



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004185

First-tier Tribunal No:
EA/05843/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 2 August 2024**

Before

**UPPER TRIBUNAL JUDGE BLUNDELL
and
DEPUTY UPPER TRIBUNAL JUDGE FROMM**

Between

ENTRY CLEARANCE OFFICER

Appellant

and

RAHMO HILOWLE ISAC

Respondent

Representation:

For the Appellant: Ms A Ahmed, Senior Presenting Officer

For the Respondent: Mr J Martin of counsel, instructed by Waran & Co Solicitors

Heard at Field House on 13 June 2024

Written submissions on 27 June 2024

DECISION AND REASONS

1. The Entry Clearance Officer appeals with the permission of First-tier Tribunal Judge Elliott against the decision of First-tier Tribunal Judge Maurice Cohen. By his decision of 21 August 2023, Judge Cohen allowed Ms Isac's appeal against the Entry Clearance Officer's refusal of her application for a family permit under Appendix EU (FP) of the Immigration Rules.

2. To avoid confusion, we will refer to the parties as they were before the First-tier Tribunal: Ms Isac as the appellant and the Entry Clearance Officer as the respondent.

Background

3. The appellant is a Somali national who lives in Saudi Arabia. Her date of birth is recorded as 1 January 1945. On 7 December 2021, she applied for a family permit under Appendix EU (FP). She wished to join her son in the United Kingdom. He is Abati Ahmed Nassir, a Dutch citizen who was born on 12 April 1971. Mr Nassir arrived in the United Kingdom in 2008 and was granted settled status on 7 December 2020. It was said in the appellant's application that they remained in contact by visits and telephone contact and that he remitted £250 per month to her. The appellant said that she had various ailments including diabetes and high blood pressure and that she needed care at her age.
4. The respondent refused the application for entry clearance on 11 May 2022. He considered the evidence of dependency which had been submitted with the application to be insufficient. The evidence was from February 2021 to November 2021 and the respondent expected to 'see evidence of dependency over a longer period'. There was also no evidence to show that the appellant was unable to meet her essential living needs without financial or other material support from the sponsor.

The Appeal to the First-tier Tribunal

5. The appellant gave notice of her appeal against the respondent's decision. A bundle of additional evidence was prepared by her solicitors. Mr Talacchi of counsel was instructed to settle an Appeal Skeleton Argument ("ASA"), which he did on 13 January 2023.
6. The ASA argued, in summary, that the appellant was elderly and that she had been fully dependent on the sponsor since she stopped working in Saudi Arabia. The bundle contained evidence of the sponsor's work in the United Kingdom. There was also evidence of the sponsor visiting the appellant in Saudi Arabia, and further evidence of financial support being sent by the sponsor to the appellant.
7. As far as we are aware, no review of the decision was undertaken following the skeleton argument and the additional evidence.
8. The appeal came before the judge, sitting at Taylor House on 11 August 2023. As we understand it, the judge was at Taylor House but the hearing was conducted by CVP, with the sponsor and the representatives joining by video link. The appellant was represented by Mr Talacchi of counsel. The respondent was represented by a Presenting Officer.
9. As we will come to explain, what happened during the hearing is in dispute before us. In the decision which followed ten days later, however, the

judge found that there was 'a plethora of evidence' to show that the 78 year old appellant was dependent upon the sponsor, such that she satisfied the requirements of the Immigration Rules. He allowed the appeal accordingly.

Permission to Appeal to the Upper Tribunal

10. The respondent's grounds of appeal contend that there was a procedural irregularity in the FtT, or that the judge's conduct during that hearing was improper. The submissions made in the grounds were materially as follows:

"(1) It is respectfully submitted that the Home Office Presenting Officer, representing the Secretary of State at this appeal, raised concerns about the way the CVP hearing was conducted by Judge Cohen, which had not afforded her a fair opportunity to advance her case on our behalf. The issues raised have been set out in the Presenting Officer's record of proceedings dated 11 August 2023 (attached with the grounds).

(2) It is submitted that Judge Cohen had indicated on several occasions that he was minded to allow the appeal as he felt '*sympathetic*' to the age of the appellant and her medical issues. Further, Judge Cohen was satisfied, having read the case before the hearing, that the appellant's evidence showed a strong case of dependency for many years, on her son.

(3) The Presenting Officer was subsequently informed by Judge Cohen that cross examination was unnecessary and the appeal should proceed on submissions only with reference to the reasons for refusal letter (RFRL).

(4) It is submitted that this is contrary to Judge Cohen's statement at [10] which states that '*It was agreed that the appeal could proceed on the basis of submissions alone.*' It is evident that the Presenting Officer had not agreed to this, Judge Cohen having made the decision on the way in which the hearing was to proceed, without deliberation.

(5) The Presenting Officer was denied the opportunity to question the appellant regarding the evidence nor was she able make submissions beyond reliance on the RFRL.

(6) Following the submissions, Judge Cohen stated that he would be allowing the appeal, the hearing having lasted all but 5 minutes.

(7) The matters raised regarding this appeal hearing indicate procedural irregularities have taken place which sets a tone of unfairness and lack of impartiality against the Secretary of State's position in line with the decision of the Upper Tribunal - [Tribunal decision \(tribunalsdecisions.service.gov.uk\)](https://tribunalsdecisions.service.gov.uk), where it is stated : (i) '*Indications of a closed judicial mind, a pre-determined outcome, engage the appearance of bias principle and are likely to render a hearing unfair.*'"

11. The authority mentioned but not cited at the end of the grounds is *Sivapatham (Appearance of Bias)* [2017] UKUT 293 (IAC).
12. The grounds were lodged with a note which was prepared by the Presenting Officer after the hearing before Judge Cohen. The note is inaccurately titled 'Record of proceedings'. It states materially as follows:

"The IJ indicated several times that he had already made his mind up in that he was going to allow the appeal. He felt 'sympathetic' to the age of the Appellants [sic] and their [sic] medical issues. The IJ felt that there was evidence of financial transactions going back years which proved dependency and that it was a very strong case when he read it before the hearing.

He informed me that I will not be asking cross-examination and we will be proceeding on submissions only, in which I would merely rely on the RFRL. I did not have the opportunity to ask/probe the evidence, nor make submissions beyond "I rely on the RFRL".

The IJ did not turn on the recording for this hearing. He also decided that the interpreter was not necessary.

Once 'submissions' had taken place, he stated that he would be allowing the appeal and a full determination is to come.

The hearing was conducted within 5 minutes."

13. First-tier Tribunal Judge Elliott considered the grounds to be arguable and granted permission to appeal.

Subsequent Events in the Upper Tribunal

14. The Upper Tribunal subsequently sought and obtained the audio recording of the hearing from the First-tier Tribunal. It lasts for one minute and twenty-five seconds and contains no recording of the discussions which were said by the Presenting Officer to have taken place between her and the judge.
15. This appeal was first listed before the Upper Tribunal (UTJ Blundell and DUTJ Haria) on 10 November 2023. The incomplete recording of the hearing before the FtT was played. It was agreed by the advocates (then Ms Ahmed and Mr Talacchi) that it would be necessary for there to be witness statements from the advocates in the FtT and also, unusually, that it would be necessary to seek the comments of Judge Cohen.
16. On 28 November 2023, another appeal raising similar allegations against Judge Cohen came before the Upper Tribunal (UTJ Blundell and DUTJ Woodcraft). It transpired that the appeal in that case (*Adan v ECO* UI-2023-004332) had also been heard at Taylor House on 11 August 2023. On further investigation, it became clear that the hearing in *Adan v ECO*

had taken place immediately after the hearing in this case. The same Somali interpreter was present for both appeals. The same Presenting Officer represented the Entry Clearance Officer, and the allegations made in that case were precisely similar to the allegations in this case.

