Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05110/2017

THE IMMIGRATION ACTS

Heard at On Glasgow	**Decision & Reasons Promulgated**
On 1st February 2019	**On 18th February 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

L L
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Winter, instructed by Katani & Co Solicitors
For the Respondent: Mr M Matthews, Senior Presenting Officer

Anonymity
Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the disclosure or publication of any matter that might lead members of the public to identity the appellant or her child is prohibited. Any failure to comply may result in contempt proceedings.

DECISION AND REASONS

INTRODUCTION

1. This is an appeal against the decision of First-tier Tribunal Judge Fox. For reasons given in his decision dated 7 September 2017, the judge dismissed the appellant's appeal under the Refugee and Human Rights Conventions and under the Immigration Rules against the Secretary of State's decision refusing her protection claim on 16 May 2017.

2. The appellant is a national of Morocco where she was born on 2 January 1990. She arrived in the United Kingdom on 27 November 2014 by air from Morocco with a visa as a visitor. She claimed asylum on 16 December 2016. The appellant's protection claim was based on her claim to have converted to Christianity and the difficulty she would encounter in Morocco as the consequence as well as being as a single parent with a child born in the United Kingdom in 2016 out of wedlock.

3. The appellant gave evidence through an interpreter before Judge Fox who was not satisfied that the appellant's conversion was genuine and, furthermore, he did not accept that her second marriage to her husband in the United Kingdom had broken down. He also doubted the truthfulness of the appellant's account regarding the paternity of her child which she claims to have been the result of an encounter with someone with whom she no longer has contact. The judge considered therefore that the appellant could be returned safely to Morocco without a risk of harm. Taking account of the appellant's health he considered nevertheless that her removal would not be in breach of Article 8 and, in terms, concluded that the best interests of the child were to accompany her.

4. The grounds of challenge are that the conduct of the judge at the hearing resulted in the appellant not having had a fair hearing with reliance placed on *Alubankudi (Appearance of bias)* [2015] UKUT 00542 (IAC) and *Elayi (Fair hearing – appearance)* [2016] UKUT 00508 (IAC). A specific allegation of bias is not made in the grounds. As to the judge's actual conduct the grounds assert the following:

   (1) The judge stated on arrival, "There is a child here, sort that out" and left the hearing room.

   (2) At the resumed hearing when it was explained that the appellant was a single mother and had no one to look after her daughter, the judge then enquired about the lack of essential passages in the documents that had been provided by the appellant's representatives. By way of response the representative Mr Katani explained how the bundle was made up and that he would orally refer to it in his submissions.

   (3) The judge sought an apology and using a sarcastic and hostile tone observed "There is no essential passages and no attempt to make arrangements (for children), so we better start then". As Mr Katani left the hearing room to collect the appellant the following exchange took place:

Judge: "No apology then?"

Mr Katani: "I apologise, Sir."

Judge: "No, I had to ask for the apology. You are a disgrace and it's totally unprofessional and I am minded to make a complaint to your professional body."

(4) In the course of submissions, the judge questioned Mr Katani's professionalism again, which he noted as a disgrace and reiterated that he would be minded to make a complaint to his professional body. Mr Katani was prohibited as a consequence from continuing his submissions and felt that he could no longer refer to an expert report. But for the judge's intervention, he would have made further submissions that the appellant's child would not be entitled to Moroccan nationality.

(5) The standard directions were for both parties and the judge did not ask the Presenting Officer about a lack of essential passages. The Presenting Officer was permitted to refer to the respondent's as well as the appellant's bundle in "an unlimited and uninterrupted capacity". Mr Katani was only allowed to refer to it six times.

(6) The appellant too felt the perceived unfairness and became visibly upset after the hearing. She was upset by what the judge had said to Mr Katani and felt that the appeal was going to be refused as a result. She considered that the judge had listened to the Presenting Officer's submissions in their entirety but not the same for Mr Katani.

The grounds also observed that a complaint had been made about the judge's conduct.

5. This appeal was adjourned on 9 August 2018 for the judge to comment on the grounds of challenge and as well as a witness statement by Mr Katani dated 3 August 2018, a statutory declaration by the appellant dated 6 July 2018 and the Presenting Officer's Record of Proceedings dated 1 September 2017. On 16 August 2018 the judge was sent this material together with his Record of Proceedings and a copy of his decision.

6. The statutory declaration by the appellant refers to the judge's statement at the outset of the hearing with regard to her child and on proceeding she felt that the judge was not happy due to his demeanour and facial expressions. The judge had acted in a very hostile manner towards Mr Katani when questioning him about the case. When it came to legal submissions, the judge listened to the respondent's submissions in full but did not extend the same opportunity to Mr Katani. These matters upset her and she believed that her appeal would be refused.

