Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10633/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Determination Promulgated**
On Friday 30 July 2021	**On Tuesday 24 August 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

K M A
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. This is an appeal on protection grounds. It is therefore appropriate to continue that order. 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 his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr F Ahmad, Legal representative, Hanson Law Ltd
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge J Burns promulgated on 5 February 2021 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 7 October 2019 refusing his protection and human rights claims. This is the Appellant's second appeal. The earlier appeal was rejected on the basis that the Appellant's claimed fear of persecution was not credible.

2. The Appellant is a national of Iraq. His original asylum claim was that he feared persecution from ISIS. His current claim is that he will be at risk on return as he has converted to Christianity whilst in the UK.

3. The Judge correctly took as his starting point the decision of the First-tier Tribunal Judge which included the adverse credibility findings. The Judge did not accept the Appellant's current claim as credible and therefore dismissed the appeal.

4. The Appellant appeals the Decision on nine grounds as follows:
Ground 1: The Judge acted procedurally unfairly because he gave an appearance of bias; he also used discriminatory comments contrary to the Equality Act 2010.
Ground 2: The Judge made a finding that the original asylum claim was a sham without giving reasons for that finding.
Ground 3 (misnumbered as second ground 2): The Judge failed to consider the Appellant's given reasons for converting to Christianity.
Ground 4 (misnumbered as ground 3): The Judge considered immaterial matters.
Ground 5 (misnumbered as ground 4): The Judge made assumptions or failed to give adequate reasons for his findings.
Ground 6 (misnumbered as ground 5): The Judge misinterpreted the evidence of the witnesses.
Ground 7: The Judge pre-determined the claim.
Ground 8 (misnumbered as ground 9): The Judge failed to give reasons for the finding that the Appellant is not a member of any political party or organisation and has not attended any demonstrations.
Ground 9 (misnumbered as ground 10): The Judge misdirected himself as to the Appellant's ability to obtain a CSID card.

5. Permission to appeal was granted by Upper Tribunal Judge Martin as a First-tier Tribunal Judge on 9 March 2020 in the following terms:

> "... 2. It is arguable that the Judge's intemperate comments at [14] and [36] indicate a closed mind and that the proceedings were thus unfair.
> 3. All the grounds may be argued."

6. Although the Respondent filed and served a lengthy Rule 24 reply, Mr Walker conceded at the outset of the hearing that ground one of the Appellant's grounds was made out and therefore that the Decision should be set aside. The basis for his concession encompasses also the Appellant's ground seven.

7. Based on that concession, I agreed that the Decision should be set aside. Given the nature of the challenge, which is accepted to be made out, and as both parties agreed, it is appropriate for the appeal to be remitted to the First-tier Tribunal for re-determination. I indicated that I would provide reasons for my decision in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

8. There are three paragraphs of the Decision which make up the Appellant's grounds one and seven, the grant of permission and the Respondent's concession as follows:

> "14. This chronology is consistent with the Appellant deciding to create a further sham basis for an asylum claim by pretending to become a Christian after he received the refusal of his 2017 submissions. That this is likely to be the case is supported by the varying explanations he has given as to what prompted his conversion.
> …
> 36. Attendance at church, bible studies, the acquisition of some basic knowledge, and reciting stock professions of belief may be indications of genuine Christian belief, but equally may be the empty gestures of a non-Christian wishing to ingratiate himself with and obtain the support of a priest for purposes of making a bogus asylum claim. Church ritual can be undertaken for purposes other than genuine belief. Pretending to have become a genuine Christian, is a well-worn and recognised means for Muslims who have come from Islamic countries, and who have no other basis for claiming asylum, to make such claims.
> …
> 44. The Appellant's previous account put forward in 2016 was rejected with findings that he had given incredible and nonsensical evidence. That decision, in respect of which the Upper Tribunal refused to grant permission to appeal, indicates that the Appellant was, at least in 2016, a person who was capable of deliberately presenting false and invented evidence to try to advance his immigration objectives."

9. I begin with [44] of the Decision which the Appellant says, at his ground 7, shows that the Judge has pre-determined the claim because this claim is a new one and based on different evidence. On this point, I would not have found for the Appellant. Given the extracts from the previous appeal decision cited at [10] of the Decision, the Judge was entitled to find that the Appellant had fabricated his original claim. That was relevant to, although of course not decisive of the new claim.

10. However, I agree with Mr Walker's concession that [14] of the Decision is indicative of a pre-determination of the claim. This paragraph was also one of those cited by Judge Martin when granting permission and described as showing "a closed mind" and being "intemperate". I agree.

11. Whilst the structure of a Decision is not necessarily determinative in relation to the way in which the Judge has reasoned his or her findings, in this case, [14] of the

Decision appears immediately following two paragraphs which merely set out the basis of the claim. The Judge had not considered the substance of the claim at that stage but launched in with a statement that, in effect, the claim was not to be believed because of the timing of it. As Judge Martin commented, the statement is also "intemperate" in its language.

12. The test for apparent bias is set out most notably in Porter v Magill [2001] UKHL 67 at [102] and [103] as follows:

> "102. In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711 A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At p 711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp726H-727C:
>
> > '85 When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'
>
> 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**."
>
> [my emphasis]

13. Whilst there is no suggestion in the grounds that the Judge behaved during the hearing in a manner which suggested bias, I agree with Judge Martin that the Judge's comments at [14] and in the final sentence of [36] of the Decision are properly described as "intemperate". A fair-minded and informed observer, having considered the facts and having read the Decision, would be likely to conclude that there was a real possibility that the Judge was biased because of his

pre-conceptions about conversion claims of this nature and the timing of the Appellant's claim.

14. For those reasons, the hearing before Judge Burns was procedurally unfair. The Decision is set aside for that reason. The complaint under the Equality Act based on what is said at [36] of the Decision adds nothing to the remainder of ground one. I do not therefore need to deal with it. Nor would it be appropriate for me to deal with the remaining grounds challenging the substance of the Decision. The concession that the hearing was procedurally unfair vitiates the Judge's findings as a whole.

CONCLUSION

15. For those reasons, I conclude that ground one discloses errors of law in the Decision. I therefore set the Decision aside in its entirety. The credibility of the Appellant's claim will therefore need to be considered afresh. Since I have found the Decision to have been reached on a procedurally unfair basis, this appeal should be remitted for a de novo hearing.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge J Burns promulgated on 5 February 2021 is set aside in its entirety. No findings are preserved. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge J Burns.

Signed *L K Smith* Dated: 3 August 2021
Upper Tribunal Judge Smith