17. The recording of the proceedings in *Adan v ECO* was also incomplete. It lasts for one minute and fifty-two seconds. That recording was played to the parties at the hearing on 28 November 2023. As in this case, the representatives agreed that it would be necessary to adjourn the hearing and to seek Judge Cohen's comments on the serious allegations which were made by the Presenting Officer. That case was also adjourned with directions and referred to the Principal Resident Judge of the Upper Tribunal (IAC) so that Judge Cohen's comments could be sought.
18. Given the common issues, and the fact that the hearings were heard sequentially by the FtT, the Upper Tribunal directed that the two appeals would be heard on the same day. Arrangements were also made for the appeals to be heard by a panel which included a Deputy Upper Tribunal Judge who was also a senior judge of the First-tier Tribunal.

The Evidence Before the Upper Tribunal

19. The Presenting Officer subsequently made a witness statement dated 23 November 2023. She said nothing of substance in that statement beyond confirming that her record of the hearing was true.
20. Mr Talacchi made a witness statement on 7 December 2023. He had seen the Presenting Officer's witness statement and her note of the hearing. He had reviewed his own contemporaneous notes in preparing his statement.
21. Mr Talacchi stated that he had logged in to the CVP hearing before 10am and that it was clear to him that the judge was 'discussing the appeals listed that date with the Presenting Officer.' Mr Talacchi introduced himself and the sponsor, who had also logged in. At [10] of his statement, Mr Talacchi described the next events in this way:

"A brief case management hearing followed: The Judge mentioned the evidence and stated that it was a strong case. The Judge asked me whether I was content to proceed with the appeal by way of submissions. The Judge asked the Home Presenting Officer if she was happy to proceed as well by submissions. The Home Presenting Officer said that she was. I told the Judge I would be relying on my skeleton argument. The Judge asked the Home Presenting Officer whether she was relying on the decision letter, and she said she would. The Judge then stated that he would be allowing the appeal."

22. Mr Talacchi requested that the recording of the hearing before Judge Cohen should be played again at the hearing before the Upper Tribunal. Responding to the allegations made by the respondent about the hearing,

Mr Talacchi noted that it was 'evident' to him that there had been a discussion between the judge and the Presenting Officer before he logged in, although he could not be sure whether the discussion related to this particular appeal, or one of the other appeals in the judge's list. In relation to this case, he observed that Judge Cohen 'had clearly read the papers and had taken a view'. The judge had not informed the Presenting Officer in his presence that she was to be prevented from cross-examining the sponsor. His recollection was, instead, that the judge had asked the Presenting Officer whether she was 'happy to proceed by way of submissions only' and that she had confirmed that she was content with that course of action. Mr Talacchi said that he was 'certain' that the judge would have permitted the Presenting Officer to ask questions of the sponsor if she had wanted to do so.

23. The Principal Resident Judge duly made contact with Judge Cohen in order to seek his comments on the allegations made by the respondent. The recording of the hearing in the FtT was provided to Judge Cohen. Also provided were the grounds of appeal to the Upper Tribunal and the Presenting Officer's record of proceedings, the decision granting permission to appeal, the directions made by the Upper Tribunal after the first hearing, and the statements made by the advocates before the FtT.
24. Judge Cohen responded on 24 March 2024. He stated that it was 'simply not true' that he had prevented the Presenting Officer from undertaking cross-examination. He had expressed a provisional view that it was a strong appeal which was likely to succeed, however, and had asked the Presenting Officer whether it might be a case which should proceed on the basis of submissions alone. She had consented to that course. His recollection tallied with Mr Talacchi's. The judge noted that the Presenting Officer had raised no objection and was content to rely merely on the Entry Clearance Officer's decision. The judge noted that two trainees had been with the Presenting Officer but that no statements had been taken from them. Nor had there been any complaint to the Resident Judge. As to the recording, the judge was not in control of it; the recording had been undertaken by the clerk at Taylor House and the judge stated that he was "likely to have been unaware that recording had not commenced during the preliminary discussions". He did not believe that he had acted with impropriety or demonstrated bias in the conduct of the appeal.
25. The Upper Tribunal subsequently arranged for the recording of the hearing before Judge Cohen to be transcribed. A copy of the short transcript is appended to this decision as Appendix A.

