



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Osefiso and another (PTA decision: effect; 'Cart' JR) [2021] UKUT 00116 (IAC)

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons Promulgated**

**On 10 February and 24 March 2021**

**16 April 2021**

**Before**

**THE HON. MR JUSTICE LANE, PRESIDENT**

**MR C M G OCKELTON, VICE PRESIDENT**

**Between**

**ABOLAJI TEMITOPE OSEFISO - FIRST APPELLANT**

**OJ - SECOND APPELLANT**

**(ANONYMITY ORDER MADE IN RESPECT OF THE SECOND APPELLANT)**

**Appellants**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation :**

For the appellants: Mr F Magennis (10 February) and Mr R Sharma, (24 March) instructed by David Benson Solicitors

For the respondent: Mr T Lindsay, Senior Home Office Presenting Officer

(1) A decision of the Upper Tribunal to refuse permission to appeal against a decision of the First-tier Tribunal disposes of proceedings in the Upper Tribunal. Except for its power to set aside under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 for procedural irregularity, the Upper Tribunal cannot revisit its decision. As a result, it has no jurisdiction to entertain subsequently-formulated grounds of challenge to the First-tier Tribunal's decision.

(2) In order to satisfy the part of CPR 54.7A(7)(a) which requires the High Court to find an arguable case that the Upper Tribunal's refusal of permission to appeal was wrong in law, the court needs to be satisfied either that:

(a) the Upper Tribunal's reaction to the grounds of challenge in the application for permission to appeal was arguably wrong in law; or

(b) where the judicial review grounds have not found expression in the grounds considered by the Upper Tribunal, the judicial review grounds are of such an a nature as to have required the Upper Tribunal to have raised them of its own volition, and then considered them; and that its failure to do so is arguably wrong in law.

## **DECISION AND REASONS**

### **A. INTRODUCTION**

1.

The appellants are citizens of Nigeria, a mother and her son, born respectively in 1987 and 2015. On 24 January 2018, they made human rights claims to the respondent. On 6 June 2018, the applications were refused. It was noted by the respondent that the first appellant had arrived in the United Kingdom in 2002, with entry clearance as a visitor. She was granted leave to remain in February 2013, on the basis of her private life, until 15 August 2015. On 11 August 2015, she was granted further leave to remain, again on the basis of her private life, until 19 February 2018. The first appellant told the respondent that her husband, the father of the second appellant, resided in Nigeria; and that she had family life with the second appellant, who resides with her in the United Kingdom.

2.

Given that the first appellant did not fall within the provisions of the relevant immigration rules for leave to remain as a partner, her application was considered by reference to the first appellant's genuine and subsisting parental relationship with the second appellant. The second appellant, however, was not a British citizen or settled in the United Kingdom; nor had he lived in the United Kingdom continuously for seven years or more. Thus, although the parental relationship was acknowledged, the respondent considered that application made by reference to the child fell for refusal under the rules.

3.

The first appellant's case was then considered by reference to paragraph 276ADE of those rules. Paragraph 276ADE reads as follows:-

" 276ADE (1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;  
or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles

to the applicant's integration into the country to which he would have to go if required to leave the UK."

4.

The respondent found that the first appellant had not lived continuously in the UK for at least the last twenty years. She was also over the age of 18. She was not between 18 and 25 years. This meant that the only way in which the first appellant could satisfy paragraph 276ADE was by reference to sub-paragraph (1)(vi). The respondent accordingly addressed the issue of whether there would be very significant obstacles to the first appellant's integration into Nigeria. The respondent considered there would not. The first appellant had spent her formative years living in Nigeria and would be familiar with the language and culture there. The first appellant had a husband living in Nigeria, who had business interests in the country. All of that would, according to the respondent, enable the first appellant to integrate into Nigeria. She had been to Nigeria since entering the United Kingdom. For these reasons, the respondent concluded that the first appellant did not meet the requirements of paragraph 276ADE(1)(vi).

5.

As for the second appellant, the respondent's attention also focused on paragraph 276ADE(1)(vi). The respondent considered that there would not be very significant obstacles in the case of the second appellant because he would be relocating to Nigeria with his mother and would be supported by her there whilst he integrated. Furthermore, the second appellant's father resided in Nigeria and would also be able to supply support.

6.

