Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00382/2016

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 8 February 2019	**On 14 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

A. A.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms Lieu, as agent for IAC Ltd
For the Respondent: Mr Bates, Home Office Presenting Officer

DECISION AND REASONS

The Appellant is a national of Libya who made a protection claim. That was refused on 22 February 2016, and the Respondent relied upon Article 1F(a) of the Convention. The Appellant's appeal against that decision has a sorry history, which it is unnecessary to rehearse. Most recently however it was heard by First-tier Tribunal Judge Cox, who dismissed it in a decision promulgated on 12 February 2018.

The Appellant's application for permission to appeal was granted by First-tier Tribunal Judge Bird on 9 March 2018 on the ground that it was arguable the Judge had failed to conduct a fair hearing. The Respondent replied to that grant

with a Rule 24 response of 27 March 2018. This led Deputy Upper Tribunal Judge Appleyard to issue case management directions on 31 July 2018 concerning the preparation and exchange of evidence as to what had occurred at the hearing.

Although the parties' responses to those directions appear to have been mislaid by the Upper Tribunal it is clear to me that those directions were complied with to the extent that witness statements were filed as directed, by the two representatives who attended the hearing below (who are not Ms Lieu or Mr Bates). The authors attended the hearing before me, expecting to be tendered for cross-examination.

Once the appeal was called on for hearing the parties were able to agree before me that Judge Cox had failed to dispose of all of the grounds of appeal with which he was seised. The appeal had been remitted to the FtT for a fresh hearing, and his decision failed to engage with the human rights appeal at all. Since Article 3 had certainly been relied upon at the hearing, even if Article 8 had not, both were agreed that this alone constituted a material error of law. It was agreed that the issues raised by the Article 3 claim were not disposed of by the Judge's findings in relation to the exclusion of the Appellant as a result of the application of Article 1F.

Having stood the appeal down for discussions between the representatives further agreement between them was reached. There was no dispute over whether the Judge had asked the number of questions of the Appellant alleged, both in examination in chief and in cross-examination, or, in the style alleged against him. Thus there had been over 40 questions from the Judge, a large number of which were prefaced by the comment "I find it hard to believe …". On the other hand, although formal objection was taken on the Appellant's behalf to both the style and quantity of the Judge's interventions, with the complaint that he had taken upon himself the role of cross-examiner, no formal application was made for him to recuse himself, and list the appeal for hearing afresh before another Judge. Thus both representatives were agreed that there was no need to tender the former representatives for cross-examination. It is a matter for regret, that this agreement was not reached earlier, as Judge Appleyard had sought to achieve by his directions.

This agreement, which I applaud as eminently pragmatic, led to the Appellant formulating the complaint in relation to the Judge's conduct as follows; the agreed conduct engaged the appearance of bias principle and rendered the hearing of the appeal procedurally unfair. The failure to make a formal application to recuse himself could not cure that unfairness which had already occurred. In short the damage was done. The Judge's own view as expressed in his decision, that he had maintained an open mind throughout, was ultimately immaterial, since it was not his view, but the view of the notional fair minded and informed observer that was material. Any such person would have been bound to conclude that there was a real possibility of bias.

Because of the complaints that had been made to him during the course of the hearing about his conduct, which, it is agreed, had not led him to alter his

conduct, the Judge sought to deal with and refute the appearance of bias argument in the course of his decision [62-65]. In so doing he referred himself to three authorities; JK (Conduct of hearing) Ivory Coast [2004] UKIAT 61, XS (Kosovo- Adjudicator's conduct) Serbia & Montenegro [2005] UKIAT 93, and, Sivapatham (appearance of bias) [2017] UKUT 293. In my judgement a considered assessment of the principles set out in the latter decision by McCloskey J ought to have led the Judge to conclude, however unwillingly, that he had indeed gone too far. This was not a complaint of actual bias – but of the appearance of bias, a more subtle and sophisticated complaint - with the distinction rehearsed in both Alubankudi (appearance of bias) [2015] UKUT 542, and in Singh [2016] EWCA Civ 492. Perhaps he was too close to matters to be able to see the force of the complaint, because in my judgement (as was the case in Sivapatham) the Appellant has established on the agreed facts that the notional fair minded and informed observer would have concluded that there was a real possibility of bias.

In the circumstances, the Appellant has made out his case of procedural unfairness, and the only proper course is that the appeal should be remitted for hearing afresh. In circumstances such as this, where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the parties of the opportunity for their case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 13 November 2014. Moreover the extent of the judicial fact finding exercise required is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 13 November 2014.

To that end I remit the appeal for a fresh hearing by a judge other than First tier Tribunal Judge Cox, at the North Shields Hearing Centre. An Arabic (North African) interpreter is required. Since the Appellant has now been cross-examined on two occasions at appeal hearings, and since both the Tribunal file, and the files of the Appellant's former solicitors are in some disarray, the following further directions are made, with any documents to be filed at the North Shields Hearing Centre;

1) The Respondent shall file and serve by 5pm 8 March 2019 a copy of the Presenting Officer's note of the oral evidence given by the Appellant before Judge Bradshaw.

2) The parties representatives are to use their best endeavours to agree a note of the Appellant's oral evidence as given before Judge Cox, and shall file a copy of that note (indicating the substance of any alternate records as appropriate) by 5pm 8 March 2019.

3) If the Appellant through his current advisers served and filed any written evidence in advance of the hearing before Judge Cox, the parties should assume that this is now lost, and should work together to reconstitute such evidence, so that the Appellant may file copies as an agreed bundle by 5pm 8 March 2019.

4) In the event that the Appellant is advised to seek further expert evidence in relation to his past conduct in Libya then the Appellant's representatives must inform the Tribunal by 5pm 8 March 2019 of that intention, and set out (i) the identity of the proposed expert, with an explanation of how they are said to have expertise on the issue, (ii) a realistic timetable for obtaining an extension to their public funding for that purpose, and, (iii) a realistic timetable for the receipt of any report. In the absence of such information the Tribunal will seek to list the appeal after 8 March 2019 at short notice.

5) If no further expert evidence is to be commissioned then the Appellant's representatives shall file and serve a skeleton argument by 5pm 8 March 2019. If such evidence is to be commissioned, then a skeleton argument is to be filed and served, together with the expert evidence in question within 7 days of its receipt.

6) The appeal will be listed with one full day allowed. Subject to the directions above the listing will be expedited, and heard on the first available date. The parties should expect a listing may be at short notice, and to that end both representatives must by 5pm 8 March 2019 file a schedule of their availability for March, April and May 2019.

Notice of decision

1. The decision did involve the making of an error of law sufficient to require the decision to be set aside on all grounds, and reheard. Accordingly the appeal is remitted to the First Tier Tribunal for rehearing de novo, with the directions set out above.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 8 February 2019
Deputy Upper Tribunal Judge J M Holmes