Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21199/2018

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reasons Promulgated**
on 8 January 2020	**on 29 January 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SEHRISH AZIZ
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Azmi instructed by Optimus Law
For the Respondent: Mr D Mills Senior Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Fox promulgated on the 4 July 2019, following a hearing at Birmingham, in which the Judge dismissed the appellant's appeal on all grounds.

Background

2. The appellant is a female citizen of Pakistan born on the 20 December 1991 who appealed against the decision of an Entry Clearance Officer (ECO) dated 24 September 2018 refusing an application for entry clearance as the spouse of a Mr Ashiq Hussain who is also the appellant's sponsor.

3. Having considered the documentary and oral evidence the Judge sets out findings of fact from [38] of the decision under appeal.

4. The appellant sought permission to appeal which was granted by another judge of the First-Tier Tribunal, the operative part of which is in the following terms:

> "It is arguable that the Judge gave an appearance of bias by raising his voice when speaking to the sponsor by depriving him to give instructions to the appellant's representative after he had concluded his evidence. Permission to appeal is therefore granted. However, the evidence produced in support of the grounds is currently limited and the granting of permission to appeal does not imply that the complaints made against the Judge have been factually substantiated. Moreover, the granting of permission does not include the right to raise the matter contained within the penultimate paragraph of the witness statement made by Aaliyah Hussain. This matter is not raised in the grounds of application and should not have been included in the witness statement."

Error of law

5. The appellant makes a number of serious allegations against the Judge claiming she did not receive a fair hearing and that the Judge was biased, rude, unprofessional, shouted at the sponsor several times and prevented the sponsor from giving instructions to his representative during the submissions of the respondent. The appellant also asserts the Judge engaged in gathering evidence for the respondent during the hearing and went out of his way to find for the respondent.

6. The grounds raise a number of challenges to the impugned decision and state that an official complaint has been filed separately, but that is not a matter for this Tribunal.

7. In accordance with normal practice a copy of the allegations was sent to the Judge whose response has been disclosed to the parties by way of a Notice dated 25 October 2019. A further copy was provided to Mr Mills at the start of the hearing as he did not have the respondent's copy on his file.

8. At [9 – 10] the Judge, in the section of the decision headed "The proceedings", writes:

> "9. During preliminary matters Mr Ali used his smartphone to view the website of the sponsor's employer as a result of Mr Smith's reliance upon the printout. He was unable to initially locate the website but then amended the website address to omit "ltd" despite its inclusion in the footer of the employer's letter.
>
> 10. Due to this anomaly I also took the opportunity to look at the employer's website using my smartphone and Mr Smith was invited to do the same. I noted that a Google search for the employer's company name provided a link to the employer's website which was actually a link to Companies House website for the employers company registration. Mr Smith and Mr Ali were invited to address these anomalies during the course of the hearing."

9. Mr Smith was the Home Office Presenting Officer at the hearing before the First-Tier Tribunal and Mr Ali the appellant's representative. At [6] the Judge records that Mr Smith filed and served a printout of his unsuccessful attempts to find the website ("printout") for Easy Global Services Limited ("sponsors employer"). No procedural unfairness is pleaded in the Judge admitting this evidence on the day and it is not suggested or shown that Mr Ali thought it necessary to make an adjournment application to enable him to obtain further evidence dealing with this point. Indeed at [8] the Judge records Mr Ali filed 9 photographs relating to the sponsors employer's business premises.

10. A useful schedule has been prepared by Mr Azmi which he claims supports the alleged lack of clarity in relation to this and other issues. The schedule is in the following terms:

Appellant		IJ Fox comments Para		Determination Para		Mr Smith notes
Grounds	IJ used mobile first	5	Mr Ali used phone first. Mr Smith used. I then used	9	Mr Ali used first. IJ did. Then Mr Smith	IJ, Rep, Appellant and himself
Grounds	Sponsor stated website updated Ramadan	13	Sponsor not state website updated in Ramadan. Stated 'Possibly Ramadan'	27	May or June during Ramadan	
		14	Only re-exam theme related to website	29	No re-exam	
		15	A lot of work centred on	50	Footfall was the key	

			telephone contact with clients.		element of trading attributes.	
		17	Mr Ali chose not to make submissions about report	35 + 43	Content of report inconsistent with response claimed.	

11. Dealing with the allegation of procedural unfairness in the Judge using his smart phone, which the appellant/sponsor assert is the basis for the conclusion the Judge engaged in gathering evidence for the respondent, no unfairness is made out. In EG (post-hearing internet research) Nigeria [2008] UKAIT 00015 the Tribunal said that it is most unwise for a judge to conduct post-hearing research, on the internet or otherwise, into the factual issues which have to be decided in a case. To derive evidence from post-hearing research on the internet and to base conclusions on that evidence without giving the parties the opportunity to comment on it is wrong.

12. The Judge did not undertake post-hearing Internet research. In light of the late filing of the report by Mr Smith in support of his contention that he had been unable to find the sponsors employer's website both the Judge and Advocates use their smart phones in court, and in the presence and knowledge of each other, to see whether the web address referred to could be accessed. The decision records that it could not save through the link to Companies House which, as the employers business is a registered company, is as expected. There is no record of any objection having been raised at the hearing by Mr Ali or Mr Smith to the Judge making such an enquiry. The Judge was endeavouring to obtain best available evidence and if his search had found a link to the employers website the appellant/sponsor would no doubt not have raised this complaint.

13. The value of the appellants claims based upon the schedule that there may be a difference between the Judge's comments and the content of the determination has to be considered in the context in which such comments arose. The determination is the document under challenge dated 4 July 2019 following a hearing on 2 July 2019. The Judge's comments were sought on 14 October 2019 and received on 21 October 2019. Time had therefore passed between the production of the determination and the opportunity being given to the Judge to comment upon the allegations made.

14. The respondent filed a Rule 24 Response opposing the application.

Discussion

15. It is not disputed that this appellant, as with any person appearing before a court or tribunal has a right to a fair hearing. There are a number of authorities both in the Upper Tribunal and Court of Appeal in which there have been detailed discussion of the development of concepts of factual and actual bias. Actual bias can occur, for example, in a judge adjudicating in a case in which he or she has an interest. This is not said to be a relevant factor in this appeal and the appellant's challenge is, in reality, a claim that she was denied a fair hearing as a result of the apparent bias of the Judge.

16. In Porter v Magill [2001] UKHL 67 at [103] the House of Lords found "the question is whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was bias.

17. The Court of Appeal in Re Medicament [2001] 1 WLR 700 provided the following guidance to decision-makers where such allegation arises in the following terms: "*The Court must first ascertain all the circumstances which have a bearing on the suggestions that the Judge was bias. It must then ask itself whether circumstances would lead to a fair minded and informed observer to conclude that there was a real possibility that the Tribunal was bias. The material circumstances will include any explanation given by the Judge under review as to his knowledge or appreciation of those circumstances*".

18. It is not disputed that justice must not only be done but must manifestly be seen to be done in any case, but it is also important to bear in mind that bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case.

19. The respondent's Rule 24 Response refers to the case law relating to who the duly informed hypothetical reasonable observer is, making reference to the decision in Resolution Chemicals ltd v H Lunbeck A/S [2013] EWCA Civ 1515 In which the following points were distilled from the case law by Sir Terence Etherton:

i. The fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent: Lawal v Northern Spirit Ltd [2003] UKHL 35 at [14]

ii. The facts and context are critical, with each turning on "an intense focus on the essential facts of the case": Helow v Secretary of State for the Home Department [2008] UKHL 62

iii. If the test of apparent bias is satisfied, the judge is automatically disqualified from hearing the case and considerations of inconvenience, cost and delay are irrelevant: Man O'War Station Ltd v Auckland City Council [2002] UKPC 28, para 11.

20. As also noted in Helow the fair-minded and informed observer is not to be confused with the person raising the complaint of apparent bias and that the test ensures that there is this measure of detachment. In

Resolution Chemicals Sir Terence Etherton also found if the legal test is not satisfied any objection to the judge must fail even if that leaves the applicant dissatisfied and bearing a sense of justice will not or may not be done.

21. The Secretary of State's written submissions, relied upon by Mr Mills, are in the following terms:

> "*Would a duly informed hypothetical reasonable observer find that the FtTJ's determination discloses an absence of judicial impartiality or real possibility of such?*
>
> 11. The Respondent submits that the findings made by FtTJ paragraphs 38 – 55 were carefully considered on the evidence before him **MK (duty to give reasons) Pakistan [2013] UKUT 641.** That the evidence on which these findings were based at paragraphs 20 – 30 are not disputed and neither was it raised in the GOA that the Sponsor was stopped from being re-examined by the representative, or that the Representative was stopped from making submissions.
>
> *Would the circumstances lead a fair minded and informed observer to conclude that there was a real possibility that the Judge was biased?*
>
> 12. It is contended that the FtTJ directed himself appropriately during the hearing. It is evident from paragraph 9 – 10, absent of evidence to the contrary, that both parties were given an opportunity to address the anomaly's in the evidence. While the order in which the parties looked up the evidence may be disputed, both parties were also given an opportunity to cross examine and re-examine the Sponsors evidence.
>
> 13. It is respectively submitted that the FtTJ was entitled to choose how to conduct their hearing, even if this involved asking questions as a form of clarification. It is also noted that it is not the Appellant's position that the representative was stopped from re-examining the witness before proceeding to submissions.
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> 14. It is also evident, that the Court was entitled to stop the Sponsor from interrupting the Respondent's submissions, provided it gave the Appellant a right of reply which it did [11].
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> 15. It is noted, that the two witness statements provided dated 30 July 2019 in support of the Appellant's appeal, do not aver to the Sponsor and the Representative being unable to put the Appellant's case.
>
> 16. Therefore, on the evidence available, the Respondent contends that on the balance of probabilities, the FtTJ was unbiased and directed himself appropriately."

22. Many Judges differ in their approach to how they manage proceedings in the courts and tribunals and adopting a robust approach does not establish bias, per se, provided the parties receive a fair hearing to which they are entitled.

23. The appellant had the benefit of Mr Ali, an experienced practitioner in this field, representing her supported by the sponsor. It is clear that Mr Ali was able to engage fully with the appeal process by the provision of additional documents, ability to call witnesses and to examine and re-examine as required, and to make submissions on the appellant's behalf. What is conspicuous by its absence in relation to the evidence relied upon by the appellant and sponsor in support of the allegation of bias is anything from Mr Ali to support or substantiate this claim. There is no witness statement, Mr Ali was not called to give evidence, and there is nothing from him asserting any difficulty in properly representing the appellant or claiming the appellant did not receive a fair hearing before the Judge.

24. The Judge in his response to the grounds of challenge records that Mr Ali did not object to the respondent's reliance on the enrichment activity report at the hearing and that he was free to raise any concerns about the evidence relied upon by the respondent during preliminary issues or throughout the hearing. The Judge records Mr Ali chose not to make submissions about the report despite the subsequent protestations and that the report demonstrated that the employer was on notice of the respondent's intentions to make contact that this was frustrated for unknown reasons.

25. The sponsor claims he was nervous, that his voice was soft and that the Judge instead of asking politely shouted at the sponsor to speak up meaning the sponsor was intimidated by the Judge.

26. The respondent's written submissions referred to [11] of the decision under challenge in which the Judge writes:

> "11. During Mr Smith's submissions the sponsors sought to confer with Mr Ali. Before Mr Ali began his submissions he was given time to take instructions. The sponsor relied upon a business card to address Mr Smith's submissions. However Mr Ali declined the opportunity to file and serve the business card and relied upon the existing evidence to advance the appeal."

27. The Judge in his response to the grounds of challenge also writes:

> "7. It is my role to ensure that I am aware of everything that takes place during the hearing. During Mr Smith's submissions I was distracted by the sponsor's conversation with Mr Ali. It is inappropriate for Mr Ali to decide whether this caused me to be distracted or not. I said that there will be an opportunity at the end of Mr Smith's submissions to confer I granted an adjournment on my own initiative for Mr Ali to take

instructions. When Mr Ali returned I sought expressed assurances that he was ready to proceed and that the sponsor had addressed all matters. Naturally I did not pursue this in detail as I respect legal privilege. Mr Ali now states that his failure to raise the sponsor's concerns caused detriment to the sponsor despite numerous opportunities to bring any concerns to my attention.

8. If the sponsor was unable to recall an instruction that I prevented him from providing as claimed, Mr Ali was free to ask for more time to confer with the sponsor or to apply for the matter to be put back. Alternatively Mr Ali had the opportunity to bring these allegations to my attention and request that I recuse myself."

28. It is not made out the Judge prevented the sponsor being able to discuss matters further with Mr Ali during the hearing or that Mr Ali was denied the opportunity to raise any matters of concern with the Judge. It is not made out the Judge's language, demeanour, or manner in which the hearing was conducted, when considering all the available material, would have given rise to concern in the mind of a fair minded and informed observer that there was a real possibility that the Judge was bias.

29. The statements relied upon by the appellant in support of the claim have been considered. The first is from the sponsor dated 24 December 2019 which seeks to provide further evidence in support of the appellant's claim, highlighting issues of concern but not establishing bias. So far as that statement provides information that was not before the Judge it does not establish legal error.

30. The second statement is written by the sponsors employer, Mr Nagi, commenting upon issues raised in the appeal. The statement seeks to provide information that was not available before the Judge who had concerns about the sponsor's claim to be employed by this gentleman. At [38] the Judge finds the sponsor had no meaningful knowledge of his employers business or trading activities and in subsequent paragraphs examines the evidence that had been provided in support of the sponsors employment and ability to meet the minimum income requirement in Appendix FM. The Judge specifically notes despite the appellant being aware of the concerns expressed by the ECO the sponsor's employer did not attend the hearing and was therefore not available for the purposes of cross-examination and re-examination. The statement provides evidence that could have been given at the hearing had Mr Nagi attended which was not available the Judge and which does not establish an error of law on the basis of a mistake of fact as per E&R and does not establish legal error.

31. In addition to the Judge, the sponsor, and Mr Ali, the only other person present at the hearing who has provided further evidence is Mr Smith

the Home Office Presenting Officer who in an email sent to Mr Mills on 7 January 2020, which was disclosed to the Tribunal and Mr Azmi, writes

> "I have read the GOA & have refreshed my memory by reading my SAT minute which was produced within 24 hours of the hearing.
>
> I recall IJ Fox & Mr Ali not seeing eye to eye on the preliminary issue when we all searched for the website on our respective phones and IJ Fox pointing out, very reasonably, that the webpage found by the appellant was in an alternative address.
>
> I do not recall any shouting by anyone at the hearing or there being anything of particular note which made the appeal stand out from any other in terms of proper procedures. In such cases I try to make reference in the SAT minute in case there are subsequent issues, such as this one.
>
> I can recall no barriers to the appellant's case being fully set out and my recollection is that Mr Ali did so in his usual detailed and very professional manner.
>
> I am happy for this email to be served on the Upper Tribunal."

32. The burden of proving the allegation of bias falls upon the appellant. Having undertaken a careful examination of the decision, pleadings, basis of claim of bias and/or other issues in the grounds of appeal, evidence, and submissions made, I find that the appellant and sponsor whilst they may not be satisfied with the Judge or the outcome of the appeal have failed to establish that the appellant did not receive a fair hearing and failed to establish they are able to satisfy the legal test set out above to establish bias in the mind of the Judge, actual or inferred.

33. As noted above further information has been provided which whilst not establishing legal error sufficient to warrant the Upper Tribunal interfering any further in relation to this decision, might support a fresh application by the appellant for leave to enter under Appendix FM. That is a matter on which advice can be taken although it is important that if such an application is made all relevant evidence that is available is provided to enable the considering Entry Clearance Officer to have a clear understanding of the relevant facts of the appellant and sponsor's circumstances; including the opportunity to discuss the matter with Mr Nagi if relevant.

Decision

34. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

35. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 23 January 2020