Upper Tribunal
(Immigration and Asylum Chamber)

Sivapatham (Appearance of Bias) [2017] UKUT 00293 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London On 28 June 2017	**Decision given orally on 28 June 2017 and promulgated on 7 July 2017**
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Before

THE HON. MR JUSTICE MCCLOSKEY, PRESIDENT

Between

MR ANTON SIVAPATHAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Mannan, of counsel, instructed by Linga & Co
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

(i) Indications of a closed judicial mind, a pre-determined outcome, engage the appearance of bias principle and are likely to render a hearing unfair.

(ii) Provisional or preliminary judicial views are permissible, provided that an open mind is maintained.

(iii) An appellant does not require the permission of the tribunal to give evidence. This does not prevent the application of fair and sensible case management and, further, is subject to the doctrine of misuse of the tribunal's process.

DECISION

Permission to Appeal

1. The principal ground upon which permission to appeal to this Tribunal was granted was that of the conduct of the hearing at first instance. The permission judge refers to the witness statement of Mr Lingajothy, counsel who represented the Appellant at first instance and states "… in light of its contents it is arguable that the decision of the First-tier Tribunal (The "FtT") was vitiated by procedural unfairness through apparent bias."

2. While, as the grant of permission makes clear, apparent bias lies at the heart of this appeal, permission was granted in respect of several wide ranging grounds and there is at least one further discrete issue of substance to be considered.

Framework of this Appeal

3. The Appellant is the father figure in a family unit completed by his spouse, and two children who were aged 18 and 12 years respectively at the time of the first instance hearing. Notably, all four family members were Appellants before the FtT. The appeal to this Tribunal has been brought by the father only. All are citizens of Sri Lanka. The decision of the Secretary of State for the Home Department (the "Secretary of State") underlying this appeal was a refusal of the Appellant's claim for asylum, advanced in circumstances where his initial presence in the United Kingdom pursuant to a student visa was lawful for a period of approximately one year and was followed by a period of overstaying of comparable dimensions.

4. The essence of the Appellant's asylum claim was as follows. He asserted that the cousin of his spouse was a senior member of the LTTE (denoting the violent rebel force which was ultimately overcome by government forces in Sri Lanka). Upon visits to Colombo the cousin stayed at the Appellant's house, to the knowledge of the authorities. The cousin went missing and, in the aftermath, the authorities were "*pursuing*" the Appellant and continue to do so. When interviewed he described episodes of arbitrary arrests, protracted detention and beatings perpetrated by State agents. Eventually he was prompted to leave lucrative employment in Sri Lanka and, in July 2010, entered the United Kingdom lawfully, in accordance with his student visa, followed by his wife and two children some months later.

5. The Secretary of State's refusal of the Appellant's asylum claim was based largely on a negative assessment of the Appellant's credibility.

6. The ensuing appeal to the FtT was based on asylum and Article 8 ECHR grounds. In dismissing the appeal the FtT essentially endorsed the reasoning of and grounds invoked in the Secretary of State's refusal decision.

The Apparent Bias Ground

7. I turn to address the evidence of apparent bias. As noted in [1] above it is contained in, *inter alia*, a witness statement of counsel who represented all four Appellants before the FtT. In passing it is heartening to note that the guidance contained in the decision of this Tribunal in BW (Witness statements by advocates) [2014] UKUT 568 (IAC) has been heeded, with the result that Mr Lingajothy has undergone the requisite conversion from advocate to witness and has been substituted by replacement counsel.

8. Former counsel's witness statement includes the following passages:

> *"3. … at the beginning of the Appeal, … the Judge spoke to me in the following tone. He informed me firstly that Appellant's history clearly shows that he is not a credible witness. When I interjected and told him that the Appellant may be able to explain the adverse points in his immigration history, to the satisfaction of the Court, the Judge then quite assertively repeated the alleged inconsistencies referred in the Respondents' refusal letter, to further justify his argument, and I use the word argument, as the Judge appeared to be in no mood to listen to me but seemed to have firmly made up his mind; that this case was a non-starter. He was also at the time, joined in by the HOPO and they both appeared to be singing from the same hymn sheet, metaphorically speaking.*
>
> *4. When I clearly felt that the Judges' hostile attitude to even hear the case, compromised the principles of natural justice, namely audi ulteram partrem, I decided to inform the Judge that his attitude to not even hear the case and to persuade me that there was no case for the Appellant to answer, that this would tantamount to a compromise of the above legal principle.*
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> *5. I also informed the Judge of the Appellant's right to be heard, although it is not mentioned in the body of the determination,* [the Judge] *then retorted the following: "Don't lecture to me the principles of natural justice."*
>
> *6. I then informed him that it is he who started to pre-empt the Appellant's credibility issue, without even hearing a sentence from the Appellant or even considering what was said in the Appellant's Witness statement.* [The judge] *then decided to hear the appeal."*

9. Next there is a witness statement of the Appellant, which contains the following:

> *"1. ... As far as I recall the immigration judge was hostile from the outset. The hearing commenced with sullen comments from the judge. He mentioned, 'It is pointless having a hearing and not to take much time'.*
>
> *2. Sadly, even my children were at the Tribunal attending the hearing with me. Even they were dreaded at the judge's attitude towards the hearing even before it could begin. The judge kept emphasising that it's pointless having a hearing as my immigration history is very bad. He also advised my representative not to dwell on to all facts of the case but simply to make representations on the material facts.*
>
> *...*
>
> *5. Simply saying, the Judge did not keep an open mind as a Judge should have. The judge had a pre-conceived mentality to my case. After acting as the Judge, Jury and the executor on the hearing, a negative credibility was found.*
>
> *6. Even before I had given evidence, the judge allowed the HO presenting officer to attack the medical report as though I was not a credible witness. As such the report was not given any weight."*

10. At this juncture I turn to the written response of the FtT Judge to an invitation by the Principal Resident Judge of the Upper Tribunal to comment on the grounds. I preface my consideration of this with the observation that, once again, good practice has been observed. The materials criticising the judge's conduct of the appeal were forwarded to him and he responded in writing. This Tribunal, in turn, provided the judge's response to the parties' representatives. These simple measures served to ensure transparency and fairness to both parties and reflects the decision of the Court of Appeal in Singh v SSHD [2016] EWCA Civ 492

11. I paraphrase the FtT judge's response in the following way:

    (a) There was nothing inappropriate about identifying the issues at the outset of the hearing.

    (b) Counsel's invocation of the *audi alteram partem principle "... was not relevant.... I was not preventing the representative from calling his evidence at all. Nor was I questioning his running of this appeal."*

    (c) The judge, at the outset of the hearing, was asking the Appellant's representative to "*take on board and address"* the issues of the Appellant's immigration history and the timing of his claim for asylum.

The judge then comments that he made detailed notes of the hearing and, in defence of his impartiality and objectivity, refers to certain passages in his decision.

12. In [14] of his decision the judge records that at the outset of the hearing he identified the main issues as the Appellant's immigration history; his asylum claim and the inconsistencies asserted in the refusal decision; the expert evidence; and the country guidance decision of GJ [2013] UKUT 00319.

Continuing, the decision states at [15]:

> *"15. Mr Lingajothy made an application to adduce the evidence of the third and fourth Appellants, namely, the son and daughter of the principal Appellant. Ms Knight objected. She indicated that this was not in compliance with directions and no application had been made prior to today. I enquired of Mr Lingajothy what the purpose of calling the children would be today. He indicated that it was to talk about the Article 8 rights. I ruled that I would reject the application for two reasons. First, no application was made until today and the Home Office had not been put on notice. Second, if the purpose of calling the two children was to shore up the Article 8 account, this is something that the principal Appellant himself could do."*

13. In any appeal involving issues of apparent bias or procedural unfairness it is incumbent upon the appellate court or tribunal to identify the material factual matrix. Concessions and *inter-partes* agreement will frequently facilitate this exercise. However these do not form part of the present appeal matrix. Thus it is necessary to identify all relevant evidence as a whole and form a view accordingly, keeping in mind that the central question is the quintessentially factual one: what actually happened at the first instance hearing?

14. In this context I refer to the decision of this Tribunal in Wagner (advocate's conduct – fair hearing) [2015] UKUT 655 (IAC) at [12] – [13]:

> *"[12] One particular reflection is apposite. Adjudication by the Upper Tribunal in respect of complaints relating to the conduct of a first instance hearing can be a difficult exercise. Since the FtT is not a court of record no transcript of the hearing is available. Furthermore, disagreement between the parties about the issues under scrutiny can occur. In some cases, as in Alubankudi, a party's representative makes a witness statement which may be of considerable assistance to the appellate tribunal. The contemporaneous notes of the parties' representatives may also be provided in certain cases. In addition, the record of proceedings, compiled by the Judge and maintained on the Tribunal's file, may provide insight and assistance. Sometimes, as in the present case, the response of the Presiding Judge is*

also available. Even where some or all of these aids are available, it is impossible to recreate matters such as atmosphere, intonation, facial expression, speed of response et al; and, fundamentally, the elusive quality of demeanour cannot be reproduced on appeal. The basic handicap is that there is no audio or written record of the words used by representatives, parties, witnesses and the presiding Judge.

[13] I highlight also that in cases of this genre first instance advocates have the potential to become witnesses, normally via the provision of a witness statement. As this Tribunal emphasised in BW (Witness Statements by Advocates) Afghanistan [2014] UKUT 00568 (IAC) the roles of advocate and witness are distinct and, thus, in cases where a first instance advocate becomes a witness a different representative must be instructed."

Having established the material facts, the reviewing or appellate court or tribunal must not overlook that there is an onus of proof in play: the onus rests on the appellant to prove, on the balance of probabilities, that the first instance judicial decision is infected by apparent bias.

15. In Alubankudi (appearance of bias) [2015] UKUT 542 (IAC) this Tribunal dilated on the governing legal principles in the following terms:

"[6] Every litigant enjoys a common law right to a fair hearing. This entails fairness of the procedural, rather than substantive, variety. Where a breach of this right is demonstrated, this will normally be considered a material error of law warranting the setting aside of the decision of the FtT: see AAN (Veil) Afghanistan [2014] UKUT 102 (IAC) and MM (Unfairness; E&R) Sudan [2014] UKUT 105 (IAC). The fair hearing principle may be viewed as the unification of the two common law maxims audi alteram partem and nemo judex in causa sua, which combine to form the doctrine of natural justice, as it was formerly known. These two maxims are, nowadays, frequently expressed in the terms of a right and a prohibition, namely the litigant's right to a fair hearing and the prohibition which precludes a Judge from adjudicating in a case in which he has an interest.

[7] Further refinements of the fair hearing principle have resulted in the development of the concepts of apparent bias and actual bias. The latter equates with the prohibition identified immediately above. In contrast, apparent bias, where invoked, gives rise to a somewhat more sophisticated and subtle challenge. It entails the application of the following test:

> *"The question is whether the fair minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was bias."*

See *Porter v Magill* [2001] UKHL 67, at [103].

In *Re Medicaments* [2001] 1 WLR 700, *the Court of Appeal provided the following exposition of the task of the appellate, or review, court or tribunal:*

> "*The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was bias. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility … that the Tribunal was bias. The material circumstances will include any explanation given by the Judge under review as to his knowledge or appreciation of those circumstances.*"

In Lawal v Northern Spirit [2003] UKHL 35, the House of Lords reiterated the importance of first identifying the circumstances which are said to give rise to apparent bias."

In [8], this Tribunal emphasised that one of the important attributes of the hypothetical reasonable observer is that he is duly informed. What this means is that the reasonable observer is aware of everything bearing on the question of the judge's impartiality. In short the hypothetical reasonable observer is endowed with greater and fuller attributes than his jurisprudential predecessor, the innocent bystander.

16. I turn to consider another dimension of this appeal. 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. In AM (Fair Hearing) Sudan [2015] UKUT 656 (IAC), this Tribunal stated, at [7](iii):

> *"The assiduous judge who has invested time and effort in reading all of the documentary materials in advance of the hearing is entitled to form provisional views. Provided that such views are provisional only and the judge conscientiously maintains an open mind, no unfairness arises."*

In Arab Monetary Fund v Hashim [1993] 6 Admin LR 348, Sir Thomas Bingham MR stated at page 356:

> "*But on the whole the English tradition sanctions and even encourages a measure of disclosure by the Judge of his current thinking …. A judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact.*"

On the other hand, the English tradition –

> *"… certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind ….*
>
> *An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be."*

More recently, in **Singh** (*supra*) the Court of Appeal added, at [35]:

> "*Indeed, such statements sometimes can positively assist the advocate or litigant in knowing where particular efforts may need to be pointed ….*
>
> *In fact, sometimes robust expression may be positively necessary in order to displace a presumption or misapprehension, whether wilful or otherwise, on the part of an advocate or litigant on a point which has the potential to be highly material to the case.*"

The decision in Singh also draws attention to the importance of considering the proceedings as a whole in conducting the objective assessment of whether there was a real possibility that the Tribunal was biased: see [36].

My Conclusions

17. In my judgement the hypothetical reasonable observer would, balancing the key elements of the evidence outlined above, take particular note of any challenge to, or disagreement with, sustainable or otherwise, the evidence pertaining to the conduct of the hearing at first instance via the judge's decision and his later response to the appeal. From this point of departure the observer would scrutinise with care the evidence said to demonstrate apparent bias on the part of the judge concerned. This exercise would include taking note of the words and descriptions employed by all concerned – in this instance the Appellant, his first instance advocate and the judge – and would be alert to the use of reported speech and verbatim quotations. The observer, in forming his overall view, would also be conscious of the absence of a recording or transcript of the proceedings under scrutiny. Thus the tools available would not include evidence of voice inflection or intonation. In such circumstances any *ex post facto* attempts to recreate the atmosphere in which a first instance hearing was transacted will invariably be difficult.

18. At the next stage the hypothetical observer would inform himself of what "bias" means in this context. In short it denotes an absence of judicial impartiality, an ingrained inclination in favour of one party to the detriment of the other.

19. Finally, the hypothetical observer would ask himself not whether the FtT judge was biased in this sense but whether this was a real possibility. In performing this exercise the observer would stand back, surveying the

relevant landscape in the round and in its totality and would be cognisant that the burden of proof rests on the appellant, to the standard of the balance of probabilities.

20. The task of – and challenge for - this appellate tribunal is to don the clothing and wear the shoes of the hypothetical reasonable observer. This duty must be undertaken in every case of this *genre.* I have undertaken this exercise, juxtaposing in particular the evidence compiled on behalf of the Appellant with the FtT judge's decision and his later response. As I have noted above, there is no, or no sustainable, controversy about certain key averments in the witness statements in question, particularly that of former instructed counsel. This *per se,* I acknowledge, is not determinative since it is incumbent upon this Tribunal to nonetheless evaluate this evidence.

21. However, I cannot overlook that the FtT Judge, when presented with the opportunity of responding to the two witness statements in question, did not challenge some of the key averments. While I acknowledge that the witness statement of the Appellant is couched in somewhat general terms – see [9] above – I would have expected the judge to respond in particular to the quoted speech contained in [1] and [2]. However the judge's response is silent on these matters. I would also have the same expectation in relation to the main averment in counsel's witness statement – see [8] above – in particular the quoted speech in [5] thereof and the suggestion that, in exchanges, counsel submitted that the judge appeared to have decided the facts before hearing any evidence. It is also significant that counsel was driven to invoke the *audi alteram partem* principle at this stage of the hearing. The Judge's response to this is set forth in [11](b) above. It makes no reply to the suggestion clearly implicit in counsel's witness statement that the judge was proposing to decide the appeal summarily, without receiving any evidence (the judge "*… then decided to hear the appeal.*") Finally, I take into account that while the two witness statements were not made in the immediate aftermath of the appeal hearing, their contents convey to me that the authors had a clear recollection of events and the statements do not suffer from either unparticularised assertions or bland generalities.

22. Giving effect to the analysis above, I conclude that the Appellant has established, on the balance of probabilities, the real possibility of bias on the part of the FtT Judge.

23. My second conclusion is that the conduct of the appeal was vitiated by unfairness having regard to [15] of the decision of the FtT Judge: see [12] *supra*. In my judgement the FtT judge could not properly or fairly have formed the view that the evidence of the two children of the family could not conceivably inform the inter-related judicial duties of determining the Article 8 ECHR and section 55 issues. As no crystal ball was available this "ruling", whereby evidence from these two parties was prohibited, is manifestly unsustainable in law. Furthermore, in thus ruling the judge did something which he expressly disavowed in his post-hearing response to the witness statements: contrary to his claim in [11](b) above, the judge was "*preventing the representative from calling his evidence*" and was

challenging "*his running of the appeal*". A twofold consequence follows. First, this fortifies the appearance of bias conclusion above. Second, since the evidence which the Judge excluded could have influenced the outcome – a possibility being sufficient in this context, by well established principle – the hearing was rendered unfair.

24. The further, related error of law into which the judge lapsed in this respect was to adopt the stance that parties to an appeal require the permission of the tribunal to give evidence in support of their case. I think it best to describe this approach as prima facie unlawful. I do not exclude the possibility that in certain circumstances it may be appropriate for a judge to refuse evidence to be adduced from a particular person. The ethos of tribunal litigation clearly recognises the validity of transparent and productive communication between the presiding judge and a party or his representative concerning the presentation of any given appeal, the calling of witnesses, the relevance and/or likely potency of certain proposed evidence and kindred issues. Furthermore, the presiding judge is the guardian against misuse of the tribunal's process. None of this is unfair or improper. All of it forms part of the legitimate judicial function and is harmonious with the overriding objective.

25. However in the circumstances of this appeal the persons concerned were parties, they were the third and fourth Appellants. It was proposed to adduce evidence from them bearing on the issues concerning Article 8 of the Human Rights Convention and those issues in turn feed into section 55 of the Borders, Citizenship and Immigration Act 2009. On this freestanding separate basis I conclude that the refusal to permit the adoption of evidence from these two Appellants fully documented in paragraph 15 of the Tribunal's decision denied the Appellants their right to a fair hearing.

26. In conclusion it seems timely to remind both judges and practitioners of what this Tribunal stated in [14] of Alubankudi:

> *"The interface between the judiciary and society is of greater importance nowadays than it has ever been. In both the conduct of hearings and the compilation of judgments, Judges must have their antennae tuned to the immediate and wider audiences. As the decision in AAN demonstrates, Judges must be alert to the sensitivities and perceptions of others, particularly in a multi-cultural society."*

In the real world of the United Kingdom in the year 2017 acute judicial alertness to what is stated above will enhance fairness, promote justice and, ultimately, further and fortify the rule of law.

Decision and Order

27. For these reasons the appeal succeeds to the following extent. I set aside the decision of the FtT and given the grounds upon which I have determined to do so I remit the case to the FtT for the purpose of a further hearing to be conducted by a different judge.

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

Date: 28 June 2017