7. The witness statement by Mr Katani explains that on arrival at the hearing centre he was informed by the clerk that the judge had enquired about a lack of essential passages and wanted to know why they were omitted.

He explained to the clerk that there were three items in his bundle, being the witness statement, translated documents and an expert report. He would explain to the judge why the bundle contained [no] essential passages in person. The statement refers to events at the outset of the hearing and the explanation offered by Mr Katani when the hearing was reconvened why the appellant did not have anyone who could look after her child. Mr Katani explains that when challenged as to the absence of essential passages, he would be relying on three items and would refer to them orally in submissions. He was reminded of the directions and responded by saying that the material was not general in nature and he would direct the judge to the specific paragraphs he wished to place reliance on. The statement also refers to the aspect of the grounds indicating the tone used by the judge when announcing that the hearing had better start and continues:

> "As I then walked towards the door to bring the appellant inside, the IJ remarked 'No apology, then?'. I said 'I apologise, Sir'. IJ Fox then said 'No. I had to ask for the apology. You are a disgrace and that's totally unprofessional; and I am minded to make a complaint to your professional body.' "

8. The statement explains that Mr Katani stood in silence and the judge observed that such silence "said it all". Mr Katani then fetched the appellant and the hearing proceeded. The statement confirms there were no further issues until he sought to refer to the expert report. Mr Katani explains:

> "IJ Fox stopped me whilst in submissions and told me that I had referred to the report six times now bearing in mind what I had discussed at the beginning, referring to it only once or twice. IJ Fox in front of the appellant, question [sic] my professionalism (again) and that it was a disgrace what I had done and reiterated that he was minded to make a complaint against me to my professional body. IJ Fox again noticed my silence and that "it said it all".
>
> I felt unable to complete my submissions as a result of the intervention and referred only to some general points before closing my submissions."

9. Mr Katani acknowledges that he had not provided the essential passages but genuinely believed that the items were not objective in nature and did not require him to provide such. He believed that the judge had not provided a fair hearing and refers also to the hostility being noticed by the appellant.

THE JUDGE'S RESPONSE

10. The judge has provided a detailed response which was set out in further directions sent to the parties on 22 October 2018. Specifically as to the events on the day, the judge explains, in summary:

    (1) His memory of the case is quite clear.

(2) Mr Katani's recollection of events is selective and clearly pointed.

(3) Noting the absence of a schedule of essential passages, he asked his clerk to confirm with Mr Katani if one would be made available prior to going down to the hearing room. She did not receive a reply so far as he was aware but the judge also confirms that he was told he did not have one.

(4) Mr Katani did not take any opportunity to provide an explanation until asked which demonstrated a lack of professional courtesy.

(5) The clerk was not advised there was a young child in the court room. On entering, the judge observed the child was crying loudly and was clearly disruptive. Having bid the parties good morning the judge noted that because of the noise it would be impossible to proceed and that "… we would have to sort this out. Even with my hearing aid I would have found it impossible to hear what any witness may have said, with that level of distraction".

(6) Mr Katani was afforded time. The judge asked the clerk to advise him when the court would be ready again for hearing and he did not say that he did not want the child in the hearing room.

(7) On return Mr Katani advised the judge that he

> "was not making any arrangements for the noisy child. Mr Katani confirmed that he had not discussed this matter with his client and had no intention of doing so prior to the day's hearing. The child continued to be noisy and disruptive. This was not the child's fault. The child was clearly unhappy with being present in the court room and/or for some other reason. Mr Katani clearly demonstrated an air of unhelpfulness and reluctance to be cooperative. His tone was less than pleasant."

11. The judge records that he asked the appellant if she could do her best to settle the child. She was offered time but did not need it. The judge then followed his standard procedure with an introduction he uses with all appellants designed to make them feel at ease. He denies that he demonstrated any hostility, dissatisfaction or other emotion. The judge experienced problems with his vocal chords due to surgery some one and a half years previously and his recent health difficulties impacted on his ability to project his voice. It was often the case that he needed to repeat himself because even those in close proximity may not hear all he had to say.

12. On being asked about the schedule of essential passages, Mr Katani explained he only intended to refer to a few paragraphs and he considered

that such a schedule was not required. The judge continues in his response:

> "This was the first indication I had from him even though I had out of courtesy asked the clerk to mention it to him prior to commencing the hearing. The courtesy was not reciprocated. He had not communicated this to me until asked. I enquired of him, should he not have done so without having to be asked for it. The Directions were issued. He did not reply. I asked for reply again. He refused to reply and got up and walked out of the court room. At that stage I asked if he intended to apologise at the very least. He did not reply. He did not apologise. At that stage I indicated to him that I was minded to make a complaint to his professional body for his attitude. Again, I remained quiet calm and collected and if anything, felt humiliated and hurt by his grossly impertinent and unprofessional attitude."

