Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04488/2017

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
9 February 2018	**10 May 2018**

Before

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

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[B M]

Respondent

Representation:
For the Appellant: Ms R Petterson, Home Office Presenting Officer.
For the Respondent: Mr K Gayle, instructed by Elder Rahimi Solicitors.

DETERMINATION AND REASONS

1. The respondent whom we shall call "the claimant" is a Kurdish national of Iraq. She claimed asylum on the basis of a fear of retribution from her family following her striking up a relationship with, and having sexual intercourse with, a man who was different from the man whom her father wanted her to marry. Her claim was refused by the Secretary of State, who, in the refusal letter dated 26 April 2017, worked through the claimant's evidence as obtained at her asylum interview and rejected it as

lacking in credibility, being "internally inconsistent" at a number of points. The rejection of the claimant's evidence about her history included rejection of her claim that her father had a position of authority in the PUK.

2. The claimant appealed. Her appeal was heard by Judge Suffield-Thompson in the First-tier Tribunal. The judge heard oral evidence from the claimant: the latter adopted her witness statement and was cross-examined by the Presenting Officer. The judge heard submissions from the Presenting Officer. She heard no submissions on behalf of the claimant. In a written determination, she allowed the appeal.

3. The Secretary of State's grounds of appeal to this Tribunal are as follows:-

> "The Judge of the First-tier Tribunal has made a material error of law in the Determination.
>
> Procedural Irregularity
>
> It is respectfully submitted that FTTJ Suffield-Thompson has erred in law. She states at paragraph 15 of her determination that she reserved her decision at the close of the hearing, however this is in complete contradiction to the minute recorded by the Presenting Officer (enclosed) which states that the FTTJ did not even hear submissions from the Representative and allowed the case immediately in court.
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> It is asserted that in doing so she has failed to demonstrate adequate consideration of the evidence or have due regard to the submissions of the Presenting Officer it is submitted that this is further demonstrated by the FTTJ's comment during the Presenting Officers submissions that she "had a plan for the hearing", as such her decision to allow the appeal is rendered unsound."

4. The Presenting Officer's note sets out a number of matters on which the Presenting Officer cross-examined the claimant. The following passage is of relevance:

> "While I was questioning how she was able to take time off work at short notice and that no one would notice that [R], who she spent a lot of time with, was also off work, the judge stated that people would find a way to have a relationship and asked me to move on from that line of questioning.
>
> Additionally, when questioning the appellant about her answer to Q.84 AI in which she said that her family were the first to find out about the relationship, and that she didn't know if [R] had told his family, which contradicted her account that it was his uncle that informed her family about the relationship, the appellant said that she could only comment on her family and her life, the judge said that this was a misinterpretation of [sc by] the home office.
>
> During my submissions the judge said that she had a plan for the hearing. She did not hear submissions from the [claimant's] rep but allowed the appeal"

5. Following the grant of permission, the judge was invited to comment on the grounds. We do not need to set out the part of her response that is a protest. She asserts that if there is no reference to a plan in the Record of Proceedings, she did not say it. She points out that it is perfectly in order to give an indication at the hearing of what the decision will be, although the decision itself is contained in the written judgement.

6. We had submissions from Mr Gayle and Ms Patterson. We have examined the judge's note of the proceedings before her, her written decision, and other material on file.

7. There is, we are satisfied, nothing in the complaint that the judge indicated at the hearing what her decision would be. That is not an irregularity of any sort. In any event, it is difficult to see how there could be an irregularity given that the written decision does indeed reflect the indication given at the hearing.

8. What is a greater concern arises from the judge's "plan" for the hearing. Whether or not that was declared, it is clear that the judge did not require the appellant's representative to make the appellant's case by any submissions, and is clear from the determination that, even without any submissions on behalf of the appellant, the judge was content to find in her favour, rejecting each of the challenges made to her evidence.

9. We will look in some more detail at the determination shortly, but we must first consider the issues raised by the judge's decision not to cal on the appellant's representative. It is a feature of immigration appeal hearings, going back in our own personal experience to the early 1990's at least, that after the evidence has been heard, closing submissions are made first by the Home Office and then by the appellant's representatives. This is despite the fact that it is normally the appellant that has the burden of establishing the case. In proceedings where the person needing to establish the case is heard first (as in appeals to this Tribunal), it may frequently be possible and appropriate for a judge to reach the view after the proponent has done everything he can to make his case, that there is no need to respond to it. There is, as it is sometimes said "no case to answer". It will, however, be very rare indeed for a judge to be able to reach the contrary view, that is to say, having heard the answer, to conclude that the case succeeds without having been fully put. We think it will only be on the rarest occasions that a conclusion of that sort will not properly suggest that a judge has not either reversed the burden of proof or failed to be open properly to arguments on both sides. In the present case it must have been clear to everybody at the close of the Presenting Officer's submissions, when the judge did not call on the applicant, not merely that the judge thought that all material difficulties had been resolved in the claimant's favour, but that, in addition, the claimant's case, on the basis of all the evidence before the judge, and without any argument in its favour, was sufficient to succeed.

