IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003611

First-tier Tribunal No:
PA/53659/2023
LP/00865/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 January 2025

Before

UPPER TRIBUNAL JUDGE MAHMOOD

Between

PP
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Wilding, Counsel, instructed by Waterstone Legal
For the Respondent: Ms A Nolan, a Senior Home Office Presenting Officer

Heard at Field House on 28 November 2024

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 the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is my oral decision which I delivered at the hearing today.

Background

2. The Appellant, a national of Albania, appeals with permission against the decision of First-tier Tribunal Judge Lewis ("the Judge") whereby his protection and human rights claim had been dismissed. Permission to appeal was refused by the First-tier Tribunal but was granted by Upper Tribunal Judge Loughran on 28 August 2024.

3. The Appellant relies on 8 grounds of appeal. Those grounds of appeal along with a skeleton argument have been drafted by Mr Wilding. Mr Wilding amplified those grounds of appeal orally before me today and I was able to re-read those documents over the short adjournment. I have also taken into account a helpful and detailed Rule 24 response from the Respondent dated 14 November 2024.

Apparent Bias and Conduct of the Judge

4. Ground 8 raises serious and important issues about the conduct of the Judge. It is contended that the Judge had acted in a way which amounted to apparent bias. In particular with reference to the way in which the Judge had dealt with that part of the hearing relating to the closing submissions.

5. It was therefore necessary for the parties to listen to the audio recording of the hearing of the First-tier Tribunal during an earlier occasion prior to today and I listened to that recording in the days leading up to this hearing. The tape lasted over 4 hours. I was able to hear the whole of the introduction of the case by the Judge but also the examination-in-chief and the cross-examination. I had also listened to the recording relating to the Home Office Presenting Officer's closing submissions and the closing submissions of counsel who appeared at the First-tier Tribunal.

6. I have taken into account a detailed witness statement by counsel, Ms Araniya Kogulathas dated 21 June 2024. She had represented the Appellant before the Judge. I have also taken into account a written response from the Judge which appears in the bundle dated 10 November 2024 and contains 97 paragraphs.

7. Mr Wilding and Ms Nolan informed me that they had agreed that there was no need for counsel to give oral evidence and she had not attended the hearing.

8. Because of its importance, I shall deal with ground 8 first because it raises issues of apparent bias. If this ground is made out then the whole of the proceedings will have been unfair and I will not need to consider the remaining grounds.

9. Ground 8 contends that the Judge demonstrated hostility towards the Appellant's counsel. It is said that the Judge demonstrated that hostility

through the tone, expression and demeanour of his interventions during counsel's submissions. It is said that the Judge had become angry, shook his head, he cut counsel off during her submissions and had shown visible anger, hostility and unpleasantness towards counsel.

10. I consider the reported decision in MS (judicial interventions, complaints, safety concerns) [2023] UKUT 00114 (IAC) (a decision of the President and Upper Tribunal Judge Kamara). The judicial headnote makes for sombre and clear reading. It is clear to me that it is unacceptable for Judges to act in the way referred to in MS. The Judicial headnote states,

> "1. Regardless of the appropriateness of judicial interventions, overbearing and intimidatory conduct, directed at a representative, could result in an unfair hearing as well as give the impression of bias to a fair-minded and informed observer, applying Porter v Magill [2001] UKHL 67.
>
> 2. Whilst it is, of course, always necessary for the judge to retain control of proceedings, so as to ensure that they remain focussed, effective, and efficient, it is also a key part of the judge's role to conduct the hearing to ensure that they get the best out of all the participants appearing before them. This approach should enable the judge to do justice to the case and help to reach a high-quality decision for the parties. The task involves listening as well as guiding, and patience tempered by the need to steer the parties in the direction of the issues that the tribunal needs to decide. However carefully constructed or well-reasoned, a decision which is founded on an unfair hearing cannot stand…"

