Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05955/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 October 2017	**On 19 January 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Lewis, Counsel instructed by Wilson Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Iraq aged 65 who arrived in the UK in November 2013 and claimed asylum in February 2013. On 26 March 2015 the respondent made a decision refusing his asylum claim and to remove him by way of directions. His appeal was heard at Taylor House on 10 April, with Judge Mulholland of the First-tier Tribunal Judge (FtT) presiding. In a decision sent on 9 May 2014 she dismissed his appeal.

2. The grounds of appeal had two main prongs. The first raised an issue of procedural fairness. It was submitted that by her manner of conducting the hearing the judge had displayed bias. The second prong contains challenges to the judge's treatment of the expert witness and the witness statements of the appellant's wife and friend.

Procedural fairness

3. As amplified by Mr Lewis the focus of the first prong of the appeal ground was on what happened at the outset of the hearing when the judge was informed that a witness was late. There are several accounts of what transpired. At paragraph 23 the judge records that:

> "I commenced the hearing at 1005hrs. A short adjournment was sought, as the Appellant's witness had not arrived. I was informed that he was in the security queue of the building and that the Appellant's representative required time to speak with him before the hearing. I granted a short adjournment until 1020am. I reconvened the appeal only to be informed that the Appellant's witness had not been in the security queue as claimed but instead was lost and still trying to make his way to the hearing centre. I adjourned again and resumed the hearing until 1045hrs."

4. I also have the more detailed comments which the judge was asked to provide in response to the grounds of appeal. The judge states as follows:-

> "I have been asked to provide my comments in relation to the hearing, which took place at Taylor House, London on 10 April 2017.
>
> I can see from the information contained in the grounds of appeal that some criticism has been made about my comments and determination, asserting that I have displayed an appearance of bias resulting in the appellant being deprived of a fair hearing.
>
> I commenced the hearing at 1005am. I was advised by Counsel appearing on behalf of the appellant that the appellant's nephew, AAM, was in the security queue in the building and that Counsel required to speak to him for five minutes. I should point out that I use the term adjournment as that term is commonly used when interrupting the hearing for a short time. I left the hearing room at 1010am and returned at 1020am, at which time I was informed that the appellant's witness was not in fact in the building as I had previously been informed, but was lost and should be at Taylor House by 1030am. Counsel failed to provide an explanation as to why I had been misled. I suggested that we start hearing the appellant's evidence as he was present and I would allow a break in between witnesses for Counsel to speak to the appellant's witness before calling the appellant. I expressed my dissatisfaction at the time that had been wasted by being misled and the cost to other court users and the taxpayer. Had I known that the appellant's witness was not in the building but instead was lost, I would have considered whether to start another case. I always speak with the Clerk before commencing. I cannot remember specifically the order of business that day, but it is not unusual to be advised that interpreters and/or Counsel is (sic) not available as they are required in another hearing room. I would have made the decision to start with this appeal, as Counsel,

> the respondent, the interpreter and the appellant were all present. I cannot recall what the position was for the rest of the cases on the list.
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> I agreed to the second short adjournment until 1030am and left the hearing room. At 1037am I was informed by the clerk that the witness had just arrived. I waited in chambers until 10.45am to allow Counsel to speak to the witness. When I returned to the hearing room Counsel acknowledged that she had the opportunity of speaking with the witness and was ready to continue. At no point did she indicate any difficulty with the hearing proceeding before me or any concern that the appellant may have had. At no point did the appellant appear distressed.
>
> It has been mentioned that I treated the appellant as a vulnerable witness. I did so because he was in receipt of regular healthcare. He suffered from musculoskeletal pain and urology problems. I followed the Practice Directions and provided a full explanation to the appellant and asked him to let me know immediately if any difficulty arose or he needed a break. I kept this matter under continual review throughout the hearing. I was not advised by Counsel or the appellant of any perceived or actual difficulty and none were apparent to me. The hearing proceeded in the usual way without event."

5. Produced before me there are two witness statements from Rachel Francis of One Pump Court Chambers who represented the appellant before the FtT judge. In broad terms her first witness statement confirms the judge's chronology of what happened but makes the observation that at an early stage of the hearing the judge "presented as vexed. She states that "[t]his was clear to me from her approach, manner and the time of her response to my request [for some time to take further instructions from the late witness]". Ms Francis also observed that the judge's conduct caused the appellant to become "visibly distressed" and "worried ... that [the judge] would not listen to him". Ms Francis also produced her 'Note of Hearing'.

