whether that decision should be set aside in a paper determination. GA was invited to make further submissions on the error of law alleged in the FTT determination, in particular in relation to the second and third grounds which were said not to be particularised in any detail. The Secretary of State

was given a right to reply, with a final right to respond to GA. At paragraph 3 of the directions it was provided: "Any party who considers that despite the foregoing directions a hearing is necessary … must submit reasons for that view no later than 21 days after this notice is sent out …".

57. GA served further submissions on 15 June 2020 and 29 June 2020. In undated written submissions served on 15 June 2020 GA set out further submissions in support of the grounds of appeal. Under a heading "Conclusions" it was submitted at paragraph 4.1 "In the event that a material error of law is found within the FTT determination, the Appellant requests for the FTT Judge's credibility finding(s) in respect of his membership to the PG7, to be reserved, and matters involving the making of an error of law(s) to be reconsidered at an oral hearing." The same formulation was used in the submission dated 29 June 2020 at paragraph 1.11. Ms Kilroy agreed that it was not entirely easy to read this paragraph, but accepted that it was not a request for an oral hearing of the error of law appeal.

58. The Secretary of State had sent a letter dated 17 June 2020 in response to the directions dated 1 June 2020. It seems that these were received by the Upper Tribunal on 23 June 2020. The Secretary of State recorded that she had not received a copy of the grant of permission to appeal, and understood that GA's legal representatives had also not received it. The letter also dealt with the merits of GA's claim, noting that the Country Guidance in *MB (OLF and MTA – risk) Ethiopia CG* [2007] UKAIT 00030 ("*MB CG"*) had been decided 13 years ago and reflected the country situation at the time. It was said that since April 2018 Oromo Liberation Front ("OLF") and PG7 were "no longer proscribed organisations". It was common ground that this letter raised a new argument of fact suggesting that the UT should depart from the existing Country Guidance in *MB CG*. In the reply on behalf of GA dated 29 June 2020 it was said that materials post-dating *MB CG* showed that the Ethiopian regime continued to target members and supporters of opposition groups in Ethiopia.

59. On 10 July 2020 the UT sent out the order granting permission to appeal which had been dated 18 May 2020 and the 29 May 2020 directions. The Upper Tribunal also sent out the directions which were dated 29 May 2020. These directions included paragraph 3 which provided: "Any party who considers that despite the foregoing directions a hearing is necessary … must submit reasons for that view no later than 21 days after this notice is sent out …".

60. It is not clear whether it was actually intended to invite a second round of submissions from the parties about whether an oral hearing was necessary but that was the effect of the directions. In this respect it is fair to note that since the first representations had been made the Secretary of State had raised the issue about the continuing applicability of the Country Guidance in *MB CG* and it might have been thought necessary to revisit the issue about whether an oral hearing was necessary in the light of that development.

61. On 23 July 2020 legal representatives on behalf of GA sent representations to the Upper Tribunal. These were stated to be served in accordance with the directions of 10 July 2020. In these directions it was recorded that the appellant requested an oral hearing, and submitted that it was necessary for oral submissions to be heard and considered. This seems to have been in the light of the issue raised about Country Guidance.

Decision and reasons of the Upper Tribunal in GA's appeal dated 2 September 2020

62. On 2 September 2020 the UT Judge promulgated a decision and reasons. In the top left of the decision it was recorded "Heard at Field House on 26 August 2020". The decision was dated 26 August 2020 and it appears that the use of the word "Heard" was a reference to the date on which the decision on the papers was made at Field House. It was common ground that there was no hearing on 26 August 2020.

63. At paragraph 11 of the decision it was recorded that the Upper Tribunal had sent out triage directions in the light of the COVID-19 pandemic. It was recorded at paragraph 12 of the decision that "both parties were directed to say whether they considered that a further hearing, oral or remote, was required. In default, the appeal would be considered on the papers and triage submissions, if any." The UT Judge referred to the first set of submissions made on behalf of GA on the merits of the appeal which had not asked for an oral hearing. The UT Judge recorded that "the appellant did not ask for a hearing for the error of law consideration but if a material error of law were found, he considered that a remaking decision would require a hearing …". The UT Judge then summarised the submissions served on behalf of the Secretary of State on 23 June 2020. It seems likely that the reference to 23 June 2020 appears to have been a reference to the date on which the submissions dated 17 June 2020 were received. The UT Judge recorded that the Secretary of State's submissions did not address the issue of whether any hearing was required at the error of law stage. At paragraph 23 of the decision the UT Judge recorded: "That is the basis on which this appeal came before the Upper Tribunal".