13. The judge explains that Mr Katani referred to many more than just three or four paragraphs; and during submissions it became clear that the references went into double figures. The judge asked if he had not considered that such a schedule of essential passages was necessary given the volume of references. When pressed, Mr Katani indicated that he had only two or three references to make which he had "grossly exceeded".

14. The judge states that he did not issue any remarks that could be in any be considered insulting. He contends that the behaviour of Mr Katani demonstrates that it was he who was in the wrong.

15. The respondent did not refer to anything other than the facts of the case and made no reference to any documents other than the interview record. The respondent had no requirement to rely on a schedule of essential passages and the judge's recollection of the standard directions were that a schedule is a requirement for the appellant alone. Mr Katani was not restricted in any way to complete his submissions; the judge had encouraged him to do so despite the lack of a schedule.

16. At the end of the hearing the judge explains that he thanked the appellant for giving her evidence. She had managed to keep the child under control for the majority of the time and the judge complimented her on her care, conduct and management of the child. She smiled.

WAS THE JUDGE UNFAIR?

17. At the hearing Mr Winter produced a response to the judge's note by Mr Katani which is unsigned and undated. It does not contain his name. It sets out a response in the first person to Judge Fox's response. Essentially the document notes the inconsistency between the parties' recollection of events and refers to contradictions in the judge's response with reference to the enquiry prior to the hearing over the availability of essential passages and that the asserted refusal to reply to questions being asked was false. An explanation had been given for the omission of essential passages.

18. The response also refers to the standard directions having been for both parties to provide essential passages and that according to Mr Katani's notes as well as the respondent's notes reference had been made by the Presenting Officer to the Reasons for Refusal Letter annexed report. It is alleged that Judge Fox did not give proper care and attention to the case and reliance was placed on an unreported decision of the Upper Tribunal *Sareh K v SSHD* (PA/03488/2017).

19. Mr Winter confirmed that he had discussed with Mr Katani the appropriateness of his attendance at the hearing but appears that this was not possible owing to a commitment to appear in Manchester. After submissions I reserved my decision.

20. The only document in the inventory of productions provided on 29 January 2019 is a copy of the Tribunal decision in *PA (Protection claim: respondent's enquiry; bias) Bangladesh* [2018] UKUT 337 (IAC). The headnote includes the following in respect of allegations of bias:

> ***"2. Allegations of judicial bias***
>
> *(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.*
>
> *(6) Allegations relating to what occurred at a hearing would be resolved far more easily if hearings in the First-tier Tribunal were officially recorded."*

21. An earlier inventory of productions provided in anticipation of the hearing on 9 August included copies of the Tribunal's decisions in *Alubankudi (Appearance of bias)* [2015] UKUT 00542 (IAC) and *Elayi (Fair hearing* –

Appearance) [2016] UKUT 00508 (IAC). These decisions provide a helpful review of the law where there is an allegation of bias and the test in *Porter McGill* [2001] UKHL 67 at 103:

> "The question is whether the fair-minded observer, having considered the facts, would conclude there was a real possibility that the Tribunal was biased."

22. Mr Winter submitted that some paragraphs of Judge Fox's decision might indicate an approach that was perceived to be biased on the basis that there was no reference to what Mr Katani had said happened. He contended that the credibility findings by the judge may have been influenced by what happened at the hearing but he acknowledged the judge had given reasons for his findings. He described what had occurred as a falling out and speculated that the fault might be on both sides. Mr Mathews described the different approaches taken by judges in situations where there is a noisy child and contended that in this case, having regard to what was said, a fair-minded informed observer could not form the view that the judge was biased. The challenge fell well short of the of the test that was required to be met.

23. I have noted that the grounds of challenge do not assert that the judge was biased. Implicit however in the detail of the allegation is the suggestion that the judge did not approach the case in an open-minded way because of the distraction caused by the appellant's child and the failure by Mr Katani to comply with directions and this was the language of the submissions that I heard. It is problematic that Mr Katani did not attend the hearing and I do not consider his reason for doing so a satisfactory one. No details have been provided why he in particular needed to attend in Manchester and the timing of Mr Winter's conversations with him show that there was sufficient time for alternative representation to be arranged. No adjournment was sought. In the light of the disagreement between him and Judge Fox as to the events at the hearing it was clearly appropriate that he attend in order to be ready to answer any questions for clarification, particularly so in the light of the unsatisfactory nature of his unsigned and undated response. I should therefore be slow to uphold any aspect of Mr Katani's account in these circumstances. The further observation I made is that I can give little weight to the statutory declaration by the appellant herself. As was evidenced before me, she does not have any ready comprehension of English. Whilst she would have been aware of the judge's arrival and departure from the hearing room at the outset of the day, she cannot be of any real assistance as to what was said at any point during the hearing.

