Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13493/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
on 14 September 2015	**on 2 December 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KASHEM ASHFAQUE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Pennington-Benton instructed by Denning Solicitors
For the Respondent: Mr Bramble – Senior Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Cohen, promulgated following a hearing at Taylor House on 24 October 2014, in which the appellants appeal against the refusal of leave to remain as a Tier 1 (Entrepreneur) Migrant and direction for his removal made pursuant to section 47 Immigration, Asylum and Nationality Act 2006 was dismissed.

2. The judge noted at paragraph 13 "The appellant was frequently evasive in respect of the evidence that he gave before me. He failed to give accurate descriptions of

the claimed business activities that he had undertaken on a self-employed basis". At paragraph 17 it is noted "The appellant was an extremely unimpressive witness before me and in his Tier 1 interview".

3. The appellant sought permission to appeal on a number of grounds the first of which is an allegation of a lack of fairness and bias in the conduct of the hearing.

4. Permission to appeal was granted by First-tier Tribunal McDade in the following terms:

> "It is arguable that if the Appellant's representative's assertion are made out that the judge has made an error of law. However at the error of law hearing it is incumbent upon the Appellant's representative to adduce evidence of the judge's conduct as mere assertions without more are unlikely to be accepted at face value. There is an arguable error of law."

Error of law

5. Ground 1, asserting a lack of fairness and/or bias makes reference to the manner in which the judge conducted the hearing alleging the following:

> "10. The judge then asked the Appellant questions about his clients and the services he provided as an IT consultant. Some questions took the form of aggressive cross-examination. Two examples the Appellant will rely on are:
>
> (1) The judge asked the Appellant what he did for Abdul Majid Ahmed. The Appellant said he could not remember. The judge asked the Appellant who Abdul Majid Ahmed was. The Appellant responded that Abdul Majid was one of his clients. The judge than asked the Appellant to look at Invoice No. AK/AB001 dated 18 January 2013 (one of the invoices the Appellant submitted in support of his application). This judge pointed out that this showed the Appellant charged £1,160 for 'MS Word 2007 Training Course'. The judge asked the Appellant, in an incredulous and hostile tone, why would someone pay that much for such training when they could get the training for free by going to college?
>
> (2) The judge referred the Appellant to Invoice No. AK/ABD0002 to Abdul Majid Ahmed dated 16 April 2013. The invoice referred to 'System check-up and Upgrade -2 laptops' for a sum of £1,050. The judge asked the Appellant, again in an incredulous and hostile tone, why would someone pay that much (for an upgrade) when they could get two new laptops for the same money.
>
> 11. Indeed, the judge's incredulity was evidence throughout the time he was asking the Appellant questions and his manner overbearing and at times hostile.
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> ...
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> 14. The judge's questions (particularly those set out in para 10 above) were entirely improper both in terms of content and the manner in which they were asked. They amounted to cross-examination of the Appellant. The judge

descended into the arena and did so in a hostile/aggressive manner and a manner suggesting his mind had been made up.

...

16. Accordingly the Appellant did not receive a fair hearing. Further or alternatively, the judge's questions (including his manner) displayed apparent bias. In other words, the fair minded and informed observer, having considered all the circumstances, would conclude there was a real possibility of bias (Porter v Magill [2001] UKHL 67). Specifically pre-determination (meaning the premature formation of a concluded view adverse to one party; Amjad v Stedman-Byrne [2007] 1 WLR 2482.)"

6. Ground 2 asserts a mistake of fact in the determination and Ground 3 an assertion of inadequate reasons.

7. Judge Cohen was invited to make comment upon the allegations. His response is in the following terms:

"***1.*** No complaint against my conduct was made on the day of the hearing or until the date of appeal. If my behaviour was as claimed, one would have expected a complaint to be made before the grounds of appeal.

2. I deny acting with hostility towards the appellant.

3. I invite you to contact the Home Office Presenting Officer involved in the case, Ms Ayodele, and ask if my conduct was in any way biased, hostile or unprofessional.

4. I do not believe that number of questions I asked was excessive or that I entered into the arena and my questions flowed from the evidence before me.