The letter of refusal concluded by considering exceptional circumstances. It was noted that the second appellant was born in the United Kingdom and that the first appellant was in employment there. Although the second appellant might be currently enrolled in education in the United Kingdom, it was clear to the respondent from objective information that Nigeria had a functioning education system, which the second appellant would be able to enter. Although it was generally accepted that the best interests of a child whose parent was facing removal from the United Kingdom were best served by the child remaining with the parent, given that the first appellant would be removed with the second appellant, and that the first appellant was "clearly the most important person in [the second appellant's] life ... this will help him to readapt to life in Nigeria". Although the first appellant had family and friends in the United Kingdom, these ties were not considered to be strong enough to engage article 8.

7.

The respondent noted that the first appellant was a nurse in the United Kingdom and that she supported newly qualified nurses. The respondent also noted that the first appellant said there was a shortage of nurses in the United Kingdom. That was carefully considered:

"however this is not an exceptional reason to grant leave outside the rules. It is open for you to return to Nigeria and apply for the correct entry clearance. You can use your skills gained in the UK in Nigeria where you could find a similar job".

Nor was it an exceptional circumstance that the first appellant had purchased a house in the United Kingdom. The house could be sold and the money used to buy a similar property in Nigeria.

## **B. APPEALS TO THE FIRST-TIER TRIBUNAL**

8.

The appellants appealed against the refusals to the First-tier Tribunal. Following an appeal heard at Taylor House on 26 June 2019, First-tier Tribunal Judge S J Clarke dismissed the appeals in a decision promulgated on 8 August 2019. The judge heard evidence from the first appellant, and from the first appellant's mother and sisters. The first appellant told the judge that her marriage to her husband in Nigeria had ended in June 2017. Amongst the findings made by the judge were those at paragraph 17 of her decision, where it was recorded that the mother of the first appellant had recently spent six months in Nigeria, looking after her own mother. The judge found that this demonstrated there was a base from which the first appellant and the second appellant could begin their life in Nigeria. At the end of paragraph 17, the judge found that "the appellant's mother is currently remitting money for some of their children by bank transfer and I find she is able to assist the appellant should the need arise".

9.

At paragraph 18, the judge found that, in any event, the first appellant could maintain the second appellant by herself or through some assistance from the father of the second appellant. The decree absolute produced by the first appellant specifically referred to the father paying for the school fees of the second appellant and specifically stated that "it is not limited to this".

10.

At paragraph 20, the judge found that the first appellant was a successful independent woman, who had set up her own home and educated herself and was earning a good salary for an international pharmaceutical company. At paragraph 20, he found the first appellant could speak Yoruba fluently:-

"... and whilst I was informed of a local dialect called Remo, I do not find this sufficient to create an insurmountable obstacle, and in any event, the first Appellant was brought up in a Remo speaking area until she came to the UK aged 15 years, and if she is a little rusty, I find she can relearn it being as educated as she is having attained a first-class degree."

11.

Also at paragraph 20, the judge found that the second appellant did not face any insurmountable obstacles and that there were schools he could access. He was young enough and of an age when he could learn Yoruba or Remo, as well as English.

12.

Having concluded that the appellants did not meet the requirements of the immigration rules, the judge looked at ECHR Article 8 outside the rules, finding, in effect, that there were no reasons such as to compel a grant of leave by reference to that Article, outside those rules. At paragraph 23, the judge noted that the second appellant would return to a network of family living in the same state as the father of the second appellant "who may or may not assist with his upbringing, but even if he does not, there remain some financial assistance from the grandmother and the first Appellant owns an asset in the form of a house ...". The first appellant also had "transferrable skills and is able to provide for her son in Nigeria in some care related or nursing related activity".

### **C. APPLICATIONS FOR PERMISSION TO APPEAL**

13.

The appellants applied for permission to appeal. The grounds of application to the First-tier Tribunal contended that the judge should have realised there was a reasonable contemplation that the first appellant's private life "would not remain stagnant". This was said to be an error of law. It was also

submitted that the judge had failed to recognise that the first appellant's qualification as a qualified registered adult nurse constituted an important public interest, given the shortage of nurses in the United Kingdom. The grounds further contended that there were factual errors in the judge's decision. At paragraph 17, the judge was said to have wrongly recorded that the first appellant's mother was able to support her financially. The first appellant said that, in fact, it was the first appellant who provided financial support to her mother. It was also untrue to say that the first appellant had grown up in a Remo speaking area. The judge had misunderstood what was said at the hearing. The language spoken in her grandmother's village was Remo, which the first appellant did not speak or understand.

14.

The First-tier Tribunal refused permission to appeal on 11 November 2019. The appellants then made a renewed application for permission to the Upper Tribunal. The renewed application emphasised the alleged factual errors made by the First-tier Tribunal Judge in the decision. It was said that these impacted upon the judge's consideration of the case for the appellants.

15.

On 6 January 2020, the Upper Tribunal refused permission to appeal. At paragraph 2 of the refusing judge's decision, he noted the alleged factual errors in the decision of the First-tier Tribunal. At paragraph 3, the refusal categorised the grounds as "unarguable". The First-tier Tribunal Judge was entitled to find that the first appellant was unable to satisfy the requirements of the immigration rules. As regards paragraph 276ADE, the refusal noted that the First-tier Tribunal judge had found that the appellants did not face "insurmountable obstacles to their integration in Nigeria". In reaching that finding, the First-tier Tribunal Judge had had regard to the history of the first appellant's mother and found that the appellants had a base to start from in Nigeria. The refusal specifically addressed the issue of whether the first appellant's mother was able to remit money to her other children in Nigeria, only because she was financially supported in the United Kingdom by the first appellant. The refusal noted that the First-tier Tribunal had not found that the appellants would necessarily have to call upon assistance from the first appellant's mother. On the contrary, the First-tier Tribunal Judge had found that the first appellant was a successful independent woman who had set up home and educated herself, and who was earning a good salary from an international pharmaceutical company. She could speak Yoruba and, although there was a local dialect called Remo, that would not create an insurmountable obstacle. The Upper Tribunal Judge considered that the assessment of an Article 8 claim "is always a highly fact sensitive task". Reading the determination as a whole the refusal of permission ended by stating that "it is quite clear that the conclusions of the judge as to the Article 8 appeal were supported by reasons open to the judge on the evidence before her, and the findings made".

#### **D. 'CART' JUDICIAL REVIEW**

16.

The appellants sought judicial review of the Upper Tribunal's decision to refuse permission to appeal. The grounds of the judicial review application were settled by Mr Sharma. He had not been involved in the proceedings up to that point. Mr Sharma mounted a criticism of the decision of the First-tier Tribunal, which had not found any expression in the grounds accompanying the applications for permission to appeal to the First-tier Tribunal or the Upper Tribunal. At paragraph 22 of the judicial review grounds, Mr Sharma submitted that, at paragraph 17 of her decision, the First-tier Tribunal Judge had misdirected herself as regards the test to be satisfied in paragraph 276ADE(1)(vi) of the Rules. The judge had described the test in terms of "insurmountable obstacles" to the integration of

the appellants in Nigeria, whereas paragraph 276ADE(1)(vi) requires consideration of whether there are “very significant obstacles to” integration.

17.

The judicial review grounds went on to critique the First-tier Tribunal’s decision on the basis that there needed to be a change in circumstances, in order to justify the respondent’s refusal to grant leave to remain to the first appellant, given that the latter had been given such leave on private life grounds on previous occasions. The grounds submitted that the first appellant’s visit to Nigeria in 2013 could not constitute such a change. Nor could the fact that the first appellant had moved from her mother’s home. The fact that the first appellant’s mother’s had contacts in Nigeria were, according to Mr Sharma’s grounds, irrelevant to the two initial grants of leave and therefore not of sufficient basis on which to depart from those previous decisions.

18.

At paragraph 41 of the judicial review grounds, Mr Sharma candidly recognised “that many of the submissions above did not explicitly form a part of the original grounds before the Tribunals”. Indeed, they did not. We do not consider they formed any part of those grounds.

19.

Following a hearing conducted by telephone on 1 April 2020, at which the appellants and the Secretary of State were represented by Counsel, the High Court granted permission to bring judicial review. The court’s reasons were that the decision of the First-tier Tribunal “appears to be poorly reasoned, appears to apply the wrong test under the relevant Rule (very significant obstacles) and arguably does not adequately weigh the factors which may render the claimant’s (sic) expulsion disproportionate”.

20.

