IAC-AH-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/39961/2014
IA/39982/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 October 2015	**On 3 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR SAJID ALI
MR MUHAMMAD TARIQ JAVED
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Solomon, Counsel instructed by Jein Solicitors
For the Respondent: Mr E Tufan, Specialist Appeals Team

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Bart-Stewart sitting at Taylor House on 1 May 2015) dismissing their appeals against the decision of the respondent to refuse to vary their leave to remain as Tier 1 Entrepreneur Migrants, and against her concomitant decision to make directions for their removal under Section 47 of the Immigration, Asylum and

Nationality Act 2006. The ground of appeal is that the judge displayed apparent bias in her conduct of the proceedings. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellants require to be accorded anonymity for these proceedings in the Upper Tribunal.

2. The appellants are entrepreneurial team members. Both of them were refused under Appendix A (attributes) for the same reason. Mr Ali's application was also refused under Appendix C (maintenance).

3. In the letter of refusal directed to Mr Ali dated 23 September 2014, it was accepted he had provided a Lloyds Bank letter dated 22 July and a Lloyds Bank statement covering the period 16 June to 5 September 2014 to demonstrate that he had been in possession of at least £945 in available funds for a consecutive 90 day period ending no more than 31 days before the date of the application. But the documents did not meet the requirements of Appendix C for the award of points because they did not cover the required period. As his application date was 30 July 2014, the three month period prior to the date of application was 1 May 2014 to 30 July 2014 so he had only provided evidence for funds for the period 16 June 2014 to 30 July 2014, and no evidence of funds had been provided for the period 1 May 2014 to 15 June 2014.

4. Mr Ali failed to score any points under Appendix A (attributes) because he had failed to meet the requirements of subparagraph (iv) as he had not shown that since before 11 July 2014 and up to the date of his application, he had continuously been working in an occupation which appeared on the list of occupations skilled to NQF framework level 4 or above, as stated in the codes of practice at Appendix J and had provided the specified evidence in paragraph 41-SD.

5. The evidence he had submitted in relation to advertising materials was not acceptable as it did not cover a continuous period commencing before 11 July 2014, up to no earlier than three months before the date of his application, as required under paragraph 41-SD(e)(iii). So he had not demonstrated he had met the requirements of the Rules to be awarded points under provision (d) in the first row of Table 4 of Appendix A.

6. In the refusal letter directed to Mr Javed dated 25 September 2014, the respondent gave the same reason for not awarding him points under Appendix A (attributes).

7. In his application form, Mr Ali said he was providing three items of advertising material, and the respondent exhibited three separate items in section E of the Home Office bundle.

8. E2 was a printout of an advertisement placed on Gumtree on 9 July 2014 for T & S Global Enterprises Limited, the company which the entrepreneurial team members had set up.

9. At E1 were photocopies of two undated documents. At the bottom there was a photocopy of Mr Ali's business card for T & S Global Enterprises Limited. Above

this, there was a photocopy of an undated leaflet for T & S Global Enterprises Limited promoting the services which Mr Ali and Mr Javed provided.

10. For present purposes, it is convenient to note that the wording on the leaflet is superimposed on a piece of electronic equipment. Between the two columns of wording the fine details of the electronic equipment are fully visible. This is just as apparent from the photocopies in the respective Home Office bundles as it is from the original which was produced at the hearing, and which is retained in my file.

The Hearing before, and the Decision of, the First-tier Tribunal

11. In advance of the hearing, the appellants' solicitors prepared a bundle for each of the appellants containing a short witness statement from each of them. At paragraph 14 of his witness statement, Mr Ali said it was unfortunate that the Secretary of State had refused his application on the ground that he had failed to provide evidence that he advertised before 11 July 2104, "though my brochure was printed before the aforementioned date and clearly states a 20% discount until 30 June 2014".

12. At paragraph 15 he said the Secretary of State had not given him ten points for maintenance although he had provided more than 90 days' bank statements from a combination of Lloyds Bank and HDL Bank in Pakistan.

13. Mr Javed also asserted in his witness statement that he had provided a brochure which clearly stated a 20% discount until 30 June 2014, which the Secretary of State had failed take into account.

14. As the conduct of the hearing by the judge is said to have displayed apparent bias against the appellants it is convenient to set out the judge's record of the proceedings which she gives in paragraphs [12] to [22] of her subsequent decision:

> "12. The second appellant included a copy bank statement from Habib Bank signed and annotated with the date 28-07-14 and the letter from Islamic Bank dated 18.07.14 that states that his account has an available balance of £50,000. The first appellant's bundle has a photocopy of a leaflet with barely legible writing lengthwise in the middle that he says was before the decision maker.
>
> 13. Ms [M] sought to argue as a preliminary issue that the application be remitted to the Secretary of State as not being in accordance with the law. The proposed changes in the rules were announced on 10th July 2014 to take effect on 11th July 2014. The Home Office stated that it had not given the usual 21 days' notice which she submitted was procedurally unfair. The respondent should have accepted any advertising material that post-dated 11 July 2014 and exercised evidential flexibility. As the appellant's case is that their advertising material pre dated 11 July 2014 I considered that the issue of procedural unfairness did not arise and it was not appropriate to summarily allow the appeal and remit as argued.
>
> 14. Both appellants gave evidence adopting their respective almost identical statements. The advertisement that the appellant submitted to show they had been trading before 11th July 2014 states it was posted online on 18th July 2014. The second appellant gave evidence first. He confirmed that he had read the

rules before completing the application and was aware of the requirements. He said the copy leaflet in the bundle says '*20% discount before 30 June 2014*' which evidences it must have been printed before that date. He had no other evidence of when this leaflet was printed. In examination he said that he had not really looked at the rules before July 2014.

15. The first appellant was asked in chief about the copy leaflet in the bundle. He said the leaflet was produced by a printing agency. The leaflet was with the application, a Gum tree on line ad and a business card. He said the bank statement was also sent to the Home Office. Asked why he obtained a further statement from Lloyds he said that he was thinking that he had not submitted his HBL (sic) statement. Asked to clarify whether his evidence was he did or did not submit the HBL statement he said he submitted with the application.

16. He was cross examined about his last answer and said he was pretty sure he sent it. He was confused whether he was going the right way. He said that he is sure as it is dated 28 July. He called his brother who sent it and he submitted it to the Home Office. Sometimes he is thinking he did not send it. He was referred to the schedule of evidence that he completed. He said that 2 leaflets were referred to as one document. He was asked why he sent one with the discount and one without. He responded that they had 2 leaflets. He did not have an original of the leaflet showing the discount at the hearing and said he would try to find it. He said that it was created in May 2014 by them both.

17. I asked when the business began. He said early April 2014. I asked where the leaflets were printed. He said in Pakistan as it was cheaper. The one with the discount was printed in April and the other in May. His bother sent them to him by courier which takes 3 to 4 days. He said he had not thought it necessary to bring an original to the hearing. I asked how long the bank statements took to arrive as he had said a courier takes 3 to 4 days. He said that if urgent it is 2 days. I noted it was signed on 28 July and his application was sent on 30 July. He said it must have come the next day.

18. Re-examined he said that he had shown his solicitor a copy of the leaflet. He had not shown them the original. Asked why he ordered 2 leaflets he said when they started the business they went here and there and tried to get business and then decided it was better to put 20% for business. He said that he received the HBL statement on 29th July.

19. The second appellant was recalled and asked when they started the business and when the leaflets were produced. He said they registered the company on 2 June. The leaflets were printed by an agency in Ilford. Both were printed at the same time. He did not know why the first appellant said they were printed overseas.

20. Ms [M] objected to my questions and said she would seek an adjournment. I pointed out that the evidence was introduced at the hearing. Further the copy leaflet in my bundle did not show the reference to the discount before 30 June. It was when the first appellant was cross examined I saw this having exchanged bundles with Ms [M]. It was for the appellants to make their case that two leaflets were before the decision maker.

21. Cross examined the appellant said that maybe 3 leaflets were submitted, one with the discount, one with and a third would be either. He said it was to prove

they were active. He said the original was net. It was put to him that the reason there is the addition in the middle of the document because it is not genuine. He denied this. He was reminded that the application stated 3 items of marketing. He said the 2 ads were treated separately and the business card was one.

22. Ms [M] went through the number of items he claimed that he submitted in examination. He said that he counted the leaflets and card as one and an online advert as one and a Gum tree ad as the third. He said the first appellant had been responsible for producing the adverts. They spoke of printing the leaflets in Ilford. He is not sure they were printed there. They printed the leaflets with a discount as they were trying to get more clients. A set number had the discount. He thinks they started doing work for the business in April."

15. In the section headed Findings and Reasons, the judge summarised the issue before her as being whether (a) the bank statements from Habib Bank Pakistan and (b) the leaflet referring to a 20% discount operative prior to 30 June 2014 had been before the Secretary of State when a case worker made a decision on the respective applications. The judge found that the appellants had not proved their case for the reasons which she gave in paragraphs [25] to [28], which I set out below:

"25. Copies of the completed application forms are at Appendix A of the respondent's bundles. At page 56 each have listed 2 bank statements and 3 marketing + leaflet. Both concede in oral evidence that the evidence of marketing included an online internet search result on Gumtree dated 19/07/2014 marked as 'posted yesterday'. The leaflet in the first appellants bundle is undated and without reference to a discount and a business card. The second appellant included an online advert on 'FRIDAY-AD' also marked posted yesterday and printed on 19/07/2014.

26. The issue was whether the Habib Bank statement and the leaflet showing the discount were new evidence. The evidence of the appellant in respect of the leaflet was inconsistent and contradictory, compounded by the inconsistent oral evidence regarding when they commenced the business. The first appellant claimed the leaflets were printed in Pakistan then sent to him by courier on 2 separate occasions. The second appellant said they were printed in Ilford. Even if it was the responsibility of the first appellant and giving the benefit of the doubt he might not be sure, his evidence was they were printed at the same time. He said nothing about 2 different batches being printed and couriered to them. The likelihood of that occurring I find lacks plausibility and I do not accept that the leaflet reflecting the discount was at any time before the decision maker.

27. I also do not accept the evidence of the first appellant with regard to the HBL statements. The application form refers to 2 bank statements. There was the letter from HBL regarding the £50,000 capital and a letter and statement from Lloyds Bank. He could not give a clear answer to the question why he submitted the Lloyds statement if he had the Habib Bank statement that showed the required funds. When referring to the leaflets he had said that a courier takes 3 to 4 days however when I pointed out to him that the bank statement was certified 2 days before submission he claimed that it arrived in the UK the next day.

28. I have regard to the principles established in **Tanveer Ahmed [2002] UKIAT 00439** *'It is for an individual [claimant] to show that a document on which he seeks to*

rely can be relied on. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2'. Neither appellant produced the original of the leaflet nor other contemporaneous material such as invoices that might evidence that the leaflet showing a discount to 30th June was produced at the time stated and so available to be submitted with the application. I find it was not."

The Application for Permission to Appeal

16. Ms M settled the application for permission to appeal to the Upper Tribunal. Ground 1 was the judge had breached fundamental principles of natural justice and procedural fairness by descending into the arena of cross-examination. In doing so, a reasonable observer would perceive potential for bias.

17. Mr Ali had given evidence first, and the judge had not asked him any questions. Mr Javed had then given evidence, and during his cross-examination the judge said abruptly: "Stop muttering. I don't know what you're saying, you're just muttering."

18. The judge then questioned Mr Javed after cross-examination about issues which had not been raised at all by the Presenting Officer, namely about the genuineness of the advertising leaflet with a 20% discount on it. The judge did not acknowledge at paragraph 17 of her decision that she had put a question to Mr Javed to the effect that the advertising leaflet was not genuine. The judge then said she wanted to recall Mr Ali, and she proceeded to question him before any questions had been put to him by either Counsel or the Presenting Officer. The judge failed to acknowledge at paragraph 19 of her decision that it was she who recalled Mr Ali.