The Hearing Before the Upper Tribunal

26. We indicated at the outset of the hearing that this appeal and that in *ECO v Adan* would be heard sequentially. Ms Ahmed appeared in both cases. Ms Hafsa Masood of counsel appeared in *ECO v Adan*. We indicated to Ms Masood that she may wish to remain to hear Ms Ahmed's submissions,

which were in many respects the same in both appeals. Ms Masood did remain throughout this hearing.

27. The recordings of both hearings were played in full.
28. Ms Ahmed stated that there would be no oral evidence from the Presenting Officer. She had left the Home Office to begin a training contract. Ms Ahmed stated that she would have been prepared to attend to give oral evidence but she had been given insufficient notice of the hearing by the Home Office. (We note that notice of the hearing was sent to the parties on 10 May 2024.) Nor was there to be any evidence, whether by statement or testimony, from the two trainees who had been with the Presenting Officer on the day of the hearing before the First-tier Tribunal.
29. We then heard oral evidence from Mr Talacchi of counsel. He adopted his statement and was cross-examined by Ms Ahmed. He thought he had logged on at around 0955 but he could not be certain. He thought that the sponsor was logged in to the hearing before him; the sponsor had logged on from the solicitor's office. An interpreter had been requested but he did not recall whether the interpreter was present.
30. Mr Talacchi did not accept that there was anything surprising about the suggestion that this was a strong case which might properly proceed on submissions only. Mr Talacchi had appeared for appellant and respondent before the judge on a number of occasions and the judge had always read the papers. Whether the hearing was in person or remote, the judge would always discuss the case with the representatives at the outset. Mr Talacchi confirmed his impression that there had been a discussion between the Presenting Officer and the judge before he joined the hearing but he could not be sure whether it related to his case. He thought that the judge might have asked the Presenting Officer to take instructions on the other case. There were a number of people in the CVP 'room' when Mr Talacchi joined but he could not recall who they were.
31. Mr Talacchi could not say how long the hearing lasted in total. He knew that his instructing solicitor had called him at 1019 and left a message about the hearing. He had called her back a few minutes later. The hearing was extremely quick. He had no note of when he logged off. He could not comment on the Presenting Officer's assertion that the hearing had taken less than five minutes. There was a discussion. He was content to proceed on submissions only and he could not say how long the whole process later. Mr Talacchi could not remember the advocate in *Adan v ECO* (a solicitor named Mr Sesay) attempting to join the hearing and being told by the judge to rejoin later. Ms Ahmed suggested to Mr Talacchi that this was because the hearing ended 'really quickly'. He responded that the judge liked to case manage his hearings and he was not able to speculate why Mr Sesay might have been asked to join later.

32. Mr Talacchi was unable to comment on the assertion by the Presenting Officer that the hearing had not been recorded. He had not noticed whether the usual icon denoting that recording was in progress was present on the screen or not. Nor was he aware whether the judge had control of the recording. There were instances in which the judge was able to control the recording. It was sometimes the clerk. He did not wish to speculate.
33. Mr Martin did not wish to re-examine Mr Talacchi. We had no questions for him.

Submissions

34. Ms Ahmed filed a skeleton argument in advance of the hearing. Very shortly before the hearing, she also filed a lengthy bundle of authorities. In her skeleton argument and her detailed oral submissions, Ms Ahmed advanced arguments which might be summarised in the following way.
35. The hearing before the First-tier Tribunal was marred by apparent bias on the part of the judge and by procedural impropriety. In considering both allegations, the Upper Tribunal should consider the totality of the evidence before it. The question was the 'quintessentially factual' one identified in *Sivapatham*: what actually happened at the hearing.
36. Ms Ahmed noted that it was accepted on all sides that the judge had a provisional view as to the merits of the case. The authorities made it clear that there was nothing objectionable about that, providing that the judge did not have (or give the impression of) a closed mind. It was clear that the judge had discussed the case with the Presenting Officer in private. That was objectionable *per se*, and the judge had even accepted that he had 'perhaps erred' in that respect.
37. It was clear from all of the evidence that there had been no cross-examination by the Presenting Officer. Mr Talacchi was not really able to shed any light on the discussion which had led to that. It was relevant but not determinative that the Presenting Officer had not protested that she should be allowed to cross-examine or make submissions.
38. It was clear in Ms Ahmed's submission that the judge had control over the recording facilities. The judge was evidently wrong to suggest that his clerk had been in control throughout. It was his obligation to keep a record of the proceedings and he had failed to do so. Ms Ahmed asked why the judge had been so insistent on stopping the recording; a fair-minded observer would view that with some suspicion and might properly conclude that there were things the judge wanted to say 'off the record'
39. It was necessary, Ms Ahmed submitted, to 'join the dots' presented by the evidence. Having done so, it was clear that the judge had acted inappropriately. He had gone beyond the expression of a provisional view and had expressed a concluded view to the Presenting Officer. A judge

with an open mind would have asked the Presenting Officer whether she had any questions for the sponsor; she did not require permission to cross-examine. That was not his approach and the judge had effectively placed the Presenting Officer in a straitjacket. It was the Presenting Officer's word against that of the judge, given that the recording did not capture the pre-hearing discussion. It could properly be inferred from the Presenting Officer's minute that she had felt that her will was overborne by a dominating judge.

40. We indicated at the end of Ms Ahmed's submissions that the Entry Clearance Officer's appeal would be dismissed for reasons which would follow in due course. We did not need to hear from Mr Martin.
41. Ms Ahmed nevertheless invited us to give guidance on the use of recording facilities in the First-tier Tribunal. She set out a number of propositions which she invited us to endorse. Mr Martin responded briefly. Judge Froom, who is the Resident Judge at the Hatton Cross hearing centre, was aware of a Presidential Guidance Note which had been issued by the former President of the FtT(IAC) on 2 December 2021, and we asked Ms Ahmed and Mr Martin for their submissions on that Note.
42. We were informed by Ms Ahmed and Mr Martin that the Guidance Note was not publicly available. We rose for a short time to make our own enquiries and it was duly confirmed to us that the Guidance Note is not available on the judiciary.uk website. We provided copies of the Guidance Note to the advocates, and to Ms Masood, and made a direction that any written submissions on the use of recording facilities in the FtT should be made within a fortnight. We are grateful for the short note which Ms Ahmed provided on 27 June 2024. Ms Masood also provided a note on the same date. Mr Martin made no further submissions in writing. We will return to this issue at the end of our decision.

Analysis

43. We agree with Ms Ahmed's first submission. The real question in this case is a factual one: what happened at the hearing on 11 August 2023? The audio recording is incomplete, as is clear from the transcript, and we are left to draw our own conclusions about the contents of the pre-hearing discussion which took place between the Presenting Officer and the judge in the absence of Mr Talacchi.
44. This is not the occasion to consider the many judgments about apparent bias, procedural impropriety and the differing role of an appellate tribunal depending on the nature of the allegation made. Those questions have been very carefully considered at [25]-[37] of *Elais (fairness and extended family members)* [2022] UKUT 300 (IAC) and, now, at [9]-[12] and [41] *Hima v SSHD* [2024] EWCA Civ 680, per William Davis LJ, with whom Underhill and King LJ agreed.