The court identified the important points of principle or practice for the purpose of CPR 54.7A to be (i) whether the First-tier Tribunal should take the successive grants of leave to remain in a category leading to settlement as the starting point in determining whether there had been a change in circumstances since the last grant of leave; (ii) what approach should be taken in considering proportionality under Article 8 or “very significant obstacles” under the Rules, where there has been a previous grant; and (iii) when should a person, who had previously been found to have lost all ties to the country of proposed return, be regarded as having established ties to that country, to such an extent that their route to settlement in the United Kingdom should be interrupted. The High Court noted that Counsel, having carried legal research, told the court there was “no case law directly on these points”.

21.

The High Court’s order, which resulted from the telephone hearing, stated that these “important points of principle or practice for the consideration of the Upper Tribunal” would be “subject to the claimants’ application to amend their grounds of appeal”.

## **E. DISCUSSION**

22.

As the Upper Tribunal explained in *MA (Cart JR: effect on UT processes) Pakistan* [2019] UKUT 353 (IAC), the “Cart” judicial review jurisdiction for which provision is made by CPR 54.7A should not be treated by parties as merely an untrammelled third opportunity to raise grounds of challenge to a decision of the First-tier Tribunal, which have found no expression in the grounds put to the First-tier

Tribunal and, then, the Upper Tribunal. In enacting section 11 of the Tribunals, Courts and Enforcement Act 2007, Parliament has provided for there to be a renewed application to the Upper Tribunal, following a refusal by the First-tier Tribunal. That renewed application is not constrained by whatever grounds have been put to the First-tier Tribunal. The “Cart” judicial review is, however, of a fundamentally different character. In order to satisfy the part of CPR 54.7A(7)(a) which requires the High Court to find an arguable case that the Upper Tribunal’s refusal of permission to appeal was wrong in law, the court needs to be satisfied either that:

(a) the Upper Tribunal’s reaction to the grounds of challenge in the application for permission to appeal was arguably wrong in law; or

(b) where the judicial review grounds have not found expression in the grounds considered by the Upper Tribunal, the judicial review grounds are of such a nature as to have required the Upper Tribunal to have raised them of its own volition, and then considered them; and that its failure to do so is arguably wrong in law.

23.

In the present case, we were concerned whether the High Court, in granting permission to bring judicial review, regarded it as significant that the appellants had supposedly applied to the Upper Tribunal to amend their grounds of appeal. Accordingly, at the hearing on 10 February 2021, directions were given to the appellants to explain (i) what information was given to the High Court about the grounds to which the Upper Tribunal’s impugned refusal of permission had in fact responded; and (ii) the basis (if any) on which it was suggested that any other grounds should be considered in a judicial review.

24.

In response to these directions, Mr Sharma filed a skeleton argument, together with a supplementary bundle. From the latter, we see that on 30 January 2020, over three weeks after the Upper Tribunal refused permission to appeal, a document purporting to be an application for permission to appeal (on Form IAUT-1) was sent to the Upper Tribunal, together with grounds. The form indicated that the application was being made outside the relevant time limit. The reasons given were as follows:-

“This is an application for amending the grounds that we have lodged on 28 November 2019 for permission seeking to Upper Tribunal (sic). This grounds was given (sic) by a different Counsel and it is necessary for us to amend this grounds (sic) for us to rely on these grounds before High Court in a Cart judicial review.

We hereby seek permission of the Upper Tribunal to amend the grounds seeking permission and extend the time of making this applicaiton (sic) in the interests of justice.”

25.

The grounds which accompanied the application were, in fact, headed “PARTICULARS OF CLAIM JUDICIAL REVIEW”. A comparison of this document and the judicial review grounds shows that the substance of the challenge now being made was the same in each case; namely, the alleged application of an incorrect test for the purposes of paragraph 276ADE(1)(vi) of the Rules; and the alleged failure of the First-tier Tribunal Judge to take as her starting point the previous grants of leave to the first appellant on private life grounds. The grounds of 30 January 2020 concluded as follows:-

"27. In making this application, A recognises the difficulty that may arise if she succeeds before the Administrative Court on grounds not previously pleaded before the Upper Tribunal and invites a pragmatic approach to granting permission to amend grounds.

28. This application has been brought as timeously as allowed in the circumstances, in good faith and on grounds that would materially alter the outcome of the appeal. There is no prejudice to the Respondent, in granting permission to amend grounds in circumstances where the Administrative Court would have identified the grounds as arguable.

29. The errors pleaded are, in relation to ground 1, material and obvious. It is unclear why it was not expressly pleaded in the preceding applications. Ground 2 is an extension of the factual errors relied upon in the grounds below and is simply an attempt to perfect the grounds. "

26.

In view of the history we have set out, we would strongly disagree with what is stated in paragraph 29 of this document. It is perfectly clear that the grounds accompanying the application made on 30 January were fundamentally different from those put to, and refused by, the Upper Tribunal.

27.

The important point, however, is that those acting for the appellants at this stage of the proceedings did in fact recognise the difficulty the appellants faced in bringing a "Cart" judicial review, whose grounds of challenge had not previously been put to the Upper Tribunal. A decision was, therefore, taken to attempt to put the newly formulated grounds before the Upper Tribunal in the form of an application for permission to appeal. But the fundamental problem with this course of action was that such an application had already been made by the appellants' previous representatives. That application had been decided by the Upper Tribunal on 6 January 2020, when it refused permission to appeal. That refusal was, unarguably, a decision that disposed of the proceedings in the Upper Tribunal. Subject to what we say in paragraph 29 below, upon the making of the refusal decision, the Upper Tribunal became functus officio .

28.

In *Patel & Ors v Secretary of State for the Home Department* [2015] EWCA Civ 1175; [2016] Imm AR 444, the Court of Appeal held that, once a decision on permission to appeal has been taken by the Upper Tribunal, that tribunal has no power to review a decision under section 11 of the 2007 Act. The court held:-

"48. It is clear from the wording of **section 13(8)(c)** taken with **section 11(4)(b)** of the 2007 Act that when the UT grants or refuses an application for permission to appeal, it is, in principle, making a "decision" within the meaning of those sections. Therefore, given the terms of **section 13(1), 13(8)(c)** and **11(4)(b)** of the 2007 Act, it is also clear that a "decision" of the UT to grant permission to appeal constitutes an "excluded decision". Once an "excluded decision" is made by the UT, then the UT has no power to "review" it, by virtue of the terms of **section 10(1)** of the 2007 Act.

29.

*Patel* presents a serious difficulty for the present appellants. It would clearly make a mockery of section 10(1) of the 2007 Act if a party could evade the restriction on review of a refusal of permission merely by making another application for permission. The only way in which a decision that disposes of proceedings can be revisited by the Upper Tribunal is under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008: *Jan* (Upper Tribunal: set-aside powers) [2016] UKUT 336 (IAC); [2016] Imm AR 1437. Rule 43 enables the Upper Tribunal to set aside such a decision if it is in the interests



of justice to do so and there has been some procedural irregularity in the proceedings. There is no question of there being such an irregularity in the present case.

30.

Furthermore if, as Mr Sharma submitted, the Upper Tribunal did have jurisdiction to consider the so-called application made on 30 January 2020, the consequences would be profound. Section 104 (Pending appeal) of the Nationality, Immigration and Asylum Act 2002 provides that an appeal is pending during the period beginning when it is instituted and ending when it is finally determined (or in other circumstances not here relevant). Section 104(2) provides that an appeal is not finally determined while (inter alia) “an application for permission to appeal under section 11 ... of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination”. If Mr Sharma is right, there would be nothing to prevent an appellant from filing an unlimited number of applications for permission to appeal, within the requisite time limit, all of which would have to be determined by the Upper Tribunal.

31.

Although decided in a different statutory context, the judgment of Richards LJ in *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78; [2009] Imm AR 499 illuminates the concern we have with the appellants’ submissions. Construing section 3C of the Immigration Act 1971 with regard to a decision of the Secretary of State on an application for leave, Richards LJ held that “once a decision has been made, no variation to the application is possible since there is nothing left to vary” (paragraph 35). By the same token, in the present case the grounds of application for permission to appeal cannot be varied, once a decision has been taken on the application that disposes of proceedings.

32.

Mr Sharma sought to avoid the consequences of *Patel* by pointing out that in the present case there was “the intervening judicial review claim. Indeed, there is also the additional quashing of the impugned decision ...” (skeleton argument, paragraph 14). His skeleton argument continues by submitting that, if the Upper Tribunal had considered the 30 January “application” (here described as an “application to amend”) before the High Court’s decision to quash the refusal of permission, that would have constituted an excluded decision and could have been challenged by the Administrative Court.

33.

We do not consider this submission takes the appellants anywhere. The mere fact that the purported application was made to the Upper Tribunal in the context of what was then an undecided “Cart” judicial review cannot invest the Upper Tribunal with a jurisdiction that it would otherwise lack. If the Upper Tribunal had formally responded to the 30 January “application” by stating that it could take no action, that decision of the Upper Tribunal could be judicially reviewed or appealed, since any decision of the Upper Tribunal is subject to one or the other form of challenge. But that does not affect the inescapable reality that the “application” of 30 January simply could have no material bearing on the High Court’s function of deciding the “Cart” judicial review. The fact that the Upper Tribunal had been belatedly approached with arguments in favour of the grant of permission, which had not hitherto found expression, could not relieve the appellants of the burden of persuading the High Court that the grounds now advanced were such that – even though they had not been put to the Upper Tribunal – they nevertheless should have occurred to it, when examining the First-tier Tribunal’s decision.

34.

In other words, because the basis of challenge in the judicial review was not the basis of challenge put to the Upper Tribunal in the appellate challenge to the First-tier Tribunal's decision, the appellants were inexorably faced with having to make their judicial review case on the basis set out in paragraph 22(b) above; namely, that the Upper Tribunal should have taken the points of its own volition. That is a more challenging task than under paragraph 22(a), since the basis of challenge needs to be a "Robinson" obvious one ( R v Secretary of State for the Home Department ex parte Robinson [1998] QB 929; [1997] Imm AR 568; R (Begum) v Social Security Commissioners [2002] EWHC 401 (Admin); Bulale v Secretary of State for the Home Department [2008] EWCA Civ 806; [2009] Imm AR 102).

35.

Mr Sharma sought to rely upon paragraph 40 of MA (paragraph 22 above):-

"40. It is necessary to make one final procedural point. If, as a result of "Cart" judicial review proceedings, the grounds for contending that the First-tier Tribunal Judge erred in law have changed, compared with those that were before the Upper Tribunal when it made its (now quashed) decision, the appellant will need to apply to the Upper Tribunal for permission to amend his or her grounds of permission, in order to be able to rely upon the grounds advanced in the "Cart" judicial review. The fact that such grounds have found favour in the High Court does not mean those grounds automatically become the grounds of challenge to the First-tier Tribunal's decision."

36.

What the Upper Tribunal said at paragraph 40 of MA cannot be used to justify what the appellants did in the present case. As is evident, the Upper Tribunal was there addressing the requirement to apply to amend the grounds of application for permission, following the quashing by the High Court of the earlier refusal of permission to appeal. In the present case, the approach to the Upper Tribunal on 30 January not only took place before the High Court had made a quashing order but also was apparently motivated by the view that the High Court might be persuaded to grant the judicial review, precisely because the Upper Tribunal had been so approached. For the reasons we have given, any such motivation was misconceived.

37.

Having said this, we are persuaded that those acting for the appellants took the steps they did in entirely good faith. We do, however, expect that, in the light of our decision in the present case, no one should repeat those steps in future.

38.

Whether or not the High Court was influenced by the fact that the appellants had made the "application" of 30 January, the outcome was that the court quashed the refusal of permission to appeal. In the light of that quashing, and of the substantive reasons given for the grant of permission, the Upper Tribunal has given permission to appeal against the decision of the First-tier Tribunal. The new grounds advanced by Mr Sharma were, we respectfully consider, compellingly synthesised by the High Court in explaining why important points of principle or practice arose. In particular, the ground alleging that the First-tier Tribunal applied the wrong test in connection with paragraph 276ADE(1(vi)) is of the kind which we accept the Upper Tribunal should have considered of its own volition, when considering the application for permission. In the circumstances, we gave permission to amend the grounds accordingly.

39.

Despite Mr Lindsay's valiant efforts to persuade us otherwise, we are satisfied that the errors in the First-tier Tribunal decision are material. The result is that we set aside the First-tier Tribunal's decision. Having regard to the nature and extent of the fact-finding required, we remit the appeals to be heard entirely afresh by the First-tier Tribunal.

### **Decision**

Appeal allowed. The cases are remitted to the First-tier Tribunal.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the second appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Mr Justice Lane

12 April 2021

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber