IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03504/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
Oral determination given following the hearing	**On 20 February 2015**
On 11 February 2015	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MRS NAIMA SLEMAN ALSALIM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Saeed, Counsel instructed by Aman Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant in this case claims to be a citizen of the Palestinian territories and she appealed against a decision by the respondent refusing her claim for asylum. She claimed that she had a well-founded fear of persecution in the Palestinian territories because of her imputed political opinions and that the authority of the Palestinian territories was unwilling or unable sufficiently to protect her. It is not necessary for the purposes of this determination to do more than summarise her claim.

2. The appellant's appeal came before First-tier Tribunal Judge Foudy, sitting at Manchester Hearing Centre on 6 August 2014, and in a determination signed the following day the judge dismissed the appeal in about as strong terms as is possible. At paragraph 14 the judge found as follows:

> "Rarely in my judicial career have I encountered a more dishonest appellant than this one. Her dishonesty is so comprehensive and sustained that I cannot be satisfied even to the lower standard as to her claimed identity, far less her nationality or events that she says happened to her in the past. I am satisfied to a high level of probability that the appellant is a Jordanian national, as are all her dependants."

3. The judge then gave substantive reasons which justified the findings that she made. Were this all I would have no hesitation in concluding that the findings she made are properly reasoned and the determination itself does not contain on its face any arguable error of law. However this appeal has not been brought on the basis of any direct challenge to the judge's findings. What is said is rather that the judge's conduct during the hearing was such as to exhibit bias or at the very least the appearance of bias. I have had the benefit of a witness statement not just from the appellant but from her solicitor, Mr Mahmood, who represented her before Judge Foudy as well as a response from the judge. I was also given a further witness statement from both Mr Mahmood and the appellant, in Mr Mahmood's case dealing with some of the matters contained in the judge's reply. I have had very full regard to the statements made both by Mr Mahmood and also by the judge. I have also had regard to the notes made by the Presenting Officer who was present at the hearing although it is fair to say that his notes, perfectly properly, are less full than those of Mr Mahmood. I have also had regard to the Record of Proceedings.

4. Permission to appeal having been granted by Designated First-tier Tribunal Judge Appleyard, a Rule 24 response was received on behalf of the respondent in which it was stated (and this is correct because I have seen the notes) that the minute of the Presenting Officer "makes no mention of any misconduct or apparent misconduct by the judge". However it would be unlikely that it would because this was not a matter which directly affected the respondent. I do not doubt the integrity of the Presenting Officer and it may well be the case that had there been very obvious bias the Presenting Officer would have made a note of it, but the fact that he did not is not necessarily, in my judgment, of decisive importance in this appeal.

5. It is as I have already noted quite clear that the judge's conclusion was that the appellant was a thoroughly dishonest witness and she has given what on its face are compelling reasons for reaching that conclusion, which was open to her. What I have to decide however is whether or not it is arguable that she may have shown during the hearing (or given the appearance) that she had reached that conclusion, or at least started from

the basis that the appellant's claim was one which could not succeed and that she had closed her mind to any other possibility. It is not possible on the basis of the evidence which has been put before me to make a finding as to whether or not the judge had already made up her mind because part of the complaint relates to the manner in which questions were asked, in what is said to have been a sarcastic tone, and what is said to have been the judge's inappropriate demeanour. I have no reason however to doubt that Mr Mahmood is sincere when he expresses the criticisms which he believes to be justified and I note that at paragraph 6 of his first witness statement he refers to the "cynical and sarcastic manner" of some of the questions asked by the judge which he believed were akin to cross-examination. It is also the case, according to Mr Mahmood (and as I say I have no reason to doubt, whether well-founded or not, that his criticism and his evidence is honestly given) that (as he states at paragraph 7 of his original witness statement), he sought to object to the manner in which the trial was being conducted by the judge but, he says, "I was denied the opportunity and was directed to make any observations I had during my submissions". He then says that he was told when making these submissions and raising his objections again that he should "take it up with the Upper Tribunal". He says that when he asked (he says "pressed") the judge to make a record of his observation on the court file the judge responded by telling him that "what I record on the court file is a matter for me". Although Judge Foudy does not remember actually saying this, she has stated that she might have done so, because that is what she believes would have been a correct response. (In the judge's own words "I can well imagine that I may have told a representative that what was recorded on the record of proceedings was a matter for me as that is exactly what I believe is correct".)

6. In her comments regarding this witness statement the judge has stated among other matters that the questions that she had asked "could not be fairly described as cross-examination" but "were necessary to clarify some of the appellant's evidence only because her own representative pointedly failed to deal with the central issues in the case of the true identity and nationality of the appellant" which the judge then goes on to suggest Mr Mahmood had "avoided... because they were particularly weak parts of the appellant's asylum claim". However, in his further witness statement responding to the judge's observations Mr Mahmood points out that the evidence relating to the appellant's identity and nationality were contained within a statement which she had adopted in examination-in-chief. (This statement is within the file and Mr Mahmood would appear to have been correct on this point.) It would seem that the person who should perhaps more appropriately have been testing the appellant's evidence on this point was the Presenting Officer although it is certainly the case that a judge is not necessarily precluded where some parts of the evidence trouble him/her from raising these matters him/herself. It is though important that when a judge does so this is done in a way that is not perceived to be combative. It is unfortunate that although the judge, as she says in her response, considers that she has "developed a rather

more tolerant attitude in court than many of my colleagues" such that she "would suggest that I am regarded as one of the more user-friendly judges in our jurisdiction", this was clearly not the impression conveyed to Mr Mahmood.

7. Although, as I have said, I cannot say in terms that the judge's behaviour showed that she was definitely biased or had definitely made her mind up, that is not the question I have to ask myself. I have in mind in particular the guidance given by the House of Lords in the well-known case of *Magill v Porter* [2002] 2 AC 357 in which the court endorsed (with modification) the formulation adopted by the Court of Appeal in *Re Medicaments (No.2)* [2001] 1WLR 700 such that the question that must now be asked is "whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased".

8. So, although I cannot be satisfied that the judge was necessarily biased, having considered the evidence very carefully and in particular the evidence given by a practising solicitor whom I have no reason to believe is not at the very least sincere in the impression which he formed, I cannot rule out the serious possibility that a fair-minded observer, having considered all the facts and having been present at the hearing, might at the very least conclude that there was "a real possibility" that the Tribunal was biased. That is as I have already indicated a lower test than my finding that the Tribunal was actually biased but in these circumstances, without making a formal finding that the Tribunal actually displayed bias, nonetheless I conclude that I am obliged to find that there was a procedural irregularity within the hearing (in that there may have been the appearance of bias) such that the decision will have to be re-made.

9. I now turn to consider what the appropriate course is and in my judgment, given my finding that there may have been the appearance of bias at the hearing, it must follow that the technical decision of this court must be that the appellant did not receive a fair trial. In those circumstances I consider that the appropriate course is to remit the appeal back to the First-tier Tribunal where it can be re-heard by a judge other than Judge Foudy and I will so order. In the circumstances of this appeal I will give directions that the appeal should be listed initially for a case management conference at the Manchester Court Centre.

Decision

The Upper Tribunal having determined that there was a procedural irregularity in the hearing of this appeal before the First-tier Tribunal the decision of First-tier Tribunal Judge Foudy is set aside and the appeal is remitted to the First-tier Tribunal sitting at Manchester for re-hearing before a judge other than First-tier Tribunal Judge Foudy.

Signed:

Date: 17 February 2015

Upper Tribunal Judge Craig