11. MS provides at paragraph 19,

> "19. There were multiple occasions, during the course of the hearing before the First-tier Tribunal, which could give the impression of bias to a fair-minded and informed observer, applying *Porter v Magill* [2001] UKHL 67. Throughout the two days of the hearing, when the HOPO was present, the recording reveals that the conduct of the judge was overbearing and intimidatory when addressing the HOPO.
>
> 20. From the outset, the judge expressed concern that the HOPO intended to challenge the evidence of the appellant and witnesses. When the HOPO stood her ground, the judge made the following comment '*if you can't hear me do say so and I will say it louder as long as you don't complain I am shouting at you*.' The judge then repeated the question which the HOPO had already answered. Another example prior to the hearing starting was when the judge chose to make a comment to the appellant's representative about the witnesses, '*in case the HOPO decides to raise a further problem.'* It is a concern that the judge has characterised the entirely proper applications made by the HOPO as raising problems. The judge indicated that she may have gone too far in her approach to the respondent's case, evidenced by her remark, made towards the end of day one, that she will take '*an interesting minute for the detail on this afterwards…just in case'*".

12. In this matter the Appellant's grounds raise no issue about that part of the hearing relating to the evidence. Namely the evidence-in-chief and the

cross-examination. Indeed, having listened to the tape for myself, in my judgment the Judge presented himself in a clear and very fair manner. This included when dealing with the practical issues so that the Appellant's vulnerability was catered for during the hearing. I heard at various occasions throughout the hearing, whether after the luncheon adjournment or otherwise, that on every occasion the Appellant was made as comfortable as possible by the Judge. The Judge also reminded the Appellant what was going to happen during the hearing. In my judgment, the courteous and appropriate approach by the Judge to the witnesses was something which stood out when listening to the tape of the hearing as a whole. I would go so far as to say that the Judge's approach to accommodating the witnesses and to the hearing during the evidence was exemplary.

13. In respect of the closing submissions part of the case, the Appellant contends that in this instance there was the appearance of bias and that the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the Judge was biased. The complaint is threefold. Firstly that there was much less in the way of questions for the Home Office Presenting Officer compared with questions put to counsel for the Appellant, second that the Judge cut counsel off in her submissions and would not let her finish her sentences, and third that when the Judge had asked for submissions in relation to the mother's evidence the Judge had become angry, shook his head and kept saying "well I'm asking you".

14. I have considered the witness statement provided by counsel who appeared at the First-tier Tribunal. I note that the hearing took place in March 2024, whereas counsel's witness statement is dated some three months later, 21 June 2024. There is also an attendance note although not contemporaneous but it appears to have been prepared the day after the hearing. There is, it appears, a fuller note that has not been provided to me but as I say, the witness statement is detailed and I have considered that with care.

15. It is worth noting that counsel's witness statement states, "I wish to make it clear from the outset that I had no concerns about the fairness of the hearing during the Appellant's and his witnesses' oral evidence". As I have said, that was certainly my view too after having listened to tape of the whole of the hearing. There can be no complaint whatsoever about the Judge's handling and conduct of the hearing during the start of the case and during the evidence of the parties.

16. I have taken into account that there is a necessary and essential drive to ensure that Judges act appropriately during hearings. I am well aware of the efforts in recent years to ensure that judicial bullying stops. I have reminded myself and had regard the Statement of Expected Behaviour dated 19 January 2023. It is the standards of behaviour expected from judicial office holders. This was not something which the parties invited me to consider, but which I have considered myself because of the

importance of the issues which arise. The Statement of Expected Behaviour states,

> "We all have a responsibility to help foster a positive working environment, where diversity is recognised and valued, and everyone is treated with dignity and respect. We are one judiciary; no-one should feel that they are perceived as 'less than' because of their differences, personal or professional background, judicial office or jurisdiction. Therefore, we should all:
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> - treat others fairly and respectfully;
> - be mindful of the authority we have and be careful not to abuse it;
> - be aware of how our words and behaviour can affect others;
> - remain patient and tolerant when encountering difficult situations;
> - act professionally and courteously, including under pressure, and avoid shouting or snapping;
> - aim to ensure that no one in a hearing room is exposed to any display of bias or prejudice;
> - build effective working relationships with and support judicial colleagues and staff;
> - welcome and support new colleagues; and
> - be open to feedback if we have done something that may have caused discomfort or offence".

17. Perhaps not all of that is directly applicable, but the headline is very clear: Judicial Office holders must be mindful of the authority that they hold and that they must ensure they remain professional and courteous, including when under pressure.

18. The parties informed me that the Judge's list had contained two cases and that this was the second case. The tape shows that this hearing lasted 4 hours and 20 minutes in total and as cases in the First-tier Tribunal go, this was a lengthy case.

19. It is right to have in mind the very different styles that Judges have to adopt when, for example, there is a litigant in person and experienced advocates before them. There is a qualitative difference to the approach between a litigant in person and experienced counsel on the other. Counsel's extensive training and experience will bring to the proceedings clarity and efficiency. Counsel's duties include assisting the court or tribunal with matters.

20. In this case, Appellant's counsel at the hearing states in her witness statement that she had been called to the Bar in 2014 and that she undertook pupillage thereafter. She states that she has worked on big cases, such as the Grenfell enquiry. Counsel also refers to having commenced at her current chambers in March 2022. Therefore, it is right

to say that this was counsel of some experience who appeared in front of the First-tier Tribunal Judge.

21. In my judgment counsel would therefore be well used to a judge asking questions and testing the arguments during closing submissions. Counsel also owes duties to further the overriding objective. The overriding objective is the same in the First tier as it is at the Upper tier. It is worth setting it out:

> "Overriding objective and parties' obligation to co-operate with the Upper Tribunal
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> 2.—(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
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> (2) Dealing with a case fairly and justly includes—
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> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
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> (d) using any special expertise of the Upper Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues.
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> (3) The Upper Tribunal must seek to give effect to the overriding objective when it—
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> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Upper Tribunal further the overriding objective; and
>
> (b) co-operate with the Upper Tribunal generally".

22. The case of Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC) was referred to before me. Mr Wilding was correct to say that there was a time when there was a tendency by the parties to only begin to focus on what their case when they turned up at the hearing and sometimes worse still, during the hearing. That is history and the approach is very different now. Judges can expect the parties to be focused on the issues and the parties can be expect to be challenged on what the issues are and where their case is headed and why.

23. In my judgment looking at the totality of the response provided by the Judge along with the witness statement of counsel, her attendance note and having listened to the tape for myself and in certain parts having

listened it on more than one occasion, the claim of apparent bias is not made out.

24. In my judgment there are two aspects where this case wholly differs from the MS case. MS refers to cross-examination and the need for the continuity to ensure that there is no broken sequence of question and answer. Jones v National Coal Board [1957] 2 QB 55 which was relied upon and which states,

> "The very gist of cross-examination lies in the unbroken sequence of question and answer. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination. It gives a witness valuable time for thought before answering a difficult question and diverts cross-examining counsel from the course which he had intended to pursue".

25. As the Appellant's counsel said herself in her witness statement, there were no concerns at all in terms of the Appellant's or his witnesses' oral evidence.

26. Having listened to the nature of the questions asked by the Judge during the closing submissions and the topics considered I conclude as follows. Firstly, this is a jurisdiction in which the burden is on the Appellant. This is not a complete adversarial process. This is a Tribunal as opposed to a court. This is a jurisdiction in which written documentation from the Secretary of State is commonplace as was the situation here with the very lengthy and detailed Reasons for Refusal Letter. By its very nature closing submissions from a Presenting Officer will usually be shorter and briefer than those from the Appellant's advocate. But in any event the fair, even-handed approach by the Judge is shown to me when he challenged the Presenting Officer in relation to what he thought were weaknesses in the Secretary of State's case. In the same way the Judge correctly pointed to the Appellant's counsel what he thought were aspects that he thought required to be dealt with and indeed he did so in a fair manner.

27. There are numerous examples of cases in which Appellants perhaps rightly ask, why a Judge did not make enquiries at the hearing in relation to certain aspects rather than to merely find against them without that question having been asked at the hearing. The Judge did say, "Well I'm asking you" but that was in the context of seeking assistance with an aspect of the case that he was concerned about.