64. It was in these circumstances that at paragraph 24 the UT Judge stated "I am satisfied that it is appropriate to decide whether the First-tier Tribunal decision contains a material error of law on the basis of the decisions and submissions before me." The written submissions before the UT Judge do not appear to have included the submissions dated 23 July 2020 on behalf of GA asking for an oral determination of the appeal.

65. At paragraph 27 of the decision the UT Judge relied on Country Policy and Information Note ("CPIN"), which had been before the FTT Judge but not the subject of any findings by the FTT Judge, to state that there was cogent evidence of a durable change of circumstances in relation to PG7. This was to the effect that the organisation no longer exists. In the decision the UT Judge determined the appeal and dismissed it on its merits, finding that there was no error of law.

66. Permission to appeal to the Court of Appeal was sought and refused by the UT Judge in a decision dated 6 October 2020. One of the proposed grounds of appeal was that there had been a paper determination of the appeal. At paragraph 5 of the reasons for refusing permission to appeal the UT Judge referred to what was then the forthcoming application for judicial review in *JCWI v The President of UTIAC.* In the reasons for refusing permission to appeal the UT Judge recorded that pending the proceedings in the Administrative Court "when this application was decided I was bound" by the guidance note. Ms Kilroy submits that this highlighted the risk of error identified in *JCWI v President of UTIAC*.

No fair determination of GA's appeal to UTIAC

67. It is apparent from the matters set out above that UTIAC's paper determination of GA's appeal from the FTT did not satisfy the requirements of common law fairness. First this was because the UT Judge does not appear to have been provided with GA's submissions dated 23 July 2020, in which GA requested an oral hearing. This meant that the UT Judge could not engage with those submissions. Secondly it is because the UT Judge appears to have decided not to follow the Country Guidance relating to the risk of persecution of members of opposition political parties in Ethiopia on the basis that the decision was some 13 years old and that there was new information in the CPIN. It is apparent that GA's legal representatives were not invited to address the judge's concerns on this specific point. In the circumstances of this case, this is not a matter of mere formality, because it is apparent that there was much that could have been said on the point. This is because in a very recent Country Guidance case on Ethiopia, which post-dated the decision and reasons promulgated by the UT Judge in GA's case, the findings about the risk of persecution of members of opposition political parties has been held not to have altered from *MB CG*.

68. In the light of these conclusions it is not necessary to determine what was meant by the UT Judge when it was recorded that the judge was "bound" by the guidance note, and indeed how that judge had applied the guidance note in the particular case.

69. I do not consider that this Court should decide the underlying error of law appeal from the FTT to the UT, which raised the issue about whether the FTT erred in law in not finding that there was a real risk of persecution in GA's case. This is because it is apparent that there have been recent developments in relation to the Country Guidance in Ethiopia and it is better for these matters to be addressed by the UT.

70. I would therefore allow GA's appeal against the decision and reasons promulgated on 2 September 2020. I would remit GA's error of law appeal from the FTT to be determined by the UT. I would not make a direction about the way in which the UT should determine that appeal. This is because that is a matter for the UT to determine on a fair basis.

Conclusion

71. For the detailed reasons set out above: (1) UTIAC could, after the guidance note had been issued on 23 March 2020, determine an error of law appeal from the FTT on the papers, so long as it was fair to do so. Therefore the critical issue on any appeal, or application for permission to appeal, will be whether such a paper determination by UTIAC of the appeal from the FTT satisfied the common law requirements of fairness. The UT was, therefore, right in *EP(Albania)* to reject the submission that, as a result of the judgment in *JCWI v President of UTIAC,* all determinations on paper made by UTIAC after the guidance note had been produced, should be set aside; (2) the paper determination by UTIAC of Mr Hussain's appeal from the FTT did not satisfy the requirements of common law fairness because his submissions dated 2 April 2020 were overlooked; and (3) the paper determination by UTIAC of GA's appeal did not satisfy the requirements of common law fairness because his submissions dated 23 July 2020 were overlooked and because the UT Judge did not give GA an opportunity to address the UT's concerns about whether the Country Guidance in *MB CG* should be followed.

72. I would therefore allow the appeals of both Mr Hussain and GA. The error of law appeals from the FTT to the UT in both appeals should be remitted to the UT.

Lady Justice King

73. I agree.

Sir Geoffrey Vos, Master of the Rolls

74. I also agree.