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

**Case No: UI-2023-004332**
**First-tier Tribunal No: EA/08711/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 07 August 2024**

**Before**

**UPPER TRIBUNAL JUDGE BLUNDELL**
**and**
**DEPUTY UPPER TRIBUNAL JUDGE FROOM**

**Between**

**ENTRY CLEARANCE OFFICER**

Appellant

**and**

**HADSAN MOHAMED ADAN**

Respondent

**Representation:**
For the Appellant: Ms A Ahmed, Senior Presenting Officer
For the Respondent: Ms H Masood of counsel, instructed by Thames Hill 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 18 August 2023, Judge Cohen allowed Ms Adan'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 Adan as the appellant and the Entry Clearance Officer as the respondent.

## Background

3. The appellant is a Somali national who gives her date of birth as 1 January 1940. She is a widow who currently lives in Uganda. On 10 May 2022, she sought entry clearance as the close family member of an EEA national with immigration status under the EU Settlement Scheme. She identified the EEA national as her son, Abdikarim Ali Farah, a Norwegian national who was born on 2 January 1985 and who has lived and worked in the UK since 2019. The application was supported by DNA evidence confirming the relationship and a number of money remittance slips, amongst other documents.

4. The respondent refused the application on 9 September 2002. He concluded that the appellant had provided inadequate evidence to show that she was financially dependent on the sponsor because there was no evidence of the appellant's domestic circumstances in Uganda. Without that evidence, the respondent stated that he was unable to ascertain whether she could meet her essential living needs without the support of the sponsor.

## Proceedings Before the First-tier Tribunal

5. The appellant gave notice of her appeal. The appeal was listed for 11 August 2023. Thames Hill Solicitors were instructed to represent the appellant. They produced a bundle of documents containing further evidence of remittances and of the sponsor's financial wherewithal. They also produced a short medical report from a 'Consultant Geriatrician' in Kampala, stating that the appellant suffered from a range of conditions including vascular dementia and anaemia. A skeleton argument was settled by a solicitor advocate, Mr Sesay, on 7 August 2023. Mr Sesay argued that the octogenarian appellant was widowed and infirm and that her essential living needs were met by the financial support which was demonstrably provided by the sponsor.

6. The appeal came before Judge Cohen on 11 August 2023. As we understand it, the judge was sitting at Taylor House, whereas the advocates and the sponsor attended remotely via CVP. As we will explain shortly, what happened during the hearing is in dispute before us. It suffices for the moment to state that the judge allowed the appeal, finding that there was evidence of financial support passing from sponsor to appellant from 2011 onwards and that she was demonstrably reliant upon that support.

## The Appeal to the Upper Tribunal

7. The respondent's grounds of appeal contend that Judge Cohen's conduct of the hearing was procedurally improper. Given the serious nature of the allegations, we will reproduce the grounds of appeal in full:

> "(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), 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.'"

8. The authority mentioned but not cited at the end of the grounds is *Sivapatham (Appearance of Bias)* [2017] UKUT 293 (IAC).

9. The grounds of appeal 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 and their 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".
>
> 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."

10. Judge Elliott considered the grounds of appeal to be arguable, noting that the procedure adopted was arguably unfair if the judge had refused to allow the Presenting Officer to test the evidence or to make submissions on it.

## Subsequent Events in the Upper Tribunal

11. The Upper Tribunal subsequently sought and obtained the audio recording of the hearing in the First-tier Tribunal. It lasts for one minute and fifty-two seconds and contains no recording of the discussions which were said by the Presenting Officer to have taken place between her and the judge.

12. This appeal was first listed before the Upper Tribunal (UTJ Blundell and DUTJ Woodcraft) on 28 November 2023. The incomplete recording of the hearing before the FtT was played. It was agreed by the advocates (then Ms Ahmed and Ms Katambala) 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.

13. On 11 November 2023, another appeal raising similar allegations against Judge Cohen had come before the Upper Tribunal (UTJ Blundell and DUTJ Haria). It transpired that the appeal in that case (*Isac v ECO UI-2023-004185*) had also been heard at Taylor House on 11 August 2023. On further investigation, it became clear that the hearing in *Isac v ECO* had taken place immediately before 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.

14. The recording of the proceedings in *Isac v ECO* was also incomplete. It lasts for one minute and twenty-five seconds. That recording was played to the parties at the hearing on 11 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.