28. Closing submissions do not mean that an advocate will be able to say what he or she wants in their submissions without interruption. Hearings, whether at the First-tier Tribunal or Upper Tribunal are dynamic. Closing submissions are not a set piece of what is to be said in submissions from a script. Whilst it is an opportunity to seek to persuade the Judge to their client's case, it is also an opportunity for a Judge to seek clarification so that he/she understands what is being said or how the arguments tie in with the case. In my judgment it was entirely fair for the Judge to point out where he thought that the arguments did not fit or where he perceived weaknesses in the case. Indeed, the Judge did so with both parties'

advocates and not just with the Appellant's counsel. The Judge is also entitled to ask questions without interruption of the advocates.

29. It may well be that counsel did not agree with the Judge's expressed thoughts at that stage about some of the evidence or the documentation, but it remained for counsel to remain courteous, polite and to ensure that she furthered the overriding objective.

30. I do not see anywhere near the alignment with the MS case. Not least because this is a case only dealing with matters which arose in closing submissions. In my judgment, the Judge merely asked about what he perceived were weaknesses in the arguments being put to him and the Judge gave an opportunity to both sides to deal with aspects which he was concerned about. The Judge was correct to approach matters in that way, instead of referring to adverse matters for the first time in his reserved decision which was to follow.

31. An aspect of the case which I was not able to immediately deal with by listening to the tape was counsel's suggestion at paragraph 5 page 47, that, "the Judge shook his head and looked visibly angry". Of course, I cannot see that because this was not a video recording and only an audio recording. However, where counsel has said there was anger or that there was an excessive tone or an inappropriate angry manner, I have not been able to find that for myself. Indeed, none of that chimes with the rest of the recording and the extensive number of times in which the Judge was polite and courteous to all during the hearing.

32. In the circumstances I conclude that although counsel was clearly not pleased with what occurred and she was not pleased with being challenged about her submissions and her client's case, I do not find that the Judge was visibly angry or that he had changed his tone in the rather extreme manner which is being suggested. Nor did the Judge evidence anything which approaches apparent bias.

33. The Judge like every other person is human and of course there will be irritations which occur in every working week but in my judgment the matters which are being said in counsel's witness statement, albeit written several months after the hearing, are not proved to the required standard. In my judgment anybody listening to the tape as a whole and acting fairly and dispassionately will conclude that the Judge presented himself in a manner which was appropriate and considerate. Accordingly, I dismiss Ground 8 and the allegations of apparent bias.

Other Grounds of Appeal

34. I turn then to ground 1. Here it is submitted that the Judge had failed to apply the vulnerable witness guidance. Vulnerability had been dealt with in advance to ensure that the correct approach was taken by the Judge to the case. The Judge had correctly referred to the Appellant's vulnerability and he said at paragraph 27:

> "I agreed to treat the Appellant as a vulnerable witness pursuant to the application set out at paragraphs 3-6 of the [Appellants' skeleton argument]. Those paragraphs helpfully set out the relevant principles with particular reference to the Joint Presidential Guidance No.2 of 2010, case law, and the Equal Treatment Bench Book. Further to this, not only were due adjustments made at the hearing, but I have approached the Appellant's testimony with his mental health issues in mind".

35. When I listened to the tape and to the references that the Judge has made to ensuring that the Appellant and his witness were accommodated, alongside Ms Nolan's submissions, I did initially consider that this ground had no merit. However, I have been assisted by Mr Wilding who points out that there are two particular aspects that show failings in relation to the actual application of the vulnerability to the findings which the Judge ultimately made.

36. Mr Wilding submits that the Judge failed to factor the accepted vulnerabilities into his credibility assessment and failed to take into account the medical evidence in respect of the vulnerabilities when undertaking the overall credibility assessment. Mr Wilding says, for example when the Judge made his findings where the medical evidence showed that there were issues with the Appellant's memory, the Judge had not gone on show how that led to a correct assessment of the Appellant's credibility.

37. Ms Nolan in her oral submissions and in the Rule 24 points out that the vulnerable witness guidance was applied as was clear from the tape, for example, appropriate breaks were given throughout and that questions were put to the Appellant in an appropriate manner. In addition counsel at the Tribunal below had noted that tag questions were not to be asked by the Presenting Officer and it is said that the Judge clearly had in mind the information provided in a report by a company called U Matter Ltd and that this had been considered in the analysis at paragraph 73 of the Judge's decision.

38. Despite Ms Nolan's helpful submissions, in my judgment there is a material error of law in the Judge's decision in relation to this ground.

39. Mr Wilding is correct that whilst the Judge cited the correct guidance, and that whilst the Judge ensured that the hearing itself was conducted as fairly and appropriately as possible for the Appellant, the Judge failed to link the actual evidence which was available to assess whether there was a reason, an arguable reason or even a possible reason as to why the Appellant's evidence was not consistent or credible. That ground is therefore made out. It was necessary for the Judge to say whether the memory problems referred to in the medical evidence, for example, did not explain the apparent inconsistencies in the evidence.

40. Ground 2 contends that there was procedural unfairness in relation to the consideration of medical evidence. Here I have considered what has been

said about the expert evidence and although I have sympathy for the Judge where he was faced with a report which was presented in an unusual and difficult-to-follow manner, it was still necessary for the Judge to make some finding in respect of the medical aspects which were put forward in the report. The Respondent had not challenged the reports specifically. All of the medical and expert evidence seems to have become convoluted. Although as I say I have sympathy for the Judge and the situation he found himself in, ultimately, he was required to make findings stating whether he accepted or not the medical ailments, the prognosis and the issues which were highlighted. Accordingly, I conclude that by not doing so adequately, the Judge materially erred in law.

41. The remaining grounds refer to other aspects of the Judge's decision but having found that there are two fundamental aspects undermining the Judge's decision as a whole, it is therefore not necessary to consider the remaining grounds.

Conclusion

42. In the circumstances I conclude that the Judge's decision is one which is infected with legal error, that the findings of fact made by the Judge cannot stand and therefore the whole of the decision of the Judge must be set aside. None of the findings can stand.

43. I had canvassed with the parties the appropriate venue for a further hearing and I had initially considered that the matter ought to remain here at the Upper Tribunal in view of the Appellant's vulnerability and in view of the relatively complicated nature of the Appellant's case. Both parties invited me to remit the matter to the First-tier Tribunal if I was to find that there is a material error of law, on the one hand because wholesale findings are required and on the other hand because for the Appellant's side it would retain any appeal rights as well.

44. I apply AEB [2022] EWCA Civ 1512 and Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC). I carefully consider whether to retain the matter for remaking in the Upper Tribunal in line with the general principles set out in paragraph 7 of the Senior President's Practice Statement. I take into account the history of the case, the nature and extent of the findings to be made and I consider paragraphs 7.1 and 7.2 of the Senior President's Practice Statement.

45. Although ordinarily the matters that the parties referred to would not be sufficient alone for me to remit the matter, I am conscious that the Appellant remains vulnerable and I want him to have the assurance that he will have any further avenues, should they be required. I therefore conclude, albeit not without hesitation, that the matter be remitted to the First-tier Tribunal for a complete rehearing. None of the current findings shall stand.

46. Mr Wilding assisted by saying that it is possible for the Upper Tribunal to invite the First-tier Tribunal to consider a Case Management hearing to

deal with the aspects which arise, in particular vulnerability. It may be that the Resident Judge or Assistant Resident Judge at the First-tier Tribunal is able to deal with the case management on the papers or in a way in which the Appellant himself would not be required to attend that preliminary hearing. In my view, this case requires some case management to deal with how the substantive hearing will proceed in terms of the vulnerability issues. I leave directions to the First-tier Tribunal to make.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is therefore is set aside.

There will be a de novo hearing at the First-tier Tribunal. None of the current findings shall stand.

The First-tier Tribunal shall provide further directions, but what I say in the preceding paragraph about a Case Management hearing is suggested.

Abid Mahmood
Judge of the Upper Tribunal
Immigration and Asylum Chamber
28 November 2024