OUTER HOUSE, COURT OF SESSION

[2018] CSOH 38

P661/17

OPINION OF LADY CLARK OF CALTON

in the petition

of

SHAHIN ABDULLAHI

Petitioner

for

Judicial Review of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 21 April 2017

Respondent

Petitioner: Forrest; Drummond Miller LLP
Respondent: Anderson; Office of the Advocate General

11 April 2018

Summary

[1] The petitioner claimed asylum based on his fear that if returned to Iran he would face mistreatment due to imputed political opinion. By letter dated 18 August 2016, the Secretary of State rejected the petitioner's claim for asylum. On 21 February 2017 the appeal by the petitioner was heard by a judge of the First-tier Tribunal (Immigration and Asylum Chamber). In the determination dated 27 February 2017, the judge having summarised the background to the appeal, the reasons for its refusal and assessed the evidence, in particular the appellant's credibility in relation to his claims, concluded in paragraph 32:

> "There are significant implausibilities and discrepancies which I find go to the core of the appellant's claims in which he has not satisfactorily explained to the low standard of proof which rests with him. The cumulative effect of these matters is such that in my view no credence can be given to his claims. My reasons for so finding are set out in the above paragraphs."

[2] For the purpose of this petition for judicial review, the only ground of appeal which is relevant is the first ground of appeal. This raises a number of issues challenging the fairness of proceedings arising out of the questioning of the petitioner by the judge of the First-tier Tribunal. Permission to appeal was refused by the Upper Tribunal on 21 April 2017 and it is this decision which is the subject of judicial review.

Proceedings before the First-tier Tribunal

[3] At the First-tier Tribunal, the petitioner was represented by a solicitor. There was no appearance on behalf of the Secretary of State. The petitioner was the only witness and his evidence-in-chief was given by adopting, in his oral evidence, his written statement dated 9 February 2017. The written statement set out background information and the reasons why the petitioner claimed to be in fear of his life "at the hands of the Iranian authorities". In addition the statement responded to and made representations in respect of the refusal letter dated 18 August 2016.

[4] There was no cross-examination on behalf of the Secretary of State. The First-tier Tribunal judge asked the petitioner a series of questions which were translated to the petitioner in his native language, Kurdish Sorani. It is these questions which underlie the challenge by the petitioner to the fairness of the proceedings and which formed the basis of his unsuccessful attempt to obtain permission to appeal from the Upper Tribunal. Prior to that application, permission to appeal was also refused by a different judge of the First-tier Tribunal.

The Upper Tribunal decision hearing dated 21 April 2017

[5] The first proposed ground of appeal considered by the Upper Tribunal set out in some detail the procedure adopted by the First-tier Tribunal judge and criticised in general terms the number, clarity, and purpose of the questions. It was alleged inter alia that the judge intervened to a material degree to challenge the petitioner on the merits of his evidence; that the questioning went far beyond what was required; that the judge gave the impression of a lack of partiality and that there was a failure to conduct the hearing fairly. The Upper Tribunal were not provided by the petitioner with a note or transcript of the questions or an affidavit from the solicitor who represented the petitioner.

[6] The Upper Tribunal refused permission to appeal for these reasons:

> "1. The first proposed ground of appeal includes the assertions that the judge failed to ensure that the appellant had a fair hearing; gave an impression of partiality; entered the arena and substantively challenged the appellant's evidence; asked questions which were 'arguably obtuse in order to introduce evidence in respect of which the appellant could be criticised'; 'questioned him excessively in order to attack his general credibility'; and questioned him 'in a manner which … suggested that she had predetermined the appeal'.
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> 2. These are generalities which if substantiated would of course amount to error of law; but judges are entitled to ask questions, and although this ground alone is set out over almost two pages, it does not cite even one example of an unfair objectionable question.
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> 3. The principles by which such grounds should be assessed were considered most recently in *Sarabjeet Singh v SSHD* [2016] EWCA Civ 492; see 53(1): *An allegation of bias or misconduct can only too easily be raised by a disgruntled litigant. It is therefore important that any application for permission to appeal, if based (in whole or part) on such a ground, is closely scrutinised when consideration is given as to whether permission to appeal should be granted. Such an allegation, if to be sufficient to merit the grant of permission at all, should ordinarily be expected to be properly particularised and appropriately evidenced.*
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> 4. This ground does not come close to passing that test. Such serious allegations against a judge should not be so lightly made. It is surprising to see them in an application prepared by experienced and respected practitioners."

Procedure in the judicial review proceedings

[7] There was a procedural hearing and interlocutor dated 19 December 2017. The First-tier Tribunal judge was invited to provide to this court:

> "(a) such comments on the factual averments contained within the Petition and the Affidavit of the petitioner's solicitor in relation to what happened at the hearing of the appeal before the FtT judge on 21 February 2017 as she sees fit;
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> (b) such comments may address the factual matters of the number of questions asked of the Petitioner, their content, the manner in which they were asked and the purpose for which they were asked;
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> (c) to respond to the allegations of unfairness and to provide her recollections of the submissions presented by the Petitioner; all comments provided by the FtT judge to the Court will be copied by the Court to the parties."

[8] In response to the interlocutor dated 19 December 2017, the judge provided to this court, a written note of the proceedings which included in summary form 70 questions and answers and a summary of the submissions on behalf of the petitioner. This court was also given an affidavit from the petitioner's solicitor dated 12 December 2017 which referred to his contemporaneous handwritten note dated 21 February 2017 of questions and answers. The affidavit explains some confusion in the numbering as between the contemporaneous note and the typed transcript also provided to this court. The solicitor in the affidavit also commented on some errors as between the transcript and his handwritten notes.

Submissions by counsel for the petitioner

[9] Counsel for the petitioner summarised his case by submitting that the judge was unfair and possibly biased. He focussed his attention on the 70 questions asked by the judge. He categorised the questioning into eight sections covering different topics namely, family members; how the petitioner got to the UK; the alleged arrest of his father; the petitioner's relationship with the equivalent of an NGO; the petitioner's alleged possession of

controversial books; the occupation of the petitioner; the arrest warrant; and the petitioner's arrival in the UK. In his analysis of the questions by the judge, counsel focussed on questions 15 and 61 using the corrected typed transcript. Question 15 stated:

> "Difficult to understand why someone would pay to get you to UK and not make arrangements to find out if you had arrived."

Question 61 stated:

> "Had serious problems with SNADJ you had nothing else to occupy your time. You come from a poor family. Given your father's age and that he was a farmer, looking after animals. You were only son. Did you not expect to work full-time to support family?"

Counsel submitted that these questions were in the nature of cross-examination. He conceded that in isolation the two questions alone were not enough to support his submission. The context of the questioning and the appropriate legal framework required to be considered. Under reference to *MNM* v *Secretary of State for the Home Department* [2000] INLR 576, counsel drew attention to guidelines (iv) and (vi) which stated:

> "(iv) Where credibility is raised in the refusal letter, the special adjudicator should request that the appellant's representative address those matters in examination-in-chief or in submissions. The special adjudicator is then entitled to form his own view as to credibility irrespective of whether the matters are addressed.
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> ….
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> (vi) It is not the function of the special adjudicator to adopt an inquisitorial role in an appeal system which is essentially adversarial. It is not the function of a special adjudicator to expand upon the refusal letter or raise matters not raised in it, unless there are matters apparent to him from reading the evidence. Where, however, a special adjudicator has refused to adjourn an appeal in which an appellant is unrepresented, it is the duty of the special adjudicator to give every assistance which he can give to the appellant."

Counsel appeared to concede that subsequent changes in practice and case law meant that he could not say the guidance was definitive. He accepted that there was a tension reflected in the guidelines between fairness and enabling a party to know the points on which a judge

may be minded to reach conclusions adverse to him. Reference was made to *WN (DRC) (Surendran guidelines)* [2004] UKIAT 00213 (IAT) paragraphs 38 to 40:

> "38. Questions should not be asked in a hostile tone. They should not be leading questions which suggest the answer which is desired, not should they disguise what is the point of concern so as to appear like to a trap or a closing of the net. They should be open ended questions, neutrally phrased. They can be persisted in, in order to obtain an answer; but they should not be persisted in for longer than is necessary for the Adjudicator to be clear that the question was understood, or to establish why it was not being answered, or to pursue so far as necessary the detail underlying vague answers. This will be a matter for the judgment of Adjudicators and it should not usually take more than a few questions for an Adjudicator to establish the position to his own satisfaction. An advocate should always be given the chance to ask questions arising out of what the Adjudicator has asked, which will enable him to follow up, if he wishes, the answers given thus far. The Adjudicator can properly put, without it becoming a cross-examination, questions which trouble him or inferences from answers given which he might wish to draw adversely to a party. These questions should not be disproportionate in length to the evidence given as to the complexity of the case, and, we repeat, an Adjudicator should be careful to avoid developing his own theory of the case.
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> …
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> 40. The tension should be resolved, so far as practicable, by recognising the following:
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> (1) It is not necessary for obvious points on credibility to be put, where credibility is generally at issue in light of the refusal letter or obviously at issue as a result of later evidence.
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> (2) Where the point is important to the decision but not obvious or where the issue of credibility has not been raised or does not obviously arise on new material, or where an Appellant is unrepresented, it is generally better for the Adjudicator to raise the point if it is not otherwise raised. He can do so by direct questioning of a witness in an appropriate manner.
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> (3) We have set out the way in which such questions should be asked.
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> (4) There is no hard and fast rule embodied in (1) and (2). It is a question in each case for a judgment as to what is fair and properly perceived as fair."

Reference was also made to the issue of timing of questioning under reference to *SW (Somalia) (Adjudicator's Questions)* [2004] UKIAT 00037 (IAT), the nature of the process under reference

to *MN* v *SSHD* [2014] UKSC 30 paragraph 25; and the appropriate procedure to be followed under reference to *Singh* v *SSHD* [2016] 4 WLR 183 at paragraph 53.

[10] Counsel submitted that the judge of the First-tier Tribunal intervened in an inquisitorial manner in what is meant to be an adversarial process and that she exceeded her role by using a cross-examination technique as evidenced in questions 15 and 61. I was asked to consider the number of questions the nature, length and mode of questions in the context of a case where credibility was the critical issue.

[11] Counsel was also critical of the response by the First-tier Tribunal judge to the interlocutor of 19 December 2017. He said the judge merely provided her notes and did not engage with other parts of the interlocutor seeking, for example, the purpose of the questions.

[12] Turning to the legal test to be applied for apparent bias, counsel referred to *Alubankudi (appearance of bias)* [2015] UKUT 542 (IAC) and *Sivapatham (appearance of bias)* [2017] UKUT 00293 (IAC). I was invited to apply the approach in *Alubankudi* to consider as a fair-minded observer properly informed of all the relevant facts and circumstances and conclude that there was a real possibility that the judge was biased. In conclusion counsel submitted that the Upper Tribunal had fallen into error in refusing leave to appeal, and that the legal test was satisfied. Counsel also relied on *Sivapatham* in which the court was critical of a judge who, when presented with the opportunity of responding to the two witness statements, did not challenge some of the key averments. That led to the conclusion of the court in paragraphs 21 and 22 that the appellant had established, on the balance of probabilities, the real possibility of bias on the part of the First-tier Tribunal judge.

Submissions by counsel for the respondent

[13] Before turning to the merits of the judicial review, counsel submitted that the short answer to the petition was that there was no relevant challenge to the Upper Tribunal decision because in the circumstances of the case, there was no error of law by the Upper Tribunal. On the information presented to the Upper Tribunal, the decision was sound. In seeking leave to appeal from the Upper Tribunal, the petitioner had not followed the procedure set out in *Singh* v *SSHD.* There was no affidavit or other information from the solicitor for the petitioner setting out the questions. On the information presented to the Upper Tribunal, the Upper Tribunal were correct to refuse the application. On that simple basis, counsel submitted the petition should be dismissed.

[14] Turning to the merits of the petition, counsel identified in statement 7.7 of the petition and paragraph 3.6 of the note of argument for the petitioner the basis of the petition. Commenting on the authorities referred to by the petitioner, he submitted that it is plain from *WN (DRC) (Surendran guidelines)* under reference to paragraphs 22 and 26 and *SW (Somalia) (adjudicator's questions)* paragraphs 27 and 29, that the focus should be on basic procedural fairness. *Koca* v *Secretary of State for the Home Department* 2015 1 SC 487 paragraph 20 supports that general principle and supports the approach of putting discrepancies of importance to an appellant in appropriate circumstances where fairness requires this. Departure from guidelines is not determinative. The correct legal test to be applied was not in dispute by the parties. In considering apparent bias, the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased. With this test in mind, counsel submitted that it was necessary for the court to go through the material available to such a fair-minded and informed observer. He made reference to the refusal letter dated 18 August 2016 from the Secretary of State and the

statement of the appellant at the asylum interview. He submitted that there were a number of points in the asylum interview including questions 21, 24, 71-72, 99-100 and 140 which were obviously relevant. Also questions 37, 45 and 64-65 which related to the books which the petitioner said he had concealed. These issues arose out of the asylum interview and were founded upon by the Secretary of State with the exception of the issue about the identity card raised in question 140. The questions asked by the judge must be seen in the context of the previous questions at the asylum interview and the reasons given by Secretary of State for refusal. Counsel for the petitioner accepted that none of the questions taken individually met the legal test. The whole proceedings must be looked at including the lack of objection by the solicitor representing the petitioner, the specific offer to the solicitor by the judge to make further submissions, the lack of any complaint by the solicitor in the affidavit and the difficulty faced by the judge of obtaining necessary clarification of issues and putting possible concerns about credibility to the petitioner in fairness for his comment.

[15] I was invited by counsel to refuse the order sought in the petition.

Decision

[16] I consider that there is an attractive simplicity and force in the first submission by counsel for the respondent summarised in paragraph 13. There was a significant difference in the information presented to this court compared with the information before the Upper Tribunal and the procedure recommended in *Singh* was not followed before the Upper Tribunal. It is important where allegations of unfairness and bias, whether actual or apparent, are made that proper consideration is given to the foundation material on which such a challenge is based and that relevant material is presented to the Tribunal or court asked to consider permission to appeal. In my opinion, the Upper Tribunal on the information placed

before them, were entitled to reach the conclusion which they did. Nevertheless when serious allegations are made about the fairness of proceedings, I consider that the Tribunal itself should always be alert to their powers to seek information or a response from the judge who dealt with the case and in some cases may wish to exercise such powers even if not invited by parties to do so.

[17] In recognition of the detailed submissions made to this court by counsel for both parties and the fact that further information was requested by the judge at the procedural hearing on 19 December 2017, I consider it appropriate to consider the substantive merits in relation to the petitioner's case. In paragraph 7 of the petition it is submitted that the questioning by the judge was unfair for two reasons. Firstly that the judge went beyond her role as an impartial judge and secondly that her questions whether considered individually or as a whole gave the appearance of bias. In the written note of argument the focus appears to be on the judge adopting the role of an advocate and cross-examining a witness in breach of guidelines. In paragraph 3.6 of the petition it is specifically stated that (alleged) judicial bias is not alleged in this case but rather that the judge did not act in accordance with relevant guidelines and the hearing was conducted in a way that was procedurally unfair. The oral submissions by counsel for the petitioner appear to found upon procedural unfairness and apparent bias. There was a lack of clarity in the legal basis of the case. Be that as it may, the facts which underpinned the complaints of the petitioner did appear to be clear.

[18] For the purposes of the judicial review proceedings, I did not consider that there was any differences of significance between the notes of the petitioner's solicitor and the notes of the judge of the First-tier Tribunal. The parties made no submissions to the contrary and for practical purposes the submissions were made under reference to the corrected typed transcript (6/10 of process). As the proceedings were not recorded, there was no formal

written transcript. I consider it of significance that the petitioner's solicitor in his affidavit did not suggest that there was anything about the tone, pace or manner of the questioning which was unfair or problematic. The solicitor in his affidavit did not express any concerns about the questioning or about the fairness of the proceedings.

[19] I note that in the record of proceedings prepared by the First-tier Tribunal judge, which was not disputed, the judge thanked the petitioner at the end of the questioning and noted a question, presumably directed at the petitioner's solicitor: "Anything you want to ask arising out of my questions?" She then asked if he was in a position to make his submissions and the solicitor confirmed that he was. There was no objection by the petitioner's solicitor to any of the questions asked by the judge and he did not take advantage of the offer by the judge to ask any further questions at the end of the questioning by the judge. This is a case in which the judge commenced questioning at the end of the very limited oral evidence in examination in chief and in circumstances where there was no cross-examination by the respondent. I consider that any criticism of the timing is ill founded. And in a case such as this it was well within the accepted guidelines for the judge to ask questions. There was no necessity for the judge to ask the petitioner's solicitor to explore issues and it is difficult to envisage how that would have been practical or useful. Most of the questions by the judge were short and open questions covering a variety of subjects which take into account the asylum interview and the reasons given by the Secretary of State for refusal in a decision letter dated 18 August 2016. Before the Upper Tribunal, there was criticism on behalf of the petitioner of the opening questions and in particular question 6 which stated: "I could tell you my family. Can you not tell me yours. That is very odd." Before this court, counsel for the petitioner did not appear to place much weight on this. There was obviously some

confusion caused by these questions and their relevance in the context of the case seems obscure. The Secretary of State showed no interest in extended members of the family and there was no dispute in this case that the petitioner came from Iran and had family there. I consider that the questioning by the judge got off to a bad start and that there was some confusion but on a fair reading the questioning appears to be well within such guidelines as are relevant as set out in *WN (DRC) (Surendran Guidelines)* in paragraphs 38 to 40. Standing back and leaving the guidelines aside, I am satisfied that the approach by the judge was both fair and reasonable.

[20] In the context of this case, I do not consider that there is any merit in the criticism of the judge for her response to the interlocutor of this court dated 19 December 2017. Her written notes produced for this court are very detailed. There was no criticism in the affidavit of the petitioner's solicitor to the questions or in relation to procedural unfairness and therefor nothing for the judge to comment on in that respect. Taking into account the way in which the petition is drafted, I consider that it would have been difficult for the judge to engage with the petition in any useful way. Whether there is procedural unfairness and the appearance of bias is essentially a matter for a different court to consider. The mere negation by the judge of the general averments and submissions in the petition could not have been of assistance to this court.

[21] I have no difficulty in concluding that the questioning by the judge in this case comes nowhere near meeting the test in *Alubankudi* and that there is no error in law and no real prospect of success in this case. For these reasons I refuse the order sought in the petition.