Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11340/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 1 April 2019	**On 04 April 2019**

Before

Deputy Upper Tribunal Judge Pickup

Between

SUNNY KHURANA
[Anonymity direction not made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr G Lee, instructed by Dean Mansons Solicitors
For the respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Moore promulgated 31.10.18, dismissing his appeal against the decision of the Secretary of State, dated 12.9.18, to refuse his claim for international protection.

2. The appellant claims to be at risk on return to India on grounds of religion. He asserts that having being raised as a Hindu in India, he became a convert to Islam in the UK following a relationship he established in 2013 with a married Muslim woman of British nationality with three children. She introduced the appellant to Islam and after several years' study in

2018 he was issued with a certificate of conversion. It is claimed that her husband found out about the relationship in 2015 with the result that the appellant was attacked, sustaining serious injury.

3. First-tier Tribunal Judge Lambert refused permission to appeal on 3.12.18. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Chalkley granted permission, on the basis that serious complaints have been made concerning the conduct of the hearing by the First-tier Tribunal Judge (as to the appearance of bias and improper questioning of the appellant and his partner). Judge Chalkley also issued a number of directions, putting the appellant and his representatives on notice that complaints of bias against judges are considered very serious and that they would be put to strict proof of the allegations.

4. I am satisfied that the appellant's representatives have done all they can to comply with those directions and the tribunal is grateful for the consolidated bundle comprising 38 pages of relevant documents, lodged in good time. This includes witness statements from the appellant, his partner, and their representative at the hearing. In addition, I have had regard to the refusal decision giving rise to the appeal.

5. Judge Moore has also been contacted for comment and his responses have been incorporated in the bundle in the form of Upper Tribunal Judge O'Connor's Memorandum, date 4.3.19. In summary, Judge Moore entirely refutes the allegations made as to his conduct of the appeal hearing.

6. Mr Tarlow explained that the Home Office was represented at the First-tier Tribunal appeal hearing by Ms H Marshall of counsel, rather than by a Home Office Presenting Officer. Whilst the appellant's representatives wrote to the Home Office to invite Ms Marshall to provide a statement of truth, as suggested in Judge Chalkley's directions, none has been forth coming. Mr Tarlow was unable to say whether Ms Marshall had been approached or not. He also indicated in reply to my enquiry that there was no note in the Home Office case file from the hearing that referenced the issues raised as to the judge's alleged conduct.

7. In his oral submissions, Mr Lee elaborated on the grounds of application for permission to appeal. He advanced two grounds, first that the judge took impermissible matters into account, namely the appellant's demeanour, and second, that the way in which the judge conducted the hearing gave the impression of apparent bias.

8. I was directed to [34] of the FTT decision where in the course of a very long paragraph, which would have been better broken down to two or three smaller paragraphs, the judge found the appellant's explanation of the differences between Islam and Hinduism vague and limited. In particular, the appellant's responses to questions about the Five Pillars of Islam was said to be poor, vague and limited. The judge went on to explain the reasons for this conclusion. The particular sentence about which issue is taken is, "I found the appellant's evidence, which at times had long

gaps, to be unreliable." The judge went on to note the appellant's claimed explanation for taking some time to respond was that he was nervous. However, given the centrality of the issue the judge stated that he would have expected the answers to those questions to have been "almost immediate, or certainly within a reasonable period of time."

9. Mr Lee relied on the recent decision of the Court of Appeal in The Queen on the application of SS (Sri Lanka) v SSHD [2018] EWCA Civ 1391, where, in the course of addressing the primary issue about delay in promulgating a decision, from [33] onwards Lord Justice Leggatt also addressed 'demeanour' as a reference to the appearance and behaviour of a witness in giving oral evidence, as opposed to the content of the evidence. At [36] it is stated that it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood of that witness telling the truth. For example, it is queried whether the fact that a witness who speaks hesitantly is the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Further at [37] it was stated that "the reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter." At [41] the Court of Appeal concluded, "No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgements which at best have no rational basis, and at worse reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making."

10. I have carefully considered the judge's remarks at [34] of the decision the light of Mr Lee's eloquent submissions to the effect that the judge took into account impermissible considerations of demeanour. I also note that in his response, the Judge confirmed that he had placed weight on the appellant's delay and hesitation with regard to the 'Pillars,' but pointed out that he found many other aspects the appellant's claim to lack credibility and to be implausible or unreliable. He then stated, "I do not accept that this singular concern has infected my decision so as to make it unbiased. As I stated in paragraph [38] of my determination, it was as a result of my negative credibility findings [as a whole and not in any singular fashion] that I was satisfied that this fundamentally undermined the appellant's account, to the extent that I was unable to accept it."

11. On reflection, I cannot accept Mr Lee's submission on this point. It was impossible for the judge to ignore the long gaps in the appellant's responses to questions in respect of a central tenet of Islam in respect of which, given his claim to have researched Islam for some years, the judge considered he should have been able to make immediate answer. I do not accept that the judge was relying generally on the appellant's demeanour

in delay or hesitancy in answering questions as undermining of his general credibility, but it was relevant in assessing the extent of his knowledge of a faith to which he claims to have converted from Hinduism after several years' study that the appellant's answers at times had long gaps before reply. Within the same paragraph, the judge makes allowance for the fact that whilst he was not able to give evidence about all the Five Pillars of Islam, he was able to respond in relation to most of them.

12. I am satisfied that the judge did not rely the demeanour of the appellant as indicative of a lack of credibility. No reference was made to such matters as eye contact, tone of voice, or body language or anything of the sort. The key factor was the delay in responding. As the judge's comments note, given the centrality of the Five Pillars of Islam he expected a more immediate response to questions on that topic.

13. The second ground of complaint advanced by Mr Lee related to whether the judge's conduct of the hearing gave rise to apparent bias and procedural unfairness. Noting that the judge refuted the allegation, Mr Lee distinguished apparent bias from actual bias. However, it was asserted that the judge entered the arena and questioned both the appellant and his partner in excessive and probing intervention, raising issues not raised by the Home Office's representative's questions. It is suggested that the judge had a closed judicial mind and acted more as the respondent than an impartial and fair judge. For example, complaint is made that the judge unfairly questioned the appellant about the ending of an Islamic prayer and used his own knowledge of Islam to effectively cross-examine the appellant. It is clear that the judge relied on the apparent inability of the appellant to recall how to verbally close the prayer by stating "May peace be upon you." However, at [34] it is recorded that the appellant stated he used the 'Learning to Pray Pocket Guide' to assist him with the important prayers of Islam. He said that whilst he prayed every morning and every night, because he was nervous he was not able to remember the prayer. In fact, the appellant produced the guide to the judge at the hearing and it appears that it was from the guide that the judge asked the appellant how the prayer is concluded. I am satisfied that the judge was not using or even trying to use his own knowledge of Islam on which to question the appellant. In the circumstances, the assertion in the appellant's statement that the judge used his own expert knowledge and failed to remain impartial is not made out.

14. I have considered relevant case law on these issues. In CD (DRC) v Secretary of State for the Home Department [2011] EWCA Civ 1425 the Court of Appeal said that the test of bias was whether all the circumstances of the case would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased: Porter v McGill [2001] UKHL 67 applied.

15. In Alubankudi (Appearance of bias) [2015] UKUT 00542 it was held that one of the important elements of apparent bias is that the hypothetical fair minded observer is properly informed and possessed of all material facts;

and that the interface between the judiciary and society is of greater importance nowadays than it has ever been. Judges must have their antennae tuned to the immediate and wider audiences, alert to the sensitivities and perceptions of others, particularly in a multi-cultural society.

16. In PA (protection claim: respondent's enquiries; bias) Bangladesh [2018] UKUT 337 it was held that : (1) An allegation of bias against a judge is a serious matter and the appellate court or tribunal will expect all proper steps to be taken by the person making it, in the light of a response from the judge; (2) The views of an appellant who cannot speak English and who has had no prior experience of an appeal hearing are unlikely to be of assistance, insofar as they concern verbal exchanges between the judge and representatives at the hearing of the appeal. In particular, the fact that the judge had more questions for the appellant's counsel than for the respondent's presenting officer has no bearing on whether the judge was biased against the appellant; (3) It is wholly inappropriate for an official interpreter to have his or her private conversations with an appellant put forward as evidence; (4) As a general matter, if Counsel concludes during a hearing that a judge is behaving in an inappropriate manner, Counsel has a duty to raise this with the judge; (5) Although each case will turn on its own facts, an appellate court or tribunal may have regard to the fact that a complaint of this kind was not made at the hearing or, at least, before receipt of the judge's decision.

17. Mr Lee drew my attention to the witness statement of the legal representative at the appeal hearing, Mr Muzaffar Mansoor, solicitor. The statement asserts that during the hearing the judge made several interventions during the examination and cross-examination of the witnesses. At [7] of the statement it is said that the judge began to ask some personal private questions to the appellant and his partner, “which she as a woman felt bad, shy and was reluctant to respond.” Mr Mansoor considered that the questioning was “more sort of probing than simply questioning.” However, I note from the attached contemporaneous notes of the hearing Mr Mansoor made no note of the questioning and evidently took no objection to it with the judge during the hearing. He did not attempt to stop or challenge the judge’s questioning. What appears to have happened is that immediately after the hearing the appellant and his partner “expressed their serious concerns on the way FTTJ probed them in relation to their relations, ex-husband, meeting points and difference between Hindu and Islam and what to say when prayer is finished or coming out of prayer. They said FTTJ was too personal & acted as HO not independent.”

18. It was unclear to me what was meant by the objection to “personal and private questioning.” I invited Mr Lee to call evidence to clarify the contention and the assertion of bias generally. Mr Mansoor adopted his statement, referred to above, and was asked by Mr Lee what he meant by personal, private questions. He said the questions were directed to their relationship and that he the partner was embarrassed and reluctant to

answer the questions. When I asked what was in particular was inappropriate about the questions, Mr Mansoor said it was asking a lady where she was meeting her partner and how her husband came to know about the relationship. Asked again what was wrong with those questions, Mr Mansoor said 'because she didn't like to.' Asked a third time what was inappropriate about the questions, he said it was the probing manner in which they were asked. He said that as these questions had not been asked by the presenting officer, he felt they shouldn't have been asked. He added that he felt the way they were asked was more than mere fact-finding but went to cross-examination. Asked what was wrong with the questions about religion, Mr Mansoor said that the appellant was naturally slower in answering questions. He agreed that he had handed the prayer book to the judge and said that with the book in hand the judge asked the appellant how one ends the daily prayer, a question that had not been asked by the presenting officer.

19. I invited Mr Lee to call further supporting evidence from the appellant and/or his partner. He decided that he would only call the appellant, who relied on his statement of 19.3.19. Asked by Mr Tarlow about what it was made him feel uneasy about the line of questioning which he considered to be personal and private, the appellant said the questions asked of him were fine but the questions asked of his partner made him feel uncomfortable. Asked to explain, he said these were questions such as where they met up with each other and that she felt uncomfortable about them. Mr Tarlow suggested to him that the judge was doing no more than clarifying in his mind the facts of the case, to which the appellant responded that the judge had the right to ask those questions of him but repeated that the same questions put to his partner made him feel uncomfortable.

20. From the written and oral evidence adduced, I reach the conclusion that the basis of the complaint is that the appellant and his partner are suggesting it was inappropriate to ask the partner, as a woman, details of their illicit relationship, such as where and when they met, and how her husband discovered her infidelity, because those were personal matters and perhaps because of the particular feeling that a woman should not be asked such delicate matters. It appears to have been the embarrassment of the partner and certainly not that of the appellant at being asked such questions that is complained of; the appellant said he was fine with the judge asking him the same questions. However, I am satisfied that the questions were material to the issues in the case and the findings the judge had to make. Nothing in what is complained of suggests that the judge had closed his mind to the facts and it is not suggested that anything specifically said indicated the judge was biased against or prejudiced towards the appellant and his partner. Nothing Mr Mansoor said in evidence provided any further clarity as to what could be regarded as inappropriate in the content of the question. From his contemporaneous note he appeared to have done little more than relay the concerns raised by the appellant and his partner.

21. Despite several opportunities being afforded, neither of the witnesses nor Mr Lee has been able to articulate what in particular made the questions or the way in which they were asked inappropriate. I reminded Mr Lee that as the finder of facts, the judge is entitled to enquire into the facts and if it appears necessary to ask questions on the relevant issues, even if the representative of the Home Office had not done so. I am satisfied that the judge was entitled to ask those questions, even if, and particularly if, they had not been asked by the Home Office presenting officer or counsel. Nothing put before me suggests that the way in which the questions were asked was inappropriate or oppressive, or suggested a 'rigid' approach with a mind made up, as has been suggested. I accept the point that to some degree the issue of apparent bias must be viewed from the eye of the informed observed. However, I am satisfied that the Judge was properly looking for clarification of relevant factual issues and was entitled to ask the questions he did. He would perhaps have faced criticism if relevant questions to establish the facts had not been asked. Even taking into account any cultural sensitivity, that the appellant or more probably his partner felt somewhat embarrassed at being asked about the conduct of their illicit affair does not establish even the appearance of bias.

22. In the circumstances, I can find no material error in the approach or conduct of the judge in handling the appeal hearing in any of the ways relied on in the grounds, or in any other way.

Decision

23. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: the appeal has been dismissed and therefore there can be no fee award.

Signed DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated