



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/04118/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16 December 2015**

**Decision & Reasons Promulgated
On 27 January 2016**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ASB
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mrs N Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr K Gayle, instructed by Mansouri and Son Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing on asylum grounds the claimant's appeal against her decision to set removal directions to Afghanistan, the claimant's country of origin, after refusing him refugee status, humanitarian protection or leave to remain in the United Kingdom on human rights grounds.
2. There are two grounds of appeal, first that the First-tier Tribunal "may have failed to give the due care and attention required in order to deal

with the facts of this case and if he had done so may well have reached a different conclusion”, and second, that internal relocation to Kabul and sufficiency of protection there had not been fully considered.

Internal relocation

3. The Secretary of State contends that the judge failed to deal ‘fully’ with possible internal relocation to Kabul and sufficiency of protection there. No case law is expressly relied upon but the judge self-directed that the relevant case is *LQ (Afghanistan)* – see paragraph 7 of the decision.
4. The second ground does not explain why his decision is legally erroneous having regard to the guidance given in that decision of the Upper Tribunal. There is no merit in the internal relocation ground and, although not expressly abandoned, it was not pursued before me with any enthusiasm.

Judge’s care and attention at the hearing

5. In relation to the due care and attention ground, the Secretary of State seeks to rely on a comment by the claimant’s representative to the Home Office Presenting Officer at the end of the hearing, as follows:

‘1. It is respectfully submitted that at the end of the hearing, the [claimant’s representative] asked the Presenting Officer if she had noticed that the Judge sleeping during his submissions. The Presenting Officer responded by saying she had not seen this, but she had noticed the Judge was not taking many notes during either sets of submissions. (Please see Presenting Officer’s minute of the hearing attached, under the heading ‘Procedural’).”

That is an odd position for the Secretary of State to have taken: in effect, she complains that her own representative did not notice, but the successful party did, that during the successful party’s submissions the Judge was not taking many notes and may have been asleep. Despite this lack of attention (if that is what it was), the claimant’s appeal succeeded.

6. The Secretary of State relied upon the Upper Tribunal’s guidance in *KD (inattentive judges) Afghanistan* [2010] UKUT 261 (IAC), although Mrs Willocks-Briscoe did not bring a copy to the Upper Tribunal hearing. The judicial headnote in *KD*, which Mr Gayle was able to find and read to me at the hearing, is as follows:

“1. The parties to an appeal are entitled to expect the Judge both to be alert during the hearing and to appear to be so. Consequently, if a Judge actually falls asleep or gives the appearance of not giving the appeal his full attention, there may be grounds for setting aside the determination on the basis that there has not been a fair hearing.

2. It is preferable for any concern about the behaviour or inattention of the Judge to be raised at the hearing.

3. When such a ground of appeal is raised, it is only likely to succeed if there is cogent evidence of the actual or apparent behaviour in question.”

7. I have seen the file notes taken by the two representatives at the hearing. The file note taken by the claimant's representative is as follows:

"I was left with the impression that the IJ lacks empathy with my client. During the respondent's submissions he was alert and took notes but during my submissions he did not seem to take notes, seemed to lack interest and seemed to look at me with a glazed appearance. After the hearing I raised this with the Presenting Officer as we were leaving the room in presence of the client and she stated 'I don't know, I was not concentrating and didn't notice'. I also mentioned to the clerk who had not been present and he laughed it off saying 'no that's just his manner'."

The record by the Secretary of State's Presenting Officer, so far as material, reads as follows:

"Procedural

At the end of the hearing the rep asked me if I had noticed the FTJ sleeping during his submissions. I advised the rep that I had not seen this, but I had noticed that he was not taking many notes of either sets of submissions."

The Judge's Record of Proceedings which is on the file includes notes of both parties' submissions. The judge has been given an opportunity to comment on this allegation but no comment has been received from him.

8. There are many reasons why a Judge may not take copious notes, one of which is that he needs little more persuasion by the party making the submission, as seems to have been the case here. The extensiveness or otherwise of the record of proceedings is a matter for the judge at the hearing and the judge is required to take only such notes as are necessary, which, on the basis of the Record of Proceedings before me, he did.
9. Both parties agree that the respondent's representative did not see the judge being either inattentive or sleeping. In addition, the lapse of attention perceived by the claimant's representative was not raised with the Judge at the hearing. I am not satisfied, on the evidence before me, that there is cogent evidence that the judge was asleep at any point during the First-tier Tribunal hearing. I find in relation to ground 1 that the *KD* standard is not met.
10. Even if the evidence had shown, which I find here that it does not, that the Judge was inattentive or asleep during the claimant's submissions, such inattentiveness would not have been material to the outcome of the appeal. The Secretary of State is obliged, in order to succeed, to advance the unattractive argument that the claimant was less likely to have succeeded if the Judge had been awake during the claimant's representative's submissions, than if he slept through them and was completely unaware of those submissions.

11. That amounts to a submission that the Secretary of State's case at the First-tier Tribunal could not succeed unless the claimant's representatives made some unspecified point during their submissions which bolstered the case of the claimant's opponent. If anyone was disadvantaged by the Judge's alleged lapse in concentration, it was the claimant, but the claimant won his appeal. On any view, such lapse would therefore be immaterial to the outcome of the appeal.
12. The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal stands.

Decision

The making of the previous decision involved the making of no error on a point of law. The decision of the First-tier Tribunal stands.

Signed: Judith AJC Gleeson
Upper Tribunal Judge Gleeson

Date: 25 January 2016