19. Counsel for the appellants objected that the judge had descended into the arena of cross-examination, and that she wanted an adjournment. The objection was acknowledged at paragraph 20 of the judge's decision, but the judge did not state the reasons for Counsel's objection nor did she acknowledge that she had put matters to Mr Ali. After the judge had stopped questioning Mr Ali, the Presenting Officer put to Mr Ali that the leaflet was not genuine.

20. The impression thus given to a reasonable observer was that the appellants did not have a fair hearing. It was immaterial what the outcome may or may not have been as the judge wrongly cross-examined the appellants.

21. It was submitted by Counsel to the judge in closing submissions that as the appellants had produced their own advertising leaflets, they could not be forgeries. The judge had irrationally decided that a document produced by the appellants was a forgery and on the basis of that line of thinking and prejudging the case she had procedurally taken unfair steps to cross-examine them. Accordingly she had already made up her mind without hearing all the evidence first.

22. Ground 2 was the judge had misdirected herself by not allowing the appeal on the ground that the decision of the respondent was procedurally unfair and not in accordance with the law. Following on from ground 1, as the judge had already made up her mind at the hearing to dismiss the appeal on the basis that the appellants' own document was allegedly a forgery, this may have affected her assessment of whether the respondent's decision was unfair.

The Grant of Permission to Appeal

23. On 26 July 2015 First-tier Tribunal Judge McDade granted permission to appeal for the following reasons:

> "The grounds of application for permission to appeal assert that the judge descended into the arena by asking questions that were effectively questions of cross-examination and then recalled a witness of whom the judge had not asked any questions during the witness' first presentation but then proceeded to question that witness before giving either of the advocates an opportunity to ask any questions of their own. It is asserted that the way in which all of this was conducted was not recorded in the judge's decision. If the grounds of application are accurate (and any notes taking at the hearing by the advocates should subsequently be made available to the error of law hearing) there is an arguable error of law."

The Rule 24 Response

24. On 11 August 2015 John Parkinson of the Specialist Appeals Team settled the Rule 24 response on behalf of the Secretary of State opposing the appeal. In summary, he submitted that the Judge of the First-tier Tribunal had directed herself appropriately. He continued:

> "3. The respondent has consulted the hearing note of the Presenting Officer which confirms that a limited number of questions were asked by the judge. The note also contains the telling comment that:
>
> > "The representative applied for an adjournment to which the IJ refused. However the IJ did not ask any further questions. I then asked to re-examine on the basis of the IJ's questions to the first Appellant. The IJ allowed questions to be put to the Appellant that had arisen from her own.
> >
> > I put further questions to the first Appellant regarding the leaflet.
> >
> > It was obvious the representative wanted to adjourn the appeal as it was becoming clear that the Appellants' business was not genuine."
>
> 4. It was open to the judge to seek to clarify matters that arose from the evidence of the appellant and when this evidence provided further uncertainties in the appellants' claimed business to seek to clarify the evidence with reference to the first appellant's previous evidence.
>
> 5. In doing so the judge extended the opportunity to the parties to deal with matters arising from the second appellant's evidence. Such an approach would appear to be reasonable under the circumstances. It would have been arguably unfair for the judge to have taken points against the appellants if they were not given the opportunity of addressing them at the hearing."

The Hearing in the Upper Tribunal

25. At the hearing to determine whether an error of law was made out, the Mr Solomon drew my attention to a witness statement from Counsel, who asked not to be named in my decision, stating that what she had said in the grounds of appeal was true to the best of her knowledge and belief. She exhibited as an annexure to her witness statement a copy of the notes which she had endorsed on her brief as to what had happened at the hearing, and I noted that her grounds of appeal reflected the contents of these notes.

26. Mr Tufan produced the Presenting Officer's note of the hearing dated 11 May 2015, from which Mr Parkinson had quoted in his Rule 24 response. The Presenting Officer's account was broadly in line with that given by Counsel, except that she did not report the judge as displaying hostility to either witness, and she did not characterise the judge's questioning as being akin to cross-examination.

27. Mr Solomon invited me to focus on what was common ground between the Presenting Officer and Counsel. He submitted that on the undisputed facts the judge had wrongly descended into the arena, and she had sought to develop a different case from that being presented by the Presenting Officer and/or to pursue her own theory of the case. He drew my attention to various passages in **K v Secretary of State for the Home Department (Côte d'Ivoire) [2004] UKIAT 00621** in which the Tribunal gave extensive consideration to an observation in the earlier case of **Oyono [2002] UKAIT 2034** that an Adjudicator's role was that of silent listening, and that an Adjudicator who intervenes during the course of evidence is running the risk that he will be seen to be taking the side of one party or the other.

28. Mr Solomon also drew my attention to **Alubankudi (appearance of bias) [2015] UKUT 542 (IAC)** which confirmed that the test to be applied was whether the fair-minded observer, having considered the facts, would conclude there was a real possibility that the Tribunal was biased. To this end, the court must first ascertain all the circumstances which would have a bearing on the suggestion that the judge was biased and it must then ask whether those circumstances would lead a fair-minded informed observer to conclude that there was a real possibility that the judge was biased.

29. The President observed at paragraph [8] that the authorities placed emphasis on the requirement that the hypothetical reasonable observer is duly informed. This connotes that the observer is in possession of all material facts.

30. In that case, the complaint of apparent bias was based on a comment which the judge had made in his determination, not on his conduct of the hearing. In so far as it is material, the President regarded it as significant that there was no challenge to any of the judge's *findings* - on the basis of irrationality or the disregard of material evidence or the intrusion of immaterial factors:

> "We observe that the presence of any of these vitiating elements could, in principle, lend sustenance to the appellant's complaint of apparent bias. However, none is evident."

31. On behalf of the Secretary of State, Mr Tufan took the same line as that taken by his colleague in the Rule 24 response. The judge would have been open to criticism is she had not given the witnesses an opportunity to deal with the concerns which she had about the genesis of the "discount" leaflet.

32. In reply, Mr Solomon said the judge was probably not biased, but by her conduct at the hearing she gave the appearance of bias.

Discussion

33. The leading case on apparent bias is Locabail (UK) Ltd v Bayfield Properties Ltd & Another [1999] EWCA Civ 3004. At paragraph [21] the court cited with approval the following observations made by the Constitutional Court of South Africa:

> "It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, *that is a mind open to persuasion by the evidence and submissions of Counsel* (my emphasis). The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is the fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

34. The observations of the South African Constitutional Court are condensed in the test for apparent bias subsequently formulated by the House of Lords in Porter v Magill [2002] 2 AC 357 as follows:

> "Whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased."

35. It is common ground that the first judicial intervention in the taking of evidence was after the second witness had been cross-examined. According to the judge's detailed manuscript notes and the Presenting Officer's file note, Mr Javed gave evidence first, and Mr Ali gave evidence second. Ms M agrees that the second appellant gave evidence first, but she treats Mr Ali as the second appellant. Ms M has not provided her notes of the evidence, but only her notes on the brief in which she singles out the interventions of the judge that caused her concern. The judge is right, and Ms M is

wrong, on the order of the witnesses as the second witness (Mr Ali) was questioned about his HBL statement: see paragraph [15] of the decision.

36. The judge explains what triggered her first intervention at paragraph [20] of her decision. It was when the first appellant Mr Ali (the second witness) was cross-examined that she saw a copy leaflet showing a reference to the discount before 30 June. She saw this having exchanged bundles with Counsel. Clearly Counsel had a clearer photocopy than was hitherto in the possession of the judge, and this reflects Mr Solomon's understanding of the position.

37. Mr Solomon provided me with the superior copy of the discount leaflet, and it is very striking. The poor photocopy version is described by the judge at paragraph [12]. As she says, there is barely legible writing lengthwise in the middle. The photocopying is so poor that nothing can be inferred or deduced as to whether the writing is integral to the leaflet, or has been added. In contrast, the superior copy of the discount leaflet clearly presents as an altered version of the undated leaflet. This is because the electronic equipment clearly shown in the undated leaflet also shows up in a haphazard and untidy way underneath the jagged and unevenly edged banner which runs down between the two columns of words. The discount message appears on the banner. But as the banner is not completely opaque, bits of the electronic equipment show through the banner, and thus make the first part of the message difficult to decipher. In short, it looks as if the discount leaflet has been created by adding the banner and the accompanying discount message to an original undated leaflet – and not by reprinting the leaflet so as to make the banner and accompanying discount message appear integral to the overall design.