6. In a further witness statement dated 26 October 2017 Ms Francis states that she regrets not having raised the issue of the appearance of bias during the appeal hearing itself. She gives as her reasons that:

> "I was extremely conscious that the tension in the hearing was already high. [The judge] clearly presented vexed, her manner was hostile and the Appellant was very distressed. I did not wish to add to these difficulties by raising the sensitive matter of the judge's appearance of bias. Secondly, I am a junior practitioner. I have never raised an issue of appearance of bias before".

7. There are also statements from the appellant, the interpreter and two of his witnesses. These broadly corroborate Ms Francis's account. The appellant avows that although he could not understand what was being said between the judge and his Counsel, the judge "had an agitated expression and from the way she was talking to my Counsel it was obvious that she was not pleased and in a bad mood. She was shouting at Counsel". He remembers "having the horrible feeling that I had done

something wrong and the judge was angry with me ... I felt hopeless". The interpreter Mr Abood Tuma refers to the judge becoming "very irritable" when the witness had still not arrived and "was shouting at Counsel". He described the appellant as panicked, stressed and worried by the judge's conduct. The interpreter concludes:

> "I have been an interpreter for over 25 years and I have worked at least 9 years as a medical counsellor for Medical Foundation for victims of torture. Accordingly, I know how vulnerable witnesses should be treated. I am at Court at least once a week and I have never seen a Judge act like this".

8. There is also the witness statement from the appellant's nephew whose lateness was the subject of discussion at the outset of the hearing. After explaining why he had been late he states that when he went into the court "I could tell the judge was angry, although he did not now what about". He found her anger "intimidating and this made me nervous".

9. There was no witness statement from the Presenting Officer and Mr Melvin was unable at the hearing to produce any file note from the gentleman in question. After I made an oral direction requiring the Presenting Officer concerned to provide a witness statement within seven days of the hearing, I was informed by Mr Melvin at the end of the hearing that he had left the Home Office and gone to Australia. Subsequently I received a letter from Mr Melvin stating that he had tried to contact Mr Apparicio to obtain a witness statement that would give an indication of events at the hearing. He confirmed that he had been informed that Mr Apparicio left the Home Office in mid-April 2017 and relocated to Australia. He attached a copy of the appeal hearing minutes "which gives no indication of anything untoward occurring at the hearing". The minute itself, dated 11 April 2017, states at the end that "The situation in Iraq significantly different than that outlined in the refusal letter. Aps account was credible, consistent and his answers in cross-examination appeared genuine and honest. In light of this, it is probable IJ will allow the appeal and perhaps rightly so". On 6 November the appellant's solicitors wrote that whilst it was accepted that the Presenting Office does not record the attitude of the Judge the Counsel who was instructed confirmed that he [the PO] looked 'surprised' at the conduct of the Judge during the course of the appeal. The letter concludes by saying that "[i]t is respectfully contended that the impression recorded by the Presenting [Officer] compared to that recorded by the judge is quite marked and does in fact provide corroboration of why the appellant may have perceived the Judge to have been biased in her assessment of him during the course of the appeal".

The substantive grounds

Evidence of Ms Guest

10. The first two of the substantive grounds of appeal allege that the judge failed to consider the report of Ms Guest, a documentary filmmaker and photographer within the framework of her claimed and actual expertise. The principal paragraph in which the judge addresses Ms Guest's report is paragraph 86:

> "I am satisfied that Miss Guest has not properly considered this matter. The Appellant has produced little evidence of functional impairment yet Miss Guest assumes it. She wrongly assumes he would be without the support of his wife, relatives and friends who live in Karbala and would be available to assist the Appellant. She provides information of the health system in Iraq, including hospitals and private medical centres and I can find no reason to assume that this Appellant would not be able to access these resources. She considers the situation in Baghdad and not Karbala and finds that there is a risk of kidnapping for this Appellant. Accordingly there is nothing in this report that convinces me that this Appellant would be at risk on account of his health and age."

