



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03405/2017

THE IMMIGRATION ACTS

Heard at: Field House
On : 23 January 2018

Decision & Reasons Promulgated
On : 25 January 2018

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

KM
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Shretha, instructed by Law Lane Solicitors
For the Respondent: Mr S Kutas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal born on 12 December 1985. He has been given permission to appeal against the decision of First-tier Tribunal Judge Rowlands dismissing his appeal against the respondent's decision to refuse his asylum and human rights claim.
2. The appellant entered the United Kingdom in October 2009 and was subsequently granted leave as a Tier 4 dependant partner. An application made in February 2015 as a dependent spouse was refused and a subsequent application for leave to remain on family and private life grounds was refused in November 2015 with an out of country right of appeal. The appellant was served with removal papers as an overstayer on 16 September

2016 and on 29 September 2016 he claimed asylum. His claim was refused on 29 March 2017 and he appealed against that decision.

3. The basis of the appellant's claim was that he feared return to Nepal due to his involvement with the Nepali Congress Party (NCP). He claimed to have worked for the Nepali Congress Party as an active member of the student union in Nepal, undertaking activities in his college. He claimed to have been attacked and threatened by the Maoists on various occasions as a result of his political activities.

4. The respondent, in refusing the appellant's claim, noted his inability to answer basic questions about the Nepali Congress Party and did not accept that was an active member of the party. The respondent found the appellant's account of the attacks on his home by Maoists to be implausible and did not accept his claim. No weight was given to the documents produced by the appellant in support of his claim. The respondent considered that the appellant's delay in claiming asylum undermined the credibility of his claim and did not accept that he had any genuine fear on return to Nepal. It was not accepted that his removal to Nepal would breach his human rights.

5. The appellant's appeal against that decision was heard by First-tier Tribunal Judge Rowlands on 4 May 2017 and was dismissed in a decision promulgated on 9 June 2017. At the appeal hearing an adjournment request was made to allow the appellant's solicitors to obtain further information in response to the respondent's rejection of his account of being injured as a result of attacks and his membership of the NCP. The judge refused the request. The judge heard from the appellant. He considered that the appellant had not been truthful about his level of involvement with the NCP and did not accept that he was an active member or that he had been targeted by the Maoists. He considered the documentary evidence, namely an NCP letter and a police report, to be unreliable. The judge considered the delay in, and timing of, the appellant's claim undermined his credibility and did not accept that he was assaulted and threatened as claimed. He considered that in any event the appellant could relocate to another part of Nepal and join his wife and children who were living with his wife's parents and had no problems. The judge considered further that there was a sufficiency of protection available to the appellant. The judge was not satisfied that the appellant would be at any risk on return to Nepal and considered that his removal would not breach his human rights on Article 3 or 8 grounds.

6. The appellant sought permission to appeal the judge's decision on the grounds of procedural impropriety and unfairness, on the basis that the judge had stated within the first few minutes of the hearing that he found the appellant's claim implausible and that he was therefore prejudiced against the appellant from the outset. The grounds also asserted that the judge had erred by refusing to adjourn the appeal to enable the appellant to produce documentary evidence and that the judge had misunderstood the evidence.

7. Permission was granted in the First-tier Tribunal on the following grounds:

"The judge on the face of it gave adequate evidence based reasons for concluding that the appellant had failed to establish his evidence was credible or that he was at risk from Maoists in Nepal.

The grounds take issue with the refusal by the Immigration Judge to adjourn. The judge's reasoning relating to this at paragraph 3 cannot be argued to amount to unfairness. However the contention at paragraph 1(a) of the grounds that the judge indicated at the start of the hearing the view that the appellant's case was implausible does if accurate amount to arguable bias and error of law."

8. At an error of law hearing on 25 August 2017 Upper Tribunal Judge Zucker adjourned the proceedings for the appellant's counsel to be given an opportunity to produce evidence of what was alleged to have been said by the judge at the hearing and for the judge to provide his comments. Mr Ahmed, counsel representing the appellant before Judge Rowlands, provided a witness statement and Judge Rowlands provided his comments. A further hearing on 6 December 2017 was adjourned, as Mr Ahmed appeared as the appellant's representative, which was agreed was not appropriate in the circumstances as he had since become a witness. In response to the Upper Tribunal's directions of 6 December 2017, the Home Office Presenting Officer who had represented the respondent at the hearing before the judge, Ms Houillet, produced her notes of the proceedings.

9. The appeal then came before me. Both parties made submissions before me. Mr Shretha submitted that the proceedings before the judge had been unfair as he had formed a view before the hearing, he had stopped the appellant from giving evidence and had not given the appellant an opportunity to express his case. The judge was therefore biased. Mr Shretha relied on the case of Sivapatham (Appearance of Bias : Sri Lanka) [2017] UKUT 293 which he submitted involved very similar circumstances. In response to my enquiry, Mr Shretha accepted that the appellant's solicitor's notes of the hearing had not been produced and that the appellant was relying on Mr Ahmed's statement. I also asked him to confirm that his submission was that the appellant had been stopped from giving his evidence and he replied that that was the case according to the instructions given to him by the appellant prior to this hearing. The appellant felt that he was unable to give evidence as he was upset because the judge had told him that he was not a credible witness.

10. Mr Kutas, relying on the case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418, submitted that the refusal by the judge of the adjournment request was not unfair as there had been no prior request for an adjournment and the appellant had known for some time that the burden lay upon him to make out his case. In regard to the allegation of bias he submitted that there was no evidence to support the appellant's claim that he was prevented from giving evidence and that had not been pleaded in the grounds. Mr Kutas relied on the case of Sivapatham in submitting that the appellant had failed to show that the proceedings were unfair. In response Mr Shretha reiterated his previous submission that there was unfairness in the proceedings and he submitted that that also arose from the judge's refusal to adjourn.

Consideration and findings

11. Having carefully considered the submissions of both parties it seems to me that the grounds fail to establish that there were any errors of law in the judge's decision.

12. With regard to the adjournment request, that was not a basis upon which permission was granted, but in any event the judge properly considered the request and provided proper reasons at [3] for rejecting it. The appellant had had plenty of opportunity to produce all relevant evidence and there was no unfairness in the judge's decision to proceed with the appeal on the basis of the evidence already available.

13. As for the question of bias, I find no merit in that ground of challenge. It is of some concern that the allegation put to me in Mr Shretha's submissions was far more serious than that previously made, asserting that the judge had actually prevented the appellant from giving evidence and putting his case forward. No such assertion was made in the grounds and neither was it made in Mr Ahmed's statement. Furthermore it was not supported by a statement from the appellant. There had been no previous suggestion that the judge had told the appellant that he was not a credible witness or that he had prevented the appellant from putting his case. It was plain from the judge's decision that the appellant had every opportunity to put his case at the hearing, through his own oral evidence and submissions from his representative. Such an allegation was, in my view, completely unfounded and did not reflect well on the appellant or his representative before me.

14. As for the allegation actually made in the grounds, namely that prior to hearing any evidence the judge had commented that he found the appellant's claim implausible, I set out Mr Ahmed's comments in his statement and Judge Rowlands' comments, as follows.

15. In his witness statement, Mr Ahmed stated:

"1. I can confirm that I am a Barrister, who represented the Appellant at the hearing on 4 May 2017. The Appeal hearing was listed before IJ Rowlands. I have provided a note of the evidence to Instructing Solicitors.

2. I can confirm that the learned Judge within minutes of the hearing stated that having read the papers, he found the claim to be implausible. This was unfortunate, since the learned Judge heard no submissions or evidence from the Appellant. The Appellant had not even been cross-examined. I was concerned by the comments made it was obvious, that the learned Judge had made up his mind to refuse the appeal."

16. Judge Rowlands' commented as follows:

" I can categorically assure the Upper Tribunal that I did not say that the Appellant's claim was implausible.

I have sat as an Immigration Adjudicator/ Judge for seventeen years and would neither conclude that a claim was implausible let alone say so without hearing the evidence first. As can be seen from my decision I considered the application for the adjournment and the reasons for it.

In paragraph 31 of my decision I actually state that he 'may well have been a member but not as significant as claimed'. This clearly shows that I did not consider his claim to be implausible at all."

17. Clearly there is a conflict in the recollection of the judge and Mr Ahmed. It is relevant to note that Mr Ahmed's statement is dated some four months after the hearing and has not been accompanied by any contemporaneous notes of the hearing from the instructing solicitors, despite the directions given by Upper Tribunal Judge Rintoul on 6 December 2017. I note UTJ Rintoul's comment at that hearing, that the passage of time between the hearing and the statement was a problem in the absence of contemporaneous notes from the hearing, and he therefore made the directions stated. It is also the case that Judge Rowlands' comments were made after the same period of time, although I have seen his contemporaneous record of the proceedings which I note makes no reference to any comments on plausibility. I note further that the grounds of appeal, drafted shortly after the judge's decision was issued, are not specific about the judge's comments in terms of timing and substance. There is, helpfully, a contemporaneous note of the hearing from the Presenting Officer, Ms Houillet. I observe that there is no reference in her detailed notes to any comment by the judge at the outset of the hearing in regard to the case being implausible. Ms Houillet notes, however, that after the adjournment request was made and refused, and after the appellant had commenced his oral evidence, the judge commented that he found it hard to believe that after 8 years the Maoists visited his father's house.

18. Having considered Mr Ahmed's statement, the judge's comments and Ms Houillet's notes, it seems to me that what happened was that the judge put to the appellant during his evidence that he found an aspect of his claim implausible. I do not see any problem with that and consider that, if anything, it was beneficial to the appellant as it provided him with an indication of issues the judge needed to be addressed. Indeed that is precisely what the Court of Appeal observed in Singh v SSHD [2016] EWCA Civ 492, as quoted at [16] of Sivapatham. A similar observation is made in AM (fair hearing) Sudan [2015] UKUT 656, also quoted at [16].

19. However, even if it was the case that the judge indicated at the outset that he considered the appellant's case to be implausible, it seems to me that that in itself did not indicate any bias on the judge's part or amount to procedural impropriety or unfairness. The Upper Tribunal, in Sivapatham, considered that: "*Provisional or preliminary judicial views are permissible, provided that an open mind is maintained.*" and found at [16] that "*The judicial duty of impartiality, one aspect whereof is the maintenance of an open mind, does not preclude the formation of tentative, provisional views in advance of adjudication.*"

20. It is plain to me that the approach taken by Judge Rowlands was entirely different to that taken by the judge in Sivapatham and that no comparison can reasonably be made between the two scenarios. Judge Rowlands plainly kept an open mind. He heard from the appellant and from the appellant's representative and made full and cogent findings on the evidence. For the reasons fully and properly given he found aspects of the appellant's claim implausible and found the evidence to be unreliable and lacking in credibility. In any event, and aside from his adverse credibility and plausibility findings, he went on to consider the appellant's case in the alternative, taking the claim at its highest and considering the background country information, and provided cogent reasons for concluding that the appellant could safely and reasonably relocate to another part of

Nepal and that there was a sufficiency of protection available to him. Those were findings which were properly open to him on the evidence.


21. For all of these reasons I reject the allegation made against the judge. In terms of the principles and guidance in Alubankudi (Appearance of bias) [2015] UKUT 542 I find no apparent or actual bias on the part of the judge. The appellant had every opportunity to present his case and to address the respondent's and judge's concerns. There was no procedural impropriety or unfairness. I find no errors of law in the judge's decision. I uphold the decision.

DECISION

22. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Anonymity

The First-tier Tribunal made an order for anonymity. I continue the order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed 
Upper Tribunal Judge Kebede

Dated: 23 January 2018