38. It was thus not irrational for the judge to ask Mr Ali whether the document had been altered. On the contrary, having been confronted with this important piece of evidence which was crucial to the issue which she had to decide, fairness demanded that she should seek clarification from Mr Ali as to the genesis of the discount leaflet.

39. The judge was not thereby developing her own theory of the case. The judge did not put to Mr Ali that he had altered the document *in order to mislead*. She posed a neutral question, the answer to which might or might not have assisted the respondent. The question whether the leaflet had been altered, and the surrounding questions about the genesis of the two leaflets (the undated one and the one with the discount message) were all relevant to the issue which was already before the judge, which was whether the appellants had discharged the burden of proving that they had provided an original of the discount leaflet with their respective applications. For they could only succeed in their appeals if they could prove that the discount leaflet had been provided with their respective applications, as only the discount leaflet had a relevant date on it.

40. No objection is taken to the judge's surrounding questions, the answers to which are recorded in paragraph [17] of the judge's decision. The objection to the judge's first intervention is solely to one of her questions about the genesis of the discount leaflet, which was that the (superior) photocopy of the leaflet made it look like an altered

document rather than a printed document, to which Mr Ali said no, it was a printed document. It is not suggested that the judge expressed incredulity at this answer.

41. Mr Solomon submitted that since Ms Laverack, the Presenting Officer, had not raised the issue in cross-examination of either witness, the judge ought not to have raised it by way of purported clarification.

42. On the available evidence Ms Laverack did not have sight of the superior copy at the time when she first cross-examined Mr Javed and Mr Ali. So the fair-minded observer would not treat her failure to raise the point initially in cross-examination as a concession by her that the discount leaflet had not been altered or that it did not look like it had been altered. In any event, the judge was not constrained by the scope of Ms Laverack's initial cross-examination from raising a matter that was of concern to her as the trier of fact.

43. The second judicial intervention, and the one which triggered the application for an adjournment, was the judge's recalling of Mr Javed in order to put similar questions to him which she had put to Mr Ali. However, it is not alleged that the judge asked Mr Javed if the discount leaflet had been altered. The nature of the questions asked, and the answers which were elicited, are set out in paragraph [19] of the judge's decision, and it is not suggested in the grounds of appeal that paragraph [19] is inaccurate.

44. Counsel's recollection that at one point the judge put to Mr Javed a suggestion *that had been made by Mr Ali* (the judge was not putting to the witness her own suggestion, as Ms M arguably implies) accords with the final sentence of paragraph [19] of the decision, where the judge records Mr Javed as saying he did not know why the first appellant (Mr Ali) said that the leaflets were printed overseas. Mr Javed could only have given this answer if it was "put" to him by the judge that this was the evidence of his entrepreneurial team member. This was a legitimate question from the judge. It was permissible (see **K** below) for the judge to put the apparent discrepancy to Mr Javed. It gave Mr Javed the opportunity to clarify his own evidence about where the leaflets had been printed. He might have been able to give some clarification which dissolved the apparent discrepancy between him and his entrepreneurial team member on this issue (such as the leaflets being printed overseas on a subcontract from the agency in Ilford).

45. Taken as a whole, I do not consider that the judge's questioning of Mr Ali, followed by her recall and questioning of Mr Javed, was procedurally irregular or such as to create the reasonable apprehension that the judge did not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of Counsel. I am reinforced in this finding by the observations of the Presidential panel in **K** which I have highlighted below.

46. **K** was decided by a panel chaired by the then President of the Tribunal, Ouseley J. Of particular pertinence to this appeal are the observations of the panel at paragraphs [42] to [44], [47] and [54] to [55]. The panel held that there was a danger

that the comments relied on in **Oyono** have been misunderstood. Even where the parties are both represented, it is still relevant for questions to be put by an Adjudicator to a witness if they raise matters which trouble the Adjudicator *even if they have not been raised or dealt with by the opposing advocate.* This is especially so if the Adjudicator is concerned by the point and it is something which may affect the decision or indeed should affect the decision, but cannot fairly do so without the relevant witness being given the opportunity to deal with it.

47. If there are inconsistencies between documents and oral evidence or between answers which had been given already, *it is nearly always best to wait until after cross-examination and re-examination to see what matters are put*. (Judge Bart-Stewart complied with this guidance). However, it is wholly legitimate for the Adjudicator ask his or her own questions on issues of inconsistency, points raised in the refusal letter or matters which trouble the Adjudicator whether or not they are raised by the other party. What is important, however, in relation to those matters is an Adjudicator should not develop a different case from that being presented by the other party or pursue his or her own theory of the case. The manner in which any intervention is undertaken is also important. It should not be done in any hostile manner or in a manner which suggests that the Adjudicator's mind has been made up. Questions should not be leading questions or ones which conceal the purpose for which they are asked, but instead should be direct and open-ended questions. It is perfectly proper for the Adjudicator to ask, after questions have been put in cross-examination and re-examination had taken place, why a witness has said X when earlier or another witness has said Y, or how document X can be reconciled with document or oral evidence Y. An Adjudicator is entitled to follow the logical train of answers to see how they fit with the case if that is regarded as potentially significant for an issue in the case. It is also important however that an Adjudicator should keep a sense of proportion about the questions which he or she asks. It is not for the Adjudicator to take over conduct of the case either by the number of questions asked or the development of his or her own theories. The interventions may or may not assist one or other party. They are not unfair merely because one or other party may derive assistance from them.

48. On the particular facts of the case before them, the panel commented at paragraph [47] there had been no suggestion of anything in the tone of the Adjudicator's questions which indicated hostility or a mind made up. If the questions were of assistance to one side rather than to another, that reflected the weakness of the case and could not impose an obligation on the Adjudicator not to ask the questions. They were not overlong in number or disproportionate to the issues; and they did not involve the Adjudicator going off on some misguided frolic of her own.

49. At paragraph [54] the panel recognised that where allegations of unfairness are made, they had to be looked at as a whole and one cannot exclude from one's consideration of them the sort of incidents which, minor in themselves, may indicate that there was hostility towards an advocate or to a party which precluded a fair hearing being or seeming to be fair. In the particular case before them, the panel found that it was possible there was some irritation between the appellant's advocate

and the Adjudicator at an early stage. They did not consider that a fair-minded observer, in possession of all the information, would have concluded that there was a real risk that the Adjudicator was biased.

> "It is important that a fair-minded observer would be able to distinguish between an Adjudicator firmly in control of a case behaving fairly and properly in order to ascertain how the case related to the available evidence and somebody who was indicating hostility towards a party or predetermination through the timing and manner of intervention. Regrettable occasional irritation between judge and advocate does not suffice for a case of apparent bias."

50. Counsel's recollection that Judge Bart-Stewart expressed irritation towards one of the witnesses when he was giving evidence (complaining that he was muttering) does not in my judgment suffice for a case of apparent bias.

51. Accordingly, I find that the main ground of appeal is not made out. Insofar as it is material, I observe that the judge did not make any interventions on the separate issue of Mr Ali's compliance with the requirements of Appendix C (maintenance) so there was never any basis for arguing that her decision on this discrete issue was tainted by apparent bias.

52. There is also no merit in ground 2. The judge addressed Counsel's argument that the decision appealed against was procedurally unfair as a preliminary issue before she had begun to hear any evidence from the witnesses. Thus there was never an evidential basis for the proposition that her decision on the preliminary issue was tainted by bias - because she had (allegedly) already made up her mind to dismiss the appeal on the ground that the discount leaflet was a forged document.

53. The judge has given adequate reasons for dismissing the case that the decision appealed against was procedurally unfair, and no error of law is made out.

Notice of Decision

The decision of the First-tier Tribunal does not contain an error of law, and the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson