



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case Nos: UI-2022-005459  
UI-2022-002505  
First-tier Tribunal No:  
PA/50787/2021  
IA/04111/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On the 19 October 2023**

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM  
UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**AA (Bangladesh)  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr P. Jorro, Counsel instructed by Lawmatic Solicitors  
For the Respondent: Mr E. Terrell, Senior Home Office Presenting Officer

**Heard at Field House on 16 May 2023**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.**

### **DECISION AND REASONS**

1. By a decision promulgated on 16 May 2022, First-tier Tribunal Judge Cary (“the judge”) dismissed an appeal brought by the appellant, a citizen of Bangladesh born in 1969, against a decision of the Secretary of State dated 12 February 2021 to refuse his asylum and humanitarian protection claim.

#### **Procedural history**

2. The appellant applied to the First-tier Tribunal for permission to appeal against the decision of the First-tier Tribunal. The application was refused. He renewed the application to the Upper Tribunal.
3. By a decision dated 1 November 2022, served on the parties on 9 November 2022, Upper Tribunal Judge Kebede refused the appellant’s application for permission to appeal on all grounds.
4. An administrative error resulted in the appellant’s renewed application for permission to appeal being allocated to Judge Keith, with no reference to Judge Kebede’s earlier refusal of permission to appeal, which had already been served on the parties. Unaware of the previous refusal of permission to appeal, Judge Keith refused permission to appeal on grounds one to three, while granting permission to appeal on ground four alone. Judge Keith’s limited grant of permission to appeal was dated 30 November 2022 and was served on the parties on 20 January 2022.
5. On 7 February 2023, the Secretary of State submitted a rule 24 notice resisting the appeal for which permission was granted by Judge Keith.
6. We are grateful to Mr Jorro for drawing the conflict between the two permission to appeal decisions to the Upper Tribunal’s attention in his skeleton argument dated 15 March 2023. On 20 March 2023, Upper Tribunal Judge O’Callaghan gave directions for the Secretary of State to serve an additional rule 24 notice, addressing the procedural implications of the two permission to appeal decisions. The Secretary of State submitted a supplementary rule 24 notice dated 15 May 2023.
7. It was against that background that the matter was listed before us on 16 May 2023. We heard argument on both the preliminary procedural issue identified above and the substantive issues in the case.
8. We record our gratitude to Mr Terrell and Mr Jorro for the high quality of their written and oral submissions, on both the procedural and substantive issues.

#### **Summary of conclusions**

9. For the reasons set out below, we have reached the following conclusions:
  - a. The decisions of Judge Kebede and Judge Keith are decisions of the Upper Tribunal and remain in force until set aside;
  - b. Judge Kebede’s decision to refuse permission to appeal was not infected by any procedural irregularity and there is no basis to set it aside;
  - c. Judge Keith’s decision was tainted by procedural irregularity, through no fault of the judge. It was taken *after* Judge Kebede’s decision disposing of proceedings in circumstances where Judge Keith was plainly unaware of the earlier decision;

- d. There is no power under the Tribunal Procedure (Upper Tribunal) Rules 2008 to set aside or review Judge Keith’s decision; the criteria for a “review” are not satisfied, and it was not a decision disposing of proceedings for the purposes of rule 43(1) of the rules;
- e. The Upper Tribunal enjoys the power to set aside Judge Keith’s decision pursuant to section 25 of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”), on the basis that the High Court would enjoy the power to do so, either pursuant to part 3.1(7) of the Civil Procedure Rules (power to make an order includes power to revoke an order), or the High Court’s inherent jurisdiction to set aside an order infected by a procedural irregularity arising from a mistake of fact. We exercise that power, with the consequence that the appellant does not enjoy permission to appeal against the decision of the First-tier Tribunal;
- f. Had the appellant enjoyed permission to appeal, we would have (i) refused the appellant’s application to rely on grounds one to three, and (ii) dismissed the appeal on all four grounds in any event;
- g. Although the appeal of the appellant has been dismissed, we consider that it is appropriate to make an order for anonymity, lest the appellant be exposed to a risk he currently does not face, upon his return to Bangladesh.