15. 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

16. The Presenting Officer subsequently made a witness statement dated 12 December 2023. She said nothing of substance in that statement beyond confirming that her record of the hearing was true.

17. Mr Sesay made a statement on 4 January 2024. He confirmed that he had joined the CVP hearing before Judge Cohen in advance of 10am and that the judge had joined at approximately 10am. Mr Sesay had been invited by the judge to leave the hearing until 1010, and then until 1020. When he rejoined the hearing at 1020, "the Judge indicated in open court that he would allow the appeal for reasons that will follow in his decision." Mr Sesay said that the judge had then asked for submissions, to which there had been no objection by either party. The Presenting Officer had relied on the letter of refusal. Mr Sesay had relied on his skeleton argument, after which the judge had reserved his decision. Mr Sesay stated that he was not privy to any conversation which took place between the judge and the Presenting Officer before joining the hearing. He had seen her statement and had no comment to make upon it.

18. 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 statement made by the Presenting Officer before the FtT. (Mr Sesay's statement was not provided to the judge; although it had been signed in January 2024, it was not filed with the Upper Tribunal until much later.)

19. Judge Cohen responded to the Principal Resident Judge 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 preliminary view during their discussion about the case. Based on his reading of the papers, he considered it to be a strong appeal which was likely to succeed. He had noted that there was substantial evidence to show that the appellant was receiving money from the sponsor and that she was an 83 year old widow with no other visible means of support. He noted that the conversation he had with the Presenting Officer had taken

place in the presence of the sponsor, the interpreter and two Home Office trainees. The Presenting Officer had agreed to proceed on the basis of submissions only; she had not been 'prevented' from cross-examining the sponsor.

20. Judge Cohen noted that Mr Sesay had not made a statement but that there was a statement from counsel who appeared in *Isac v ECO*, Mr C Talacchi. The judge noted that Mr Talacchi had confirmed in the other case that the Presenting Officer had consented to proceeding on the basis of submissions only despite her suggestion to the contrary in her post-hearing minute. Judge Cohen observed that the Presenting Officer had "quite willingly" opted to rely on the notice of refusal; that there were no statements from the two trainees; and that no complaint had ever been made to the Resident Judge at Taylor House. In respect of the incomplete recording, the judge noted that he was not in control of the facilities; that was undertaken by the clerk at Taylor House. 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 respect of the conduct of the appeal.

21. 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

22. We indicated that this appeal would be heard immediately after that in *ECO v Isac*. Ms Ahmed appeared for the Entry Clearance Officer in both cases. Mr Jonathan Martin of counsel appeared in *ECO v Isac*. Ms Hafsah Masood of counsel appeared in this appeal. We indicated to Ms Masood that she may wish to remain to hear Ms Ahmed's submissions, which were in many respects common to both appeals. Ms Masood accordingly remained throughout the hearing in *ECO v Isac*.

23. The recordings of both hearings were played in full.

24. 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.

25. We then heard the appeal in *ECO v Isac*. We heard oral evidence from Mr Talacchi of counsel and submissions from Ms Ahmed. We did not need to call on Mr Martin of counsel. We indicated that the Entry Clearance

Officer's appeal would be dismissed for reasons which would follow in writing.

26. We then heard this appeal. We heard oral evidence from Mr Sesay, initially by video link and then (when the CVP link failed and with the agreement of Ms Ahmed and Ms Masood) by telephone. He adopted the statement which we have summarised above and he was cross-examined by Mr Ahmed. Ms Ahmed asked Mr Sesay to confirm who was logged in to the call when he had first joined at around 10am. He said that there had been the judge, the Presenting Officer, the two 'students' and the interpreter. He had not witnessed the judge having a discussion about the case with the Presenting Officer. When he had rejoined at 1010, he could not remember who was present. He recalled that the judge had set out the order in which he would be taking the cases. The judge had said that he would be likely to dispose of one of the other cases quickly, but it had taken a little longer. When Mr Sesay had rejoined at 1010, nothing had been said; the judge merely asked him to log off and to rejoin in ten minutes. The judge had not discussed the merits of this case with Mr Sesay before 1020. Ms Ahmed asked whether the judge had said that he would allow the appeal *before* asking for submissions. Mr Sesay confirmed that was the case.

27. Ms Ahmed asked whether Mr Sesay's recollection tallied with the suggestion that it had been "agreed" that the hearing would proceed on submissions only. He stated that there had been no such agreement between him and his opponent. That could only have been an agreement between the Presenting Officer and the judge. He noted that there had been no objection on the part of the Presenting Officer, but he could not recall the judge asking either party for their views on that course either. He was unable to comment on whether there had been a discussion between the Presenting Officer and the judge. He did not know whether the judge had control of the recording equipment. Mr Sesay had not been surprised when the judge had to remind him that it was 'submissions only'. He had misunderstood the situation, and that was why he had asked the sponsor to adopt his statement. It was not uncommon for a hearing to proceed on submissions only, however.

28. In re-examination, Mr Sesay confirmed that he had the transcript of the hearing. Ms Masood observed to him that his version of events - in which the judge gave an indication that he would allow the appeal before he heard submissions – was not supported by the transcript. Mr Sesay agreed, noting that what he had said was not recorded in the transcript.

## Submissions

29. Ms Ahmed had filed a skeleton argument in advance of the hearing. She had also provided a sizeable bundle of authorities. She indicated at the outset of her submissions that she intended to rely on the general points she had made *in ECO v Isac*. As we have noted above, Ms Masood was present throughout that hearing and was evidently not prejudiced by this

approach. For the reader, however, we record that the submissions made in the earlier appeal were as follows:

(a) 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.

(b) 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.

(c) 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.

(d) 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'

(e) 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.

30. In relation to this appeal, Ms Ahmed added the following submissions. She accepted that the evidence was 'limited' but she submitted that it

nevertheless sufficient, when considered in context and as a whole, to make out the complaints in the grounds of appeal.

31. Ms Ahmed submitted that the judge had clearly expressed a view to the Presenting Officer which was more than provisional. It was notable that both the judge and the Presenting Officer made reference in their notes to the appellant's age. It was likely that Mr Sesay was correct in his assertion that the judge had indicated that he would allow the appeal even before he had heard the submissions, such as they were. It was clear that the judge had not discussed this appeal with Mr Sesay, and that he had heard no submissions from him. Mr Sesay had tried to call the sponsor to give evidence but the judge had told him 'No, no, it's submissions', which was itself indicative of a closed mind.

32. The recording was incomplete. The appeal turned on what was said during the discussions which had not been recorded and it was the word of the Presenting Officer against that of the judge. The tone of the Presenting Officer on the recording was notable. Ms Ahmed submitted that the Presenting Officer's reliance on the refusal letter was 'begrudging', whereas the judge's tone was 'dismissive and casual'. Ms Ahmed also asked us to note that the Presenting Officer had asked the judge to confirm that he would give full written reasons for her decision, which amounted to a 'meek form of protest'. Taken all of these matters into account, it was clear that the judge had placed the Presenting Officer in a procedural straitjacket by limiting the extent to which she was able to participate in the hearing. A fair-minded observer would conclude that there was a bar on cross-examination and full submissions and that the hearing had been conducted unfairly as a result.

33. 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 had read Ms Masood's skeleton argument and we did not need to call on her to make oral submissions.

34. 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. Ms Masood 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 Ms Masood for their submissions on that Note.

35. We were informed by Ms Ahmed and Ms Masood 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 Mr Martin, 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

36. We are grateful to Ms Ahmed and Ms Masood for their analysis of the relevant law in their skeleton arguments, and for the authorities provided for the hearing. This is not the occasion, however, 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 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 LJJ agreed.

37. 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 Sesay. The outcome of the appeal depends straightforwardly on the content of those discussions.

38. 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*. Ms Masood, for her part, readily accepted that it would be objectionable for a judge during such discussions to express a concluded view about an issue, or the merits of a case as a whole. She 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.

39. 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.

40. 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.

41. 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.

42. 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 suffers from various health complaints. There was evidence to show that the sponsor has been remitting money to her 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.

43. 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.

44. 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.

45. 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. Ms Ahmed asked us to note the Presenting Officer's tone when she stated that she relied on the letter of refusal, and submitted that it was notably 'begrudging'. We have listened to the recording several times and we are unable to accept that categorisation. The Presenting Officer's answer to the judge's invitation to make submissions was courteous and economical: "Yes Judge, I rely on the refusal letter". There is nothing in her tone to suggest that she had somehow been coerced into adopting that stance.

46. We also note that the Presenting Officer was apparently aware that the hearing was being recorded, even though the pre-hearing discussions between her and the judge had not been. If she felt that she had been straitjacketed by the judge in the pre-hearing discussions, there was every opportunity to note that this was so when the recording began. When she was invited to make submissions, she could have noted that she had questions for the sponsor, or she could have embarked upon submissions on the merits of the case. It is notable that she did not do so, and submitted merely that she relied on the letter of refusal. Ms Ahmed suggested that the Presenting Officer's request for written reasons was a 'meek form of protest' which shed some light on what had gone before. We disagree. The Presenting Officer was plainly cognisant of the fact that the Tribunal had given its decision orally at the hearing, in accordance with rule 29(1) of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014, and that it was not required by rule 29(3) to provide written reasons for its decision because the appeal did not relate to an asylum or humanitarian protection claim. She was entitled to ask for confirmation that written reasons would be provided and nothing is to be inferred from her request, or from the way in which it was made.

47. Ms Ahmed attempted to support her argument with reference to Mr Sesay's evidence that the judge stated that the appeal would be allowed even before he had heard submissions. The answer to that submission is simple: Mr Sesay was clearly mistaken. To recap, Mr Sesay rejoined the hearing at the point that the recording started and heard nothing of the discussions between the Presenting Officer and the judge. If the judge 'indicated several times… that he was going to allow the appeal', as suggested by the Presenting Officer, it is not suggested by either side that Mr Sesay was present during that discussion. When the recording began, the sequence of events is as clear as it is conventional. The judge heard submissions, and then he allowed the appeal. As Mr Sesay came to accept at the end of his oral evidence, his suggestion to the contrary was simply not borne out by the recording.

48. 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 we think it likely 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] of *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.

49. 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.

50. 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 fact that the Presenting Officer went on to offer nothing more than that submission when the judge turned to her.

51. 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.

52. 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 and because it is not clear how soon after the hearing she compiled the note.

53. 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."

54. We respectfully agree; any discussion about a case should be conducted in the presence of the parties or their advocates, where they are represented.

55. That observation, and the citation of what was said by Leggatt LJ, leads to a further point. We do not know why the recording in this case began after the discussions between the judge and the Presenting Officer had concluded. Had the CVP recording captured the entirety of those 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."

56. 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.

57. 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 the 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 LJJ agreed) at [53] of *Sarabjeet Singh v SSHD* [2016] EWCA Civ 492; [2016] 4 WLR 183.

58. 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.

59. 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 considerations which she invited us to consider and to endorse. 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 above.

## Notice of Decision

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

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 July 2024

**APPENDIX A – TRANSCRIPT OF RECORDING**

JUDGE COHEN: Hadsan Mohammed Adan. My name is Maurice Cohen, I am the Immigration Judge. We have Ms Walia representing the Home Office and Mr Sesay who is the solicitor for the appellant. We are accompanied by the appellant's son – Mr Abdi Karim [interruption] Ali Farah, thank you. It has been agreed that we will proceed on the basis of submission alone. So, with that in mind, and the interpreter has already made sure that she understands the sponsor, and vice versa, so Ms Walia, would you like to make submissions to me, please?

MS WALIA: Yes Judge, I rely on the refusal letter.

JUDGE COHEN: Thank you very much. Mr Sesay?

MR SESAY: Judge, I'll just get the appellant, the sponsor, to adopt his statement.

JUDGE COHEN: No, no, it's submissions.

MR SESAY: Judge, I will invite you to allow the appeal and to find that there is sufficient evidence of dependency.

JUDGE COHEN: And remind me, a skeleton argument in this case?

MR SESAY: I rely on the skeleton argument, Judge.

JUDGE COHEN: Thank you very much. OK. I allow the appeal. Thank you very much. Ms Ismail, will you just interpret to the sponsor that I allow the appeal, please?

INTERPRETER: [speaks in Somali to sponsor]

MS WALIA: Judge, can I confirm that written reasons will be provided?

JUDGE COHEN: Of course.

MS WALIA: Yes, of course. I just wanted to double-check.

JUDGE COHEN: Yeah, yeah, yeah. A full determination will follow in due course. OK, Mr Sesay, please feel free to go. Ms Ismail, please feel free to go. Abdikarim, please feel free to go. That is the end of the appeal, thank you

[RECORDING ENDS]