5. The appellant did identify some clients merely by the use of one name and I invite careful scrutiny of his interview record.

6. I believe that I provided detailed reasons for my decision.

7. I question the appellant's actions in credibility both in interview and in respect of his actions, controlling five bank accounts and transferring money between them and in respect of his vague and evasive responses before me."

8. The Tribunal has received a witness statement from Hafsah Masood who represented the appellant before Judge Cohen. Ms Masood was called to the bar in 2006 and practices from 3 Hare Court, Temple.

9. Ms Masood outlines the proceeding on the day and makes the following observations:

"10. The judge began by asking Mr Kashem some open-ended questions: what did you do for Arif Aktar? What did you do for Abdul Majid? Who is he? Although the judge's tone was a little clipped, there was nothing that caused me any real concern at this stage.

> 11. The judge then asked Mr Kashem to turn to an invoice in the Respondent's bundle. This was an invoice to Mr Abdul Majid Ahmed dated 18 January 2013 and appears at Exhibit HM3. The judge pointed out that it showed Mr Kashem had charged £1,160 for a MS word 2007 training course and a MS Excel 2007 training course. The judge then asked Mr Kashem, with a raised voice and in an incredulous tone: why would someone pay £1,160 for excel and word training when they could get it for free by going to college? Although framed as a question, it came across more like a comment, and the judge's manner when asking the question (the combination of the raised voice and incredulity) was unfortunately hostile."

10. Mr Bramble has provided a witness statement from the Presenting Officer who represented the Secretary of State on the day who states "Throughout the hearing I cannot recall the IJ being overbearing and/or hostile in his questions to the appellant".

11. A witness statement provided by the appellant claims he was denied the opportunity to 'defend his case'. It is alleged the judge asked irrelevant question, asked no questions about the replies given at interview yet relied upon this to assess the appellant's credibility. At paragraphs 6 of the statement the appellant states:

> "6. Unfortunate, I did not get the chance to explain all this to the IJ as he kept interjecting. I also found him to be quite aggressive and hostile towards me. During the proceedings I became very nervous and felt intimidated."

12. The appellant challenges the accuracy of paragraph 18 of the determination claiming the statement he was unable to give an explanation about the services he provided for his clients is wrong and it fails to record the correct version of the answers he gave.

Discussion

13. In paragraph 7 of Mr Pennington-Benton's skeleton argument it is written:

> "It is important to point out at the outset (if not already obvious) that the Appellant makes no personal criticism of the Judge. There is no accusation of actual bias. The Appellant simply argues that, taken in the round, and for the reasons set out in more detail below, the hearing did not accord with the rightly high standards of procedural fairness (including public perception of fairness) that as part of the civil justice system in England and Wales they really ought."

14. In paragraphs 9 and 10, which sum up the heart of the appellants case, it is written:

> "9. The Appellant left the hearing with a justified sense that the Judge may not have approached his case with an open mind. It is submitted that, upon consideration of the evidence that the court will hear from Ms Masood, and in light of the Appellant's obvious emotional response to the questioning, the objective observer would have been left with the impression that the Judge may have already made up his mind. The incredulity with which the Judge

approached the Appellant's evidence is further unlikely to have been viewed as a genuine attempt to understand his evidence.

10. As noted above it is not suggested that the Judge intended or was even aware that his manner and tone were either hostile or expressing incredulity. It was however clear to those in attendance that this was the way it came across. Apparent bias is of course all about perception; how the matter would look to members of the public observing proceedings."

15. The tests for determining bias adopted by the House of Lords in Porter and Another v Magill (2001) UKHL 67 was "whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased." In Helo v SSHD (2008) UKHL 62 the House of Lords added that the fair minded and informed observer was the sort of person who was able to put whatever she had read or seen in its overall social political and geographical context and who was neither complacent nor unduly sensitive or suspicious. It was added that there was a presumption that judges would carry out their judicial duty.

16. As noted in the skeleton argument it is not being asserted this is a case of actual bias but of perceived bias.

17. Judge Cohen was right to observe that no complaint had been raised on the day, a fact confirmed by Ms Masood who indicated she had concerns but failed to raise them at the time. In KD (Inattentive Judges) Afghanistan [2010] UKUT 261 (IAC) the Tribunal found it was preferable for any concerns about behaviour or inattention of the Judge to be raised at the hearing. Whilst this may be so, a failure to do so is not determinative of the issue. It was also found in KD that when such a ground of appeal is raised, it is only likely to succeed if there is cogent evidence of the actual apparent behaviour in question. In this matter the Tribunal has the appellant's account, that of his barrister on the day, the Presenting Officer's statement and Judge Cohen's response. It is settled law that a party alleging judicial misconduct needs to prove it and their representatives need to ensure that the evidence is collected while memories are fresh. The hearing occurred on 24 October 2014. The Presenting Officer's statement is dated 23 June 2015 based upon personal recollection of the events. The appellant's witness statement (number 2) is dated 20 April 2015. Ms Masood's statement is dated 16 April 2015 making reference to contemporaneous notes taken at the hearing and more detailed notes prepared on return to Chambers, copies of which are annexed to the statement, and supported by her oral evidence at the hearing. Judge Cohen's reply is dated 9 July 2015.

18. The Tribunal is able to rely upon the evidence provided in support of the claim. Whilst some may think an appellant who has lost his case may have a vested interest in claiming bias or an unfair hearing no such allegation can be made in relation to the evidence of Ms Masood who remains professionally neutral in relation to the matter, presenting the facts as she recalls them on the day.

19. Judge Cohen is an experienced judge of the First-tier Tribunal who has heard a considerable number of appeals in his time and who may form a view of the merits of the case during the course of his pre hearing preparation. In this case it is noted the matter was not originally listed in Judge Cohen's fixed list but was taken as a float case.

20. There can be no complaint if a judge forms a preliminary view of the evidence as the role of a judge is to assess the materiel made available and the merits of a claim against the fact accepted and applicable law. There is no guidance stating that such a process can only be undertaken at the end of the hearing although fairness dictates that any final decision as to the merits is not made until all the evidence has been heard and considered, from a neutral perspective, with the required degree of anxious scrutiny.

21. If a preliminary view has been formed a judge can either inform the parties and invite submissions to demonstrate why this is incorrect, or not as the case may be, or keep such thoughts to him or herself and hear the case following which the preliminary view is reconsidered in light of the evidence now available. What a judge cannot and must not do is to form a preliminary view of the merits and then close his or her mind to there being any other outcome. When it was said in Helo v SSHD that there is a presumption a judge would do his job, that is a reference to the judge siting as a fair minded impartial assessor, willing and able to hear and consider the evidence and submissions made, and to only form a final view as to the merits of the case before them once the parties have had the opportunity to put their cases in full.

22. In this case it is not suggested Judge Cohen deliberately set out to prevent the appellant putting his case but that his conduct during the hearing had that effect. Judge Cohen has a reputation for being firm and direct in his approach to cases he is required to hear and whilst there is nothing wrong with a robust approach being taken it is important a judge does not cross the line between effective case management, controlling the evidence and making best use of court time, and becoming a bar to the proper administration of justice.

23. It is not suggested what is said to have happened is deliberate but, even if this is so, it gives rise to concern as it may be indicative of a pattern of conduct that subconsciously is preventing a fair hearing.

24. The weight of evidence clearly indicates something went wrong at the hearing before Judge Cohen on the 24 October 2014. The result is a perception the appellant did not receive a fair hearing. It is an established principle that justice must not only been done but be seen to be done. The perception of a procedural irregularity sufficient to amount to a material error of law in the manner in which the hearing was conducted is made out.

25. The determination shall be set aside in full and the case remitted to the First-tier Tribunal sitting at Taylor House to be reheard by a salaried judge of the Tribunal other than Judge Cohen

Decision

26. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the First-tier Tribunal sitting at Taylor House to be heard by a salaried judge nominated by the Resident Judge other than Judge Cohen.**

Anonymity

27. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 26 November 2015