Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10277/2016

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 20 October 2017	**On 11 December 2017**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[A A]

Respondent

Representation:
For the Appellant: Mr I Richards, Senior Home Office Presenting Officer.
For the Respondent: Mr Dieu, instructed by Duncan Lewis & Co. Solicitors (Harrow Office).

DETERMINATION AND REASONS

1. The respondent, whom we shall call "the claimant", is a national of Iran. He came to the United Kingdom on 24 March 2016, and claimed asylum immediately, on the basis of his conversion to Christianity, which is said to have taken place before the claimant left Iran. The Secretary of State refused the claimant's claim, because the decision-maker, having considered the claimant's evidence about his own history and beliefs did not accept that he was Christian or that he was telling the truth about the circumstances of his claimed conversion. The claimant appealed, and the

matter came before First-tier Tribunal Judge Suffield-Thompson in Newport on 18 January 2017.

2. The judge did not hear oral evidence: the claimant was not called. She accepted the claimant's account as found in the documents on file, and allowed the appeal.

3. The Secretary of State now has permission to appeal against her decision. The grounds of appeal are as follows:-

> "1. Procedural unfairness.
>
> As is evidenced by extracts from the PO's hearing minute (see below), the FTJ had clearly decided the appeal would proceed by submissions only, even before having arrived at court. Despite the PO's objections that she quite properly wanted an opportunity to cross-examine, the FTJ declined to allow this. The SSHD could have no real complaint if the decision not to call the appellant was made by the appellant's representative, without prior knowledge of the FTJ's view, but this clearly did not happen in the extant appeal. It is quite apparent that the FTJ had pre-empted the conduct of the hearing in this way. Indeed the recording of the way the hearing was conducted at [10] in no way reflects the reality of how this came to be.
>
> Further and in the alternative – the FTJ indicating she was not minded to entertain cross-examination, even before arriving at court, clearly shows the FTJ had made up her mind about the outcome of the appeal even before hearing submissions on the merits of the claim, or entertaining the possibility that cross-examination might undermine the appellant's claim. Such an approach shows a distinct lack of impartiality. It cannot be said that the outcome of the appeal was inevitable.
>
> *"Before the hearing started, the clerk approached me and the Rep to say that the IJ wanted to proceed with submissions only and asked for our comments. The Rep confirmed that he was happy to proceed on that basis. I objected to this and asked for the opportunity to cross-examine the Appellant. The clerk came back to inform me that the IJ acknowledged my request but said that the hearing would proceed by submissions only.*
>
> *As the IJ did this and ignored my request, it was clear that she had already made up her mind and was going to allow the appeal.*
>
> *Mr Dieu also provided me with certificates and pictures to show that the Appellant had been baptised on 8th January 2017.*
>
> *When we were called into Court, the IJ said to the Rep that she understood that there was a particular way in which he wanted the hearing to be conducted. The Rep said that he would not call the Appellant or the Pastor to give evidence and relied upon their witness statements and evidence. The IJ granted this request and asked for my submissions. I believe that the way in which the IJ*

went about this case by canvassing with us first for the best course of action and then prompting the Rep to indicate that this case would be dealt with in a particular way is procedurally unfair."

4. At the beginning of the hearing before us we observed to the parties that the judge's note of proceedings does not record the matters asserted in the grounds of appeal; the note begins:

> "Mr Dieu intends to deal with the case by way of submissions."

5. Mr Dieu, however, confirmed that the grounds of appeal correctly recorded what had happened before the hearing began. He also accepted that the crucial question in this case was the credibility of the claimant. He submitted to us that despite any irregularity in the proceedings before the First-tier Tribunal Judge, her decision ought to stand: she had reached a view she was entitled to reach on the evidence before her, and had concluded that the claimant's story was indeed the truth.

6. The events that took place before the hearing in this case cause us grave concern. In the first place we have difficulty in detecting any justification for conducting a dialogue between the judge and the parties through a clerk, nor can we see any justification for conducting it outside the hearing room. Those difficulties are compounded by the judge's decision not to record her dealings, through the clerk, with the parties before the hearing began.

7. Secondly, it is clearly apparent to us, it was apparent to the parties, and it must surely have been apparent to the judge, that the issue to be determined was the credibility of the claimant. By indicating to the parties that she was intending to deal with the matter without oral evidence, she gave the clearest imaginable indication that she had already decided that issue in favour of the claimant, before the hearing even began. This feature of the case also was compounded by the judge's invitation to Mr Dieu to state the way in which "he wanted the hearing to be conducted". There is no doubt in our mind that, in the circumstances of this case, where the normal procedure, and the expected procedure, was that the claimant's credibility would be tested in cross-examination, to indicate that no oral evidence was necessary and then hint to the claimant's representative that no oral evidence need be called, was a demonstration of prejudgment.

8. In any event, there is also no doubt, applying the well-known test in Re Medicaments and Related Classes of Goods (No.2) [2001] 1 WLR 700 at [85], as endorsed by the House of Lords in Porter v Magill [2002] 2 AC 537, that the circumstances we have set out would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased.

9. It follows that the judge erred in law by continuing to hear the case after conducting herself in this way.

10. There is a further problem, because having brought about the situation in which there was no oral evidence from the claimant, and therefore also no cross-examination of the claimant, and similarly no oral evidence from or cross- examination of the claimant's supporting witness, the judge herself seems to have made a factual contribution in the claimant's favour. At [35], having set out what the Secretary of State submitted was a difficulty in the claimant's evidence, the judge wrote this:

> "This is not odd at all, I find, as in this Tribunal's experience all of the Evangelical churches insist that their members take pre-baptism classes so that they demonstrate the commitment and insight needed to becoming [sic] full members of the church and this is confirmed by the pastor's statement."

11. It does not appear to us that the judge's assertion about "all of the Evangelical churches" can be a matter properly the subject of judicial notice: the reference to "this Tribunal" must, we think, be a reference to her own personal knowledge. If she was going to use her own personal knowledge she ought to have made it perfectly clear to the parties that she proposed to do so, in order that they might make submissions on the propriety of that course of action, or, indeed, call evidence to show that she was wrong. Her failure to do so can only confirm the impression that she was biased in favour of the claimant.

12. In these circumstances we do not think it would be right to attempt to save the determination. Even if the eventual outcome is to the same effect, it cannot be regarded as a judicial decision unless the proceedings have the characteristics of judicial proceedings, including particularly that of fairness.

13. We set aside the decision of Judge Suffield-Thompson for error of law. We direct that the claimant's appeal be reheard in the First-tier Tribunal before a different judge.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 28 November 2017