UT Neutral citation number: [2023] UKUT 00114 (IAC)

MS (judicial interventions; complaints; safety concerns) Bangladesh

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at **Field House**

THE IMMIGRATION ACTS

Heard on **24 February 2023**
Promulgated on **25 April 2023**

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE KAMARA

Between

Secretary of State for the Home Department

Appellant

and

MS
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr M Iqbal, counsel instructed by Hamilton Rees Solicitors

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

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1. *Regardless of the appropriateness of judicial interventions, overbearing and intimidatory conduct, directed at a representative, could result in an unfair hearing as well as give the impression of bias to a fair-minded and informed observer, applying* Porter v Magill *[2001] UKHL 67.*

2. *Whilst it is, of course, always necessary for the judge to retain control of proceedings, so as to ensure that they remain focussed, effective, and efficient, it is also a key part of the judge's role to conduct the hearing to ensure that they get the best out of all the participants appearing before them. This approach should enable the judge to do justice to the case and help to reach a high-quality decision for the parties. The task involves listening as well as guiding, and patience tempered by the need to steer the parties in the direction of the issues that the tribunal needs to decide. However carefully constructed or well-reasoned, a decision which is founded on an unfair hearing cannot stand.*

3. *In the event a representative raises a concern as to personal safety, this must be explored promptly, in sufficient detail and with sensitivity.*

4. *The inclusion of a copy of a formal complaint made about a judge with the notice of appeal is a practice which is to be deprecated. The two processes should operate separately from one another. No recourse is to be had to either the existence of or the content of a complaint against the judge in reaching a decision as to the presence of an error of law in the decision and reasons of the First-tier Tribunal.*

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of the First-tier Tribunal signed and dated 11 December 2021, which was promulgated on 18 May 2022

2. The appellant is the Secretary of State however, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.

3. Permission to appeal was granted by Upper Tribunal Judge Jackson on 30 October 2022.

Anonymity

4. No anonymity direction was made previously however, it is appropriate to make one as the appellant's protection claim concerns a fear of persecution from the government of Bangladesh owing to his political opinion.

Factual Background

5. The appellant first arrived in the United Kingdom on 2 May 2011 with leave to enter as a Tier 4 migrant, which was valid until 25 August 2012. He was granted further leave to remain in the same capacity until 31 May 2015. The appellant unsuccessfully applied for further leave outside the Immigration Rules on 29 May 2015. Thereafter, he unsuccessfully applied for an EEA residence card, the refusal of which occurred on 22 April 2016. On 16 February 2017, the appellant was served with notification that he was deemed to be an overstayer. He attended the Asylum Intake Unit the following day and applied for asylum.

6. The appellant's protection claim is based on his involvement with politics since arriving in the United Kingdom, which he states led to his detention during a visit to Bangladesh in 2014. He fears ill-

treatment by various branches of the Bangladeshi authorities as well as members of the Awami League owing, principally, to his political involvement with the Bangladesh Nationalist Party (BNP).

7. The appellant's protection claim was initially refused by the Secretary of State in a decision dated 1 February 2018. His appeal against that decision came before First-tier Tribunal Judge Lucas on 15 May 2018. At that hearing, neither the appellant, the respondent nor the judge had the respondent's bundle. The appeal was allowed to the extent that the Secretary of State 'reconsiders the extensive claim that has been submitted…'

8. The asylum claim was reconsidered and refused again, by way of a decision letter dated 6 August 2019. This is the decision under appeal. In that decision, the respondent accepted that the appellant was a member of the BNP in Bangladesh but not that he was ever politically active there. Nor was it accepted that the appellant was wanted by the Bangladeshi authorities, owing to concerns with the credibility of the appellant's claim. The respondent placed no weight on the First Information Reports (FIRs) provided because attempts at verification indicated that the documents had been altered to include the appellant's name. As for the sur place activities, the respondent was of the view that the appellant would be perceived as a 'hanger on' and as such would not face a real risk of ill-treatment on return to Bangladesh.

The decision of the First-tier Tribunal

9. The hearing before the First-tier Tribunal was listed for two days, 8 and 11 October 2021, as well as a prior reading day. It is worth mentioning that the appeal had been adjourned on several occasions owing to the appellant's bundle not being available, through no fault of those representing him. The hearing was put back until after lunch on 8 October as the appellant's hand-delivered bundle had not made its way to the judge. Cross-examination of the appellant began on the afternoon of the 8 October but was not completed.

