Upper Tribunal
(Immigration and Asylum Chamber)

BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC)

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 12 November 2014	
	……

Before

The President, The Hon. Mr Justice McCloskey

Between

BW

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant:	Mr E Nicholson (of Counsel), instructed by Lawrence and Company Solicitors
Respondent:	Mr D Mills, Senior Home Office Presenting Officer

(i) It is timely to recall the golden rule of judicial adjudication that justice must not only be done but must manifestly be seen to be done.

(ii) In certain cases, likely to be rare, evidence presented to the Upper Tribunal may include a witness statement compiled by a representative involved in the hearing before the First-tier Tribunal ("FtT"). In practice, this is most likely to occur in cases where such evidence is

considered necessary to demonstrate that the appellant was deprived of his right to a fair hearing at first instance.

(iii) Evidence of this kind will not be required if the determination of the FtT speaks for itself on the relevant issue.

(iv) In applications for permission to appeal, the distinction between legal submissions and arguments (on the one hand) and evidence about events at the hearing (on the other) must be carefully observed.

(v) Where an advocate makes a witness statement in the circumstances outlined above, a change of advocate may be necessary, since the roles of advocate and witness are distinct, separated by a bright luminous line. An advocate must never assume the role of witness.

(vi) The respondent's rule 24 response must engage specifically with additional evidence of this kind.

DECISION, REMITTAL AND DIRECTIONS

1. This is an appeal against the decision of the First-tier Tribunal (the "*FtT*") promulgated on 18 July 2014, whereby the Appellant's appeal against the Secretary of State's decision to remove him from the United Kingdom to Afghanistan, following rejection of his asylum application, was dismissed.

2. It was conceded on behalf of the Secretary of State that the determination of the FtT cannot be sustained, on an assortment of grounds. In the Notice of Appeal, five central grounds are advanced. In substance, the concession on behalf of the Secretary of State related to the first three grounds. I consider this concession properly made.

3. One of the grounds of appeal to which the concession related was based on the Judge's statement at the conclusion of the evidence, when the closing submissions of the Appellant's Counsel were about to begin, that he had effectively made up his mind on the issue of whether the Appellant was the person depicted in a series of photographs adduced in evidence. This was not disputed. This issue was one of not less than fundamental importance: if the photographs were found to depict a person other than the Appellant, his appeal was almost certainly doomed to fail. This serves as a timely reminder of the fundamental rule of adjudication in all contexts that an open mind must be conscientiously maintained until the conclusion of the adjudicative process. In the hallowed words of Lord Hewart CJ, justice must not only be done but must manifestly be seen to be done. Lord Bingham of Cornhill described this duty as "*so fundamental, so pervasive and …….. so basic "*(The Business of Judging, p 81). The judicial intervention which occurred in this case (and about which there was no dispute) created a clear appearance of unfairness and, in my judgement, had the effect of denying the Appellant a fair hearing.

4. I turn to address an important issue of professional standards and ethics which arose in this appeal. The material upon which the application for permission to appeal was made and, in turn, the substantive appeal was presented included a witness

statement signed by Counsel who represented the Appellant at first instance. This statement described certain events at the hearing, in particular that outlined in [3] above. In response to my enquiry, I was informed by Mr Nicholson, representing the Appellant, that the change of Counsel was a deliberate, planned development, motivated by the consideration that Counsel at first instance now had the status of a witness.

5. In these circumstances, the following guidance seems appropriate:

   (i) In certain circumstances, it is appropriate for a legal representative to make a witness statement of this kind, particularly where the grounds of appeal are based, in whole or in part, on how the first instance hearing was conducted and events which unfolded therein.

   (ii) The cases in which a witness statement of this type materialises between first instance hearing and appeal are likely to be rare. In practice, this course is most likely to occur where it is contended that the litigant was deprived of his right to a fair hearing by reason of events which occurred at the hearing itself. One far from fanciful illustration which comes to mind is a case where it is considered necessary to present, as part of an application for permission to appeal, evidence relating to the circumstances in which a late application for an adjournment materialised and how such application was handled by the Tribunal <u>if the Tribunal's determination does not speak for itself on this discrete issue</u>.

   (iii) Those compiling applications for permission to appeal must be alert to the important distinction between legal submissions and arguments (on the one hand) and evidence (on the other). This distinction must not be blurred.

   (iv) Where it is decided that a witness statement of the kind which materialised in the present case must be made, the legal representative concerned should, as a general rule, not present the appeal before the Upper Tribunal. The roles of advocate and witness are distinct, separated by a bright luminous line. An advocate must never assume the role of witness. This conflict <u>may</u> be avoided if, for example, the facts bearing on the judicial aberration in question are undisputed. Otherwise, the appellate advocacy function must be relinquished to another representative.

   (v) In every rule 24 response, care must be taken to set out the Respondent's position in relation to a witness statement of this kind. Thus, if the contents of the statement are undisputed, this should be simply stated. Alternatively, any controversy regarding the contents must be highlighted.

6. Reference to the relevant professional standards of barristers confirms the correctness of and rationale underpinning the propositions listed above. Adherence to the latter, with specific reference to the relevant provisions of the Bar Standards Board Handbook (First Edition, January 2014), will:

(i) discharge the core duties of acting in the best interests of the client and avoiding conduct likely to diminish public trust and confidence (see CD2 and CD5);

(ii) enhance the willingness and ability of the court or tribunal to rely on information provided to it by both the former advocate (now witness) and the new advocate (see OC1);

(iii) further the proper administration of justice (see OC2);

(iv) protect and promote the interests of the client (see OC3); and

(v) discharge the former advocate's duty to the Tribunal (see RC3);

7. Reference may also be made to RC17, RC26. The first of these rules provides that the duty to act in the best interests of one's client includes "*a duty to consider whether the client's best interests are served by different legal representations*" – and, if so, to advise the client to this effect. RC26 provides that counsel instructed in a matter may cease to act where there is some "*substantial reason*" for doing so. Further, I refer to the guidance enshrined in GC73. This relates to the rule contained in RC21.10 that Counsel must not accept instructions to act if there is "*a real prospect that you are not going to be able to maintain your independence*". The operative passage is thus:

> "*Examples of when you may not be able to maintain your independence include appearing as an advocate in a matter in which you are likely to be called as a witness ….*"

Finally, it is appropriate to observe that adherence to the rules and standards highlighted above will serve to protect and enhance the necessary standards of dignity and decorum in the courtroom and will, thereby, promote the rule of law.

8. It is appropriate to observe that, in the present case, Counsel who represented the Appellant at first instance conducted himself impeccably, observing all of these precepts fully. In this way the highest standards of professional conduct and ethics were duly observed.

DECISION

9. I decide and direct as follows:

(i) The decision of the FtT is hereby set aside.

(ii) I remit the appeal to a differently constituted FtT.

(iii) No findings of fact are preserved.

(iv) Any application on behalf of the Appellant to adduce further evidence will be made within six weeks of the date hereof. The relisting will follow on the first available date thereafter.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 18 November 2014