45. There is no need to consider those questions because both advocates accepted that the outcome of the appeal depends straightforwardly on the content of the discussions between the judge and the Presenting Officer. Ms Ahmed accepts, as she must, that there is nothing objectionable about a judge expressing a provisional or preliminary view about an issue, or indeed about the merits of a case as a whole. So much is clear from the authorities cited [28]-[29] of *Elais*. Mr Martin, for his part, readily accepted that it would be objectionable for a judge to express a concluded view about an issue, or the merits of a case as a whole. He also accepts, unsurprisingly, that it would ordinarily be objectionable for a judge to prohibit an advocate from cross-examining a witness who was to be called, just as it would be to prohibit an advocate from making submissions on the merits of the case. It is common ground, therefore, that Judge Cohen would have erred in law if the factual allegations in the Presenting Officer's record of proceedings are made out, and that there would be no error of law if the judge's note is accurate.
46. Ms Ahmed suggested somewhat tentatively at one stage in her submissions that the proceedings were automatically rendered unfair by the fact – which is accepted on all sides as such – that there was a discussion between the judge and the Presenting Officer in the absence of counsel. She did not press that submission and she was correct not to do so. Although justice must be seen to be done, and although discussions about the merits of a case must ordinarily take place with the parties and any representatives, Ms Ahmed's tentative submission goes far too far. All must depend on the content of the discussion, as is clear from *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468.
47. Judge Cohen states that he expressed nothing more than a provisional view about the merits of the case and that, having done so, the Presenting Officer indicated that she was content to proceed on the basis of submissions only. The evidence adduced by the respondent falls far short of persuading us that we should not accept Judge Cohen's account. We reach that conclusion for the following reasons.
48. It is inherently unlikely that a judge would state privately to an advocate that they will not be permitted to cross-examine or to make submissions in defence of the party that they represent. That does not mean that such conduct could not occur, of course, but it is the context in which this serious allegation is to be considered.
49. Some context is also provided by the apparent merits of the case which the judge was invited to consider. The appellant is an elderly woman who has adduced evidence that she has had to stop working in Saudi Arabia on grounds of ill health. Her son has demonstrably been visiting her in Saudi Arabia for some time. There was evidence to show that he has been remitting money to her there on a regular basis. She was required to show that she was dependent upon him for meeting her essential needs and she had, on any proper view, assembled a respectable body of documentary evidence to show that this test was met. It is plausible in the

circumstances that the judge expressed a strong provisional view and the Presenting Officer decided, in light of that view, not to cross-examine or to make submissions beyond stating that she relied on the ECO's decision.

50. The Presenting Officer's record is very brief, and gives no indication of the actual words which are said to have been used by Judge Cohen to indicate that she was to be prevented from doing her job. Her witness statement sheds no further light on that important question. Had she attended the hearing before us, she would undoubtedly have been asked what precisely the judge had said to indicate that his mind was closed and that she would not be permitted to ask questions or make submissions. The Presenting Officer did not attend, however, and the reason given for her absence (that the Home Office had not given her sufficient notice of the hearing) is wholly inadequate.
51. It is common ground in this case that the Presenting Officer was not alone when the discussions with Judge Cohen took place. It is accepted on all sides that there were two trainees with her. That has been apparent for some time and the possibility of obtaining statements and oral evidence from those two trainees was canvassed at an earlier stage of the proceedings. Neither has made a statement and neither was called to give evidence before us. That is an extraordinary omission. Any trainee advocate would have been surprised (to put it at its lowest) to witness a judge behaving in the way that is alleged in this case, and they could have shed light on what occurred. The fact that 'the Secretary of State and HOPOs are a single entity' in law, as Ms Ahmed submitted with reference to [29] of *Awuah and Others (Wasted Costs Orders - HOPOs - Tribunal Powers)* [2017] UKFTT 555 (IAC) is nothing to the point. The issue in this case is a factual one and there are witnesses whose identities are known to the respondent. They could have given evidence of the disputed events but they have not done so.
52. There is nothing in the recording which suggests to us that the Presenting Officer had been shackled or straitjacketed in the manner asserted. The absence of protest on the part of the advocate is relevant but not determinative, as Ms Ahmed rightly noted with reference to the recent decision in *Hossain v SSHD* [2024] EWCA Civ 608. We appreciate that the recording is very limited, seemingly reflecting only the moments of the hearing after the 'submissions' had concluded, but the judge gave a clear indication that the recording had started and we would have expected an advocate (even an inexperienced one, as this Presenting Officer was) to have seized upon the fact that recording was underway and to have placed on the record her disquiet at the procedure which had been followed. It seems in any event that Mr Talacchi heard and observed a little more of the hearing than was captured by the recording, and we note that there is no suggestion on his part that his opponent gave any indication that she had been straitjacketed by the judge. On the contrary, he recalls that she said that she was content to proceed in the manner suggested by the judge.

53. Ms Ahmed invited us to draw inferences from the facts which are not in dispute. She submitted that the absence of a recording of the discussions between the Presenting Officer and Judge Cohen was suspicious, and tended to add credence to the suggestion that there had been something improper about the discussion. We decline to draw any inference from the absence of a recording of the discussion. Whilst it is clear to us from the final few moments of the hearing (in which the judge suggests that he was capable of stopping the recording and then did so) that the judge had some control over the recording, we cannot know why the discussions were not recorded. Such recording systems are not infallible, as Steyn J observed at [46] *Ullmer v Secretary of State for Education* [2021] EWHC 1366 (Admin), but we consider there to be a more fundamental point in the case of the recording of CVP hearings such as this.
54. In a superior court of record such as the Upper Tribunal, a recording is made of the whole hearing day. The recording will be started by the clerk before the Upper Tribunal sits, and will be stopped when the sitting day has ended. The recording of a CVP hearing in the FtT is different, in that the recording is specific to the case in question. The Tribunal is therefore required to start recording when case (a) begins, and stop it when case (a) ends, before starting a fresh recording when case (b) on the list begins. The potential for error in those circumstances is apparent.
55. We also note, in that connection, that the Presenting Officer was mistaken in this case in asserting that the judge 'did not turn on the recording for this case', as there was at least a recording of some of the hearing. The judge clearly announced that the recording had started and it casts some doubt on the Presenting Officer's recollection of events that she suggested that the recording was switched off throughout. That is another point which would undoubtedly have been put to her if the respondent had taken steps to notify her of the hearing.
56. Ms Ahmed sought in her skeleton argument to rely on the fact that the judge had not responded to some of the specific allegations made by the Presenting Officer in her hearing minute. What the judge did say was that he had given a preliminary view; that is his answer to the suggestion that he had already made up his mind. The judge did not need to respond in terms to the suggestion that he felt sympathetic towards the appellant and her medical issues; that is a compassionate observation, and not one which is suggestive of a closed mind or a pre-determined outcome. The judge accepts that he had formed the view that it was a strong case and that he had suggested as much to the Presenting Officer. The judge did respond to the Presenting Officer's suggestion that she had not been permitted to cross-examine; he said that it was 'simply not true'. He responded to the suggestion that he had effectively ordered that there should be no 'submissions beyond "I rely on the RFRL"'; his answer was that the Presenting Officer had agreed to that course, which tallies with the account Mr Talacchi gives of the part of the discussion to which he was privy.

57. For all of these reasons, we conclude that there is insufficient evidence to show that the judge expressed anything more than a provisional view as to the merits of the appeal, and we reject the suggestion that he refused to allow the Presenting Officer to cross-examine or make submissions on the merits. The establishment of such grave allegations requires appreciably better evidence than the Presenting Officer's record and her very brief witness statement. Taking the evidence as a whole, as Ms Ahmed invited us to do, we do not accept that the judge exhibited apparent bias or gave an indication of a closed mind, or that he conducted a procedurally unfair hearing by preventing the Presenting Officer from doing her job.
58. We do not know and we do not need to decide why the Presenting Officer made the allegations she did about the conduct of this hearing. We do not accept that the allegations are correct. There are therefore two possibilities. The first is that the Presenting Officer was mistaken, and that the judge's indication of a strong provisional view was misinterpreted by an inexperienced advocate as an indication that his mind was already made up. The second is that she manufactured the account in order to attempt to cover up a decision which she subsequently came to regret. We consider (but do not decide) that the first of those possibilities is more likely because the Presenting Officer was inexperienced, because her recollection about the recording was demonstrably wrong, and because it is not clear how soon after the hearing she compiled the note.
59. In reaching our decision, we should not be taken to endorse the approach adopted by Judge Cohen in this case. He was correct to accept in his response to the Principal Resident Judge that he should not have engaged the Presenting Officer in discussions about the case without the appellant's representative. Whilst that discussion does not establish an error of law on the part of the judge, it was certainly unwise. As Leggatt LJ (as he then was) stated at [25] of Bubbles & Wine v Lusha:
- "... it ought to be obvious that it is wrong for a judge to express views about the merits of the case to one party's representative in the absence of the other, particularly when no recording is being made of what is said."
60. We respectfully agree; any discussion about a case should be conducted in the presence of the parties or their advocates, where they are represented.
61. That observation, and the citation of what was said by Leggatt LJ, leads to a further point. As we have explained, we cannot know why the recording in this case began after the 'submissions' had concluded. Had the CVP recording captured the entirety of the discussions, as it undoubtedly should have, there could have been no dispute about what was said. We respectfully agree with [4] of the interim Guidance Note which was issued by the previous President of the First-tier Tribunal (IAC) on 2 December 2021. We need only reproduce the first sentence in full:

“Judges should not commence a hearing until satisfied that the proceedings are being recorded.”

62. That paragraph continues to offer sensible guidance, which we also endorse, about the practice to be followed when it becomes clear to a judge that the recording equipment is no longer functioning; the proceedings should be halted until the recording has resumed and, in the event that it cannot resume, a written record of proceedings should be taken.
63. The recording of hearings in the FtT(IAC) is a relatively recent phenomenon. The usual practice, certainly before the pandemic, was for the judge to take a written record of the proceedings which was retained on the court file. Where there was a dispute as to what had happened at the hearing, it was necessary to have statements from advocates and any relevant witnesses, and for the record of proceedings to be considered, and for the comments of the judge to be sought in accordance with the guidance given by the Court of Appeal (Davis LJ, with whom Beatson and Lindblom LJ agreed) at [53] of *Sarabjeet Singh v SSHD* [2016] EWCA Civ 492; [2016] 4 WLR 183.
64. That procedure is time consuming and burdensome and, as the Upper Tribunal noted in *Elais*, likely to be unnecessary where there is a full recording of the hearing before the FtT. Therefore, where it is possible for the FtT(IAC) to make an audio recording of the hearing, it in the interests of justice that it should be made. Any such recording should capture the whole of the hearing, including any discussions between the judge and the advocates as well as the evidence of any witnesses, any submissions made by the advocates, and any oral decision communicated by the judge, whether by way of an extempore judgment or otherwise. However, the absence of a full recording cannot in itself justify the conclusion that the proceedings were unfair, and any such allegation must be considered in light of the evidence which is available.
65. We have reflected on the helpful submissions which were made to us about the use of recording facilities in the First-tier Tribunal. Ms Ahmed set out a list of matters which she invited us to consider and to endorse. For his part, Mr Martin asked us to exercise some caution about giving guidance as to when recording equipment might properly be turned off whilst a hearing was ongoing. He gave the example of a medical emergency, or of counsel being permitted to use the hearing room to take instructions from a particularly vulnerable client.
66. On reflection, and with the benefit of the written submissions made by Ms Masood, we consider it unwise to attempt to be prescriptive in such matters and we note, in any event, that the present President of the First-tier Tribunal (IAC) has indicated to us that she intends to promulgate revised guidance on the recording of hearings in the FtT. In those

circumstances, we do not propose to go any further than the observations we have made in [64] above.

Notice of Decision

The Entry Clearance Officer's appeal is dismissed. The FtT's decision to allow the appeal stands.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 July 2024

APPENDIX A - TRANSCRIPT OF RECORDING

MR TALLACCHI: Judge, Yes

JUDGE COHEN: OK, fine. We are now recording so, in which case, I have heard submissions from Ms Walia and Mr Tallacchi and I have indicated that I am going to be allowing the appeal. Mr Nassir, do you understand?

MR NASSIR: Yes, I understand.

JUDGE COHEN: OK, that's the end of the appeal, thank you very much. Ms Ismail, thank you for coming to help us. Please feel free to go.

MR TALLACHI: Thank you, Judge.

MS ISMAIL (INTERPRETER): Sir, I think...

JUDGE COHEN: Oh, are you saying that you're required in the other case as well?

MS ISMAIL: Yes, sir

JUDGE COHEN: Oh, OK, stay here for the time being.

[pause - 13 seconds - typing is heard]

JUDGE COHEN: Erm, Ms Walia, or, erm Tunde, can we stop the recording for the time being, please?

[pause - 17 seconds]

JUDGE COHEN: If not, I think I am capable of doing it myself. Disconnect.

[RECORDING ENDS]