24. It is common ground that the appellant was with her child when the hearing was to commence. Despite my reservations over Mr Katani's response, it is significant that he does not challenge the judge's explanation of the child being disruptive at the outset of the hearing. In my judgment it was properly open to the judge to rise to see if arrangements could be made. Even if the judge did so in an abrupt

manner no possible unfairness arises from that. Mr Katani would have been aware from the outset of the potential difficulty. There is no indication that he had explored earlier whether arrangements could be made for the child to be cared for whilst the appellant was in the hearing room. Had he done so and learned of this impossibility, at the very least, he should have addressed the judge at the outset to explain the position.

25. Turning to the matter of the absence of essential passages, Mr Katani is correct in observing that the directions required both parties to provide a paginated and indexed bundle of all documents to be relied on at the hearing with a schedule identifying the essential passages. No documents in addition to the standard Home Office bundle were relied on by the respondent. In my view it was properly open to the judge to enquire of the appellant why there was an absence of a schedule relating to the bundle of some 60 pages. Again, it appears common ground that the judge made enquiries through his clerk about this aspect prior to commencement of the hearing and it would have been appropriate for Mr Katani to explain his position and offer an apology, if necessary, at the outset of the hearing which might have defused matters.

26. It appears that on return of the judge to the hearing room, the appellant remained outside and did not witness the exchange regarding the absence of a carer for her child and the exchange over the absence of the essential reading schedule. It is not clear why she felt able to address these matters in her declaration. The judge addresses the point in paragraph 6 of his decision and I accept his account that he needed to press Mr Katani for an apology rather than the latter taking the initiative.

27. Judge Fox appears to be exercised by this aspect and perhaps a better course might have been for the hearing to be stood down for Mr Katani to prepare the schedule. It was also open to Mr Katani to offer to do so. Even so, I consider the judge was entitled to express concern over the matter in the absence of Mr Katani addressing the non-compliance at the outset. As accepted by Mr Katani, the hearing then proceeded.

28. To my mind the judge was entitled to remind Mr Katani during his submissions of the indication at the outset that the references would be few. It was unnecessary for him to refer again to non-compliance since that had been fully addressed at the outset of the hearing. I do not consider however that this was indicative of unfairness. Mr Govan's note records short further submissions made after that intervention and to my mind there is no evidential support other than Mr Katani's assertion for the case that the judge's intervention effectively stopped him making the further submissions he wished.

29. The judge's manuscript note indicates that it was fairly lengthy. Mr Govan, the Presenting Officer typed a note in which he records under the heading "Prelims":

> "Rep asked why no essential passages index. IJ took exception to a child being in the court and left the bench. On return he chastised the rep but agreed to continue."

Mr Govan's note records what may well be verbatim the questions and answers given and the submissions in detail. His own submissions take up a page. Mr Katani's submissions are recorded over a page and a half. Towards the end of those submissions Mr Govan records:

> "IJ: You have now referred to six passages and told me that you would only be referring to a couple. You have not provided a schedule of essential passages and I am not happy about situation. Directed to do something and ignored it. Where leave me? Your silence says enough."

30. In the course of his submissions, Mr Matthews took me to the relevant passage from Dr Joffe's report where he considers the issue of nationality as follows:

> "Originally, under the 1958 Nationality code, nationality was conferred by filiation from the father, although, as a result of an amendment in 2007, it can now also be conferred by the mother (Article 6 of the law).

31. A further passage refers to nationality being defined as being separate from citizenship. Failure to register a child for his or her civil status involves the loss of benefits of citizenship. It is possible for an unregistered person to self-register but the procedure is long and cumbersome. Almost certainly, this would require the services of a Moroccan lawyer. Even if I were persuaded that Mr Katani was precluded from making a submission on this point, I am not satisfied that had he done so it would have materially affected the outcome.

32. By way of conclusion therefore any acrimony that developed between the judge and Mr Katani did not spill over into unfairness and fell well short of any possible suggestion of bias. I do not consider that any fair minded observer aware of all the facts would conclude that there was a real possibility that the judge was biased.

33. This appeal is dismissed.

Signed

Date 14 February 2019

UTJ Dawson
Upper Tribunal Judge Dawson