### The procedural issue

10. It was common ground that there were two valid decisions of the Upper Tribunal, both of which would remain in force until one or both were set aside (as to which, see *R (oao Majera) v Secretary of State for the Home Department* [2021] UKSC 46 at para. 56, and by analogy, *PAA (FtT: Oral decision - written reasons) Iraq* [2019] UKUT 13 (IAC), at para. 7, headnote para. 3).
11. The question then arises as to which, if either, decision should be set aside.
12. In relation to Judge Kebede’s decision, it was a decision which disposed of proceedings in the Upper Tribunal. In principle, it is of a class of decision that could be set aside under rule 43(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Rule 43(1) 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.”

13. However, none of the rule 43(2) criteria are met, and so the rule 43 power is not engaged in the circumstances of these proceedings in relation to the Kebede decision. Judge Kebede’s decision was, if we may respectfully observe, appropriately taken, in circumstances where there was (and could not be) any suggestion of any procedural irregularity. The procedural irregularity occurred *after* her decision had already disposed of the proceedings and related wholly to the circumstances in which the application, that had already been refused, was placed before Judge Keith.
14. Mr Jorro submitted that the effect of Judge Keith’s decision was to set aside Judge Kebede’s decision. We reject that submission. The circumstances in which a decision disposing of proceedings may be set aside are prescribed by rule 43. Those criteria were plainly not met. We find that Judge Keith’s decision could not have the effect of setting aside a decision of which he was unaware, in circumstances where, first, the rules of procedure would not have permitted the decision to be set aside, and, secondly, there was no basis to do so in any event. Certainly, Judge Keith did not expressly seek to set aside Judge Kebede’s decision. There is no authority to support any doctrine of implied set aside.
15. In the alternative, Mr Jorro applied for us to set aside Judge Kebede’s decision, on the basis that a procedural irregularity occurred by virtue of there being two conflicting decisions of judges of the Upper Tribunal on the appellant’s application for permission to appeal. That state of affairs, he submitted, was *itself* a procedural irregularity, and merits the Upper Tribunal utilising the jurisdiction it enjoys pursuant to section 25 of the 2007 Act.
16. Section 25 of the 2007 Act provides, where relevant:

**“25 Supplementary powers of Upper Tribunal**

  - (1) In relation to the matters mentioned in subsection (2), the Upper Tribunal–
    - (a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and
    - (b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.
  - (2) The matters are–
    - (a) the attendance and examination of witnesses,
    - (b) the production and inspection of documents, and
    - (c) all other matters incidental to the Upper Tribunal's functions.
  - (3) Subsection (1) shall not be taken–
    - (a) to limit any power to make Tribunal Procedure Rules;
    - (b) to be limited by anything in Tribunal Procedure Rules other than an express limitation.”
17. The effect of section 25(1)(a), read with subsection (2)(c), is that the Upper Tribunal has the same powers, rights, privileges and authority as the High Court

in relation to “all other matters incidental to the Upper Tribunal’s functions”. That being so, if the High Court would enjoy the power to set aside an order made in circumstances corresponding to those in which Judge Kebede’s decision was taken, whether conferred by the Civil Procedure Rules, other legislation, or its inherent jurisdiction, the Upper Tribunal would have those same powers, such powers being “incidental to the Upper Tribunal’s functions”.

18. We accept that, in principle, the High Court enjoys the power to revoke an order it has made: see part 3.1(7) of the Civil Procedure Rules. It provides:

“(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order.”
19. CPR3.1(7) is a power to be used sparingly. One example of an appropriate use of the rule may be found in *Tibbles v SIG PLC* [2012] EWCA Civ 518 at para. 39(vi), namely where there was a “manifest mistake on the part of the judge in the formulation of his order.”
20. As we respectfully observed above, nothing about Judge Kebede’s decision was tainted by any procedural irregularity. The mere fact that another judge of the Upper Tribunal subsequently reached the opposite conclusion in ignorance of Judge Kebede’s decision does not impute to the circumstances of Judge Kebede’s decision any procedural irregularity. The procedural irregularity occurred when an application was placed before Judge Keith in circumstances where (unbeknown to the judge) it had already been finally determined by another judge, thereby disposing of the proceedings.
21. No features of Judge Kebede’s decision in these proceedings were tainted by developments which post-dated her decision. We reject Mr Jorro’s alternative submission that *both* decisions were tainted by procedural irregularity. For those reasons, it would plainly be inappropriate for the Upper Tribunal to purport to exercise a power analogous to that enjoyed by the High Court under CPR3.1(7), or any similar power it enjoys pursuant to its inherent jurisdiction, in relation to Judge Kebede’s decision.
22. The same cannot be said for Judge Keith’s decision, which was plainly taken in circumstances which gave rise to a procedural irregularity. If either decision is a candidate to be set aside, it is Judge Keith’s decision.
23. Rule 43(1) does not provide a basis to set aside Judge Keith’s decision; it was not a decision “which disposes of proceedings”, and so is not capable of engaging the set-aside power on that basis.
24. We consider that the High Court would enjoy the power to set aside an order made in circumstances corresponding to those in which Judge Keith was asked to determine this application for permission to appeal. This would be the paradigm scenario in which the High Court would be entitled to rely on CPR3.1(7) or rely on its inherent jurisdiction, thereby paving the way for the Upper Tribunal to do so.
25. As we conclude on this issue, we touch briefly on *Patel v Secretary of State for the Home Department* [2015] EWCA Civ 1175 and *Jan (Upper Tribunal: set-aside powers)* [2016] UKUT 336 (IAC). *Patel* concerned a decision of the Vice-President to revoke a decision granting permission to appeal, given orally in the course of the same hearing at which he sought to revoke the decision. The Court of Appeal considered whether the Upper Tribunal had the power to “review” a decision concerning permission to appeal under section 10 of the 2007 Act. Section 10 provides that the Upper Tribunal may “review” a decision made by it on a matter in a case, other than a decision that is an excluded decision; a decision

concerning a grant or refusal of permission to appeal is an “excluded decision” (see section 13(8)(c) of the 2007 Act). A “review” enables a decision to be set aside on grounds additional to those contained in rule 43. The Court of Appeal held that there was no power for the Vice-President to have reviewed his decision to grant permission to appeal, since it was an excluded decision and did not engage the power under section 10. The Court remitted the proceedings back to the Upper Tribunal to be considered in light of the Vice-President’s initial, seemingly irrevocable decision to grant permission to appeal.

26. In *Jan*, the Upper Tribunal addressed the implications of *Patel*. The panel in *Jan* noted that the Court of Appeal did not consider or otherwise address section 25 of the 2007 Act in *Patel*. It concluded that, by not doing so, the Court must have concluded that a power under section 25 either did not exist, or if it did, was irrelevant to the issue before the court (para. 27). The headnote reads:

“The decision of the Court of Appeal in *Patel* [2015] EWCA Civ 1175 entails the view that the Upper Tribunal's powers to set aside its own decisions are limited to those in rules 43 and 45-6 of the Upper Tribunal Rules.”

27. *Patel* and *Jan* must be read subject to *R (oao Harkitan Singh) v Secretary of State for the Home Department* [2019] EWCA Civ 1014, in which the Court of Appeal held that section 25 enabled the Upper Tribunal to revoke a decision refusing permission to bring judicial review proceedings. A judge of the Upper Tribunal had granted an applicant permission to bring judicial review proceedings at a hearing conducted in the absence of the respondent, on the mistaken understanding that the respondent had chosen not to be represented or otherwise participate in the hearing. Upon becoming aware that the respondent had, in fact, intended to attend, the Upper Tribunal judge revoked her order refusing permission, and listed the matter for a fresh hearing. The issue before the Court of Appeal concerned whether section 25 enabled the Upper Tribunal judge to revoke her order in those circumstances. It was held that it did. The Court considered *Patel* and *Jan*. Lord Justice Leggett, as he then was, said at para. 33 of *Singh*:

“So far as appears from the judgment, no reference was made in the *Patel* case to section 25 of the 2007 Act and no argument was addressed to the Court of Appeal that the Upper Tribunal had power under section 25 to revoke its initial decision.”

28. At para. 36, he added:

“...the judgment of this court in the *Patel* case cannot properly be interpreted as having decided without saying so that the powers of the Upper Tribunal under section 25 to set aside and re-make a decision when the High Court has such a power do not exist. In particular, the *Patel* case was not concerned with the power to re-hear an application which was, as a result of a misunderstanding and in breach of the principle of natural justice, decided in the absence of a party. For the reasons given earlier, I consider it clear that the Upper Tribunal has under section 25 the same power as the High Court would undoubtedly have to set aside its decision in such a case and to re-list the matter for a fresh hearing.”

29. While the Court did not conclude that *Patel* was wrongly decided (para. 35 : “It may well be that on the particular facts which arose in the *Patel* case the Upper Tribunal did not have either an inherent power or a power conferred by section

25...”), it is clear that section 25 is capable of being engaged in a broader range of situations than *Patel* initially implied. These proceedings are, in our judgment, one such case. They may be distinguished from *Patel*; in contrast to the decision to grant permission to appeal in *Patel*, by the time Judge Keith purportedly granted permission to appeal, a decision had already been taken by Judge Kebede to refuse permission to appeal, thereby disposing of the proceedings. It follows that at the time Judge Keith took his decision, the UT’s jurisdiction to consider an application for permission to appeal had already come to an end. The Upper Tribunal was *functus officio* in relation to the application for permission to appeal. *Patel* concerned the decision to reverse a lawfully made (excluded) decision to grant permission within the same hearing following the judge becoming aware that the application had been made out of time.

30. Drawing this analysis together, therefore, we reach the following findings:
  - a. Judge Keith’s decision was tainted by procedural irregularity, having been taken in ignorance of the fact a decision on the appellant’s application for permission to appeal had already been taken;
  - b. The High Court would undoubtedly have the power to set aside Judge Keith’s decision, were it an order made in analogous circumstances, and would do so, thereby permitting the Upper Tribunal to do the same, acting under section 25;
  - c. Since Judge Kebede’s decision was not tainted by any procedural irregularity, and in the absence of any reason to set that decision aside, we set Judge Keith’s decision aside, acting under section 25. We consider that doing so is consistent with the overriding objective of the Upper Tribunal to decide cases fairly and justly. It is neither fair nor just to entertain the procedural and jurisdictional ambiguity which would follow from permitting Judge Keith’s decision to stand, or to expect the parties to attempt to challenge it elsewhere.
31. We therefore set aside the decision of Judge Keith, acting under section 25 of the 2007 Act.
32. The consequences of the above analysis are that the appellant does not enjoy permission to appeal against the decision of Judge Cary, permission having been refused by Judge Kebede’s decision of 1 November 2022.

### **Consideration of the substantive issues in the appeal**

33. Since we heard full argument on the substantive issues in the appeal in any event, we will address the submissions advanced, in order to indicate how we would have decided the appeal, had Judge Keith’s decision to grant permission to appeal been the operative decision on that issue.

### **Factual background**

34. The appellant was admitted to the UK as a visitor on 1 June 2019 and claimed asylum on 21 June 2019. He claimed to face a real risk of being persecuted in Bangladesh on account of his involvement in the BNP. He had been the head of a local BNP chapter in Bangladesh and had been attacked by Awami League activists in 2015, in the run up to the 2016 elections. He was forced to relocate to Sylhet in late 2018, and later decided to flee the country. The Bangladeshi authorities have since issued charges against him and a warrant has been issued for his arrest, on the basis of false allegations, as is common in the country. He

had engaged in *sur place* activities in the UK and would be at risk on account of his social media profile.

35. The Secretary of State accepted that the appellant was a low level BNP activist. The issues before the judge concerned whether he was a higher-level activist, or whether he would otherwise be at risk from his profile.
36. The judge had credibility concerns arising from the delay in the appellant claiming asylum, and about the provenance of various documents relied upon by the appellant to substantiate his claim. The appellant's evidence had been inconsistent. There would be no basis for the authorities to be interested in him upon his return, and his social media profile would not place him at risk. In any event, it was open to him to delete his account. The appellant was a low level supporter who would not be at a real risk of being persecuted.

### **Grounds of appeal**

37. There were four grounds of appeal:
  - a. Ground 1: the judge failed to apply the correct standard of proof and unlawfully rejected the corroborative value of supporting documents relied upon by the appellant;
  - b. Ground 2: this ground is a perversity challenge, contending that the judge failed to take any or adequate account of the background evidence concerning the prevalence of politically motivated false charges brought against opposition activists by the Bangladeshi authorities;
  - c. Ground 3: the judge's approach to evidence from the appellant's lawyer and his brother-in-law in Bangladesh was irrational;
  - d. Ground 4: the judge misdirected himself concerning the principle in *Hj (Iran)* [2010] UKSC 31, in particular concerning his social media presence; it was contrary to *Hj (Iran)* to have expected, as the judge did, the appellant to delete his Facebook account in order to avoid persecution.
38. Judge Keith granted permission in relation to ground four only and refused permission to appeal for grounds one to three. He gave the required direction pursuant to *EH (PTA: limited grounds; Cart JR) Bangladesh* [2021] UKUT 0117 (IAC) that the focus of the 'error of law' hearing in the Upper Tribunal should be limited to ground four. Mr Jorro applied to vary that direction, by reference to the submissions he would have made on those grounds in any event.

### **Ground 1: documentary evidence**

39. Relying on the grounds of appeal, Mr Jorro submitted that the extensive supporting documentary evidence relied upon by the appellant attracted such weight that the judge erred in law by rejecting their corroborative value. The basis upon which the judge did so, namely that it was "possible" that they were not reliable, was inconsistent with *Karanakaran v Secretary of State for the Home Department* [2000] INLR 122.
40. Had the appellant enjoyed permission to appeal, we would not have varied Judge Keith's direction that this ground could not be pursued. This ground of appeal is a classic example of "island hopping" on appeal, in contrast to the benefit enjoyed by the trial judge of considering the "whole sea of evidence" (see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, para. 114). Although we have



set aside Judge Keith's order, we gratefully adopt his reasons for refusing permission to appeal on this ground in their entirety. Judge Keith said:

"2. In ground (1), the appellant asserts that the FtT impermissibly rejected corroborative evidence, specifically a First Information Report and internet media articles, on the basis that it was 'possible that they were not reliable.' In doing so, the grounds refer to the FtT's reference at paragraph [68] to it being perfectly possible to obtain fraudulent police and court documents; at paragraph [85], the FtT's comment that evidence appeared to be internet-based articles, which suggest that they may be unreliable; and at paragraph [101], the FtT's observation that documentation 'may well have been manufactured.'

3. I am conscious of the risk of so-called 'island-hopping' – see para [65] of *Volpi v Volpi* [2022] EWCA Civ 464. The challenges made in ground (1) are in the context of very detailed and clearly structured findings by the FtT. The FtT had correctly reminded himself of the relevant standard of proof at paragraph [46]. At paragraph [52], the FtT cautioned himself that there may be occasions where a genuine claimant may give implausible or inconsistent evidence, and at paragraph [53], that even if the appellant had not told the truth about certain aspects of his account, that did not mean that he was not entitled to international protection. The FtT considered at length the objective evidence and the appellant's asylum interview. At paragraph [65], the FtT noted that it was for the appellant to show the documents on which he sought to rely were reliable and at paragraphs [67] to [69], the multiple sources of evidence on both the availability of fraudulent documentation, and genuine documentation fraudulently obtained and the levels of corruption in Bangladesh, which was described as endemic. At paragraph [69], the FtT also noted the evidence about it being easier to publish fake news online. The FtT then conducted an analysis of the appellant's claims of adverse interest, noting the absence of medical evidence (paragraph [72]), differences between a social media report and the appellant's account at paragraph [74], and an analysis of the First Information Report. The FtT was not impermissibly discounting evidence simply because it may be unreliable, when read in context. Rather, the analysis was detailed and as part of a wider analysis. For example, at paragraphs [84] to [85], the analysis was of one reported news organisation being based in the UK, without any detail about how they were able to interview the appellant's mother in Bangladesh (paragraph [84] to [85]), as part of wider concerns about various aspects of the appellant's narrative. When the isolated excerpts are read in context, the ground discloses no arguable error."

41. We agree with that analysis and would have adopted it, had the appellant obtained permission to appeal.

**Ground 2: background evidence**

42. By this ground, the appellant sought to submit that the judge erred in relation to his conclusions concerning the criminal charges the appellant claimed had been laid against him in Bangladesh. The grounds of appeal, and Mr Jorro's skeleton argument, contended that the judge failed properly to take account of the extensive background materials which demonstrate the prevalence of false

charges and other law enforcement abuses being used by the authorities to target BNP supporters. In particular, Mr Jorro submitted that it was not rationally open to the judge to say, as he did at paragraph 80, that “it is also difficult to understand why anyone would bother to concoct a criminal charge against the appellant when he has been out of Bangladesh for so many months...” The judge went on to contrast the explanation the appellant had given in his first asylum interview with the fact that, on his own case, the appellant had not stood for election in Bangladesh since 2016, and had moved out of that area, to Sylhet, at the end of 2018.

43. Judge Keith characterised this challenge as a perversity challenge in his refusal of permission. We agree. Appeals lie to the Upper Tribunal on the basis of an error of law, not a disagreement of fact. As Lady Hale PSC said in *Perry v Raleys Solicitors* [2019] UKSC 5 at [52], the constraints to which appellate judges are subject in relation to reviewing first instance judges’ findings of fact may be summarised as:

“...requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge’s finding was one that no reasonable judge could have reached.”

44. We again agree with the reasons given by Judge Keith when refusing permission to appeal on this ground, which we respectfully adopt in their entirety:

“4. Ground (2) is a challenge on grounds of perversity and that the FtT ignored evidence, on the basis that at paragraph [80], the FtT had failed to understand why a criminal charge would be concocted against the appellant when he had been absent from Bangladesh for many months and had moved out of the relevant district at the end of 2018. The FtT was unarguably conscious of the use of false and politically motivated criminal charges and the fact that an election was taking place in December 2018 (paragraph [58]). The reference to the appellant having been out of Bangladesh for ‘many months’ was explained by his departure in June 2019. The FtT considered that the elections which took place at the end of 2018 were due not to be repeated for some years, and it was in that context about the plausibility of concocted charges was made. That was an analysis open to the FtT and was not arguably irrational. “

45. Mr Jorro’s submissions did not demonstrate that the judge reached an irrational decision or that his findings were, to adopt the words of Lady Hale, unsupported by evidence, or findings that no reasonable judge could have reached.

**Ground 3: evidence from the appellant’s lawyer and brother in law**

46. Mr Jorro did not pursue this ground at the hearing. He was right not to do so. Again, we adopt Judge Keith’s reasoning:

“5. Ground (3) is that the FtT ignored evidence of how the appellant came to know about a criminal case against him and that the FtT’s analysis, at paragraph [79], was flawed. The grounds then recite a chain of events which it is said constitute the basis of that knowledge. However, the FtT clearly explained why he was concerned about those claims. In particular there was nothing in the advocate’s letter to confirm that documents said to have been obtained, were obtained by him, or if he obtained the documents, that he then gave them to the appellant’s brother. Instead, there was a separate witness

statement from the appellant's brother. That was a concern open to the FtT to consider when assessing the evidence. That does not disclose an arguable error of law."

**Grounds 1 to 3 not arguable**

47. For the above reasons, we would have refused to vary the direction given under *EH* to allow the appellant to rely on this ground of appeal. Even had the direction not been given, we would have dismissed the appeal on these grounds in any event.

**Ground 4: *sur place* activities and *HJ (Iran)***

48. This was the sole ground which Judge Keith considered to be arguable. Judge Keith's reasons for seeking to grant permission on this ground focussed on the judge's findings that the appellant could avoid any risk arising from his *sur place* activities "by the simple expedient of deleting his Facebook posts which would have the effect of removing all the posts he had created as well as by not adding to them" (para. 98). We accept that, in principle, such reasoning would offend the principle in *HJ (Iran)*; since the appellant had been recognised as a genuine, albeit low level, supporter of the BNP, if the only way for him to avoid a real risk of being persecuted was to suppress his political views, and act as though he did not have them, the criteria for recognition as a refugee may well have been met.

49. However, when the judge's findings are read in context, any error is immaterial; we essentially agree with the position adopted by the Secretary of State in her first rule 24 response, dated 7 February 2023. Paragraph 98 of the judge's decision were findings reached in the alternative, applicable only in the event that the judge's primary findings concerning the appellant's minimal risk profile were wrong. So much is clear from the opening wording to paragraph 98, "[e]ven if contrary to my findings the appellant's Facebook posts are reasonably likely to place him at risk on return, he is able to extinguish that risk by [deleting the posts etc. ...]" The appellant has not challenged the judge's findings of fact concerning his minimal risk profile by reference to any of the established bases for challenging findings of fact reached by first instance trial judges. We set those findings out below.

50. From paras 89 to 97, the judge addressed the risk arising from the appellant's *sur place* activities. The appellant had claimed to have been an active participant in "protests, demonstrations and seminars" organised by the UK branch of the BNP, and that he had been "very active" in criticism of the government of Bangladesh on social media. He was not a member of the BNP in the United Kingdom, but nevertheless claimed to have been an activist on behalf of the party, and have been the vice president of one of its forums, and to have worked as a convener for the party in another capacity. See the judge's summary at para. 86.

51. The judge directed himself at paragraph 87 that even opportunistic activity was not a bar to *sur place* claim succeeding. At para 88, the judge directed himself that a relevant issue when considering claims of this nature was whether the authorities of the individual's own country would be aware of the *sur place* activities, for example through surveillance and intelligence gathering. At para 89, the judge said that mere attendance at one or more protests, meetings and demonstrations in the UK, even when documented on social media, "does not mean that he is reasonably likely to be at risk on return." The judge added, "it is not enough for an applicant simply to establish that he was involved in such activities without producing any evidence that the authorities or others would be

concerned about them or even that they were or would be aware of them.” Having directed himself concerning the background materials addressing the risk to returnees to Bangladesh arising from social media and similar activities, the judge said the following, at para. 95:

“95. The Appellant is not a journalist nor a significant online activist. I have not been provided with his profile page on Facebook. I have also not been provided with any evidence to suggest that the Bangladeshi authorities or their supporters have either the will or the means to monitor the activities of all political opponents in the United Kingdom or even if they did that a low level activist such as the Appellant would be of any interest to them. It is not suggested that the Appellant has a particularly high profile in the Bangladeshi opposition in the UK. He is not, for example one of the leaders or even a member of the BNP in this country. My attention has also not been directed to any evidence that the Bangladeshi authorities actively monitor those returning to Bangladesh to check for potential political dissidents.

52. At para 96, the judge found that the appellant’s activities were not of “high order”. He was not involved at an organisational level with any of the main opposition groups in the United Kingdom. Although he had posted details of his attendance at “a few” demonstrations and meetings as “one of a crowd” on social media, those posts had not attracted much support. He was not being prosecuted under the Digital Security act. There was nothing that “bridges the gap between the possibility of ill treatment and the real risk of ill-treatment”. At para 97, the judge found that there was “no basis for finding this appellant would be singled out for ill-treatment. He is not a high level activist. His activities low level and there is nothing to suggest that low-level activists generally are at risk...”
53. Accordingly, while there is superficial force in ground four, when the judge’s findings are viewed as a whole, those superficial concerns fall away. We would have dismissed the appeal on this ground, had the appellant enjoyed permission to appeal in relation to it.

### **Anonymity**

54. We consider that it is appropriate to make an anonymity order in respect of the appellant. While on the judge’s findings he is not at a real risk of being persecuted upon his return to Bangladesh, we make this order to ensure that the publication of this judgment does not inadvertently expose the appellant to a risk he does not currently face. Pursuant to *Cokaj (anonymity orders: jurisdiction and ambit)* [2021] UKUT 202 (IAC), the Upper Tribunal retains jurisdiction to deal with the open justice aspects of a case, even though it is no longer seized of the proceedings (as it was when Judge Kebede considered the application for permission to appeal).

### **Notice of Decision**

We do not set aside the decision of Judge Kebede dated 1 November 2022 refusing permission to appeal to the Upper Tribunal.

We set aside the decision of Judge Keith dated 30 November 2022 purporting to grant permission to appeal, acting under section 25 of the Tribunals, Courts and Enforcement Act 2007.

**Case Nos: UI-2022-005459  
UI-2022-002505  
First-tier Tribunal No: PA/50787/2021**

Since the appellant does not enjoy permission to appeal, the Upper Tribunal has no jurisdiction to decide the appeal under section 11 of the Tribunals, Courts and Enforcement Act 2007.

**Stephen H Smith**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**21 August 2023**