



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: AA/04570/2015  
AA/04577/2015

**THE IMMIGRATION ACTS**

Heard at Manchester  
On 13 March 2018

Decision & Reasons Promulgated  
On 7 June 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

FN  
KA  
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr Greer, instructed by Ison Harrison  
For the Respondent: Ms Aboni, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants who were born in 1987 and 2006 respectively, are citizens of Pakistan. The first appellant is the mother of the second appellant. I shall throughout this decision refer to the first appellant as “the appellant”.
2. The appellants appeal against decisions of the respondent dated 3 March 2015 to remove them from the United Kingdom, the Secretary of State having refused their asylum/human rights claims. The appellant claims that she would be at risk in Pakistan from her brothers and/or others on account of marrying a man of a lower caste. The appellant has appealed on several occasions to the First-tier Tribunal. On each occasion, the First-tier Tribunal decisions have been set aside by the Upper

Tribunal. Most recently, the appellants' appeal was heard in the First-tier Tribunal by Judge Cruthers who, in a decision promulgated on 21 July 2016 dismissed the appeal. The appellants now appeal, with permission, to the Upper Tribunal.

3. The matter first came before me at Liverpool on 31 August 2017. On that occasion, Mr Draycot of Counsel was representing the appellant. In the light of the allegations advanced in the appeal to the Upper Tribunal, I considered it appropriate that Mr Draycot should appear as a witness in the proceedings and not also as a representative. Accordingly, the hearing was adjourned. At the resumed hearing at Manchester on 13 March 2018, Mr Greer of Counsel appeared for the appellants. Ms Aboni, a Senior Home Office Presenting Officer, appeared for the respondent. Mr Paul Draycot of Counsel and Mr Regan, a Home Office Presenting Officer, appeared as witnesses.
4. The burden of proof is on the appellants and the standard of proof is a balance of probabilities; the evidence adduced in the Upper Tribunal did not concern the international protection claim of the appellants but only the proceedings in the First-tier Tribunal before Judge Cruthers. The primary ground of appeal is that Judge Cruthers was biased towards the appellants or, in the alternative, that he conducted the First-tier Tribunal hearing in such a way as to give the impression of bias. There are other grounds of appeal which are not connected with the allegations of bias but, given that I have found that the first ground of appeal succeeds and that the decision of the First-tier Tribunal should be set aside and none of the findings of fact preserved, I have declined to consider those other grounds of appeal. For the reasons I give below, the appeal will need to be heard again in the First-tier Tribunal *de novo*.
5. In addition to the written statements of Mr Regan and Mr Draycot, I have a note prepared by Judge Cruthers and sent to the President of the Upper Tribunal. All the material which I considered in reaching my decision has been seen by both parties and their respective representatives.
6. On any account of the First-tier Tribunal hearing, relations between Mr Draycot and Judge Cruthers were far from ideal. In his note, Judge Cruthers describes Mr Draycot's conduct as "unnecessarily difficult and poor from start to finish". In his written statement of 9 March 2018, Mr Draycot says that Judge Cruthers interrupted him, spoke over him and prevented him from completing his oral submissions. Mr Draycot draws attention to a note in the Record of Proceedings (also disclosed to all the parties in the appeal) in which the judge had written, "is [this submission] a statement or something Mr Draycot has made up?" The appellant asserts that the judge has, in effect, accused Mr Draycot of having made up evidence. Mr Draycot describes this as "an allegation of professional misconduct of the most serious kind". For his part, Mr Regan refers to Mr Draycot's submissions when "there can what only be described as 'fireworks'" [between Mr Draycot and the judge].
7. As very often happens in cases of this sort, there is little agreement as to why exactly proceedings in court deteriorated. It is fair to say that Mr Draycot's statement and the note of Judge Cruthers are the most detailed accounts of what happened; Mr Regan has provided less detail although he believed that the judge had maintained control of

the court throughout even during the “fireworks”. I do not consider it necessary for me to go through each and every allegation which Mr Draycot and the judge have exchanged. The test which I need to apply in this case is that clearly set out by the House of Lords in *Magill v Porter* [2001] UKHL 67 at [103]:

I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to “a real danger”. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

8. For whatever reason, an appearance of bias such as to satisfy the test in *Porter v Magill* has occurred in this case and it has arisen out of events at the hearing which, so far as I understand the evidence, is uncontroversial. Given the ‘fireworks’ which all present seem to agree were detonated, it is unnecessary for me to determine, for example, whether the judge acted in a “hostile fashion” as Mr Draycot alleges [my emphasis]. There is no disagreement, for example, that the judge asked the appellant a number of questions during the course of her evidence. Judge Cruthers says that:

It has always been my understanding that a Tribunal Judge should intervene where he/she considers that a witness has given an answer that calls out for clarification or simply does not address the question that was asked. Unfortunately, in the instance referred to in paragraph 6 of the grounds, FN was giving very unclear answers to a relatively straightforward question. I felt that clarification of what she was saying was needed before her evidence went any further.

9. The judge asked the appellant when the second appellant had begun attending school in the United Kingdom. Mr Draycot says that the judge first asked this question at the very beginning of Mr Regan’s cross-examination and then repeated the question at least ten times. The judge does not appear to deny that he asked the same question repeatedly. He does deny that he repeated the question “in a disbelieving manner” as Mr Draycot alleges. However, whatever the manner in which the judge repeated the question, I have to consider whether his conduct gave rise to the appearance of bias. Judge Cruthers is quite right to observe that a Tribunal Judge should seek to clarify evidence which he or she does not understand. However, a question should be put to an appellant simply to clarify the evidence and not to make a point; in particular, the judge should not ask questions in such a way or so often as to give the appearance of having entered the arena on behalf of one of the parties. The judge should ask questions for clarification after cross-examination had been completed; it is not clear why the judge in this case felt that he had to intervene so early. It appears that the appellant did give an answer to the question when asked it was first put to her so it is not apparent why the same question had to be asked repeatedly. It does not matter whether a question is asked ten times in a “hostile manner” or in a friendly manner; the mere fact that the question is repeated so many times is likely, in my opinion, to

create an understanding in the mind of an impartial observer that the questioner did not believe the answers which he or she was receiving. To create such an impression so early in an asylum appeal, in which the evidence must be considered in its totality, is problematic. Having put the question and having received a clear answer (no matter how unsatisfactory the judge may have found it), the judge should have allowed questioning by the representatives to continue. I consider that the *Magill* test is satisfied. In those circumstances, the judge's findings of fact and his conclusions cannot stand.

10. I wish to make the following matters clear. What I have said above should not be taken as suggesting that either Judge Cruthers or Mr Draycot behaved in an unprofessional manner. There seems little doubt that Mr Draycot became impassioned ("fireworks") but I consider this suggests nothing more than an intention on his part to present the best possible case that he could for his client. Judge Cruthers, on the other hand, plainly kept control of the court throughout (as Mr Regan indicated) notwithstanding the difficulties which arose.
11. It is unfortunate that this appeal needs, yet again, to be returned to the First-tier Tribunal. However, in the light of the findings which I have made, I do not believe it is prudent to preserve any of the findings of fact of the First-tier Tribunal. There will need to be a new fact-finding exercise which is better conducted before the First-tier Tribunal to which this appeal is now returned.

### **Notice of Decision**

12. **The decision of the First-tier Tribunal which was promulgated on 21 July 2016 is set aside. None of the findings of fact are preserved. The appeal is returned to the First-tier Tribunal (not Judges Mulvenna and Cruthers) for that Tribunal to remake the decisions.**

### **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 their 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 20 MAY 2018

Upper Tribunal Judge Lane