IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2022-006086

First-tier Tribunal Nos: PA/50401/2022
IA/01424/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FK (IRAQ)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr K Gayle, Solicitor Advocate instructed by Elder Rahimi Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House via Teams on 17 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify him. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals from the decision of First-tier Tribunal Judge Andrew Davies promulgated on 27 October 2022 ("the Decision"). By the Decision, the Judge dismissed the appellant's appeal against the decision of the respondent dated 19 January 2022 to refuse the further submissions made by the appellant's representatives that new evidence which the appellant had obtained from Iraq showed that he had a well-founded fear of persecution, notwithstanding the previous decision of the First-tier Tribunal to the contrary.

Relevant Background

2. The appellant is a national of Iraq, whose date of birth is 1 September 1993. He originates from Sangasar in Sulaymaniyah Province in the Iraqi Kurdish Region ("IKR"). The appellant left Iraq on 10 November 2015 by air using his own Iraqi passport. He travelled to Turkey and then by boat to Greece. He had the assistance of a people smuggler. He was fingerprinted by the Greek authorities. He travelled to Germany. He made an asylum claim in Germany. He then travelled to Sweden. He was fingerprinted in Sweden and made an asylum claim there. He stayed in Sweden until July 2016 and was then deported back to Germany. His asylum claim in Germany was refused. He travelled to France. He entered the UK unlawfully in a lorry on 9 February 2017 and claimed asylum on the same day.

3. The appellant claimed that he fled Iraq out of fear of becoming the victim of an honour killing. He said that he had had a relationship with a young woman, Zhian, whose father was a commander in Asayish. He was attacked and stabbed by her relatives. He was later duped into transporting drugs by one of Zhian's relatives. He claimed that the family were intent on killing him or having him prosecuted for handling drugs.

4. The appellant's asylum claim was refused by the respondent on the grounds that there were inconsistencies in his account. Among other things, the respondent contended that the appellant had been internally inconsistent in his claim to be of adverse interest to Asayish and in his claim that Zhian's family had attempted to frame him for drug smuggling.

5. The appellant's appeal against the refusal of his asylum claim came before Judge Andrew Davies sitting at Manchester Piccadilly on 20 December 2019. Both parties were legally represented.

6. In his subsequent decision, the Judge contrasted what the appellant had said in his screening interview with the elaboration of his claim in his substantive interview. One of the matters not mentioned in the screening interview was that his girlfriend's family had sought to frame him. The appellant said he had a friend who was his girlfriend's cousin. The latter persuaded him to transport some whisky on his father's fishing boat to avoid duty. Unbeknown to him, the package contained drugs. Asayish

officers were waiting for him at the dock. He fled in the boat. Shots were fired in the air to try and scare him.

7. The Judge disbelieved this claim because, firstly, the appellant had not mentioned the matter of the drugs at the screening interview. Secondly, he was satisfied that if Asayish officers were waiting for the appellant at the quayside they were likely to have planned an operation to arrest him or would have taken necessary contingency measures, including a water-borne vessel. Thirdly, he was not satisfied that Asayish, which is an organisation with overall responsibility for domestic security, would have limited their intervention to shooting in the air when the appellant was obviously, on his account, making his escape.

8. The Judge concluded that the appellant was not credible. He did not accept that the appellant had developed a relationship with the daughter of a senior member of the Security and Intelligence Services. He did not mention that, even briefly, in the screening interview, but it was at the heart of this claim. He did not accept that he was stabbed. He did not mention the stabbing at the preliminary interview. He did not mention a threat. Nor did he accept that he was set up by members of his lover's family. The appellant was able to leave the IKR for Turkey without any difficulty. The Judge was satisfied that, if he had been implicated in drug smuggling, the powerful Asayish would have had the ability to notify airports of the likely arrival of such a fugitive. Accordingly, he rejected the appellant's claim for international protection on the basis of the claimed facts he had put forward. He was an unreliable witness and he did not believe his account.

9. The appellant applied for permission to appeal, but permission to appeal was refused both by the First-tier Tribunal and the Upper Tribunal.

10. In a decision dated 29 January 2020, Judge Saffer of the First-tier Tribunal refused permission to appeal for the following reasons:

> "There is nothing in the grounds as they essentially boil down to one point only. The Judge did not speculate but applied a common-sense analysis to the evidence and gave adequate reasons for rejecting it."

11. Following a renewed application for permission to appeal to the Upper Tribunal, Upper Tribunal Judge McWilliam gave reasons for refusing permission on 2 March 2020 as follows:

> 1. The represented appellant's insufficiently particularised grounds of appeal are an attempt to re-argue the case and the disagreement with the findings.
> 2. The Judge accepted the purpose and reality of SCR (see [32]); however, he was unarguably entitled to conclude that the appellant had made significant omissions during the interview (see [28] and [42]). He had failed to say that he was stabbed, that his girlfriend's family had links with the Security Service, or that he had been duped into drug smuggling.

3. In the light of the evidence, it is not arguable that the Judge entered into impermissible speculation. His interpretation of the evidence was rational. It is not arguable that he misunderstood aspects of it. The Judge properly directed himself on the burden of proof (see [11]) and unarguably applied it throughout.
4. The grounds are unarguable.

12. The appellant became appeal rights-exhausted on 1 March 2020.

13. In the further submissions letter dated 25 February 2021, the appellant's solicitors attached a further witness statement from the appellant dated 11 February 2021; a screenshot of an arrest warrant purportedly issued against him by the judicial authorities on 17 November 2015; an email from Kara Ali to which the screenshot of the warrant had been attached, and an Iraqi KRG Bar Association ID card for Kara Ali Ahmad.

14. In his witness statement, the appellant said that he was very disappointed when his previous asylum claim was refused and his appeal dismissed. He had provided a wholly truthful account of his reasons for fleeing Iraq and claiming asylum. He had now received evidence from Iraq confirming that he was being actively sought by the authorities. As he had previously made clear, he had not had any contact with his family. They had disowned him. Fortunately, he had managed to obtain an arrest warrant that was issued against him by the Investigation Court in Rania. This was emailed to him in the UK. As he had consistently maintained, he had fled Iraq in fear of an honour killing.

15. In their letter, the appellant's solicitors submitted that the warrant served as clear, corroborative evidence of the efforts of the family of Zhian Aziz, with whom he had had a relationship, to have him prosecuted on false charges, having duped him into transporting drugs.

16. In the refusal decision dated 19 January 2022, the respondent made a number of observations about the arrest warrant. The appellant had provided no explanation as to why he had only just received the document five and a half years after it was issued. The arrest warrant was for "*FKL*", and he had not provided this name before. The arrest warrant did not state who had made the complaint against him, nor the details of the alleged crime, and nor did it note that he had already left the country. He claimed that Zhian's family were trying to falsely prosecute him from drug charges, but arrest warrant stated that the crime was against Article 397 of the Iraqi Penal Code which stated as follows: "*Article 397 - Any person who sexually assaults a boy or girl under the age of 18 without the use of force, menaces or deception is punishable by detention."* Therefore, the arrest warrant was for sexual offences against someone under the age of 18 and not for any kind of crime relating to drugs.

17. The respondent stated that the inconsistencies between his claim and the arrest warrant that he had provided undermined its credibility.

Therefore, in line with *Tanveer Ahmed*, it was considered that the document added little weight to his claim.

The Hearing Before, and the Decision of the First-tier Tribunal

18. The appellant's appeal against the refusal of his fresh asylum claim was listed before Judge Davies sitting in the First-tier Tribunal at Manchester Piccadilly on 13 October 2022. Both parties were legally represented, with the appellant being represented by Mr Schwenk of Counsel.

19. At paragraphs [17] to [24] of the Decision, Judge Davies gave an account of the hearing. Mr Schwenk applied at the outset for an adjournment because he had heard the earlier appeal. He made the request on the grounds of fairness, in the light particularly of the credibility findings which had been made. Mr Schwenk made a supplementary point, that the appellant was feeling unwell, but this was not the principal reason for his application. The Judge went on to give reasons as to why he had refused to recuse himself and to adjourn the substantive hearing to a future date so that the appeal could be heard by a different judge:

> "18. I considered the application. There had been no suggestion of any concerns about the conduct of the previous hearing or any claim of bias. Permission to appeal the previous determination had been refused by the Upper Tribunal. Mr Schwenk did not put forward any proposition other than that it would be fairer to have a different Judge.
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> 19. I reminded myself of the Guidance contained in the Court of Appeal decision in **Ansar -v- Lloyds Bank TSB [2006] EWCA Civ 1462**. Any objection must be considered. It would be wrong to yield to a tenuous or frivolous objection as it would be to ignore an objection of substance. I should make it clear that Mr Schwenk did not put forward a tenuous or frivolous case for an adjournment, but nor did he put forward a case over and above the wish of the appellant to have a different judge. No issue of bias was raised.
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> 20. The Court of Appeal had indicated in **Ansar** that the mere fact that a judge earlier in the same case or in a previous case had commented adversely on a party or witness or found the evidence of a party to be unreliable would not, without more, found a sustainable objection. This was precisely the position here. Accordingly, I refused the application."

20. The Judge went on to hear oral evidence from the appellant, who was cross-examined and re-examined on the new evidence upon which he relied.

21. The Judge's analysis began at [26]. His starting point was to consider his earlier decision promulgated on 6 January 2020 taking into account *Devaseelan*, but reminding himself that the guidelines in that decision were not legal principles. The earlier finding of the Tribunal required to be taken as a starting point when considering the factual basis of the current appeal. At [27], the Judge observed that the appellant disagreed with the

earlier decision. However, his application for permission to appeal was rejected by Judges of the First-tier and Upper Tribunals. The Judge went on to summarise the reasons given by Upper Tribunal Judge McWilliam for holding that the grounds of appeal were an attempt to re-argue the case and were a disagreement with the findings.

22. At [28], the Judge observed that he had made some general credibility findings and also that he had made findings about three specific matters which were raised again in this appeal. Those concerned the alleged knife attack on the appellant by Zhian's family; the position of his girlfriend's father in the Security and Intelligence Services; and the matter of the drug smuggling sting. The Judge said that he would deal with each of these in turn, which he did.

23. At [42], the Judge held that there was no reason to depart from the earlier decision on the matter of the alleged status of his girlfriend's father, just as there was no reason to depart from the earlier decision on the alleged knife attack. The Judge continued:

> "As the appellant has not proved to the lower standard that his girlfriend's father held such a senior position, it begs the question as to how they would be able to dupe the appellant into transporting drugs and then frame him for that offence. However, the appellant has produced fresh evidence on that matter which I consider next."

24. The Judge went on to address the new evidence in paragraphs [43] to [55]. At [45], the Judge said that he had considered the sequence of events as related by the appellant in his evidence in the interviews of 2019, and in his 2019 witness statement. He had taken his boat out in the river between Asos and Sangasar (a 30-minute journey on the appellant's estimate) and was carrying alcohol for a cousin of Zhian in order to avoid duty. Asayish vehicles were waiting for him and he turned back towards Asos (AIR 23). Security services shot up in the air rather than at him, and it appeared that he was able to escape rather easily.

25. At [46], the Judge observed that the entire episode appeared to have taken one day to play out, according to the account given at the substantive interview. The appellant travelled on the same night to Erbil, and on the following day obtained a visa and flew to Turkey. The arrest warrant was issued by a Court on 17 November, which was 7 days later:

> "However, the appellant had abandoned his boat and it is reasonable to assume that this would have been impounded by the security services and the drugs and alcohol seized providing prima facie evidence against the appellant. However, completely different charges were put forward, taking an arrest warrant at face value. I find it implausible that if Zhian's family had arranged such an elaborate sting concerning the transport of illegal drugs, they would have abandoned the plot from an entirely different charge on which they would have had no evidence and at such very short notice (around 7 days)."

26. At [47], the Judge said that these matters were put to the appellant during his oral evidence. He did not know about the allegation of sexual assault before the arrest warrant was received. He confirmed that the lawyer in Iraq had access to the police file. He was pressed as to whether there was an arrest warrant for drug smuggling. The question had to be repeated twice before he stated that there was such a document in the police file. He did not know why it had not been provided. The appellant had stated that he had just spoken to the lawyer to take legal advice. The lawyer took a screen shot and forwarded it by email. He did not know if the lawyer could have access to or take the documents. However, it had been the appellant's case that a lawyer would have had access to the police file, and that the plot against him concerned drug smuggling into which he had been duped.

27. At [48], the Judge observed that, during re-examination, the appellant was asked by Mr Schwenk whether the lawyer had had a look at the police file, and whether he took the arrest warrant or a copy. The appellant stated that, as he was not there, he did not know what happened exactly.

28. At [49], the Judge said that the appellant's account was not credible. He had claimed that his lawyer had access to the police file. If so, and if there was an arrest warrant for drug smuggling, it was inconceivable that it would not have been sent, because it was at the heart of the appellant's case now and earlier that Zhian's family were powerful enough to be able to set him up to be charged for drug smuggling.

29. At [51], the Judge observed that there was little detail about the appellant in the arrest warrant. There was no photograph. There was also no supporting objective evidence to shed any light on what an arrest warrant in the KRI or Iraq would generally contain.

30. At [52], the Judge made an adverse credibility finding about the delay in contacting a lawyer in Kurdistan. He rejected the appellant's explanation about the difficulties in contacting a lawyer. There were lawyers in Kurdistan, and the appellant had provided no corroborating evidence about his attempts to instruct someone. The document now relied upon in the fresh claim related to an entirely different (alleged) crime. The Judge continued in [53]:

> "The appellant had been adamant during his substantive asylum interview in 2019 that even though the other family were powerful, they did not want the issue to become tribal and preferred to implicate him with the Law and have him arrested. He knew that, because he had not done anything wrong in the past, and so they could not get him arrested (replies to questions 99 and 100). That was the purpose of the drugs sting orchestrated by Zhian's cousin, with whom the appellant remained friendly, notwithstanding the alleged hostility as a family."

31. At [54], the Judge said that it was of some significance that the appellant was able to leave Kurdistan through the airport at Erbil, rather than being

smuggled out of the country. He used his own passport. On his own account, he had managed to escape the clutches of Asayish in his boat. The Judge was satisfied that a powerful intelligence agency would have had the capacity to inform ports and airports of a drug-smuggling fugitive.

32. At [55], the Judge concluded that, in light of all the evidence, he placed no weight on the arrest warrant or the short note from the legal consultant that he had instructed.

33. The Judge returned to the topic of the arrest warrant at paragraph [69], where he said as follows:

> "The appellant had also claimed in his asylum interview that he had not been in touch with his family or any friends in Iraq since 10 November 2015. I found that claim implausible, as he was close to his family and lived with them and, as I found in the previous appeal, likely depended on them to fund the expensive process of travelling to Europe. It is inconsistent with his claim to know that the authorities visited his house on many occasions. This inconsistency is also relevant on the matter of the arrest warrant, because he told this Tribunal under cross-examination that a friend had arranged a solicitor for him. The appellant told his GP in January 2018 that his mother knew that he was in England. The appellant had been in various other countries after leaving Iraq, and so it follows that he must have been in touch with his mother."

The Grounds of Appeal to the Upper Tribunal

34. The grounds of appeal to the Upper Tribunal were settled by the appellant's solicitors. Ground 1 was that Judge Davies materially erred in law by failing to grant an adjournment to allow another judge to consider the appeal. Ground 2 was that the Judge failed to properly consider the further submissions evidence. Although *AS & AA (Effect of previous linked determinations) Somalia* [2006] UKUT IAT 00052 related to different parties in subsequent appeals, they submitted that the case was of general applicability in terms of the weight to be placed on the previous determination. The fact that the Judge was also the Judge in the previous determination added to concerns about the fairness of his consideration of the present appeal.

The Reason for the Grant of Permission to Appeal

35. On 17 December 2022 First-tier Tribunal Judge Mills held that the grounds disclosed arguable errors of law for the following reason:

> "The Judge gives detailed reasons for his decision to proceed to hear this second appeal, with references to authorities on similar matters. However, I find it to be strongly arguable that in the particular context of a protection appeal, especially where credibility findings are likely to be determinative, fairness dictates that any subsequent appeal ought not to be heard by the same Judge who has considered the original appeal. It is thus arguable that procedural unfairness has arisen in this case."

The Hearing in the Upper Tribunal

36. At the hearing before me to determine whether an error of law was made out, Mr Gayle submitted that the core issue was fairness. It was strongly arguable that, as this was a protection appeal, the Judge should have recused himself. Mr Schwenk had supplied a specific reason for the Judge to recuse himself, which was that he was the previous Judge in a protection claim appeal. The Judge misdirected himself in relying on the case of *Ansar*. The circumstances of *Ansar* were very different. The Judge had to take into account that the appellant was critical of him for the findings which he had made in the previous appeal. The appellant had criticised him in his appeal statement.

37. On behalf of the respondent, Mr Melvin adopted his skeleton argument dated 13 July 2023, in which he set out the respondent's reasons for opposing the appeal. Any judge would have had to evaluate whether the new evidence was capable of dislodging the previous adverse findings which had to be the starting point for any judge. This was exactly what occurred here with the Judge meticulously considering the new points raised. He painstakingly considered the evidence of the arrest warrant at paragraphs [42] to [55], drawing logical and rational conclusions on that evidence, after hearing detailed cross-examination and re-examination on it. Ground 2 was no more than an argument with the fact-finding of the Judge, when it was trite law that, unless irrationality was shown, the Tribunal should not interfere with fact-finding: see *Volpi -v-Volpi* [2022] EWCA Civ 464.

38. In his oral submissions, Mr Melvin acknowledged that the facts o*f Ansar* were not on all fours with those of the present case, but he submitted that the principles were equally applicable. It was irrelevant that the appellant was critical of the previous decision dismissing his first appeal.

39. In reply, Mr Gayle submitted that it was not just the arrest warrant that had not been properly considered, but also the message from the lawyer and the lawyer's ID. There was no evidence that these documents were not genuine.

Discussion and Conclusions

40. As the central issue in this appeal was whether the Judge erred in law in not recusing himself, I consider that it is helpful to set out the guidance given by the Court of Appeal in *Locabail (UK) Limited -v- Bayfield Properties Limited & Another* [1999] EWCA Civ 3004, and in the subsequent Court of Appeal decision in *Ansar*.

41. In *Locabail* at [25], the Court said that it would be dangerous and futile to attempt to define a list of factors which may or may not give rise to a real danger of bias. Everything would depend on the facts, which may include the nature of the issue to be decided. Having identified various

circumstances in which the Court could not conceive that a bias objection could be soundly based, the Court went on to identify various circumstances in which a real danger of bias might well be thought to arise:

> "By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v. Kelly (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more, found a sustainable objection. (My emphasis) In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

42. In *Ansar*, the claimant appealed to the Court of Appeal against the decision of Burton J who upheld a ruling that a chairman of an employment tribunal should not recuse himself from presiding over a Directions hearing. Ms Ansar's case was that since he had made allegations of bias and misconduct against the same chairman in connection with previous proceedings, he should not sit on the Directions hearing in further proceedings brought by him.

43. At paragraph [14], the Court said that Burton J had considered the authorities in relation to bias, and had also considered the decisions of the Employment Tribunal, which could have been said to support Mr Ansar's argument, and he had summarised the law with some care in his judgment. The Court went on to cite with approval Burton J's summary of the law in full, as follows:

> "I. The test to be applied as stated by Lord Hope in Porter v Magill 620021 2AC 357, at para 103 and recited by Pill LJ in Lodwick v London Borough of Southwark at para 18 in determining bias 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.

2. If an objection of bias is then made, it will be the duty of the Chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance: Locabail at para 21.
3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: Re JRL ex parte CJL [l9861] 161 CLR 342 at 352, per Mason J, High Court of Australia recited in Locabail at para 22.
4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application: Clenae Ptv Ud v Australia & New Zealand Banking Group Ltd[l9991] VSCA 35 recited in Locabail at para 24.
5. The EAT should test the Employment Tribunal's decision as to recusal and also consider the proceedings before the Tribunal as a whole and decide whether a perception of bias had arisen: Pill LJ in Lodwick, at para 18.
6. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without something more found a sustainable objection: Locabail at para 25.
7. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown: Pill LJ in Lodwick above, at para 21, recited by Cox J in Breeze Benton Solicitors (A Partnership) v Weddell UKEAT/0873/03 at para 41.14 ...
8. Courts and tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment (or stay) cannot: Sedley LJ in Bennett at para 19.
9. There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal Employment Tribunal hearings, of the dialogue which frequently takes place between the judge or Tribunal and a party or representative. No doubt should be cast on the right of the Tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies: Peter Gibson J in Peter Simpler & CO Ltd v Cooke [l986] IRLR 19 EAT at para 17.
10. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal: Locabail at para 25.
11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (Locabail at para 25) if: a. there were personal friendship or animosity between the judge and any member of the public involved in the case; or b. the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or c. in a case where the credibility of any individual were an issue to be decided by the judge, the judge had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or d. on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind; or e. for any other reason, there were real grounds for

> doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues."

44. At [15], the Court held that Mr Ansar very properly did not seek to argue that any complaint should lead to recusal. Mr Ansar suggested (and this was the nub of his argument) that there were weak recusal applications and strong recusal applications. Thus, his argument (as he put it right at the end of his submissions) was that it was the substance or nature of the allegations that had been made, which was the important aspect on which a court should concentrate.

45. At [16], the Court said that his attack was on the balancing exercise carried out originally by the Regional Chairman, then by Mr Kolanko, and ultimately reviewed by Burton J. The Court held that Burton J's review of the balancing exercise was impeccable.

Ground 1

46. It is not apparently disputed that the Judge was right to conduct a balancing exercise. But it is submitted that the Judge misdirected himself in conducting this exercise, and that there was only one conclusion that was open to him, which was that for him to hear and determine the appellant's second appeal would be procedurally unfair.

47. It is submitted that the Judge failed to make clear that in *Ansar* the Court of Appeal was considering whether the Chairman of the Employment Tribunal should have recused himself from presiding over a Directions hearing in further proceedings. This contrasts significantly with the situation in the instant case, which is a protection appeal, the outcome of which could have implications for the appellant's safety.

48. In citing *Ansar*, the Judge was not suggesting that he was basing his decision on the particular facts of Mr Ansar's case, rather than on the legal principles that were identified by Burton J at first instance, and which were endorsed by the Court of Appeal.

49. There is no challenge to the Judge's account of the argument presented by Mr Schwenk. Accordingly, on the Judge's unchallenged account, Mr Schwenk did not put forward any proposition other than it would be fairer to have a different judge because of Judge Davies' previous adverse credibility findings. Mr Schwenk did not raise any concerns about the conduct of the previous hearing or any claim of actual bias. In oral argument before me, Mr Gayle drew my attention to the appellant's appeal statement signed on 18 July 2022, in which the appellant said, with reference to the previous decision dismissing his appeal, that he maintained that he had provided a truthful account of his reasons for fleeing from Iraq, and that the previous Judge was wrong to dismiss his appeal. I do not consider that this constitutes an allegation of bias against

the previous Judge. The appellant was simply asserting that the previous Judge had reached the wrong conclusion.

50. The Judge was not wrong to treat the sixth principle which he extracted from *Ansar* as being of general application. He was not wrong to treat it as applying in a protection appeal, where the standard of proof is lower than the civil standard of proof. He was also not wrong to treat the sixth principle as applying to a substantive hearing of a protection appeal, as distinct from a Directions hearing of a protection appeal.

51. It is implied that the Judge misdirected himself by not having regard to the tenth principle, which is that in any case where there is real ground for doubt, that doubt should be resolved in favour of recusal. But there is no reason to suppose that the Judge did not have all the relevant legal principles in mind. Having reviewed the relevant facts and the relevant material, I am not persuaded that the Judge ought to have considered that this was a borderline case where there was real ground for doubt.

52. Reliance is placed on a passage in the unreported case of *Deman -v- Association of University Teachers & Others,* a copy of which has not been provided. In the passage quoted in the Grounds of Appeal, an unidentified Judge held that, given the very long procedural history of the case, *"if there is the possibility that the matter can be handled by another Judge, it ought to be taken rather than any distraction being introduced to the merits of Mr Deman's case by consideration of whether or not he is having a fair hearing."*

53. Aside from the fact that a copy of the full decision has not been produced, the citation does not advance the appellant's error of law challenge for another reason, which is that it only serves to highlight the fact that the question of whether a judicial decision-maker should recuse himself is highly fact-specific; and so it is nothing to the point that in a completely different set of circumstances a judge expressed the view that if there was a possibility that the matter could be handled by another judge, that possibility ought to be taken.

54. Judge Davies was not being asked to recuse himself from a future substantive hearing of the second appeal at a case management review hearing. He was being asked to recuse himself in circumstances where the appeal had been assigned to him to hear and determine, and the application was being made at the outset of the substantive hearing. In these circumstances, the third, fourth and seventh principles were clearly in play, as well as the sixth principle to which the Judge made express reference in paragraph [20] of the Decision. The appellant had no right to assume that his second appeal would be tried by a different judge than the judge who had dismissed his first appeal. The appellant had no right to disqualify Judge Davies from hearing his second appeal in the hope that another judge would decide his second appeal in his favour. The second appeal had been assigned to Judge Davies, and he had a duty to hear and

determine it, unless he was supplied with a sufficient reason to recuse himself.

55. This was not, and is not, a case where a real danger of bias might well be thought to arise for any one of the reasons listed in the eleventh principle.

56. For the above reasons, I find that Ground 1 is not made out. The Judge did not err in law in refusing to grant an adjournment so that the second appeal could be listed before another Judge.

Ground 2

57. As to Ground 2, the test to be applied 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.

58. On this issue, the appellant effectively puts his case in two ways. The first is that there is an appearance of bias simply flowing from the fact that Judge Davies was also the Judge who found against him in the previous determination. The fair-minded and informed observer would not consider that there was an appearance of bias on this account, as (a) there was no allegation of bias or misconduct with regard to the previous hearing or determination; and (b) permission to appeal against the previous determination had been refused by both the First-tier Tribunal and the Upper Tribunal on the grounds that the Judge had made sustainable and adequately reasoned findings of fact on the evidence that had been put before him. In the circumstances, the fair-minded and informed observer would have no reason to suppose that Judge Davies might be unable to try the second appeal with an objective judicial mind.

59. The second way the case is put is that it is clear that from paragraphs [43] to [45] of the Decision that the Judge "*predicates*" his findings on the arrest warrant upon his previous adverse credibility findings, and that in his approach to the new evidence the Judge has failed to follow the guidance given in *AS & AA* at paragraph [66] as follows: "*The previous determination is not the result of the application of the rigorous requirements of the criminal law; and the fact that a previous court or other decision-maker has reached a view on the facts which are an issue in the present appeal is not of itself any evidence as to those facts.*"

60. The reliance on *AS & AA* is misconceived. The guidance given in that case does not apply precisely because it was given in the context of different parties in subsequent appeals, not in the context of a second appeal by the same party in respect of the same claim.

61. The guidance given by the Tribunal in *Devaseelan* was helpfully summarised by Rose LJ at paragraph [32] of *BK (Afghanistan)* [2019] EWCA Civ 1358:

(1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.

(2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.

(3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.

(4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.

(5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.

(6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.

(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.

(8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case

62. The appellant had not abandoned his previous asylum claim, but was relying on the new evidence as fortifying a core element of it. In the circumstances, the Judge was required by *Devaseelan* to consider the new evidence in the context of the original claim, which the appellant continued to adhere to, and in the context of the findings of fact made in the previous decision.

63. The Judge did not approach the new evidence on the prejudicial basis that it was inherently incapable of belief simply because the appellant had been found not to be credible in the previous appeal. The Judge addressed the new evidence in its own terms, and he also addressed the question of how the new evidence interrelated with the other aspects of the appellant's claim.

64. It was open to a Judge to reach the conclusion that no weight should be attached to the new evidence for the reasons which he gave, and his finding in that regard would not lead the fair-minded and informed observer to conclude that there is a real possibility that the Decision is tainted by bias.

Notice of Decision

The decision of the First-tier Tribunal is not vitiated by procedural unfairness and it does not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal made an anonymity order in favour of the appellant, and I consider that it is appropriate that the appellant continues to be protected by anonymity for the purposes of these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
26 July 2023