11. I am not persuaded that these two grounds are made out. The thrust of Ms Guest's report is an assessment of the healthcare system in Iraq based on her working there between 1998 and 2004. As a source of objective evidence about the correct situation in Iraq Ms Guest's evidence had clear limitations. She was not a country expert on Iraq. Her own direct knowledge was over thirteen years old. Her report did not deal with health facilities in the appellant's home area. Despite lacking credentials as a country expert she ventured opinions on the risks of kidnapping that were beyond her own expertise. Further, to the extent that she purported to assess the difficulties the appellant would face on return related to his medical problems, she clearly failed to apprise herself of the medical evidence in existence relating to the appellant. Whereas Ms Guest records the appellant as suffering from severe osteo-arthritis, that is contradicted by the medical report at p. 163 of the bundle which records that there were "no overt signs of osteo arthritis". As is acknowledged in the appellant's grounds Ms Guest simply relied on the appellant's own statement at p. 19 that he suffered from osteoarthritis.

12. The next substantive ground maintains that in assessing the witness statements of the appellant's wife and friend as "self-serving" the judge failed to have regard to material evidence. Reliance is placed on the guidance given by the Upper Tribunal in **R (on the application of SS) v Secretary of State for the Home Department ("self-serving" statements) [2017] UKUT 00164 (IAC)**.

13. I do not consider that the judge can be said to have erred merely because she described these two individuals as "self-serving". As the UT observed in the aforementioned judgment, the expression itself tells us little or nothing and what matters is whether it is supported by adequate reasons.

14. However, Mr Lewis still has a point here. The judge's reasons either amount to a mere reliance on the self-serving character of the evidence

(in itself a reason empty of content) or to reliance on extraneous features of the witnesses' evidence.

15. As an example of the former, it is pertinent to address Mr Melvin's submissions on this matter. Mr Melvin seeks to mitigate the judge's reference to the witnesses' evidence as self-serving by noting that the judge restricted herself to saying that their statements "could be self-serving", not that they were. I do not find that this language redeems the judge's clear reliance on this feature. At paragraph 68 the judge said that the nephew's assertion that the appellant was a member of the Al Dawaa Party "could be true"; yet the only reason given for rejecting this was that this statement "could be self-serving".

16. As an example of the latter, the judge's rejection of the wife's evidence for being (or capable of being) self-serving was at first sight unobjectionable in that she noted that it was "vague and lacking in detail". However, as regards her explanation for the wife's failure to provide a full statement (fear of reprisals), the judge rejected it – "I would have expected her to do all she could to assist her husband save his life, which in turn would entitle her to family reunification" (paragraph 70). In light of that assessment, the conclusion that her evidence "could be self-serving to bolster the Appellant's claim" is hard to follow as it stands. If anything her statement in this respect was the opposite of self-serving.

17. Although not clearly set out in the written grounds Mr Lewis expressed a concern during the hearing about the judge's apparent lack of appreciation of the complexity of the appellant's claim about the risks he faced in Iraq following his experiences in Iraq and Syria. He took particular issue with the judge's treatment at paragraph 67 of the appellant's return to Karbala given the known risks he said he faced there: In my judgement this concern is real. At paragraphs 39-40 of his witness statement the appellant had offered an explanation for his return to Karbala, stating he had "nowhere else to go" and that he "thought [he] could hide out". At the very least the judge should have addressed this explanation and made clear why it was not accepted.

18. I am persuaded that the judge's reasons for rejecting the evidence of the appellant's wife and nephew are vitiated by legal error capable of having a material effect on the outcome of the appeal. The judge's treatment of the appellant's explanations regarding his return to Karbala was also deficient.

19. I shall not address ground 5 except to observe that I regard it as makeweight.

Procedural fairness

20. So far as the relevant legal principles are concerned, in relation to the issue of unfairness consisting of an appearance of bias, it is common

ground that they are clearly and accurately set out in **Alubankudi (Appearance of bias) [2015] UKUT 00542 (IAC)**.

21. In light of my finding of a material error in the judge's treatment of the evidence of the appellant's wife and nephew, it is not strictly necessary for me to reach a firm view on the procedural fairness ground. Indeed there is an important reason why it would be premature of me to do so because, whilst the judge was afforded the opportunity to respond to the grounds of appeal, those as drafted did not upbraid the tone and manner of the judge's remarks but their contents (she was said to have made "a strong remark against the appellant's witness at the outset", one that was "highly pejorative in nature"). The judge's further comments made in response to Tribunal directions were made without sight of Ms Francis's two statements or those of the interpreter, appellant and nephew summarised above. Only the latter set of statements highlight concerns about tone and manner and in particular refer to the judge shouting. The judge has not had an opportunity to respond to those allegations.