10. When the appeal resumed on 11 October, the Home Office Presenting Officer (HOPO) withdrew from the case for reasons which are discussed below. The appellant was informed that his appeal was allowed, with the decision and reasons following subsequently.

The grounds of appeal

11. In the grounds, it was argued that the First-tier Tribunal erred in permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings. The first complaint was that the hearing was unfair because the conduct of the judge indicated bias, the judge limited cross-examination and flawed credibility findings were arrived at based on that limited cross examination. The second complaint was that there was a failure to adjourn, specifically, when the HOPO raised issues of her personal safety. A copy of a formal complaint made about the judge to the Resident Judge was appended to the grounds of appeal.

12. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

> The grounds of appeal are that the First-tier Tribunal erred in law in failing to afford the Respondent a fair hearing by limiting cross examination of the Appellant and other witnesses, and refusing to adjourn the hearing. It is said a formal complaint has been made, the outcome of which is awaited.
>
> The appropriateness of the Respondent attaching a copy of her complaint as part of the grounds of appeal is highly questionable. The two processes are and should have been kept entirely separate in this appeal, particularly where the grounds of appeal are based on the fairness of proceedings as opposed to any wider matters of conduct. However, I have taken the document into account only so far as it concerns directly the two grounds of appeal given the additional detail which fleshes out those grounds.

The grounds of appeal are arguable, particularly the second ground as to the fairness of proceeding with the hearing in the absence of a Presenting Officer for the Respondent and in the absence of any provision for final written submissions, even taking into account the lengthy and difficult procedural history of the appeal.

13. Arrangements were made for the parties to attend Field House to listen to the recordings of the First-tier Tribunal hearing following directions issued by an Upper Tribunal lawyer on 3 January 2023.

14. The Secretary of State filed written submissions dated 16 January 2023 which included a Rule 15(2A) application to rely upon a witness statement and post-hearing minute from the HOPO concerned as well as a list of timestamps from the recordings of the hearing. The appellant filed a skeleton argument dated 8 February 2023, in which the appeal was robustly opposed, and support was expressed for the approach of the First-tier Tribunal judge.

The hearing

15. Both parties confirmed that they had the opportunity to listen to the recordings and made detailed oral submissions, in line with the written arguments already filed. Owing to the existence of the recording, there was no dispute as to what was said during the hearing. We were satisfied that given the existence of the live recording of the hearing, and the opportunity that all participants had to listen to it, there was no justification for a transcript in this case. Furthermore, we were satisfied that given the recording was the best evidence of what had in fact occurred at the hearing, there was no requirement for the judge to be contacted for her comments on the grounds of appeal. The grounds fell to be evaluated on the basis of the evidence of the hearing which had been recorded. The disagreement in the case concerned whether the judge's conduct meant that the hearing was conducted unfairly, and this could be judged from listening to the recording. Ms Isherwood clarified that the respondent was arguing both that there was bias and unfairness. At the end of the hearing, we reserved our decision.

Decision and Reasons

16. In reaching this decision we take into account the oral and written submissions of both parties as well as all the evidence relied upon by the parties, even if not expressly referred to, with the exception of the correspondence concerning the respondent's formal complaint.

17. After careful consideration, we conclude that both grounds of appeal are made out for the reasons set out below. These types of cases are inevitably sensitive to the particular factual circumstances in which they arise. It will be clear from what is set out below that the conclusions in this case are based upon the application of well-known public law principles and dependant on the specific evidence of the events at the hearing provided by the recording.

18. We find that the manner in which the hearing before the First-tier Tribunal was conducted was vitiated by apparent bias and procedural unfairness. Having listened to the recordings, we find that there are very many causes for concern, only some of which we will refer to directly. Whilst it is, of course, always necessary for the judge to retain control of proceedings, so as to ensure that they remain focussed, effective and efficient, it is also a key part of the judge's role to conduct the hearing so that they ensure that they get the best out of all the participants appearing before them. This approach should enable the judge to do justice to the case and help to reach a high quality decision for the parties. The task involves listening as well as guiding, and patience tempered by the need to steer the parties in the direction of the issues that the tribunal needs to decide. It appears clear to us that, as will be apparent from what is set out below, the judge lost sight of these principles in the hearing of this case. Having lost sight of them, it was then all too easy to fall into the errors in relation to the principles of fairness which she did.