10. The circumstances in which the in which the judge reached that view now need to be examined. At paragraphs 22 to 24 the judge sets out that there is an issue as to credibility, and indeed asserts that "the only area of dispute in this case is the credibility of the appellant." The judge then goes through a number of the aspects of the claimant's case on which the Presenting Officer had cross-examined her. On each of these points she says simply that she accepts the claimant's evidence. She declines to discover any inconsistencies and provides explanations for the inconsistencies alleged by the Home Office Presenting Officer. So far as concerns the assessment of the evidence, this might not be objectionable, were it not that at paragraph 26, in explaining why it is credible that the claimant would know nothing of her father's business or political affiliations, the judge writes "the respondent cannot impose elements of western culture onto people such as the appellant". At paragraph 31, however, dealing with the Presenting Officer's submission that the claimant's evidence of a long term intimate relationship between two colleagues being wholly secret was implausible, the judge writes: "many people are able to carry on relationships together for many years without being discovered". That, however, *does* appear to be imposing a western interpretation on the evidence. The judge cites no evidential support that her assertion would be valid in Iraq. These are matters which, no doubt, the judge ought to have heard the parties' various submissions on. It is, with respect, very difficult to see why a western interpretation should be imposed in order to explain an implausibility in the claimant's favour, but should be inadmissible if detected as part of the respondent's case. In particular, it is difficult to see that that treatment of the issue properly reflects the fact that it was for the claimant to make her case.

11. As we have said, the reasons for refusal letter deals with the claimant's credibility, and the judge identified that issue as the only issue in the case. Once the judge accepted the claimant's credibility, however, other issues obviously arose. In particular, (bearing in mind again that it was for the claimant to prove her case), if her story was the truth, was she at risk of persecution? That required an evaluation of what the actual risk to her would be, whether there would be a sufficiency of protection against it, and whether she could relocate to another part of Iraq. The judge deals with these matters in paragraphs 33 to 39. The only relevant submission before her was that of the Presenting Officer, briefly noted (whether or not briefly made) as "could go to IKR". There was a substantial bundle of country evidence. The judge dealt with this by setting out 6 sentences from that material which she says "have been helpful to me in making my findings and decision". She concludes at paragraph 36 that the claimant "would be at real risk from all the male members of her family if she were to go back. She cannot turn to the State as they do not adequately protect women and I accept that honour killings are a part of their culture and society". So far as internal relocation is concerned, the judge again refers to a few sentences of the material and concludes that the claimant

would be at real risk of physical harm in the IKR and that it would be unfeasible to expect her to go there.

12. It is clear that at this part of the determination, the judge was taking a great deal on herself. The Secretary of State had, as yet, given no consideration to what the position would be if the claimant's story were the truth; and the claimant's representative was not invited to make a case on that basis. Instead, the judge appears to have decided to do all the work herself, justifying her conclusion solely by those parts of the country evidence which she thought supported the claimant's case.

13. This process demonstrates, in our view, the danger of proceeding without hearing submissions on behalf of the claimant. It is, frankly, extraordinary that she was able to conclude so much in the claimant's favour and nothing against her without hearing the claimant's case being made. Again, whether or not she declared that she had a "plan" for the hearing, it is clear from her decision that without the claimant's assistance she was able to read a substantial body of country evidence in a way that so clearly favoured the claimant's case that no attention needed to be given to any parts of it which pointed in the other direction.

14. The most apparent and public aspect of the judge's conduct of the hearing was evidently that she did not hear submissions from the claimant's representative. The reasons why she did not need to do so are, in our judgment, apparent from the determination. It seems to us that a well-informed observer of the hearing (including the points at which the judge refused to allow the Presenting Officer to press the claimant in her evidence) and the determination would reach the view that judge was not exercising an independent and impartial judgment, but was at all stages viewing the matter in a way which tended to favour the claimant and disfavour the respondent. We have therefore, with regret, reached a view that this is a case where the judge showed apparent bias.

15. In the circumstances, the position is that the parties have not had a fair hearing. We set aside Judge Suffield-Thompson's determination and remit the claimant's appeal for redetermination by a different judge in the First-tier Tribunal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 24 April 2018.