22. Nevertheless, it may assist the parties if I record my understanding of the evidence that I do have before me, incomplete as it is. On the basis of that evidence and the submissions I heard, I see significant weaknesses in Mr Lewis's submission. As he acknowledged, it is to be expected that if Counsel experiences judicial conduct giving rise to the appearance of bias, he or she should raise the matter at the hearing or, if for some reason that is felt too difficult, as soon as possible thereafter. No complaint was raised, however, until the appellant was sent the decision dismissing his appeal. If Counsel takes a contemporaneous Note of proceedings at which a judge behaves inappropriately one would normally expect that to have been written down in such a Note somewhere. Mr Lewis acknowledged as much. But it was not.

23. When I speak above of incomplete evidence I particularly have in mind the absence of any witness statement from Mr Apparicio. Nevertheless we do have his minute and it makes no note of untoward tone or manner or other questionable conduct on the part of the judge. Ordinarily it would be expected that a Presenting Officer file note would record something where it was felt a judge had not conducted the hearing fairly. Mr Melvin said it was his own practice to do so and he understood it to be good HOPO practice. Given that Mr Apparicio is not available to clear the matter up, it is difficult to place too much weight on the absence of any comment on the judge's conduct, but the note certainly does not really help the appellant's main argument about unfairness.

24. Another feature of the evidence that does not help the appellant's argument is that the judge appears to have taken all the proper steps you would expect in dealing with the absence of a witness said to be on his way. There can be no suggestion she rode roughshod over Counsel's request for short adjournments and she also allowed time for Counsel to confer with the witness beforehand.

25. The main allegation, that of a judge shouting, must also be considered with some care. Shouting per se does not evince any judicial misconduct. If for example there is a disturbance amongst the public in courtroom shouting may sometimes be necessary to restore order. That said, there is nothing to suggest that there was such a context in this case.

26. Criticism is made in Ms Francis's first statement of the fact that the judge had stated that court time was expensive and delay was a waste of taxpayer's money. In her first witness statement Ms Francis said:

> "I was very struck by this comment. I have represented hundreds of clients in immigration and asylum cases and have appeared in over 140 hearings in the FtT and UT and in the Administrative Court. I have never heard a comment like this made by a judge …".

27. As I observed in discussions with Mr Lewis, for judges to remind users of the importance of avoiding delay given costs that accrue to the taxpayer is quotidian and indeed it would be remiss if judges said nothing about delays. Ms Francis's above statement also jars somewhat with her description of herself as junior and inexperienced. I am sure she was expressing how she viewed herself, but in relative terms, someone who has appeared in over 140 hearings is not inexperienced.

28. At the same time (and this was a point more forcibly made by Ms Francis in the same witness statement) it was an important feature of this case that the appellant was a vulnerable witness. The fact that the judge acceded to Ms Francis's request that the appellant be treated as a vulnerable witness and undertook to follow the Joint Presidential Guidance Note No 2 of 2010 (see paragraph 21 of her decision) can be said to point to her readiness to treat the witness sensitively. However, it is not clear to me that the judge considered the fact that her interactions with the appellant's Counsel might have an impact on the appellant's ability to give evidence and in the supportive conditions described in the Guidance Note. Even assuming that in these interactions the judge was being no more than robust, such conduct could be perceived by a vulnerable appellant in a different way than a normal appellant. To be balanced against that, the Presenting Officer at least appears to have thought that the witness was able to give a good account of himself and indeed the HOPO seemed fairly sure his appeal was going to be allowed because he struck him as credible.

29. Whilst I do not have sufficient evidence before me to reach a definitive conclusion on these competing considerations, I cannot exclude that in her reaction to Counsel's submissions regarding a late witness the judge may (inadvertently or otherwise) have lost sight of the relevance of the appellant being a vulnerable witness to how his evidence should have been approached.

Notice of Decision

30. For the above reasons:

The FtT judge materially erred in law and her decision is set aside.

In light of the history of this case, I direct that it be remitted to the First-tier to be heard by a judge (other than Judge Mulholland) or judges chosen by the Resident Judge.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed Date:24 November 2017

Dr H H Storey
Judge of the Upper Tribunal