Bias

19. There were multiple occasions, during the course of the hearing before the First-tier Tribunal, which could give the impression of bias to a fair-minded and informed observer, applying *Porter v Magill*

[2001] UKHL 67. Throughout the two days of the hearing, when the HOPO was present, the recording reveals that the conduct of the judge was overbearing and intimidatory when addressing the HOPO.

20. From the outset, the judge expressed concern that the HOPO intended to challenge the evidence of the appellant and witnesses. When the HOPO stood her ground, the judge made the following comment "*if you can't hear me do say so and I will say it louder as long as you don't complain I am shouting at you*." The judge then repeated the question which the HOPO had already answered. Another example prior to the hearing starting was when the judge chose to make a comment to the appellant's representative about the witnesses, "*in case the HOPO decides to raise a further problem.*" It is a concern that the judge has characterised the entirely proper applications made by the HOPO as raising problems. The judge indicated that she may have gone too far in her approach to the respondent's case, evidenced by her remark, made towards the end of day one, that she will take "*an interesting minute for the detail on this afterwards…just in case*."

21. The judge's comments on the respondent's case strongly indicated that the judge's mind was firmly made up as to the outcome of the appeal before the hearing commenced. From the outset, the judge stated that the Secretary of State had not applied the lower standard of proof nor considered all the evidence in the round when deciding the appellant's protection claim. The judge also said that she was '*amazed*' that the respondent was challenging the appellant's sur place activities, because it was accepted that he had been a member of the BNP in Bangladesh. The HOPO offered to take instructions, to which the judge told her not to bother, expressing her view that the only way the deficiencies of the refusal letter could be addressed was if the respondent were to withdraw that decision or granted the appellant leave. She observed that all that would happen would be that the HOPO's managers would tell her to "fight, fight, fight" notwithstanding the concerns of the judge.

22. The judge also raised the prospect of the case proceeding solely by submissions despite the clear indication from the review that the respondent's position in the decision letter was maintained, as well as the HOPO's statement that the respondent intended to test the evidence via cross-examination. All these comments were made before the judge rose to consider the appellant's updated bundle which she had not previously seen. While there is nothing wrong in the judge giving an indication of a provisional view, we find that she would have been in difficulty in offering an informed preliminary view having read only some of the papers. Furthermore, it is not the case that the judge was merely giving a steer to the representatives, as the judge pointedly told the parties that she was not expressing a provisional view. To a fair-minded and well-informed observer, listening to the recording of the hearing, the judge's conduct was redolent of her having made up her mind in advance of either having read all the papers in the case or hearing any of the evidence in the case.

23. On the issue of apparent bias, we note that once the hearing started, several of the judge's interjections during cross-examination resembled advocacy on the appellant's behalf, in that the judge attempted to explain apparent inconsistencies in his evidence, including in relation to the reasons for his delay in seeking asylum and ability to leave Bangladesh. There was also a remark made by the judge on day two of the hearing in which she described the appellant as a victim of torture before the appeal was concluded.

24. When the hearing resumed on day one, the judge, on more than one occasion, invited the appellant's representative to submit further documentary evidence to address matters raised during cross-examination or which might be raised, given that the cross-examination of the appellant was not completed by the end of the first day. There were also several occasions when the judge turned to the appellant's representative for confirmation of her approach, confirmation which invariably arrived.

25. We consider that the judge's conduct prior to the commencement of hearing the evidence and during the hearing indicates that her mind was closed as to the outcome of the appeal, that cross-examination was a waste of time and that she intended to allow the appeal, regardless. In this, she materially erred in law.

<u>Unfairness</u>

26. On the second day of the hearing, the judge entertained an application by the appellant's counsel in an additional skeleton argument drafted over the weekend for the Tribunal to 'take a grip on this appeal.' The judge considered the said application to be "well-founded." While the HOPO was permitted to respond to this application, we are of the view that such an application was improper and amounted to the representative colluding in the treatment of the HOPO.

27. Immediately after the 'take a grip' application, the judge said the following to the HOPO. "*I will remind you in a facilitative and helpful manner of a few matters…*" Thereafter the judge slowly read detailed extracts from both the code of conduct relating to the HOPO's professional body as well as the Home Office Code of Conduct for Presenting Staff. This was not the first reference the judge had made to the HOPO's professional qualifications and duties. It was also at this point that the judge referred to the appellant as a victim of torture, a matter which was in dispute.

28. As alluded to above, the judge invited the appellant's representative to submit further evidence regarding a Bangladeshi lawyer. The HOPO objected, requesting permission to submit evidence in response. In replying to those submissions, the judge said that she was "*seriously concerned that everything I have just said didn't settle on you at all*." There followed a two-minute criticism of the HOPO's approach to cross-examination, references to time-wasting and a repeated reference to the HOPO's professional duties. The HOPO asked the Tribunal to specify where she had failed in her duty to assist the court, however the judge did not respond.

29. We consider the judge's reference to professional conduct matters was both unfair and unnecessary, done in a bullying manner and calculated to undermine the HOPO's ability to put forward the Secretary of State's case. Furthermore, the references to wasting time took no account of the fact that the hearing did not commence until after 2pm, the time taken by judge's interruptions to cross-examination, that the judge had stated at the outset on day one that she would not sit beyond 1645 and that the hearing started very late on day two for the convenience of the appellant's representative.

30. We now examine the issues which arose concerning the cross-examination of the appellant, and the fact that it was proposed that additional witnesses were to be called as part of his case. Earlier on day one the HOPO stated that she hoped that the evidence could be taken on the first day as she would be asking cross-over questions, to which the judge replied, "*tough, it's a two-day hearing*." In the afternoon, the HOPO sought an adjournment so that all the witness evidence could take place on the second day of the hearing, to avoid witness collusion. The judge refused that application, without giving reasons, and announced that the two additional witnesses would be heard on the second day. We consider that the HOPO's application for the evidence to be heard on one day, in an appeal where credibility was very much in issue, raised a valid point which went entirely unaddressed by the judge who reached a decision in respect of it which was unexplained.

31. Cross-examination was beset by interruptions from the judge. In the main period of cross-examination which took place before the break in proceedings, there were around eight lengthy interventions by the judge. Those interventions were continuous, often included florid and unnecessary criticism of the HOPO's questioning, and included one series of interjections that took up close to forty-five minutes of the hearing, during which the HOPO was unable to progress her cross-examination.

32. The judge's hectoring attitude to the HOPO continued when she asked the judge if she should begin a new theme for cross-examination given the judge's indication that she would not sit beyond 1645. From this point, the judge addressed a series of criticisms at the HOPO for her approach to cross-examination. The criticisms included the manner and length of cross-examination of the appellant, the nature and proposed length of cross-examination of the appellant's witnesses and that the HOPO was "*loathe to take guidance*." The judge expressed having serious concerns and stated that a witness had to leave owing to the time taken in cross-examination. We note that the recording reveals that the witness left before the hearing began in the afternoon as he had childcare issues.

33. The way the judge questioned the HOPO about her proposed cross-examination of the witnesses, itself resembled a somewhat hostile form of cross-examination. To her credit, the HOPO politely stood her

ground and explained that she did not wish to prejudice the respondent's case. The judge invited counsel for the appellant to help her with this "*very problematic case*." This he did at great length, including an exhortation for the Tribunal to "*exert and enforce its authority and regulate the procedure*." At the end of the hearing on day one, the judge remarked, "*can you see the problem* (said to the appellant's counsel) *it's like trying to nail jelly to a wall*."

34. We make no findings on whether any of the judge's objections to the content of the cross-examination were appropriate in principle however, considering the totality of the interventions, we conclude that the HOPO was simply unable to properly test the evidence and present the Secretary of State's case. In this we note the following extracts from *Jones v National Coal Board* [1957] 2 QB 55 including that, '*the very gist of cross-examination lies in the unbroken sequence of question and answer…Excessive judicial interruption inevitably weakens the effectiveness of cross-examination… it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue.*'

35. The unfairness evidenced by the judge's excessive interventions amounts to a material error without more. In addition, the judge relied on that flawed cross-examination in allowing the appeal, including at [67] of the decision. However carefully constructed or well-reasoned, a decision which is founded on an unfair hearing cannot stand. The following extract from *Serafin v Malkiewicz* [2020] UKSC 33 at [49], illustrates that the findings set out in the decision and reasons cannot cure the problems caused by the judge's unfair conduct of the hearing.

> *'… a judgment which results from an unfair trial is written in water. An appellate court cannot seize even on parts of it and erect legal conclusions upon them.'*

Procedural error

36. The second ground concerns the judge's response to several applications made on behalf of the Secretary of State. We concentrate on just one, an application made for an adjournment for an alternative HOPO to attend the hearing on a later date. The facts which led to this application are accepted by Mr Iqbal.

37. During the weekend following day one of the hearing, the appellant viewed the HOPO's LinkedIn profile and a gentleman who accompanied the appellant to the hearing sent the HOPO an invitation to connect via the same platform. Of course, this conduct occurred in the midst of the HOPO's cross-examination of the appellant which had gone part-heard over the weekend at the end of day one. The HOPO was advised by a Senior Case Worker (having discussed her concerns with them) to divulge this information to the judge by way of an in-camera discussion and to withdraw from the case if an adjournment was refused. We note that the judge prevented the HOPO from making this application at the outset and that she had to wait approximately half an hour to do so owing to the judge's lengthy criticism of the HOPO's cross-examination.

38. During that discussion at which the appellant's representative was present, the HOPO told the judge that her employers were concerned for the HOPO's safety, she provided the judge with evidence in the form of screenshots, and raised concerns as to how the appellant and the other gentleman had learned of her full name and what the association was between the appellant and the other gentleman.

39. The judge, in refusing to adjourn, stated that she took very seriously any allegation of a potential threat, but that she did not accept what she described as the "*claimed*" concerns in this case. The judge's immediate response to the application was to say, "*yet here you are*." The judge questioned the HOPO as to why someone from this case contacting her on social media constituted a security threat when the HOPO had put herself on social media. In refusing to adjourn the judge stated that it was "*incumbent on each and every one of us to be vigilant in our use of social media and take appropriate steps to safeguard our privacy"* and that the judge was *"at a loss to understand and no further forward in understanding your sense of lack of security.*"

40. The manner in which the judge dealt with the security issue was dismissive, engaged in victim-blaming and did not address the concerns raised by the HOPO. In particular, the judge did not ask the appellant's representative to take instructions as to how the appellant and his associate knew the HOPO's full name (which we find they would have needed to identify her), why had they gone to the length of searching for the HOPO online midway through the appellant's cross-examination and what the association was between the two gentlemen. In response to questions from the panel, Mr Iqbal did not suggest that there was any legitimate purpose behind the attempts to communicate with the HOPO and was unable to allay the panel's concern that such contact could be seen as tantamount to stalking. It was in any event unaccountable conduct at a very sensitive stage of the proceedings which could and should have been seen as potentially having a significant impact on the integrity of the hearing. On the point which the panel raised in relation to this conduct being tantamount to stalking, we note from the HOPO's witness statement that she had been made to feel uncomfortable by the appellant's associate early on during the hearing as he was 'staring intently' at her and that she had addressed this, discreetly, by asking if the gentleman could move further away from her, as can be heard on the recording.

41. The judge's summary dismissal of the HOPO's application led inevitably to the HOPO withdrawing from the hearing. The withdrawal of the HOPO meant that cross-examination of the appellant was incomplete and that the evidence of the witnesses was not tested at all. We conclude that the failure of the judge to adequately investigate and consider the personal safety issues raised by the HOPO was procedurally unfair and amounts to a further material error of law which had a material effect on the outcome of the appeal.

42. For the reasons given, we find that the decision of the First-tier Tribunal is unsafe and we set it aside in its entirety.

Inclusion of complaint in grounds of appeal

43. Lastly, we will briefly comment on the inclusion of a copy of a formal complaint about the judge with the notice of appeal. This is a practice which is to be deprecated. In fairness, Ms Isherwood did not persist in referring to the complaint once the panel indicated its view that it was inappropriate for it to have been included. As the judge granting permission noted, the two processes should be separate from one another. It follows, that we have not had recourse to either the existence of or the content of the complaint in reaching our decision.

Disposal

44. We canvassed the views of the parties as to the venue of any remaking should the panel detect a material error of law and have taken those views into account. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), the panel carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statements. We took into consideration the history of this case, the nature and extent of the findings to be made as well as our conclusion that the nature of the errors of law in this case meant that the Secretary of State was deprived of a fair hearing and of the opportunity for her case to be put. We consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and we therefore remit the appeal to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal is set aside for error of law, and we direct that the appeal be re-determined, de novo, in the First-tier Tribunal.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 April 2023